

two-fold. First, in the aftermath of September 11, Canada felt immense pressure from the U.S. to be seen to be doing something. And for the U.S., doing something these days involves “governing through crime.” (This trendy approach to governance means emphasizing dramatic moral judgments, symbolic actions and draconian laws—remember Bill Clinton’s decision to execute a mental incompetent rather than be seen as soft on crime—while the idea of the state as a commonwealth diminishes to a vanishing point.) In terms of international relations, the symbolic importance of this Canadian bill was huge, trumping any question about its wisdom or legal value. The Bush administration had to be made happy.

Second, the bill fit an evolving pattern of law making by means of reactive, ad hoc, criminal law reform. Although often ineffective, a “narrative and memorial style of criminal law” is cheap and easy: the media love it, the opposition never howls. No one ever argues in favour of domestic violence, kiddie porn, hateful speech or terrorism. “The criminal law,” Roach says, “builds on itself, using previous expansions to justify further expansions. It also follows the pattern of new criminal law being fashioned as a response to particular crimes, and not on the basis of overarching principles.” Because exceptional powers tend to become normalized, one incursion on civil liberties spawns another as surely as the inevitable sequence of dramatic and violent events generates a vicious circle of ever-escalating demands for memorial-style criminal law. That, however, is the road to tyranny. Criminal law reform should respect core “principles such as the need for a clearly defined and restrained criminal law, and respect for rights such as freedom of expression, the right to silence, and the presumption of innocence.”

Two particularly insidious arguments were put forth by government members defending the *Anti-Terrorism Act* as it moved through Parliament. One was the idea that the bill must be good law because it had been “charter-protected” by the Attorney General’s staff. Even leaving aside the patronizing “trust me” attitude that such an assertion implies, charter proofing is not the whole story of constitutionalism. Taking steps to ensure that an act will survive scrutiny by the Supreme Court of Canada applying the Canadian Charter of Rights and Freedoms sets the bar very low, deflecting attention entirely from the wisdom of the statute. For a minister to say a bill will survive charter scrutiny implies nothing about the way in which police officers will use the act, nothing about the likelihood of the bill attaining its desired ends and nothing about its consonance with Canadian standards of civil liberties, justice, constitutionalism or the rule of law. Presenting draconian legislation as charter-proof is fundamentally a shell game wherein the public’s eyes are focused on one spot while the action takes place elsewhere:

Such a strategy may deceive a public who thinks that the consistency with the Charter means that rights are not infringed ... Constitutionalism in Canada before the Charter was built on the notion that those in power should not exercise their legal powers to the fullest extent possible even in times

of perceived crisis. It was fundamental to British constitutionalism that what was legal might nevertheless be improper and unconstitutional ... we are losing sight of this older sense that power must be restrained by decency, prudence, and tradition, not just the legal limits that lawyers and courts impose on us.

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The second bad argument the government developed was positively Orwellian. Whereas the conventional way of thinking about police powers in relation to civil liberties recognizes a need

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to reconcile conflicting demands between law enforcement or security on the one hand and the values of liberty on the other, the problem was made to go away entirely by the rhetorical magic trick of calling security a human right. Presto, now we have not a human right balanced against its opposite, but two human rights deserving of equal attention! “Even illiberal definitions of terrorism and strong police powers would now be defended in the name of human and equality rights.” Although this obfuscatory word play probably fooled no one, the national embarrassment of seeing ministers and government-side MPs shamelessly mouthing such nonsense in the House of Commons and elsewhere, day in, day out, speaks poorly both of Canada’s Parliament and the members of the media who cover it.

While it would be bad enough if Roach’s book only illuminated an illiberal bill passed into law by means of particularly unpleasant political manoeuvring, a further theme is more disturbing still: terrorism, after all, presents real threats to public safety, but it turns out that the Canadian government has actually done little to increase public safety. Horrific acts of terror are not hard to pull off: an angry individual with fertilizer and a rental truck can blow up a building in Oklahoma City; a man and a boy with a gun and a car can terrorize a city; a suicidal killer armed with office tools can crash an airplane into a highrise; a dirty nuclear device can be assembled from readily available industrial dynamite and radioactive materials used in laboratories and hospitals across the country. Simply put, no system of policing and security, no matter how draconian, can provide 100 percent protection against such acts of terrorism. Real security requires enhancing the security of places and systems, target hardening and better emergency preparedness. The false sense of security produced by a tough-on-crime approach to the threat of terrorism (peace bonds for terrorists! stiffer penalties for suicide bombers!) “makes Canada vulnerable to a non-rational and even counter-productive allocation of resources to security.” In a major contribution to the thinking about this subject, Roach develops a public health or disaster-based approach to terrorism

that, through reliance on “technology, better emergency responses, and the control of weapons and other hazardous substances also poses less threat to liberty, privacy, and equality than one that relies on criminal investigations and prosecutions.” The *Public Safety Act*, a much-delayed bill that has appeared in Parliament in several forms now, is, Roach says, a step in the right direction.

Roach’s analysis will run into heavy criticism on several grounds. In criticizing American policy in many areas he will (unfairly, in my view) be labelled as anti-American. Others will balk at his defence of anti-majoritarian judicial policing of civil liberties. Others still will react angrily to the book because they reject the idea of civil liberties altogether. These, I think, are fundamentally wrong-headed criticisms that could only be sustained by a biased reading of the text and in ignorance of Canadian constitutionalism.

Roach is on thinner ice, however, in three respects. First, he may be overly optimistic about the ability of Canada—a fine place but a smallish economy and third-tier power at best—to withstand either American diplomatic pressure or American cultural logic.

Second, he has glossed over the failures of Canadian democracy (better dealt with by Donald Savoie or Jeffrey Simpson) rather badly. This allows him, in a particularly unfortunate blooper, to pen these words: “Some government backbenchers, senators, and even Cabinet ministers courageously voiced their concerns about the bill” before collapsing under party discipline on final reading. This, of course, entirely overlooks the point that the whole idea of parliamentary democracy is that MPs are supposed to act in the public interest and in fear or favour of no one, especially not of the executive branch of government. To single a few out for courage in doing what they are constitutionally bound to do is to demonstrate the hollowed-out, corrupted shell that Canada’s Parliament has become.

Third, Roach is insufficiently critical of the proposed *Public Safety Act*, a bill that operates by creating huge areas for ministerial discretion. It does so without providing the safeguard implicit in the principle of collective Cabinet responsibility (ministers are authorized to act on their own and without Order-in-Council) and without the kinds of constraints, checks and accountability mechanisms provided for by the *Emergencies Act*, for example. Although the focus on safety is undoubtedly a good thing, the mechanisms provided are themselves a threat to Canadian constitutional values and democracy. It is not altogether clear that the massively expanded ministerial authority this act would create is greater than the criminal law enforcement that Roach so effectively criticizes.

These are not inconsequential matters, but pointing them out does nothing to detract from this invaluable book. Roach has produced an excellent Canadian history of the year passed, an insightful and highly readable analysis of some really tricky stuff, a valuable blueprint for confronting the challenges of terrorism and a primer on Canadian civics. This is an outstanding work, and a must-read for anyone who would understand Canada’s role in the new circumstances of the early 21st century. ☐

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