PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, RICHARD A. POSNER (NEW YORK: ROWMAN & LITTLEFIELD, 2005); *REMAKING DOMESTIC INTELLIGENCE*, RICHARD A. POSNER (STANFORD, CAL.: HOOVER INSTITUTION PRESS, 2005); AND *UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM*, RICHARD A. POSNER (NEW YORK: ROWMAN & LITTLEFIELD, 2006)

Judge Richard Posner responded to the issues of post 9/11 domestic United States intelligence system reform through an article published in the *New York Times Review of Books*, which grew into a book, augmented by a monograph, and updated by another book. As might be expected of Posner, these short works are lucid, provocative, and informative.

The *New York Times* article, "The 9/11 Report: A Dissent,"[1] is a review of the recommendations of the 9/11 Commission.[2] This article is foundational to the other works, and, in brief compass, criticizes the Commission's recommendation for centralizing intelligence functions, points out the difficulties of anticipating surprise attacks, and proposes the establishment of a domestic intelligence agency separate from the Federal Bureau of Investigation (FBI). *Preventing Surprise Attacks*[3] elaborates the article's arguments, particularly in light of the passage of the *Intelligence Reform and Terrorism Prevention Act of 2004*[4] (which adopted the Commission's main recommendations), and engages relevant historical and organizational theory literature. Posner reviews the flaws in the Commission and subsequent legislative processes,[5] and takes the Commission to task for its parochial disregard for the domestic intelligence experience of other countries. The monograph, *Remaking Domestic Intelligence*, focuses on the role of the FBI in domestic national security intelligence.[6] Posner argues that the FBI should retain its role in the criminal investigation of terrorism offences, but that a separate domestic intelligence agency should be established with the broader mandate of conducting national security intelligence operations without law enforcement functions. Posner's organizational model for his proposed agency is, interestingly from a Canadian perspective, the Canadian Security Intelligence Service (CSIS). Material from the CSIS website is even reproduced in the appendix to the monograph. *Uncertain Shield* updates *Preventing Surprise Attacks* by addressing the implementation of the *IRTP Act* and the report of the Commission on the Intelligence

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1 Richard A. Posner, "The 9/11 Report: A Dissent" *The New York Times* (29 August 2004), online: The New York Times <http://query.nytimes.com/gst/fullpage.html?res=9C07E6D81E3FF93AA1575BC0A9629C8B63&sep=1&sq=the+9%2F11+Report%3A+a+dissent&st=nyt> [Posner, "Dissent"].

2 U.S., National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004), online: National Commission on Terrorist Attacks Upon the United States <http://govinfo.library.unt.edu/911/report/911Report.pdf> [National Commission, *9/11 Commission Report*].

3 Richard A. Posner, *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (New York: Rowman & Littlefield, 2005) [Posner, *Preventing Surprise Attacks*].

4 Pub. L. No. 108-458, 118 Stat. 3638 (2004) [*IRTP Act*].

5 Overall: excessive haste, distortions of issues and options by consensus conclusions, lack of usual legislative and media challenges, and safeguards. Respecting the Commission in particular: bipartisan rather than non-partisan membership; lack of engagement with relevant scholarly literature; excessive influence of victims' families, Posner, *Preventing Surprise Attacks*, *supra* note 3 at 6, 13; see also Richard A. Posner, *Uncertain Shield: The U.S. Intelligence System in the Throes of Reform* (New York: Rowman & Littlefield, 2006) at 1-7 [Posner, *Uncertain Shield*].

6 Richard A. Posner, *Remaking Domestic Intelligence* (Stanford, Cal.: Hoover Institution Press, 2005) [Posner, *Remaking Domestic Intelligence*].

Capabilities of the United States Regarding Weapons of Mass Destruction.[7] Posner considers technological issues bearing on intelligence collection and sharing, and considers the roles of Congress and the President in relation to intelligence activities.

Certainly these works are valuable for students of American intelligence organization and policy. Posner's treatment of four themes, though, should interest a broader readership. These themes concern (1) the limitations on the capabilities of our intelligence organizations to prevent surprise attacks; (2) the inappropriateness of centralizing the organization of domestic intelligence; (3) the relationship of law enforcement and intelligence gathering; and (4) our attitudes and expectations respecting our safety.

I. LIMITATIONS ON CAPABILITIES TO PREVENT SURPRISE ATTACKS

Since 9/11, some surprise attacks have succeeded;[8] some surprise attacks have been thwarted;[9] and others have doubtless been deterred by counter-measures. Contrary to what the title *Preventing Surprise Attacks* might suggest, Posner does not offer a formula that would assure success in stopping attacks. Instead, he stresses three factors that limit the capacity of intelligence organizations to prevent surprise attacks.

First, intelligence organizations lack sufficient information. We have many enemies. Some we are aware of — such as international terrorist organizations like Al Qaeda. Some we may not be aware of — Posner points to the perils posed by homegrown terrorists.[10] He cautions that the Islamist threat is not the only threat, and even if it is a threat today, a new threat may emerge tomorrow.[11] Our enemies can pick the time, the place, and the means of the attack.

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7 The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *Report to the President of the United States* (Washington, D.C., 2005), online: The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction <http://www.wmd.gov/report/wmd_report.pdf>.

8 Most notably the attack in Madrid on 11 March 2004 (see "Madrid Train Attacks" *BBC News* (11 March 2004), online: BBC News <http://news.bbc.co.uk/2/hi/in_depth/europe/2004/madrid_train_attacks/default.stm>), and the attack in London on 7 July 2005 (see "London Attacks" *BBC News* (7 July 2005), online: BBC News <http://news.bbc.co.uk/2/hi/in_depth/uk/2005/london_explosions/default.stm>).

9 See e.g. Dame Eliza Manningham-Buller, "The International Terrorist Threat to the UK" (Speech presented to Queen Mary's College, London, 9 November 2006), online: Security Service (MI5) <http://www.mi5.gov.uk/output/Page374.html>; Mark Landler, "German Police Arrest 3 in Terrorist Plot" *The New York Times* (6 September 2007), online: The New York Times <http://www.nytimes.com/2007/09/06/world/europe/06germany.html?scp=1&sq=mark+landler%2C+september+6%2C+2007&st=nyt>; John Miller, "Law Enforcement, American Style" *The New York Times* (14 September 2006), online: The New York Times <http://www.nytimes.com/2006/09/14/opinion/14miller.html>, outlining five terrorist plots stopped by the Federal Bureau of Investigation (FBI) in 2005 alone; "In Depth: Alleged Toronto bomb plot, Timeline: Key events in the case" *CBC News* (2 June 2006), online: CBC News <http://www.cbc.ca/canada/story/2008/06/02/f-toronto-timeline.html> (an alleged terrorist plot in Canada was foiled by authorities in June 2006).

10 For an excellent assessment of the homegrown terrorist threat, see Mitchell D. Silber & Arvin Bhatt, "Radicalization in the West: The Homegrown Threat," online: NYPD Shield <http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf>.

11 Posner, *Preventing Surprise Attacks*, *supra* note 3 at 35, 86; Posner, "Dissent," *supra* note 1. We face the difficulty of Donald Rumsfeld's "unknown unknowns": "Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns — the ones we don't know we don't

We cannot be strong everywhere.[12] While large cities may be well-protected, smaller centres may not be. An attack on a smaller centre may have devastating psychological effects, showing that we are not safe anywhere.[13] The potential means of attack are extraordinarily varied — nuclear weapons, chemical weapons, biological weapons (which could be aimed at humans or, for economic reasons, at livestock), cyber-attacks, improvised explosive devices at the roadside, conventional explosives in buildings, trains, or buses, or armed assaults on shopping malls or schools.[14] We must credit our enemies with the ability to conceal their plans, to plant false information, and if they suspect operational compromise, to change their plans.[15] We underestimate our enemies' skill and ingenuity at our peril.

Second, if we have information, it may be scattered between agencies or within different departments of one agency. There are impediments to information sharing. These may be legal, although these sorts of impediments can be corrected fairly easily, and more often than not, the impediments lie not in the law but in its administration. More serious impediments are technological, such as the ability to share information between different computer or communication systems, and organizational. Institutions involved in combating terrorism may tend to hoard information and to be reluctant to share.[16] This reluctance is aggravated by real needs to maintain information security and to limit disclosure to those with a need-to-know.[17]

Third, even if information is before analysts and decision-makers, the information has to be interpreted properly. Posner's most significant contribution to the discussion of the limits of warning intelligence capacity is to remind us of the socio-psychological and organizational theory literature, which helps identify cognitive obstacles to recognizing the evidence of impending attacks. The crucial point is that information does not tell us its meaning or significance. It is up to us to draw inferences from the information, to place it in the appropriate relationships with other bits of information. Any set of information may support a variety of interpretations. The larger the data set and the more complex the data, the larger the number of potential interpretations. It is true that after an event has occurred, one interpretation — the interpretation that would have led to the prediction of that event — may seem obvious. We have to avoid hindsight bias. The particular constellation of information and inferences that would have yielded the prediction of disaster may not have been practically available before the disaster occurred.

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know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones": Donald Rumsfeld, "Defence Department Briefing" (Address at the Pentagon, Washington, D.C., 12 February 2002), online: GlobalSecurity.org <http://www.globalsecurity.org/military/library/news/2002/02/mil-020212-usia01.htm>.

12 Posner, *Preventing Surprise Attacks*, *ibid.* at 20, 34.

13 Posner, *Remaking Domestic Intelligence*, *supra* note 6 at 31.

14 John Giduck provides a thorough and gripping account of the Beslan School siege: John Giduck, *Terror at Beslan: A Russian Tragedy with Lessons for America's Schools* (Golden, Colo.: Archangel Group, 2005).

15 Posner, *Preventing Surprise Attacks*, *supra* note 3 at 19, 102; Posner, *Uncertain Shield*, *supra* note 5 at 39.

16 Posner, "Dissent," *supra* note 1.

17 *Ibid.*

We all approach information with pre-established perspectives or interpretive frames of reference. This is rational; it permits us to filter and assess what we experience.[18] The perspectives brought to information, though, may not be adequate. We may engage in "mirror-imaging." We assume that others will think, act, and react in the same ways that we do. Such assumptions may be based on cultural ignorance.[19] We may suffer from poverty of imagination. If an event has happened before, we can easily consider that it will happen again, and assess information accordingly. If an event has not actually happened before, such as using airliners as missiles, it is more difficult to adopt this as a serious organizing hypothesis.[20] We are all apt to be afflicted by confirmation bias. We interpret information to confirm our views, rather than to disconfirm them or to support other views.[21]

Moreover, the perspectives of individuals in organizations tend to assimilate. "Herding" and groupthinking occurs.[22] Even if group perspectives are formally tested through internal processes, the consensus tends to be hardened.[23] Deviating from group-consensus may be difficult. It is easy to be a "yes-man," but hard to be a lone dissenter. It is particularly difficult to dissent from superiors' views.[24] Dissent can have career implications.[25] If an individual sides with the group and the consensus turns out to be wrong, blame is diffused. If an individual dissents and turns out to be wrong, he or she will take the blame. Even a dissenter who is right in his or her overall approach may turn out to be wrong about particular predictions. False alarms not only tend to discredit the dissenter, but have a lulling effect.[26]

Our intelligence organizations do not know enough. What they do know may not be consolidated or easily accessible. What they are aware of may not be interpreted in a way that permits a particular attack to be predicted and intercepted. Our intelligence organizations cannot guarantee that another 9/11 (or Madrid or London) will not happen again, this time involving some unimagined destructive modality. Furthermore, these limitations are endemic to any organizational structure. They cannot be eliminated by adding a layer of bureaucracy and by attempting to fuse multiple organizations into one. Hence, Posner opposes the Commission's recommendation to make America safer by re-engineering the intelligence organizational chart.

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18 Posner, *Preventing Surprise Attacks*, *supra* note 3 at 117; Posner, *Uncertain Shield*, *supra* note 5 at 22.
19 Posner, *Preventing Surprise Attacks*, *ibid.* at 77, 81, 120; Posner, *Uncertain Shield*, *ibid.* at 27-28.
20 Posner, *Preventing Surprise Attacks*, *ibid.* at 20; Posner, *Uncertain Shield*, *ibid.* at 9-10.
21 Posner, *Preventing Surprise Attacks*, *ibid.* at 120.
22 Posner, *Uncertain Shield*, *supra* note 5 at 29.
23 *Ibid.* at 24, 27.
24 *Ibid.* at 34.
25 Posner, *Preventing Surprise Attacks*, *supra* note 3 at 104.
26 *Ibid.*; Posner, *Uncertain Shield*, *supra* note 5 at 41.

II. CENTRALIZATION IS NOT THE ANSWER

The 9/11 Commission recommended increased centralization of intelligence gathering. It wrote as follows:

> Much of the public commentary about the 9/11 attacks has dealt with "lost opportunities," some of which we reviewed in chapter 11. These are often characterized as problems of "watchlisting," of "information sharing," or of "connecting the dots." In chapter 11 we explained that these labels are too narrow. They describe the symptoms, not the disease.
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> In each of our examples, no one was firmly in charge of managing the case and able to draw relevant intelligence from anywhere in the government, assign responsibilities across the agencies (foreign or domestic), track progress, and quickly bring obstacles up to the level where they could be resolved. Responsibility and accountability were diffuse.
>
> The agencies cooperated, some of the time. But even such cooperation as there was is not the same thing as joint action. When agencies cooperate, one defines the problem and seeks help with it. When they act jointly, the problem and options for action are defined differently from the start. Individuals from different backgrounds come together in analyzing a case and planning how to manage it.
>
> In our hearings we regularly asked witnesses: Who is the quarterback? The other players are in their positions, doing their jobs. But who is calling the play that assigns roles to help them execute as a team?[27]

The Commission recommended that

> [t]he current position of Director of Central Intelligence should be replaced by a National Intelligence Director with two main areas of responsibility: (1) to oversee national intelligence centers on specific subjects of interest across the U.S. government and (2) to manage the national intelligence program and oversee the agencies that contribute to it.[28]

This recommendation was reflected in Subtitle A of Title I of the *IRTP Act*, which established the office of the Director of National Intelligence.[29]

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27 National Commission, *9/11 Commission Report*, *supra* note 2 at 400.

28 *Ibid.* at 411.

29 In a press conference on 17 December 2004, President Bush commented on the new legislation as follows:

> A key lesson of September the 11th, 2001 is that America's intelligence agencies must work together as a single, unified enterprise.... The Director will lead a unified intelligence community and will serve as the principal advisor to the President on intelligence matters. The DNI will have the authority to order the collection of new intelligence, to ensure the sharing of information among agencies and to establish common standards for the intelligence community's personnel. It will be the DNI's responsibility to determine the annual budgets for all national intelligence agencies and offices and to direct how these funds are spent. These authorities vested in a single official who reports directly to me will make all our intelligence efforts better coordinated, more efficient, and more effective."

(George W. Bush, "President Signs Intelligence Reform and Terrorism Prevention Act" (Address at Andrew W. Mellon Auditorium, Washington, D.C., 17 December 2004), online: The White House <http://www.whitehouse.gov/news/releases/2004/12/20041217-1.html>).

Posner opposes this increased centralization. Information-sharing does not require centralization. Before 9/11, most defects in inter-agency information-sharing had been corrected.[30] A quarterback or team leader model makes sense in environments in which less information requires processing and fewer issues must be addressed. When dealing with issues of national security, one individual is unlikely to have the breadth or depth of knowledge required to make decisions or to make recommendations for his or her Commander in Chief. Posner is concerned that within a centralized domestic intelligence organization, there would be delays in the transmission of intelligence up through the bureaucracy, intelligence would be lost along the way, and there would be a lack of coordination between different organizational levels.[31] Moreover, centralization does not address the cognitive issues identified in the previous section. The establishment of a unitary organization is likely to exacerbate those issues through forging one big consensus.

Posner makes the telling analogy to the defects of central planning in economic matters.[32] Central planning is doomed because the central planner cannot know enough or know it quickly enough. Posner refers to Friedrich Hayek, who describes the problem as follows:

> The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. The economic problem of society is thus not merely a problem of how to allocate "given" resources—if "given" is taken to mean given to a single mind which deliberately solves the problem set by these "data." It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge not given to anyone in its totality.[33]

That is, the problem with central planning relates to its management of knowledge, but the management of knowledge is what the intelligence community must also contend with. As decentralization (through the free market and the operation of the price system) is the solution to the economic problem, so some form of decentralization is the solution to the intelligence problem.

Posner, therefore, favours diversity and competition in intelligence gathering and analysis. Redundancy, in the sense of multiple agencies looking at the same or similar information, should not be regarded as a defect, but as a safety mechanism.[34] Different organizations will develop different sources of information and will develop different analyses and interpretations of the same or similar information. Diversity is a way of mitigating the problems of "groupthink" that bedevil single organizations. Diversity will permit the development of specialized knowledge, information sources, and analytical techniques.

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30 Posner, *Preventing Surprise Attacks*, *supra* note 3 at 40; Posner, *Uncertain Shield*, *supra* note 5 at 208.

31 Posner, *Preventing Surprise Attacks*, *ibid.* at 135-38.

32 *Ibid.* at 133.

33 F.A. Hayek, "The Use of Knowledge in Society" (1945) 35:4 American Economic Review 519 at 519-20.

34 Posner, *Preventing Surprise Attacks*, *supra* note 3 at 47-48, 84; Posner, "Dissent," *supra* note 1.

Diversity, though, poses its own problems. How can information and competing interpretations be shared? How can they interact? How can multiple views be assembled to permit the Commander in Chief or subordinate members of the executive to decide? The intelligence system has no parallel to the free market or price system. Diversity does require coordination and the establishment and maintenance of processes that permit different organizations to interact and provide recommendations to decision-makers. What is required is not a "quarterback," but an intelligence community facilitator or coordinator who ensures that interactive processes take place.[35]

The organizational structure that Posner favours for the intelligence community is not a hierarchical, vertically integrated unified structure, but a flattened, decentralized collection of intelligence centres.[36] Universities are good organizational analogs:[37] truths ("whatsoever things are true," we might say at our University) are sought not through One Big Faculty, but through numerous faculties and even more numerous departments, with different disciplinary approaches. A current institutional emphasis is to bring together members of different faculties in interdisciplinary collaborations for particular projects, or, for longer-term joint work, in interdisciplinary centres or institutes. Furthermore, many projects now involve researchers from multiple disciplines and multiple universities. Coordination is hard work and, for large projects, does require its own organization and dedicated staff. However, the substantive research is done by the dispersed experts who determine the products of collaboration. That is to say, decentralized but coordinated relationships are not just a wish or a theoretical possibility — they are operational now. If this form of organization works for other knowledge workers, it may work for the intelligence community.

III. LAW ENFORCEMENT AND INTELLIGENCE GATHERING

Posner opposes the FBI's role as the lead domestic intelligence agency, not only because of its poor record preceding and following 9/11,[38] but also for conceptual reasons. The FBI is a law enforcement agency. That entails a particular organizational perspective.[39] Classically, law enforcement is retrospective and reactive, rather than proactive and preventative.[40] It views events within categories established by the criminal law. It assesses information on the basis of its admissibility in establishing the commission of offences by identified individuals.[41] It is concerned with activities that are typically local, not international.[42] Because of its focus on building cases, it works slowly and methodically. Because of risks to ongoing investigations and a reluctance to disclose information that could be used by accused persons, it tends not to share information. It deals with activities that, although criminal, do not threaten national security.[43]

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35 Posner, *Preventing Surprise Attacks*, *ibid.* at 207; Posner, *Remaking Domestic Intelligence*, *supra* note 6 at 54-55.

36 Posner, *Preventing Surprise Attacks*, *ibid.* at 139-42.

37 Posner, *Uncertain Shield*, *supra* note 5 at 67.

38 Posner, *Preventing Surprise Attacks*, *supra* note 3 at 28-29; Posner, "Dissent," *supra* note 1.

39 Posner, *Remaking Domestic Intelligence*, *supra* note 6 at 1, 10-11.

40 Posner, *Uncertain Shield*, *supra* note 5 at 93.

41 Posner, *Remaking Domestic Intelligence*, *supra* note 6 at 15; Posner, *Uncertain Shield*, *ibid.* at 97, 114.

42 Posner, *Uncertain Shield*, *ibid.* at 94, 100.

43 *Ibid.* at 183-84.

For Posner, good domestic intelligence work requires thinking outside this perspective. Good domestic intelligence work must be forward-looking and preventative. It must be proactive — looking for troublesome situations and not waiting until complaints are made or laws are broken. It should not be concerned only, or even primarily, with activities that could be classified as offences. It must be alert to the international elements of situations of interest. It must move quickly. It must share information and rely on shared information.[44] It must focus on activities that threaten national security. Good intelligence work requires a vivid imagination, but "[a] vivid imagination is not part of the normal equipment of police officers."[45]

Criminal investigation and national security investigations require different types of empathy:

> Good police officers learn to think like criminals; good intelligence officers learn to think like terrorists and spies. The hunter must be empathetic with (as distinct from sympathetic to) his quarry. Cops and spies have different quarry.[46]

Posner therefore recommends the establishment of an American domestic intelligence agency that is separate from the FBI. The models he proposes are Britain's MI5 and our CSIS. Indeed, many modern democracies have removed domestic security from the policing apparatus and created separate domestic intelligence agencies.[47]

In the U.S., civil liberties organizations have opposed the formation of this sort of agency. One might observe that police-based intelligence services, including those of the FBI and our Royal Canadian Mounted Police (RCMP), have not always respected individuals' rights and freedoms. But better, perhaps, the devil that is known than the devil that is not known. The central civil liberties concern, I think, is this: Because a policing agency is law-bound and reactive, it will interfere with individuals only in restricted circumstances, after a crime is alleged to have been committed, and only if interference can be justified (traditionally, if there are reasonable grounds for believing that the individuals are involved in the commission of the crime). A policing agency will only be interested in acquiring information or things that could be evidence. In contrast, the remit of an intelligence agency would be much broader — anyone, any communication, any information could fall within its field of interest. There would be no requirement of a proximate relationship to an actual crime. A domestic intelligence agency freed from the policing model promises massive surveillance.

Posner has several responses to these sorts of concerns. First, a new agency would not have arrest or other coercive powers.[48] That is, it would not be an enforcement agency. It could be entitled to search and seize, or engage in wiretaps, but only if these measures were

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44 Posner, *Remaking Domestic Intelligence*, *supra* note 6 at 15-16, 25.

45 *Ibid.* at 47.

46 *Ibid.* at 16.

47 *Ibid.* at 3; Peter Chalk & William Rosenau, *Confronting the "Enemy Within": Security Intelligence, the Police, and Counterterrorism in Four Democracies* (Santa Monica, Cal.: RAND, 2004), online: RAND Corporation <http://www.rand.org/pubs/monographs/2004/RAND_MG100.pdf>. For a contrary view, compare Miller, *supra* note 9.

48 Posner, *Remaking Domestic Intelligence*, *ibid.* at 75; Posner, *Uncertain Shield*, *supra* note 5 at 134.

received prior to authorization by appropriate officials. While it would have access to more information than a policing agency, it would not have the authority to interfere with individuals' lives and property in the same manner as a policing agency. Posner quotes Stuart Taylor Jr.: "[i]f we don't want a secret police, maybe we should put the secrets and the police in different agencies."[49] Second, for an intelligence agency to infringe privacy or undermine freedom of expression or association would be counterproductive. On the one hand, the agency would depend on information flowing from various communities of interest. Posner emphasizes, in particular, that good relations must be maintained between intelligence operators and the Muslim community.[50] If the intelligence agency were perceived to be abusive of rights and freedoms, information sources would dry up. On the other hand, the agency would thrive on free speech. The more individuals communicate, even if they are advocating violence, the more useful information the intelligence agency would gather. The agency would not be interested — as a law enforcement agency might be — in stopping or prosecuting hate speech.[51] For the agency, this sort of speech would be a good lead. Third, the agency would be subject to multiple levels of oversight.[52]

As a final rejoinder, Posner admonishes against the "fetishing" of (certain) civil liberties[53] and he argues that security from destruction is a fundamental civil right.[54] In this, he echoes Irwin Cotler, who also argued that human security is a fundamental right.[55] Posner can accept the civil libertarians' charge that a freestanding intelligence agency would engage in broader surveillance than a police-based intelligence agency. The diminution of privacy, though, would be marginal. Most of the activity under surveillance would be more or less public, and special dispensation, equivalent to that required for police-initiated processes, would be required to overbear reasonable expectations of privacy. The information would not — unless it disclosed criminal activity — be disclosed to the coercive apparatus of the police. This limited surveillance would serve national security and thereby support the lives and freedoms of members of the political community.

Posner does maintain roles for the police in national security cases. The domestic intelligence agency would maintain a relationship with the FBI, which would retain its role in the investigation of national security offences. The domestic agency and the FBI would stand in the relationship of MI5 and the Special Branch of Scotland Yard, or CSIS and the RCMP.[56] If intelligence-gathering turned up evidence of offences, the policing agency would become involved. No doubt protocols or negotiations would be required, since the intelligence agency or the police might be inclined to permit the activity to continue, so that more could be learned, more individuals could be implicated, or more evidence gathered.

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49 Posner, *Remaking Domestic Intelligence*, *ibid.* at 75.

50 *Ibid.* at 74; Posner, *Uncertain Shield*, *supra* note 5 at 134-35.

51 Posner, *Uncertain Shield*, *ibid.* at 135.

52 Posner, *Remaking Domestic Intelligence*, *supra* note 6 at 78; Posner, *Uncertain Shield*, *ibid.* at 137.

53 Posner, *Preventing Surprise Attacks*, *supra* note 3 at 186.

54 Posner, *Remaking Domestic Intelligence*, *supra* note 6 at 73.

55 Irwin Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy" 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) 111 at 112-13.

56 Posner, *Remaking Domestic Intelligence*, *supra* note 6 at 45.

The domestic intelligence agency would also maintain a relationship with local policing agencies.[57] Local police services understand prevention very well. They often have excellent community relations and information sources — which are the very sorts of contacts that are useful for intelligence purposes. Moreover, local police agencies are likely to be in possession of information about suspicious activities and about minor offences committed by suspected terrorists and their fellow travellers. Posner does not propose any diminution of the vital role played by local policing in anti-terrorism efforts.

IV. UNREALISTIC EXPECTATIONS OF SAFETY

After a catastrophe occurs it is not unusual for a commission or task force to be struck to investigate and determine what occurred, and to make recommendations to prevent or mitigate future like events. Investigation and improvement are prudent. Posner himself makes or endorses modest recommendations that would lower the risk of successful terrorist attacks. Indeed, he recommends the formation of a new domestic intelligence agency.

Posner cautions, however, against the imposition of unrealistic standards. He identifies what he refers to as a variant of the "Pelagian heresy" at work in the American psyche. This is the attitude that all problems can be solved, that all tragedies can be prevented, and that any catastrophe, then, could only have occurred because an individual or group of individuals failed to do what they could and should have done. If a catastrophe occurs, someone or some group must be to blame. What is needed is a solution to prevent that catastrophe from happening again.[58] St. Thomas Aquinas would have agreed with the identification of the heresy, but would have added the label of "presumption" to this attitude — the view that human will alone suffice to achieve perfection.[59]

Tragedies may occur without anyone being to blame. No one may have erred. No one may have been negligent. Tragedies may occur despite peoples' best reasonable efforts, despite planning and strategies. The improvements we make are no guarantees of total safety. These observations, I admit, may be entirely banal. But, if we consider how litigation-happy North Americans have become — as if someone must always be to blame — if we consider our organizations' obsession with risk management — as if our planning can save us from harm — and if we consider our excessive reliance on governmental institutions — as if government both can and should offer us perfect protection — we could well conclude that these simple truths have been forgotten.

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57 *Ibid.* at 8, 46; Posner, *Uncertain Shield*, *supra* note 5 at 115, 122, 137; for an example of the extraordinary local police capacity in this area, see Silber & Bhatt, *supra* note 10.

58 Posner, *Preventing Surprise Attacks*, *supra* note 3 at 49; Posner, *Uncertain Shield*, *ibid.* at xv, 5, 23, 33, 35, 44.

59 St. Thomas Aquinas, *"The Summa Theologica" of St. Thomas Aquinas*, 2d & rev. ed., trans. by Fathers of the English Dominican Province (London: Burns Oates & Washbourne, 1927).

While this goes against the "American grain," Posner urges, in effect, a tempered fatalism that says[60] we should do what we can to prevent surprise attacks and to limit their effects, but we must accept our vulnerability. Posner's final grim message is that another 9/11, in an unimagined guise, is a real possibility: "greater dangers may be gathering of which we are unaware and haven't a clue as to how to prevent."[61]

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[60] Posner, *Preventing Surprise Attacks*, *supra* note 3 at 49; Posner, *Uncertain Shield*, *supra* note 5 at 208.
[61] Posner, "Dissent," *supra* note 1.