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Book Review: September 11: Consequences for Canada, by Kent Roach

Margaret E. Beare
Osgoode Hall Law School of York University, mbeare@osgoode.yorku.ca

SEPTEMBER 11: CONSEQUENCES FOR CANADA BY KENT ROACH (MONTREAL AND KINGSTON: McGILL-QUEEN'S UNIVERSITY PRESS, 2003) 272 PAGES.

BY MARGARET E. BEARE[1]

This book does more than provide the reader with an extremely thorough analysis of the debates that surrounded the introduction of a broad range of anti-terrorism measures in Canada including the *Anti-Terrorism Act*.[2] Kent Roach is in the unique position of being a legal scholar who is equipped to apply a social science analysis to these issues. Social positions, societal definitions, and politics are all very relevant to not only the making of laws but also the interpretation of them. Law is seen to be relevant only in context—more often serving a symbolic function rather than a strictly utilitarian one. The advantage of topics like terrorism, organized crime, or any other ill-defined concept is that they can metamorphose into a very different type, and degree, of threat under the pens (or the computer equivalent) of writers, representing either different disciplines or different vested interests—or both.

All national security matters have traditionally been cloaked in secrecy. How does one know if Canadian responses will work effectively to curb the threats from organized crime, corruption, or terrorism if one does not know accurately what those threats are? One is not particularly reassured by the comments of former Minister of Justice Anne McLellan in response to the various criticisms of the reach of the proposed anti-terrorism bill: "Gosh, you know, I wish you were in my shoes for 24 hours.

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[1] Associate Professor, Department of Law and Sociology, Osgoode Hall Law School, York University.

[2] Bill C-36, *Anti-Terrorism Act*, 1st Sess., 37th Parl., 2001(as passed by the House of Commons 28 November 2001).

I wish you knew what I know ... ."[3] Anyone who has worked with the police in any capacity knows how useful this claim to special, secret knowledge can be, when wider circulation of the information might do no harm and prompt very different responses from people in similar situations. The "war on terrorism" has been called a propaganda war and one does not want to mess with the desired tone of the message. As President Bush has said, "Either you are with us or you are with the terrorists."[4] Hence, "knowing" what the real threats are becomes even more impossible than it previously was and the link that is currently being made between organized crime, transnational crime, money laundering, and terrorism has ratcheted the rhetoric machinery way up!

The essential question posed in part by Roach is the following: Did very much change after 11 September 2001 ("9/11")? His answer helps to determine his analysis, and he outlines his two main goals: first, to examine developments in Canadian law within the two years between the attacks and the publication of his book; second, to examine notions of democracy and policies related to immigration, the military, foreign affairs, and security capabilities. In addition, Roach attempts to outline how this response ought to evolve in the future to deal realistically with both terrorism and potential terrorism.[5]

In response to the question as to whether the terrorism threat was new, Roach concludes that 9/11 did not fundamentally change anything, "[r]ather, it accelerated a number of preexisting challenges already faced by Canada."[6] Law was already seen as the symbolic gesture of choice whenever there was a well-publicized issue—be it the murders at L'École Polytechnique in Montreal or violence against women and spousal assault issues. Roach lists the laws that were already in place to charge and convict the serious offenses committed by terrorists. As Roach states, the existing criminal laws already carried the maximum penalties, including life imprisonment.[7] As noted, the law already had the stature of a powerful symbolizing force that indicated, as perhaps few other societal mechanisms do, the outrage or at least the intolerance of society to certain acts.

An important point that Roach makes, however, is that only certain acts—or perhaps, more accurately, only certain victims—warrant these

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[3] See Kent Roach, *September 11: Consequences for Canada* (Montreal and Kingston: McGill-Queen's University Press, 2001) at 224, n. 77.

[4] "Either you're with us or with the terrorists" *Globe & Mail* (21 September, 2001) A1.

[5] *Supra* note 3.

[6] *Ibid.* at 15.

[7] *Ibid.* at 23.

shows of outrage. All victims and likewise all suspects or all criminals are not equal in this legal arena. Roach raises an important argument in his "contextual and narrative" analysis of the legislation.[8] He notes that only some narratives are heard, and those narratives are interpreted through the politics of the legal drafting process. Part of this process involves three sorts of narratives: The immodest claims of government to justify the new powers; the narratives pertaining to the victims of the attacks; and the narratives of those "experts" speaking in support of or against the legislative changes. The University of Toronto symposium that resulted in the book, *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*,[9] was an important gathering. Who was in attendance? Certainly, attendees were mainly lawyers with a smattering of political scientists. Even the Justice officials and the civil liberties representatives were uniformly lawyers—all sharing in part a common law-oriented narrative. However, even in this gathering, the concerns were political and social, rather than a black-letter law approach to understanding the complex issues.

In preparing this review, it was instructive to analyze the reviews by other scholars, each seeing the post-9/11 "problems" differently, and hence each seeing the strengths and weaknesses of Roach's analysis through the prism of their own interpretation. Underlying much of the controversy is the unverified, and I would argue unverifiable, question as to whether the attacks in New York and Washington signaled an era of profoundly different terrorism—more irrational, more frequent, and more massively destructive. This is the preferred message of some politicians, some media, some academics, and of course the entire U.S. Homeland Security group. Roach is guilty of challenging this message. A review of Roach's book by University of Toronto academic Wesley Wark refers to "the new security environment" and criticizes Roach for failing to appreciate these new realities.[10]

There may be nothing new about the cause, the scale, or the individual fear that has been generated by the 9/11 attacks. What is profoundly different is the specific target, and the media attention that it generated. And yes, citizens in North America, and perhaps western nations, do fear that they are vulnerable in a way that had previously been reserved for other citizens in whose lives terrorist acts are possibly even common. Perhaps, rather than an era of new terrorist threats, the lesson to

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[8] *Ibid.* at 74.

[9] 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).

[10] Wesley K. Wark, "Has anti-terrorism bill made Canada safer?" *The Globe and Mail* (12 July 2003) D12 (WL).

be derived from the attacks ought to have been an awareness of the pre-existing insecurities, encouraging an appreciation of the atrocities occurring world-wide and the social, economic, and political responses that fuel ongoing acts of violence.

The environment in which the anti-terrorism legislation was debated is essential to understanding the speed with which it was enacted, the content of the new powers, and more general responses. It is possible to trace the blaming exercise for the World Trade Center and Washington attacks from original statements made by the U.S. government about Good vs. Evil and God vs. the Devil, to looking off-shore to firm up an alliance of international support, and to identifying the "Axis of Evil"—with the assertion that everyone who did not join was, therefore, on the opposing team. It was not long, however, before the finger was pointed closer to home, focussing on the "open and dangerous" Canada–U.S. border. Only after a full year was there any open acknowledgement that some of the failings might be even closer to home and internal to U.S. institutional failures—with perhaps even some consideration of U.S. policy. Each of these stages of blame-making was accomplished by the rhetoric that identified the weak links external to the United States that were seen to be causing specific harm to the country, followed by pressures and demands for policy and legislative changes. U.S. homeland security was to be secured far and wide from the confines of the United States.

The loudest voices during the early period following the attacks tended to support the more extreme interpretation. Under this interpretation, countries agreed to significant changes with little opposition, in order to fight the scourge of terrorism, with little consideration given to whether or not the changes would relate in any real way to greater security. Hence, these countries called for an all-out war against terrorists that was, in many cases, translated into draconian laws, broadened policing powers, military enhancements, and closer alignment with the United States. Even some critics of the proposed Canadian legislation saw the situation in an extreme light. Roach quite rightly appears ambivalent as to the position that he grants to former Liberal backbencher, human rights lawyer, Irwin Cotler (currently the Minister of Justice and Attorney General of Canada), who was one of the speakers at the *Security of Freedom* University of Toronto Workshop.[11] Cotler expresses at times a concern with the breadth of the legislation but then engages in rhetoric such as the "new

[11] Daniels, Macklem & Roach, *supra* note 9.

transnational superterrorist."[12]

Following Stanley Cohen's classic moral panic sequence,[13] since 9/11 we continue to be treated to warnings of some impending or potential terrorist acts—warnings that create fear but offer no ability for the ordinary citizen to respond rationally. Any moral panic will involve responses from a bevy of "experts". In many cases, the hype of the panic overshadows the lack of credentials of those who offer the most vociferous opinions. The threat is seen to be *foreign* but *inside* our communities and is, hence, perceived to be both a betrayal and deadly. In speaking about late eighteenth century London and Paris, Allan Silver describes the sense of fear generated by what was perceived to be the "criminal, vicious and violent" rapidly multiplying poor in cities whose number had no precedent in western history:

> It was much more than a question of annoyance, indignation, or personal insecurity; the social order itself was threatened by an entity whose characteristic name reflects the fears of the time—the "dangerous classes."[14]

These new forms of civil unrest were seen to represent a challenge to the fabric of society and to demand that a garrison force (police or military) act to suppress this "internal enemy." While the terrorism of 9/11 is of a very different ilk than the riots in eighteenth century England, the sense that the fundamental fabric of the society was at risk may be similar. Perceived risks within Canada were compounded by pressures from the United States for policy and legislative change that were deemed to be essential to protect their territory. Roach quotes from Stanley Cohen's namesake, Stanley A. Cohen, a senior Department of Justice Canada official, who stated well before 9/11: "Distressing events, especially well publicized events, galvanize politicians and policy makers to legislative action. ... [U]ltimately there are limits to the ability of the formal law to deter or prevent crime."[15]

A vying for toughness of response pits the Federal government

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[12] Irwin Cotler, "Does the anti-terrorism bill go too far? No: We need powerful new legal tools to fight the new global terror threat" *The Globe and Mail* (20 November 2001) (WL). See also Roach, *supra* note 3 at 81.

[13] *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, 2nd ed. (New York: St. Martin's Press, 1980).

[14] "The Demand for Order in Civil Society" in David J. Bordua, ed., *The Police: Six Sociological Essays* (New York: John Wiley and Sons, 1967) 1 at 3.

[15] "Law Reform, the Charter, and the Future of Criminal Law" in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 344 at 347, cited in Roach, *supra* note 3 at 23-24.

against the expectations, desires, or demands of the government of the United States. In addition to a presumed need for changes, opportunism abounded! From down in the pit at ground zero, out to the far reaches of the globe, agencies and individuals looked to capitalize on terrorism. In government, officials speak of "windows of opportunity"—in other words, moments in time that allow for new policies or laws to be passed that the public or the opposition would not normally agree to. The planes through the towers left in their wake windows of opportunity for many agencies, and in some cases, for individuals to benefit from new powers, resources, or mandates, and in the case of a few academics, new reputations to be made.

Roach argues that the justification for the additional powers are as dangerous as the powers themselves. The federal government argued that it was via the *Charter*-proof and pro human-rights anti-terrorism legislation that security would be enhanced. Roach sees not only the dangers in these justifications, but also the dangers in what he terms "this narrative approach" to law making—an approach that had a history prior to 9/11. Responses favouring the increasingly powerful victims' groups, and quick-fixes via the enactment of criminal laws, run through law-making during at least the past two decades. Roach argues that law ought not to be a "popularity contest between the accused and the victim, because the victim will win every time."[16] This is true, not just because of the sympathy due to victims, but also because victims' groups are extremely powerful in Ottawa. One thinks of groups such as Caveat—articulate, well funded, and extremely well organized. Victims' groups have had a significant impact on the enactment of laws and on the sentencing process. Hence, the vivid images from 9/11, and narratives such as the daily *New York Times* biographies on each of the victims, ought not to justify abrupt termination of all due rights and protections.

Roach is not naive to the limitations of the criminal law to actually deliver security, equality, or sense of justice that is demanded, and then promised, by the state via the passing of new laws. While one reviewer criticizes Roach for offering "a vision of law as the ultimate foundation of societal values,"[17] a careful reading of Roach's book reveals quite a different picture. Repeatedly, Roach argues that law will be turned to as the *symbolic* response, but that there is little evidence that tougher laws will actually deter terrorists. Roach argues that there were sufficient laws in place before 9/11 to deal with all of the crimes that occurred during that attack and any further attacks. Supplying adequate legal powers is not,

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[16] Roach, *supra* note 3 at 82.

[17] Wark, *Supra* note 10.

however, the sole function of the legislative process—instilling a *sense* of "control" and "security" becomes an equal or even prime objective. He argues that the lessons learned from the treatment of ordinary criminals ought to make one question the notion of deterrence. And yet, tougher, stronger penalties are trotted out as the appropriate response to gaining greater security from terrorism. Quick legislative responses have the political salience that is missing from the more profound search for ways to eliminate root causes. As Roach states: "Canadians have relied on the criminal law in a desperate and frequently vain quest for an increased sense of security and an understandable desire to express concern for those victimized by crime."[18]

Roach deals less thoroughly with the provisions of the new powers that are intended to prevent terrorism—via the identification of dangerous people before they are allowed to act—rather than the powers to arrest after the event. He expresses a concern for the breadth of powers, such as preventative detention and the investigative hearings. He notes, for example, that the peace bonds for terrorists builds on what was to have been very restrictive use of peace bonds in cases involving organized crimes.[19] While it is likely that more controversial cases will arise, Roach documents the potential for abuse, as cases such as Michel Jalbert, Maher Arar, Ahmad Abou El-Maati, and Abdullah Almalki continue to gain public profile, and in the case of Arar, a formal inquiry. Likewise, Richard Mosley, a senior Federal Justice official (and now a judge) stated at the *Security of Freedom* symposium:

> [W]e are very concerned with the impact of this legislation on the ethno-cultural communities of Canada ... we reached out to national organizations representing those communities. That was particularly with reference to the Arab, the Islamic, and the Afghan communities within Canada. ... There is always the capacity for abuse ... .[20]

The anti-terrorism legislation does make various changes to the role that the justice sectors are now to play, and continues the shift away from the crime per se, toward what traditionally used to be merely seen as evidentiary material. However, even this change could be seen to have a precedent in organized crime legislation (Bill C-95 and Bill C-24), which come extremely close to criminalizing membership in groups defined as organized crime groups. This organized crime legislation is also instructive in emphasizing an additional point that Roach makes: Powers brought in

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[18] Roach, *supra* note 3 at 15.

[19] *Ibid.* at 49

[20] Daniels, Macklem & Roach, *supra* note 9 at 445.

to target selective threats can quickly be normalized to apply much more broadly. The original proceeds of crime legislation, passed in 1989, applied to some twenty-four "enterprise crime" offenses, plus designated drug offenses. These offenses grew in number to approximately forty—and now the proceeds of crime seizure powers apply to most indictable offences and include, under certain circumstances, powers of preventive detention. Likewise, the international preoccupation with money laundering has resulted in a significant shift *away* from both the predicate crime and the criminal, to what some critics see as a misplaced—and perhaps also a "state-grab"—focus on the criminal proceeds. This focus on criminal proceeds has been enhanced by the new focus on terrorist financing—all without an *iota* of evidence that targeting money laundering has any impact on organized crime—even when the offenses are profit driven. How much less likely will it be that we achieve more security from the current legislated requirement that front-line bank tellers, business folk, in addition to law enforcement agencies, must now focus on the financing of ideologically driven terrorist operations? Identifying *legitimate* proceeds that may be put to a future criminal use is impossible.

Roach argues that it is unfortunate that Canadian lawmakers did not have enough confidence to rely on the traditional principles that saw motive as a method of eliminating suspects, and not as a crime in itself. Hence, "we criminalized political and religious motives by making them an essential part of the many new crimes of terrorism."[21] Later, he writes: "we do not need a special motive-based criminal law to denounce and punish the crimes of terrorism."[22] Once you move into this realm, racial or religious profiling and the elimination of the presumptions of innocence may be the result. Again, those "experts" who maintain that 9/11 fundamentally changed everything may see these "costs" as necessary ones. This view will, however, be *coloured* by who you are. Various Muslim groups, and other visible minorities who "look" dangerous to ill-informed members of the public, customs officials, or law enforcement agencies, are right to hold a different view. Roach catalogues some of the profiling impacts following both the attack and the Canadian response. I am not as optimistic as Roach in believing that adding a non-discrimination clause to Bill C-36 (as apparently they did in the U.S. to the *Patriot Act*) would have any impact—except again, perhaps symbolically.

It is impossible to do justice to all of the points raised by Roach. In terms of how Canadian anti-terrorism policies should evolve in the future,

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[21] Roach, *supra* note 3 at 28.

[22] *Ibid.* at 82.

Roach argues for *less* reliance on a criminal or military approach. Short-term repressive solutions imposed by possibly violent and corrupt enforcers will add to the level of insecurity. Even truly professional and ethical police ought not to be seen to have a monopoly on the resolutions to conflicts. As the former Canadian Foreign Affairs Minister Lloyd Axworthy stated, we need to move beyond legal approaches and view problems, instead, from a broad human security perspective.[23] This view will, of course, outrage those who see 9/11 as a watershed event. A critical review of Roach by Philippe Lagassé takes Roach to task for failing to provide *proof* that a human security approach would weaken terrorism.[24] Lagassé agrees with the criticisms that Wesley Wark aimed at Roach, that Roach displays "no sense of the new security environment or the realities against which Bill C-36 was designed to operate."[25] Lagassé goes on to say that Roach "ignores the moral imperative of the war on terrorism."[26] Perhaps better than any other, this phrase, "the moral imperative of war," illustrates the sense of "rightness" that both sides bring to their arguments—with belief rather than cold facts as support.

As Roach notes, it is heartening that eleven countries including Canada and the UK (but not the United States) agreed to the following statement at the Progressive Summit: "We must be resolute in fighting terrorism and equally resolute in tackling its causes .... For the only lasting answers lie in justice, more effective international cooperation, peace and freedom, democracy and development."[27]

As Roach acknowledges, these are platitudes—but platitudes that counter the war-mongering platitudes that dwell on the capturing, and possibly torture, of evildoers. Roach builds a solid argument to support his claim that what has changed has been an acceleration of responses. In terms of assessing the appropriateness of these responses, perhaps two years has been too short of a period. What we do not know can hurt us. Countering terrorism requires secret security intelligence operations, and yes, former Justice Minister Anne McLellan, as holder of secret information, has a responsibility to pass laws for our protection. However,

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[23] Department of Foreign Affairs and International Trade, News Release, "Axworthy Launches Hemispheric Dialogue on Drugs During Visit to Jamaica" (8 January 1999).

[24] Book Review of *September 11: Consequences for Canada* by Kent Roach (2003) 4 Can. Mil. J. 70, online: National Defence <http://www.journal.forces.gc.ca/engraph/Vol4/no3/book5_e.asp> [cited to Can. Mil. J.].

[25] *Supra* note 10 at D12.

[26] *Supra* note 24 at 71.

[27] Shawn McCarthy, "Anti-terror coalition's fissures are showing" *The Globe and Mail* (25 February 2002) (WL), cited in Roach, *supra* note 3 at 196.

already we are seeing abuses that flow from new powers with old or non-existent accountability mechanisms. "You can trust us" has never been a safe formula. The debate, the negotiations, and the outcome of the Canadian responses to the attacks of 9/11 were significantly different from those in the United States. Whether there is fodder for a worthy debate regarding the gain or loss of our sovereignty in the process is open for further discussion. However, the more important question is the one Roach most fully addresses: The appropriateness of the Canadian response for Canada.