As globalization becomes more pervasive, the legal regimes of constitutional democracies throughout the world become ever more interdependent. This is so for at least two principal reasons: First, the citizens of one country find themselves affected to an ever greater extent by the laws of other nations. What happens elsewhere affects us here. Second, a growing similarity of legal regimes—a growing determination, for example, to maintain democratic societies that protect basic human rights—means that both judges and policy makers in one country find that other nations face problems similar to their own. These circumstances do not mean domestic law that changes to reflect the values held by those in foreign nations. These circumstances do mean that, in shaping our own domestic legal responses to common problems, we can learn from the experience of others.

The value of looking to common experience is most dramatically illustrated by the challenges posed by the recent wave of global terrorism and by the multiple and often vexing legal issues that emerge in the course waging the war on terror. As recent terrorist attacks, such as those against the United States on 9/11, 2001, in Madrid in March 2004, or in London in July 2005, have demonstrated, not only is contemporary terrorism global in its ambitions and scope, but it also recruits and trains its agents, obtains and manages its financing, and selects targets for its attacks on a veritable worldwide basis. This, in turn, calls for cooperation among democracies engaged in the fight against terrorism and for sharing the fruits of experience in combating and preventing terrorism with a view to developing approaches that will maximize efficiency in the war on terror. This symposium seeks to take a constructive step in that direction.

The articles included in the present symposium were first presented at the conference on “Terrorism, Globalization and the Rule of Law” held at the Rockefeller Foundation’s Conference Center in Bellagio, Italy on July 18-22, 2005. The Bellagio conference’s participants came from several countries spanning four continents and included judges, legal academics, and government officials responsible for combating terrorism as well as specialists in philosophy, political theory and psychology. One of the principal aims of the conference was to gain a better understanding of global terrorism, to assess the similarities and differences between the latter and older types of nation-state based terrorism, such as that of ETA in Spain or of the IRA in Northern
Ireland. A second important aim was to compare reactions to global terrorism both from a cultural and an institutional standpoint, and to understand how different perceptions of the threats and challenges that such terrorism poses shape reactions to it. A third major aim was to compare how different legal systems with varying constitutional regimes did and could cope with the threats posed by global terrorism and with the actions and policies adopted to combat it. Of special interest in this connection was how different approaches seek to strike a proper balance between the security needs triggered by the ongoing threat of global terrorism and the continuous obligation to afford meaningful protection to civil liberties. In particular, attention was given to resemblances and differences among different approaches and to the extent to which useful lessons could be derived from different approaches to similar problems.

The articles included in this symposium publication tackle various aspects of these issues. Some of them, such as those of Cyrille Begorre-Bret and David Dyzenhaus, deal with questions relating to global terrorism at a more abstract theoretical level. The remaining articles approach these issues from an institutional and comparative standpoint. Some of them focus on the role of judicial intervention in cases challenging novel security measures adopted to combat global terrorism.

Though philosophical in their approach, the articles by Begorre-Bret and Dyzenhaus address questions that have important practical implications. Begorre-Bret underscores the difficulties that inhere in any systematic attempt to define terrorism and advocates a pluralist approach toward what ultimately ought to be encompassed within the concept of terrorism. Whereas the 9/11 attacks unmistakably qualify as terrorist acts whatever plausible definition of term one may choose, Begorre-Bret’s admonitions sound a cautionary note in the context of preventive strategies associated with the war on terror. If, for example, preventive detention of suspected would-be terrorists is more justified than preventive detention of others, then it is important to have a broadly acceptable definition for determining who is a terrorist.

Dyzenhaus explores the theoretical implications stemming from triggering a state of emergency leading to the assumption of extraordinary powers by a country’s chief executive consistent with applicable explicit or implicit constitutional norms. How can we reconcile “emergency powers” with basic democratic norms including

---


the rule of law? Unlike several other constitutions, the United States Constitution does not contain emergency power provisions. Nevertheless, American presidents have exercised considerable power in times of war and of crisis. To what extent has the judiciary kept American presidential power within bounds?

The remaining articles focus on important institutional and legal issues concerning terrorism and the fight against it from a comparative perspective. Antoine Garapon³ compares the French inquisitorial system of justice to the American adversary system of justice. Garapon argues that the American system seems better suited to protect civil liberties in ordinary times, but the flexibility of the French system enables it to adjust better to the exigencies of times of crisis with smaller sacrifice in respect to the protection of civil liberties. He leads the reader to ask whether the formal characteristics of the adversary system themselves sometimes inhibit protection of civil liberties in times of crisis. If so, a degree of flexibility may be needed in respect to how the American Constitution protects traditional civil liberties in times of war or threat of terror. Is the “flexible” approach of the plurality opinion in the United States Supreme Court decision in the Hamdi case (which I joined)⁴ a sound one?

Michel Rosenfeld’s article⁵ presents a comparative analysis of the “war on terror” jurisprudence of the Supreme Court of Israel, of the United States Supreme Court, and of the United Kingdom’s Law Lords. All three courts resort to judicial balancing in cases arising out of the war on terror and Rosenfeld argues that such judicial balancing is preferable to purely legislative and/or executive approaches and to judicial approaches that rely exclusively on rigid categorical criteria. Rosenfeld’s account of the British and Israeli judicial decisions and his conclusions seem roughly consistent with the balancing approach employed in the plurality opinions in Hamdi.

Kent Roach⁶ compares British and Canadian antiterrorist legislation to assess the extent to which the war on terror calls for trade-offs between liberty and security. Roach maintains that in many cases these trade-offs are not necessary and that increased security often goes hand in hand with full and vigorous protection of civil liberties. Nevertheless, according to Roach, there are some cases where trade-offs

---

⁵ Michel Rosenfeld, Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror, 27 CARDOZO L. REV. 2083 (2006).
are unavoidable. In those cases, concludes Roach, the key to fair and workable solutions is recourse to proportionality, and in particular to judicial use of a proportionality standard.

Claude Klein’s article provides an acute historical insight into one country’s legal battle against multiple and changing forms of terrorism spanning over a half a century. Klein emphasizes that Israel has confronted terrorism and deployed a legal regime against it well before 9/11, 2001, in fact going all the way back to its independence in 1948. Although Klein’s focus is exclusively on one country’s experience, his analysis affords a valuable comparative perspective. Israel’s changing law used to combat terrorism has incorporated legal norms from the British mandate as well as from other sources, such as Jordanian law. Moreover, the targets of Israel’s anti-terror laws have been multiple, including Jewish extremists as well as Palestinians. Finally, the laws in question have been variously used to prosecute perpetrators of violent acts and to attempt prevention through repression of “pro-terrorist” propaganda. Klein stresses that over the years the courts have increasingly found a proper and useful role to play in assuring that government policy remains consistent with a liberty-protecting rule of law.

Paul Verkuil’s article examines the important issue of privatization of public security from a comparative perspective. The article zeroes in on a single case, that of airport security. Since 9/11, 2001 the United States has entrusted theretofore private security at the airports to federal employees. At the same time some European countries have switched form public to private security at their airports. Comparing the two experiences Verkuil concludes that, in terms of combating terrorism, the key issue is not whether airport security is in private or public hands, but whether there is a proper system of public accountability.

András Sajó’s article analyzes the potential systematic institutional effects that a total and protracted war on terror with increasing restrictions on civil liberties would bring about. Sajó argues that well-functioning constitutional democracies are characterized by their willingness to take risks to secure liberty. The experience of totalitarianism, however, has made certain societies more risk averse. One consequence of this phenomenon is the constitutionalizing of “militant democracy” in countries such as Germany. Unlike the United

States, where almost all political speech receives strong constitutional protection, the German Basic Law allows the banning of political parties that advocate totalitarianism or racial hatred. Following the logic of “militant democracy” in the face of fundamentalist global terrorism is likely to make democracies so risk adverse, argues Sajó, as to lead from militant democracy to what he calls the “preventive state,” a state so averse to the risk of terrorism that it disregards the importance of protection basic liberty. Sajó argues that we do not face a stark choice between security and liberty and warns against over-emphasis of terrorist risks.

These articles taken together demonstrate that, in respect to terrorism and the liberty/security balance, circumstances differ among nations and among cultures. Yet there are basic similarities among constitutional democracies and the nature of the threat that make it possible for each to learn from the experience of others. Indeed, the similarities are sufficient that it should surprise no one if, through such comparative efforts, emerge better, perhaps more similar, responses to a common problem.