

# Terrorism, Law & Democracy: How is Canada Changing Following September 11?

David Daubney et al., eds. (Montréal: Les Éditions Thémis, 2002) Pp. 412.

## I. INTRODUCTION

September 11, 2001 has been viewed around the world as a turning point in modern social, political and legal history.<sup>1</sup> For example, according to press materials from President George W. Bush, "[t]he attacks of September 11th changed America".<sup>2</sup> In the mind of former British Prime Minister Margaret Thatcher, as a result of the "horror of Sept. 11", the United States "will never be the same again."<sup>3</sup>

Similar views are held in Canada. For example, as Shirley Heafey, Chair of the Commission for Public Complaints Against the RCMP commented, September 11th "will be remembered as a turning point in modern history."<sup>4</sup> From the introduction to this collection of essays, the Honourable Madame Justice Constance Hunt of the Alberta Court of Appeal, after describing the period following the events of September 11th as a "changed landscape" that had "sweeping effects ... on all sectors of Canadian society", stated that, as a result of those events and effects, "many elements of the justice system had been, and would continue to be, profoundly altered."<sup>5</sup>

1. I have discussed the post-September 11th landscape elsewhere. See e.g. Trevor C.W. Farrow, "Security and Rights" Rev. Const. Stud. [forthcoming in 2004] [Farrow, "Security and Rights"]; Trevor C.W. Farrow, "Citizen Participation and Peaceful Protest: Let's Not Forget APEC" in Canadian Institute for the Administration of Justice ("CIAJ"), *Participatory Justice in a Global Economy: The New Rule of Law?* (Montréal: Les Éditions Thémis) [forthcoming in 2004] [Farrow, "Citizen Participation and Peaceful Protest"]; Trevor C.W. Farrow, "Law & Politics After September 11th: Civil Rights & The Rule of Law" (2003) 35 *Hosei Riron J. L. & Pol.* 163 [Farrow, "Law & Politics After September 11th"].
2. "Biography of President George W. Bush", *The White House*, online: White House <<http://www.whitehouse.gov/president/gwbbio.html>>.
3. Margaret Thatcher, "Advice to a Superpower" *The New York Times* (11 February 2002), online: <<http://www.nytimes.com/2002/02/11/opinion/11THAT.html>>.
4. Shirley Heafey, "Civilian Oversight in a Changed World" ["Civilian Oversight in a Changed World"], in David Daubney et al., eds., *Terrorism, Law & Democracy: How is Canada Changing Following September 11?* (Montréal: Les Éditions Thémis, 2002) 395 at 395 [Terrorism, Law & Democracy].
5. Constance D. Hunt, "Introduction to Essays", in *Terrorism, Law & Democracy*, supra note 4 at 1-2 ["Introduction to Essays"]. Earlier, in an October 2001 interview, the Honourable A. Anne McLellan, P.C., M.P.—then Canada's Minister of Justice—stated that the notion of "reasonable limit" in s. 1 of the *Charter* has shifted since September 11th. See Shawn McCarthy, "The War on Terror: Anne McLellan's New Ideals" *The Globe and Mail* (22 October 2001) A7. Similarly, in the context of discussing national security and arrest powers, John Manley—then Canada's Minister of Foreign Affairs and chair of an ad hoc Cabinet committee on security and anti-terrorism—was reported as stating that "[e]ither nothing changed on Sept. 11 or everything changed". See Luiza Chwialkowska, "Police Get Vast Power of Arrest" *National Post* (16 October 2001) A1.

Taken together, these views represent a widespread collective sensibility of insecurity and fear as a result of terrorist attacks<sup>6</sup> and threats<sup>7</sup> on and since September 11th.<sup>8</sup> While I think, as a descriptive matter, we do live in a general state of fear, the question now becomes: how do we interpret those events and threats in order to, ultimately, respond to those insecurities and fears, particularly without infringing on well-established constitutional rights and freedoms? For example, again from her introduction to this collection of essays, Madame Justice Hunt “wondered how we could continue to feel secure in our formerly peaceful homeland, without sacrificing the individual rights and freedoms so cherished in Canada.”<sup>9</sup>

To address these sorts of questions in the context of our post-September 11th landscape and state of fear, numerous conferences and research colloquia have been held to discuss the terrorist events, their meaning and their future implications.<sup>10</sup> One of these conferences—Canadian Institute for the Administration of Justice (“CIAJ”), “Terrorism, Law & Democracy: How is Canada Changing Following September 11?”<sup>11</sup>—produced an excellent collection of articles and comments from a wide range of perspectives and opinions. That collection—published as a book under the same name as the conference<sup>12</sup>—is the subject of this review essay.

6. In addition to the September 11th attacks in New York, Washington, D.C. and Pennsylvania, see *e.g.* the 12 October 2002 nightclub bombings in Bali and the 11 March 2004 train bombings in Madrid.
7. We are exposed to threats and security reminders almost daily. Most recently, for example, are the threat reports and security alerts in the US regarding potential attacks on property connected to the financial services industry. See *e.g.* Tom Ridge, “Remarks by Secretary of Homeland Security Tom Ridge Regarding Recent Threat Reports” (11 August 2004), online: White House <<http://www.whitehouse.gov/news/releases/2004/08/20040801.html>>.
8. I have discussed this heightened sensibility of fear elsewhere. See *e.g.* Farrow, “Citizen Participation and Peaceful Protest”, *supra* note 1, Farrow, “Security and Rights”, *supra* note 1. For a useful and provocative comment on post-September 11th fear in the US, see Margaret Atwood, “A Letter to America” *The Globe and Mail* (28 March 2003) A13.
9. “Introduction to Essays”, *supra* note 5 at 1.
10. See *e.g.* Centre for Constitutional Studies “It’s the End of the World as We Know It? Global Order, World Security and International Human Rights in the Aftermath of the Attacks in the United States” (Lecture by the Centre for Constitutional Studies, University of Alberta, Edmonton, 14 September 2001), noted in “Centres and Institutes” (Winter 2001/2002) 21 at 22, online: University of Alberta, Faculty of Law Homepage <[http://www.law.ualberta.ca/alumni/withoutprejudice01\\_02.pdf](http://www.law.ualberta.ca/alumni/withoutprejudice01_02.pdf)>; University of Toronto, Faculty of Law, “The Security of Freedom: A Conference on Canada’s Anti-Terrorism Bill” (Lecture by the University of Toronto, 9-10 November 2001), papers for which were published in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) [Security of Freedom]; Centre for Constitutional Studies and the University of Alberta, Department of Political Science, “Globalisation and the Re-Constitution of Security: European and North American Perspectives” (Research Colloquium, University of Alberta, Edmonton, 23-24 October 2003); “Research Colloquium: Globalisation and the Re-Constitution of Security: European and North American Perspectives” Rev. Const. Stud. [forthcoming in 2004] [“Globalisation and the Re-Constitution of Security”].
11. The conference was held in Montréal on 25-26 March 2002.
12. See *Terrorism, Law & Democracy*, *supra* note 4.

## II. TERRORISM, LAW & DEMOCRACY

As a general matter, I think the collection makes a very valuable contribution to the already rich and developing post-September 11th literature on security, rights, terrorism and democracy.<sup>13</sup> Further, what particularly interests and impresses me about the collection, and what I find most useful about it, are: (a) its breadth of topics and (b) its breadth of perspectives.

It is these particular strengths of the collection that I address in the next two sections of this part of the essay. In the final section of this part, I address two potential weaknesses of the collection.

### a) Breadth of Topics

The collection does a good job of including papers that deal with a wide range of topics. First, as a starting point, it acknowledges that terrorism as a political act was not born three years ago. As Martin Rudner comments, “[t]errorism is certainly not a new form of violence, and indeed the use of terror to achieve political or ideological ends may be traced back several millennia.”<sup>14</sup> Two essays in particular, together with comments from Rudner,<sup>15</sup> provide this valuable history lesson. The first, by Reg Whitaker, looks at terrorism experiences during the Cold War and the October 1970 Crisis.<sup>16</sup> The

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13. See *e.g.* *Security of Freedom*, *supra* note 10; “Globalisation and the Re-Constitution of Security”, *supra* note 10; Robert M. Chesney, “Civil Liberties and the Terrorism Paradigm: The Guilt by Association Critique” (2002–2003) 101 Mich. L. Rev. 1408; “Responding to Terrorism: Crime, Punishment, and War” (2002) 115 Harv. L. Rev. 1217; Kent Roach, “Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism” (2002) 47 McGill L.J. 893; L.E. Weinrib, “Canada’s *Charter of Rights*: Paradigm Lost?” (2002) 6 Rev. Const. Stud. 119; Leonie Huddy, Nadia Khatib & Theresa Capelos, “Reactions to the Terrorist Attacks of September 11, 2001” (2002) 66 Pub. Op. Q. 418; Roderick P. Hart, Sharon E. Jarvis & Elvin T. Lim, “The American People in Crisis: A Content Analysis” (2002) 23 Pol. Psych. 417; Alice F. Healy *et al.*, “Terrorists and Democrats: Individual Reactions to International Attacks”, *ibid.* at 439; Virginia A. Chanley, “Trust in Government in the Aftermath of 9/11: Determinants and Consequences”, *ibid.* at 469; Leonie Huddy *et al.*, “The Consequences of Terrorism: Disentangling the Effects of Personal and National Threat”, *ibid.* at 485; Deborah J. Schildkraut, “The More Things Change... American Identity and Mass and Elite Responses to 9/11”, *ibid.* at 511. For more general discussions on the aftermath of September 11th, see *e.g.* R. Jervis, “An Interim Assessment of September 11: What Has Changed and What Has Not” (2002) 117 Pol. Sci. Q. 37, Yonah Alexander & Edgar H. Brenner, eds., *The United Kingdom’s Legal Responses to Terrorism* (London: Cavendish Publishing Limited, 2003); Norman Abrams, *Anti-Terrorism and Criminal Enforcement* (St. Paul, MN: West Group, 2003); Donald J. Musch, *Balancing Civil Rights and Security: American Judicial Responses Since 9/11* (Dobbs Ferry, NY: Oceana Publications, Inc., 2003). For a useful collection of topical terrorism articles, see University of Washington School of Law, “Law Review Articles on Terrorism”, online: University of Washington <<http://lib.law.washington.edu/ref/terrorart.html>>. For a useful collection of Canadian and international anti-terrorism initiatives, see Jurist Legal Intelligence, “World Anti-Terrorism Laws”, online: <<http://jurist.law.pitt.edu/terrorism/terrorism3a.htm>>. I have also looked briefly at these issues elsewhere: Farrow, “Security and Rights”, *supra* note 1, Farrow, “Citizen Participation and Peaceful Protest”, *supra* note 1, Farrow, “Law & Politics After September 11th”, *supra* note 1.
  14. Martin Rudner, “International Terrorism Dimensions of a Security Challenge”, in *Terrorism, Law & Democracy*, *supra* note 4 at 5 (having acknowledged terrorism’s long history, however, Rudner does go on to say that “the current terrorist threat differs in significant respects from the forms of terrorism that have been encountered until now....” at 7).
  15. See *ibid.*
  16. Reg Whitaker, “Before September 11—Some History Lessons”, in *Terrorism, Law & Democracy*, *supra* note 4 at 39.

second, by Desmond Morton, looks at Canada's responses to terror threats that occurred primarily between 1866 and 1942.<sup>17</sup>

These historical perspectives help to bring a more nuanced and contextual understanding to our assessment of the events of September 11th.<sup>18</sup> More important, however, is their recognition that, because we have dealt with terrorism in the past, our response to current threats can be informed by our responses in the past. As Constance Hunt acknowledged (when commenting on these historical perspectives), because "this is not the first time we have had to deal with the frightening [spectre] of terrorism...", our responses "can be informed by the experiences of the past century and a half."<sup>19</sup>

Second, and perhaps most important in my view, are the collection's discussions on the potential negative impact of September 11th responses on individual rights and democratic values.<sup>20</sup> A particularly forceful version of the thesis that post-September 11th responses have lost sight of individual rights and freedoms is that put forward by Kate Martin.<sup>21</sup> In essence, when discussing the US response to September 11th, she argues that the American approach fails adequately to balance rights with security, and further, that only a balanced approach—one that employs democratic values in that fight—will ultimately be effective in combating terrorist threats. According to Martin, "[c]urrent [US] administration policies assign no weight to respecting civil liberties as useful in the fight against terrorism. Only when that is done, will we truly be effective in what has been acknowledged to be a long and difficult struggle."<sup>22</sup>

17. Desmond P. Morton, "Canada's Response to Past Serious Threats", in *Terrorism, Law & Democracy*, *supra* note 4 at 55.

18. In my view, there is a particular similarity between the importance of history in understanding the September 11th terrorist events and the importance of history in understanding the phenomenon of globalization in general (two topics that are, in my view, ultimately related (a view, however, that is beyond the scope of this paper)). For example, compare the different views of globalization, and its historical roots, in Thomas L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (New York: Anchor Books, 2000) and Paul Hirst and Grahame Thompson, *Globalization in Question: The International Economy and the Possibilities of Governance*, 2d ed. (Cambridge: Polity Press, 1999). For a general discussion, see David Held et al., *Global Transformations: Politics, Economics and Culture* (Stanford: Stanford University Press, 1999).

19. "Introduction to Essays", *supra* note 5 at 2.

20. See e.g. Gwynne Dyer, "Terrorism, Law & Democracy", in *Terrorism, Law & Democracy*, *supra* note 4 at 67, 77-78; Kate Martin, "Civil Liberties and the US Government Response to September 11", in *Terrorism, Law & Democracy*, *supra* note 4 at 79 ["Civil Liberties and the US Government Response to September 11"]; Emerson Douyon, "L'impact du 11 septembre sur les communautés ethno-culturelles du Canada", in *Terrorism, Law & Democracy*, *supra* note 4 at 193; Irwin Cotler, "Constitutional Democracy: Balancing Security and Civil Liberties", in *Terrorism, Law & Democracy*, *supra* note 4 at 225 ["Constitutional Democracy"]; Errol P. Mendes, "Between Crime and War Terrorism, Democracy and the Constitution", in *Terrorism, Law & Democracy*, *supra* note 4 at 239 ["Between Crime and War Terrorism"]; Patrice Garant, "Prévention du terrorisme et principes de justice fondamentale", in *Terrorism, Law & Democracy*, *supra* note 4 at 271. I have also briefly commented on these issues elsewhere: see Farrow, "Law & Politics after September 11th", *supra* note 1, Farrow, "Security and Rights", *supra* note 1, Farrow, "Citizen Participation and Peaceful Protest", *supra* note 1.

21. "Civil Liberties and the US Government Response to September 11", *ibid.* at 79.

22. *Ibid.* at 94.

Somewhat in contrast to Martin's thesis is that put forward by Irwin Cotler, now Canada's Minister of Justice. While recognizing the potentially negative impact on rights and liberties, Cotler takes the view that opposing rights with security, at the end of the day, does not help to evaluate critically current threats and responses. As he argues, "I would like to suggest that there are good civil libertarians on both sides of the issue—just as there are good security-oriented people on both sides of the issue—and we ought to assess the arguments on their merits, rather than in terms of a configuration of national security versus civil liberties."<sup>23</sup>

Third, there are a number of entries dealing with criminal law and police powers in the context of Canada's anti-terrorism legislation.<sup>24</sup> These papers, through examinations of specific legislative and policing provisions, seek to address head on, from varying perspectives, the balance between security and rights in the criminal and policing contexts. Of particular interest are the competing views of Richard Mosley and Don Stuart. In Mosley's view, Bill C-36 "reflects the global consensus that emerged in the aftermath of September 11, 2001 and responds to Canada's international obligations.... The provisions of this Act have been tailored to the objectives of protecting national security and preventing terrorism while respecting Canadian values."<sup>25</sup>

Don Stuart, on the other hand, argues, in summary, that "the massive new criminal law powers placed in our permanent criminal laws by Bill C-36 were not necessary to respond to the outrage of September 11. More resources for intelligence and investigation were needed but not new laws."<sup>26</sup> Further, the "definition of terrorist acts and the process for listing terrorist groups is seen to be far too wide."<sup>27</sup> Finally, according to Stuart, "Bill C-36 endangers freedoms of vulnerable minorities and protesters."<sup>28</sup> As a result, he "calls for vigilance in the review of the implementation of Bill C-36 and hopes for its eventual repeal."<sup>29</sup>

23. "Constitutional Democracy", *supra* note 20 at 226.

24. See e.g. Stewart Bell, "Canadian Terrorists", in *Terrorism, Law & Democracy*, *supra* note 4 at 15 ["Canadian Terrorists"]; Kent Roach, "The New Terrorism Offences in Canadian Criminal Law", in *Terrorism, Law & Democracy*, *supra* note 4 at 113 ["The New Terrorism Offences in Canadian Criminal Law"]; Richard G. Mosley, "Preventing Terrorism Bill C-36: The Anti-terrorism Act 2001", in *Terrorism, Law & Democracy*, *supra* note 4 at 173 ["Preventing Terrorism Bill C-36"]; Don Stuart, "The Anti-terrorism Bill (Bill C-36): An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System", in *Terrorism, Law & Democracy*, *supra* note 4 at 173 ["An Unnecessary Law and Order Quick Fix"]; Susan Eng, "Does Bill C-36 Give Police too Many Powers?", in *Terrorism, Law & Democracy*, *supra* note 4 at 199 [Eng, "Does Bill C-36 Give Police too Many Powers?"]; Paul D. Copeland, "Does Bill C-36 Give Police too Many Powers", in *Terrorism, Law & Democracy*, *supra* note 4 at 211; Gwen Boniface, "Does Bill C-36 Give Police too Many Powers", in *Terrorism, Law & Democracy*, *supra* note 4 at 219.

25. "Preventing Terrorism Bill C-36", *ibid.* at 171–172.

26. "An Unnecessary Law and Order Quick Fix", *supra* note 24 at 175.

27. *Ibid.*

28. *Ibid.*

29. *Ibid.*

A further paper dealing with this part of the collection—that of Stewart Bell—focuses not on the substance of these provisions, but rather on their timing. In one of the more provocative (and fear-mongering) papers in the collection, Bell argues that, whether or not Canada's anti-terror initiatives are effective, they were brought in too late. According to Bell, "Ottawa is now so late into the game that terrorist organizations are so well-entrenched, so deeply embedded into Canadian society, that ridding them from the country may well be impossible."<sup>30</sup>

Fourth, related to the previous group of papers, the collection includes a significant number of papers looking at the issue of civilian and democratic oversight of police and related anti-terror powers.<sup>31</sup> Of particular interest, in my view, is the balanced view brought to the issue by Susan Eng, former Chair of the Metropolitan Toronto Police Services Board. She argues, in essence, that while it may be true that increased police powers are necessary in light of current security risks, there clearly is a need for increased civilian oversight of any such increased powers. Further, without such auditing abilities, we will not be able to answer the more basic question of whether increased police powers under anti-terror initiatives amount to excessive police powers.<sup>32</sup>

Fifth, the collection includes several papers dealing with the issue of communication, secrecy and access to information.<sup>33</sup> Of particular note are the competing views included from Elizabeth Sanderson and Alan Leadbeater. Sanderson, recognizing that we "do not live in a world of absolutes", takes the position that the discussion about secrecy and access is really about "finding a proper balance."<sup>34</sup> After looking at the various Canadian post-September 11th privacy provisions, she acknowledges, in light of "a new, immediate threat to our security", that these new initiatives "adjusted the existing balance between access and security" by allowing the government to "tighten [...] pre-existing exceptions to the access and privacy regimes to reflect a higher public interest."<sup>35</sup> However, notwithstanding

30. "Canadian Terrorists", *supra* note 24 at 22.

31. See e.g. Eng, "Does Bill C-36 Give Police too Many Powers?", *supra* note 24; James K. Hugessen, "Watching the Watchers: Democratic Oversight", in *Terrorism, Law & Democracy*, *supra* note 4 at 381; [Hugessen, "Watching the Watchers: Democratic Oversight"]; "Civilian Oversight in a Changed World", *supra* note 4; A. Alan Borovoy, "Watching the Watchers: Democratic Oversight", in *Terrorism, Law & Democracy*, *supra* note 4 at 409.

32. Eng, "Does Bill C-36 Give Police too Many Powers?", *ibid*.

33. See e.g. Jean-Paul Brodeur, "Le Centre de sécurité des télécommunications et les libertés civiles", in *Terrorism, Law & Democracy*, *supra* note 4 at 201; Alan Leadbeater, "Antiterrorism and Secrecy", in *Terrorism, Law & Democracy*, *supra* note 4 at 327 ["Antiterrorism and Secrecy"]; Elizabeth Sanderson, "Access to Information and Privacy in the Post September 11 Context", in *Terrorism, Law & Democracy*, *supra* note 4 at 337 ["Access to Information and Privacy in the Post September 11 Context"].

34. "Access to Information and Privacy in the Post September 11 Context", *ibid*. at 339.

35. *Ibid*. at 340, 349 (she goes on to provide, however, her opinion that the new initiatives are "only a slight modification to (and quite consistent with) both the philosophy and schemes" of the pre-existing legislation, at 340).

this adjustment, Sanderson's view is that the initiatives provide a "balanced, comprehensive package of legislative reforms" that provide law enforcement personnel with "specifically tailored powers to ensure that terrorists would find neither refuge nor comfort within our borders."<sup>36</sup> As a result, returning to her opening theme of balance, Sanderson's view is that the Canadian government "got that balance right."<sup>37</sup>

Alan Leadbeater, on the other hand, takes issue with the secrecy provisions. He looks at the scope of Bill C-36, and in particular, the federal government's "legal tools to stop in its tracks any independent review of denials of access under the *Access to Information Act*."<sup>38</sup> This, for Leadbeater, is an example of the overreaching that has been sanctioned in the federal government's new anti-terrorism tools. In essentially polar opposition to Sanderson, Leadbeater argues that:

[i]n times of emergency or threat, it is sometimes necessary for states to take rights away from citizens and give new powers to governments. But also, history is replete with examples of unnecessary power grabs by states in the guise of protecting the welfare of the collectivity. The challenge for any healthy democracy is to resist the temptation of states to overreach. Our government failed the challenge when it gave itself the power...to escape independent scrutiny of its decisions to keep secrets from its citizens.<sup>39</sup>

The sixth and final topic covered by this collection of essays deals with the issue of fighting terrorism financing in the context of the ongoing war on terrorism.<sup>40</sup> The papers addressing this issue provide several useful perspectives on this thorny topic. Of particular interest to lawyers will be Vern Krishna's comments on mandatory reporting in the context of accountants and lawyers<sup>41</sup> and Reid Morden's comments about reporting requirements and the need for rigorous due diligence.<sup>42</sup>

Overall, given the inclusion of these six fundamental topics, the collection provides wide coverage of many of the issues that are at play with respect to post-September 11th security risks and potential responses.

#### *b) Breadth of Perspectives*

From the outset, the stated purpose of the collection is to bring together a

36. *Ibid.* at 344.

37. *Ibid.* at 349.

38. "Antiterrorism and Secrecy", *supra* note 33 at 331.

39. *Ibid.* at 334-335.

40. See e.g. Vern Krishna, "Fighting Terrorism Financing—Implications for the Legal and Financial Sectors", in *Terrorism, Law & Democracy*, *supra* note 4 at 351 [Krishna, "Fighting Terrorism Financing"]; Paul Kennedy, "Fighting Terrorism Financing—Implications for the Legal and Financial Sectors", in *Terrorism, Law & Democracy*, *supra* note 4 at 357; Reid Morden, "Terrorism Funding: Implications for the Legal and Financial Sectors", in *Terrorism, Law & Democracy*, *supra* note 4 at 365 ["Terrorism Funding"].

41. Krishna, "Fighting Terrorism Financing", *ibid.* at 354-355.

42. "Terrorism Funding", *supra* note 40.

wide variety of perspectives. As Constance Hunt commented in her introduction to the collection, the CIAJ was well placed and intended “to bring together...diverse participants in the justice system....”<sup>43</sup> In my view, it succeeds at this aspect of its project. Included in the list of authors are law professors, journalists, historians, political scientists, criminologists, practicing lawyers and members of the bar, accountants, current and former members of parliament, civil libertarians, judges, and representatives from the Law Commission of Canada, the Canadian Security Intelligence Service, Justice Canada, the Information Commission of Canada, and local and national police and police services bodies. International perspectives are also included.

This broad scope of national and international perspectives brings to the collection a breadth of experience that significantly adds to its value and authority as a resource for future thinking on the issues of terrorism and appropriate responses. Further, bringing these varied perspectives together makes for a more sophisticated dialogue, both internally within the collection and with the debates included in the broader literature.<sup>44</sup> This project of enhancing dialogue was also part of the overall stated purpose of the collection: to “promote informed debate about how to improve [the justice] system...”<sup>45</sup> Again, in my view, the collection succeeds in this aspect of its goal.

Second, a further strength of the scope of the collection is its inclusion of papers from French-language and French-specific perspectives. While this type of approach is not limited to Canada, it certainly lends itself well to our bilingual country. More important, however, is the implicit recognition that different cultures may face different challenges, or understand the risks in a different way, even within the same sophisticated modern society. In a country where French and English legal scholarship often do not engage the other, terrorism and our potential responses to it are areas that will benefit from these sorts of dual language collaborative efforts.

A third benefit of the scope of this collection comes not so much from the make-up of its authorship, but rather from the make-up of its audience. Other than Constance Hunt, the only express representative from the bench included in the collection is James K. Hugessen.<sup>46</sup> I say express because, according to Justice Hugessen, the comments in his paper were endorsed by other members of his court.<sup>47</sup> The vast majority of authors in the collection come from somewhere other than the judiciary.<sup>48</sup> However, if this

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43. “Introduction to Essays”, *supra* note 5 at 1.

44. For examples of that literature, see *supra* note 13.

45. “Introduction to Essays”, *supra* note 5 at 1.

46. See Hugessen, “Watching the Watchers: Democratic Oversight”, *supra* note 31.

47. According to Justice Hugessen, “Often, when I speak in public, I make the customary disavowal that I am not speaking for the Court and I am not speaking for my colleagues but I am speaking only for myself. I make no such disavowal this afternoon” *ibid.* at 384. I am grateful to Peter J. Carver for bringing this specific passage to my attention.

48. See *supra* note 5 and surrounding text.



conference was typical of other CIAJ conferences,<sup>49</sup> then there would have been a significant number of judges attending from different levels of courts from all jurisdictions across the country. And in my view, this is one of the major benefits to this collection, and in particular, this conference.

I say this because in my view, much of what will happen with respect to understanding and interpreting the use and scope of post-September 11th initiatives, and their proper role in a free and democratic society, will occur in the courts. As Kent Roach stated, the “debate about whether Bill C-36 was necessary or wise is over.”<sup>50</sup> What is just beginning, however, in addition to legislative review of the new provisions,<sup>51</sup> is the way in which courts will handle and apply all of the new provisions that come before them. As Errol Mendes comments,

I suggest that the power and justice of proportionality does not make “security” overwhelm “human rights” in the aftermath of September 11, 2001. Rather it mandates that law and justice adapt to the evolution of our society and the larger world. Ultimately, what is demanded of our Governments, our legislators, our judiciary and our fellow citizens is not only the knowledge of how to deal with the new threats that face us, but also the wisdom that forestalls them from overwhelming us and our most fundamental values.<sup>52</sup>

The Supreme Court of Canada recently had its first occasion to consider the new anti-terrorism legislation.<sup>53</sup> Needless to say, there will be more times for it and other courts to be called upon to consider these issues. For this reason, I am of the view that having judges participate in a meaningful way in this kind of critical discussion of such current and fundamental issues is a significant benefit coming out of this collection.

### c) *Potential Weaknesses*

There are two potential weaknesses to the collection, neither of which, ultimately, detracts in a significant way from the overall success of the project. First, some papers suffer from a problem of brevity and a lack of detailed research analysis. This is at times simply a result of limited footnoting and reference providing. It is also, at times, a function of the nature of the paper itself. For example, several of the papers are really only summaries or point-form speaking notes.<sup>54</sup> They would be more persuasive, in my view, if they

49. I say this given my experience as a presenter at the CIAJ’s “Participatory Justice in a Global Economy: The New Rule of Law?” annual conference in Banff, Alberta (16–18 October 2003).

50. “The New Terrorism Offences in Canadian Criminal Law”, *supra* note 24 at 143.

51. Mentioned in *ibid.* at 143, n. 47.

52. “Between Crime and War Terrorism”, *supra* note 20 at 269.

53. See *Application under s. 83.28 of the Criminal Code (Re)* (2004), 240 D.L.R. (4th) 81, 2004 SCC 42. For recent treatments by the US Supreme Court of American anti-terrorism initiatives and responses, see *Hamdi v. Rumsfeld, Secretary of Defense*, 159 L. Ed. 2d 578 (S. Ct. 2004), *Rumsfeld, Secretary of Defense v. Padilla*, 159 L. Ed. 2d 513 (S. Ct. 2004), *Rasul v. Bush, President of the United States*, 159 L. Ed. 2d 548 (S. Ct. 2004).

54. See *e.g.* “Civilian Oversight in a Changed World”, *supra* note 4.

included more of the authors' background research and sources of reference. Having said that, this "problem" is typical of conference papers and the format in which they have been presented here. It is ultimately not a criticism of the authors or their projects. In any event, even the shorter summary papers themselves still provide the basis for further meaningful discussion, reaction and analysis.

Second, many of the topics addressed in the collection have already been addressed in the earlier collection coming out of the University of Toronto "Security of Freedom" conference.<sup>55</sup> These include, for example, the topics of security and rights, criminal and police powers, information gathering and terrorism financing.<sup>56</sup> Further, some of the individual papers in this collection, from authors who participated in both conferences, are very similar to the essays from the earlier collection.<sup>57</sup>

However, having said that, there is no direct connection between the two collections. Further, while the *Security of Freedom* collection gains from its rapid publication following the events of September 11th, this collection benefits from a slightly more removed perspective and consideration of the follow-up debates concerning Bill C-36.<sup>58</sup> Finally, there is absolutely no harm in deepening the discussion on these various topics through the further consideration of similar and related ideas, particularly when provided by different authors. Here, as I discussed above,<sup>59</sup> the *Terrorism, Law & Democracy* collection provides a wide scope of perspectives and voices on the various issues, one that is perhaps even broader than that present in the largely University of Toronto-dominated *Security of Freedom* collection.

In sum, even these two potential weaknesses do not detract, in a meaningful way, from the overall value of the collection. The entries here—as with those in the *Security of Freedom* collection—are valuable and act significantly to move the various arguments forward on the issues of terrorism, security and the protection of fundamental rights and values in our modern democratic society.

### III. CONCLUSION

In the introduction to this essay, I indicated that one of the underlying themes addressed in this collection is that "everything has changed" following the

55. See *supra* note 10.

56. See *e.g.* *Security of Freedom*, *ibid.* at v–vii.

57. One paper, in particular, expressly acknowledges that a shorter version of it was "published as one of the 24 conference essays" in the *Security of Freedom* collection. See "An Unnecessary Law and Order Quick Fix", *supra* note 24 at 173.

58. The "Security of Freedom" conference was held on 9–10 November 2001, whereas the "Terrorism, Law & Democracy" conference was held more than four months later, on 25–26 March 2002. See *supra* notes 10–11.

59. *Supra* Part II b.

events of September 11th.<sup>60</sup> As I have discussed elsewhere, I am concerned that this pervasive, fear-based attitude may open the door for far-reaching government initiatives and judicial interpretations that do not adequately take seriously the underlying rights and democratic values that the post-September 11th security initiatives are designed to protect in the first place.<sup>61</sup>

Through its wide variety of topics and perspectives, this collection, in my view, helps to address this concern by taking seriously the need for critical thinking and debate about our current fear-based landscape and the initiatives we have put in place to address this fear. More discussion is needed obviously, particularly in the area of judicial interpretation and review. However, what we are presented with in this collection of essays is a well-balanced, broad-based series of views that significantly adds to our ongoing and fundamental discussions about terrorism, security and freedom. As such, it makes a very positive contribution to the important and growing post-September 11th literature and debates.

*Trevor C.W. Farrow\**

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60. See *supra* Part I, notes 1–9 and surrounding text.

61. See *e.g.* Farrow, “Citizen Participation and Peaceful Protest”, *supra* note 1, Farrow, “Security and Rights”, *supra* note 1. See further Farrow, “Law & Politics after September 11th”, *supra* note 1.  
 \* University of Alberta, Faculty of Law, (Visiting Professor, University of Toronto, Faculty of Law, York University, Osgoode Hall Law School, 2004–2005). I am grateful to my colleague Peter J. Carver for helpful comments on a draft of this review essay.