Summary

Since 2001, preventive detention has become almost commonplace as a means of "incapacitating" terrorist networks. No other development — with the possible exception of the use of extreme interrogation techniques — has been as controversial, or as uncomfortably reconciled with conventional legal practices. But there are legitimate uses of preventive detention that respect the legal principles of protection of civil liberties.

In this study Craig Forcese proposes lessons for Canada from state practices in the United States, the United Kingdom and Australia since 9/11 that might reasonably guide the development of an appropriate system of preventive detention; specifically, one that is maximally effective within a sphere of tolerable restrictions on civil liberties. He does so in four sections. In the first section, Forcese compares several models that are essentially systems of preventive detention. In the second section, he examines the Canadian legal environment in which any discussion of preventive detention must be situated. He highlights the extent to which Canadian law already empowers the state to preempt terrorist activity. He concludes that while the gap that might reasonably be filled by a separate system of preventive detention is narrow, it does exist. In the third section, Forcese proposes, first, criteria for measuring the public safety effectiveness of such a system and, second, a zone of tolerable civil liberty restrictions. In the last section he draws on these criteria and prior practice to propose a model for the Canadian system of preventive detention.

The author favours a model that balances effectiveness and civil liberties. He identifies as a legitimate concern the narrow circumstances where the state (1) has reason to believe that a terrorist attack will occur; (2) has reason to believe that a particular group is behind the plot and that the suspect is a member of that group; but (3) has no information, other than this belief, to connect that particular individual to the plot. In these circumstances, conventional legal instruments allowing the state to disrupt that threat through detention of the individual may not be available. In that narrow space, there are arguments in favour of preventive detention.

Forcese suggests that section 83.3 of the the 2001 *Anti-terrorism Act*, the anti-terrorism provision allowing short-term detention in circumstances where conventional arrest powers could not be exercised, was a reasonable approach. He proposes a revamped section-83.3 process that adds certain other civil liberties safeguards and also permits the constrained use of secret evidence and special advocates. The net result is a system of "catch and release" (or catch and release subject to a peace bond) that focuses on disruption of a threat via the short-term detention of persons who are tied to specific threats. Forcese rejects approaches that detain solely on the basis of perceived inherent dangerousness.