

**IMAGINED FEARS: FROM MASS TERROR TO AUTHORITARIAN
LEGALITY, AND THE FUTURE OF LIBERAL REFORM**

by

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Abstract

In the decade after 9/11, a series of extraordinary counter-terror measures have come to be entrenched in law and policy in Canada and the United States. These include indefinite detention without charge, expanded state secrecy and surveillance, and (in the US) targeted killing. This thesis examines policy debates, jurisprudence, and public opinion relating to these measures with a view to advancing three claims. First, by virtue of a common political insistence that such measures were legal, and a broad acceptance of such on the part of the judiciary and the public, the measures can be understood collectively as marking a shift in the cultural currency of liberal legality to what can be called authoritarian legality. Second, the shift was made possible in part by the prevalence of a “catastrophic imagination.” This was a belief that an attack was likely to occur in the near future involving weapons of mass destruction or casualties on the order of 9/11 or greater, and that to defend against this, states were justified in embracing a larger preemptive turn in law and security. Third, in the process of defending liberal legality, rights advocates, scholars, and jurists have tended to either defer to or ignore claims about the imminence of mass terror, when a more effective case for reform might have been made by challenging those beliefs directly. The final part of this thesis offers a model for advocating reform of extraordinary measures that is premised on showing (a) why an attack involving WMD is not in fact imminent or probable; and (b) why future attacks in North America are likely to be no more serious or frequent than previous attacks (Oklahoma, Air India), which were capable of being addressed effectively through the criminal law and liberal legal principles. The conclusion addresses potential obstacles to the use of this model as a basis for reform advocacy, including the claim that concerns other than a fear of mass terror (*e.g.*, racism, xenophobia, broader fears of violent crime) are the true basis of public support for authoritarian measures.

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Dedication

To Ciara, Rosemary, and Sean.

1 Introduction

Ten years after 9/11, US and Canadian law have been transformed in ways unimaginable in August of 2001. The nature of the change is best understood not in terms of what captures public attention or provokes debate, but in terms of what – for the majority – now goes virtually unnoticed.

After a decade in which two presidents have claimed the authority to detain indefinitely and without charge both foreigners and citizens, the power has now been entrenched in law.¹ Many of those detained after 9/11 are still being held without charge. Many have been tortured, or subject to cruel and inhumane treatment.² Others have been kidnapped, held for years in secret prisons, and tortured – all as a result of mistaken identity, reliance on faulty information, or some other error. Yet no form of redress or accountability has followed. With no oversight, President Obama has ordered hundreds of drone strikes against persons in Asia and Africa he deems to be terror suspects, killing hundreds more innocent civilians in the process. He has also openly targeted and ordered the killing of an American citizen not charged with an offence or substantially tied to a specific crime. Two other US citizens, including a minor, were killed in similar strikes.³

For these and other measures, the administration has relied in large part upon a congressional “Authorization to Use Military Force” (‘AUMF’) issued in September of

¹ See section 1021 of the *National Defense Authorization Act for Fiscal Year 2012*, H.R. 1540, 112th Cong. (2011). The section was successfully challenged as unconstitutional in *Hedges v. Obama*, 12 Civ. 331 (May 16, 2012), a decision of the US District Court for the Southern District of New York. It is, however, unclear whether the decision enjoins (or strikes down) all of section 1021, or only portions of it. An appeal to the US Court of Appeals, Second Circuit, is pending. The NDAA is discussed in more detail in Chapter 2.

² Evidence for this is explored in Chapter 2.

³ Sources and details about the killing of all three Americans – Anwar Awlaki, Samir Khan, and Awlaki’s 16-year-old son, Abdulrahman – are provided in Chapter 2.

2001.⁴ This ‘joint resolution’ of congress allows for the use of force against members of al Qaeda, or related groups or individuals, on the basis that they pose “an unusual and extraordinary threat” to the United States. Yet often the connection between targeted suspects and al Qaeda has been tenuous, and evidence for the claim that the group or individual involved poses an extraordinary or imminent threat has been unclear. Despite this, the administration insists that the power to detain suspects or carry out killings should be subject to either limited or no judicial oversight.

A majority of the public approves. A Washington Post-ABC poll of February 2012 found that “by a margin of more than 2 to 1, Americans say the president’s handling of terrorism is a major reason to support rather than oppose his bid for reelection.”⁵ Seventy percent of respondents approve of the president’s decision to keep the prison at Guantanamo Bay open.⁶ Eighty-three percent of those polled approve of his drone policy, including 77 percent of Democrats.⁷ The proportion in favour of such strikes drops “only somewhat when respondents are asked specifically about targeting American citizens”.⁸

Thus, among the most striking changes in US legal and political culture is not only the fact that both foreigners and *citizens* are now being detained indefinitely or assassinated solely at the discretion of the president, on criteria not known to the public. What is also striking is the government’s insistence on, and the public’s broad acceptance of, its *legality*.

⁴ The “Authorization to Use Military Force” Public Law 107-40 [S. J. RES. 23].

⁵ Scott Wilson and Jon Cohen, “Poll Finds Broad Support for Obama’s Counterterrorism Policies” (7 February 2012) *Washington Post*.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

Extraordinary measures have come to be entrenched in US law in a host of other ways. In military tribunal cases currently underway at Guantanamo, the US seeks the death penalty against a group of detainees whose trials will allow for the use of secret hearsay evidence, and possibly also information obtained through torture.⁹ This, in turn, points to the broader issue of US involvement in torture over the course of the decade at Guantanamo and various “black sites” around the world. The Red Cross and Amnesty International, among other groups, have provided ample evidence of US complicity in torture,¹⁰ and called repeatedly for investigations or prosecutions. Yet the Bush and Obama administrations have consistently resisted – invoking, among other law, an expansive interpretation of the state privilege doctrine, and courts have consistently deferred. Meanwhile, the US continues to hold some 170 detainees at Guantanamo without charge, and has made clear its intention to hold roughly a third of them indefinitely.¹¹

In carrying out these measures, both administrations have relied upon a range of authority including the AUMF, the *USA PATRIOT Act*,¹² and more recent law allowing for greater state secrecy and surveillance. For President Obama, however, the AUMF has come to play a more central role, purportedly serving as sufficient authority for some of the more serious measures, such as targeted killing and extended detention without

⁹ The first case involved Saudi national Abd al-Rahim al-Nashiri for his alleged involvement in the bombing of the USS Cole in 2000; Charlie Savage, “Accused al-Qaeda Leader is Arraigned in U.S.S. Cole Bombing” (9 November 2011) *New York Times*. This is being followed by the trial of 9/11 plotter and “mastermind” Khalid Sheikh Mohammed, along with four others; John Cushman, “Sept. 11 Suspects to Be Tried by Military” (4 April 2012) *The New York Times*. Rules governing military tribunal hearings at Guantanamo are discussed in Chapter 2.

¹⁰ See, e.g., International Committee of the Red Cross, “ICRC Report on the Treatment of Fourteen ‘High Value Detainees’ in CIA Custody” (February 2007), online: <<http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>>

¹¹ “Text: Obama’s Speech on National Security” (21 May 2009) *The New York Times*, online: <<http://www.nytimes.com/2009/05/21/us/politics/21obama.text.html>>.

¹² P.L. 107-56, 115 Stat. 272 (2001).

charge. Although many have questioned this reliance, one objection to it had begun to raise serious concerns for the administration. The AUMF contains no time limit. But at some point in the near future, it was argued, the Authorization would lapse due to the passage of an implied time limit. Partly in response to this, in December of 2011, congress passed a bill, signed by the president – with relatively little public notice or concern – which effectively renews the AUMF, lending it several more years of unquestionable currency.¹³ The same bill further entrenches legal powers that support indefinite detention, targeted killing, and limited judicial review.

Over the course the past decade, a similar expansion of executive power has taken place in Canada. One important example involves an immigration law allowing for detention pending deportation.¹⁴ The statute, which pre-dates 9/11, authorizes officials to issue a certificate to arrest and detain anyone deemed “inadmissible” to Canada. Grounds for inadmissibility include “serious criminality” or, more broadly and vaguely, “being a danger to the security of Canada.”¹⁵ On review of the certificate, the court can hear evidence in the case in private, without the detainee or their counsel present. It can also deny disclosure of evidence to the detainee, and limit their knowledge of the case against them to a brief and general summary. Thus, the process falls far short of the protections found in criminal proceedings, but detentions were meant to be brief, with deportations usually carried out in short order. In the wake of 9/11, however, Canada would come to use these powers in a different context. It would detain 5 men, suspected of ties to al Qaeda, for between 2 and 10 years – by any measure, an extraordinary period of time to

¹³ See the discussion in Chapter 2 of the *National Defence Authorization Act of 2012*, *supra*, note 1.

¹⁴ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

¹⁵ *Ibid*, section 34.

be detained *without charge, on secret evidence*.¹⁶ Although all have now been released, three continue to be subject to some of the most restrictive conditions ever imposed in Canadian law.¹⁷ None has yet been deported.

Canada has also been found to be complicit in the torture and unlawful detention of its own citizens traveling abroad in a number of cases.¹⁸ Aside from a settlement reached with Maher Arar, the federal government has resisted accountability, transparency, or redress in each case. In public inquiries and lawsuits against it, the government has sought to cloak much of the evidence in secrecy by invoking broad claims of privilege. More broadly, in parliamentary reviews of counter-terror law, and in new legislation, Canada has sought to bolster a host of powers, ranging from pre-charge detention and investigation to state secrecy and surveillance.¹⁹ As in the United States, the general acceptance of these measures in Canadian law and society reflects the embrace of a new set of legal norms.

Thus, a series of extraordinary measures brought about in response to 9/11 have come to be entrenched in US and Canadian law. But rather than being understood as temporary, exceptional departures from the rule of law, they have gained a large measure of acceptance as legally valid or constitutional, and remain current. This thesis explores

¹⁶ For details of the cases of Mohammad Mahjoub, Mahmoud Jaballah, Mohamed Harkat, Adil Charkaoui, and Hassan Almrei, see Robert Diab, *Guantanamo North: Terrorism and the Administration of Justice in Canada* (Fernwood Publishing, 2008).

¹⁷ Currently, Mahjoub, Jaballah, and Harkat remain subject to release conditions as part of the “security certificate” regime discussed in Chapter 2.

¹⁸ These include the cases of Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati, Muayyed Nureddin, and Abufsian Abdelrazik. For findings of Canada’s complicity, see the “Report of the Events Relating to Maher Arar: Analysis and Recommendations” (Ottawa, 2006). The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. See also the “Final Report of the Iacobucci Inquiry”, Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin; online: < http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/en/documents/final-report.htm>. See also *Abdelrazik v. Canada*, 2009 FC 580.

¹⁹ These developments are explored in Chapter 2.

two questions in response to these developments: what made them possible and why were efforts to prevent or reform them not more effective? More specifically, what were some of the key assumptions and beliefs about terror and security among government, security experts, and the public that made it possible for extraordinary measures to arise and become entrenched? And by contrast to this, given the fact that for much of the past decade many rights advocates and law scholars have agreed on the need for reform, and a great deal has been done to advance the cause of reform, why has relatively little reform been accomplished?

The possible reasons are of course numerous and complex. The first part of this thesis examines one facet of the problem by focusing on a common rationale for extraordinary measures in political discourse and public opinion, and a common response to this reasoning among reform advocates. A survey of a range of discourses – political, scholarly, and juridical – along with public opinion in both nations, suggests that a central facet of a wider acceptance of extraordinary measures was the prevalence of a belief that another large-scale attack on a North American city would occur at some point in the near future. More specifically, this was a belief that al Qaeda, or an affiliated or analogous group, would soon make use of a weapon of mass destruction (WMD), with cataclysmic or possibly “existential” consequences for the state – or that terrorists without WMD might soon carry out another attack on the scale of 9/11 or greater. Either might entail thousands or more casualties rather than tens or hundreds, as in earlier events, such as the Air India or Oklahoma City bombings. Put otherwise, 9/11 was seen by many as a harbinger of a new order of terror rather than a profoundly anomalous event. This belief often served in turn to support a larger claim, made in a number of contexts, that given the catastrophic nature of the outstanding threat, more invasive measures had become necessary.

Even after bin Laden's death in May 2011, and the targeted killing or capture of several 'high-level' al Qaeda operatives, polls suggest that concerns about large-scale terror remain current among both the US and Canadian public. And although governments of both countries have shifted the tenor of their rhetoric on outstanding threats in the post-bin Laden period – no longer insisting as they often did, for example, that terror involving WMD is an imminent possibility – both maintain that terrorists continue to pose a “direct and significant threat,” a “substantial threat,” or an “urgent and undeniable” danger.²⁰ In short, neither the public nor the government of either country has abandoned the harbinger theory. Both states continue to justify extraordinary measures in light of it.

Yet, in contrast to the public and political embrace of illiberal measures, a strong consensus has held throughout the post-9/11 period among a broad range of scholars, rights advocates, and NGOs that many of the measures brought about after 9/11 were excessive, unnecessary, contrary to the rule of law, and in need of reform. This was expressed in part through an enormous body of scholarship on counter-terror policy, in fields ranging from law and criminology to psychology, political science, literary studies, and history.²¹ It was also conveyed to a broader public by civil liberties and human rights groups, and other NGOs, through numerous public awareness campaigns, copious reports and declarations, and several high-profile court challenges to oppose the measures. Many have therefore resisted the embrace of extraordinary measures, and their efforts to advance the cause of reform have been diverse and extensive.

²⁰ The context and sources for these statements are explored in Chapter 3.

²¹ A portion of this literature is canvased below.

Since 2001, a divide has thus persisted between, on the one hand, a large portion of the public and those in government who harbor fears of large-scale terror and embrace extraordinary measures, and on the other, a wide assortment of liberal scholars, jurists, and rights advocates who agree on the need for reform. And as the events of 9/11 recede further into the distance, the divide appears to persist.

In the second part of this thesis, I argue that reform advocates might have been more effective in bridging this divide if they had placed a greater emphasis on challenging some of the common beliefs and assumptions about the nature of outstanding threats that are said to justify extraordinary measures. For much of the period at issue, rather than seeking to challenge the harbinger theory, or the claim that terror had come to pose a much greater and imminent threat to national security, many if not most law scholars and rights advocates have been concerned primarily with questions of law and principle. In ways to be explored below, the prevailing approach to reform was not to question common claims and assumptions about outstanding threats, but to show instead how new laws and policies were unconstitutional or in violation of core human rights. Liberal advocates have often, therefore, been silent, ambivalent, or deferential to claims about the nature of the threats that are said to justify more elaborate measures.

In response to this finding, I suggest that by focusing predominantly on questions of law and principle in the period after 9/11, rights advocates missed an opportunity to make a potentially more effective case for reform by marshaling a large body of evidence and opinion in support of the view that the threat of terrorism at the hands of al Qaeda, its offshoots, and homegrown extremists, has been largely overstated. Those seeking reform might instead have challenged – more often and more directly – assumptions about the need to resort to extraordinary measures by citing evidence as to why the

likelihood of a large-scale attack involving WMD at the hands of a non-state actor is, as one commentator has suggested, “vanishingly small,”²² and why the threat posed more recently by offshoots of al Qaeda or by “lone wolf” terrorists employing conventional methods does not amount to a “significant threat” to Canadian or American national security as is often alleged. On the contrary, ample evidence supports the view that future attacks in North America are likely to be no more serious or frequent than previous attacks (Oklahoma, Air India), which were effectively addressed through the criminal law and liberal legal principles. At the least, by drawing more frequently on skeptical evidence, reform advocates might have addressed – and might still – a significant gap that continues to exist in critical responses to state claims about the nature of outstanding threats in political and public discourse.

To advance this argument, this thesis draws on a range of literature. In addition to legal scholarship, it explores work in the fields of security studies, political science and journalism, the history of terrorism, expert opinion on technologies and probabilities of terror, and the psychology of threat perception. In what follows, I briefly attempt to situate the inquiry within these bodies of literature, and articulate the scholarly contribution this thesis attempts to make. I then provide an overview of each chapter.

1.1 An overview of relevant literature

US and Canadian scholarship on counter-terror law is extensive. Much of it, however, is focused on the constitutional merits of recent measures, or their consistency with other liberal legal principles (the rule of law, human rights, and democracy).²³ Much

²² John Mueller, “The Atomic Terrorist: Assessing the Likelihood” (International Commission on Nuclear Non-Proliferation and Disarmament, 2009), 13.

²³ See, e.g., Ronald Dworkin, “The Threat to Patriotism” 2002 *New York Review of Books* 49, 3 (February); Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queens UP, 2003); and Jeremy Waldron, “Torture and Positive Law: Jurisprudence for the White House” (2005) 105 *Colum. L. Rev.* 1681.

of it also neglects to explore deeper assumptions and beliefs about the nature of current threats, or their role as a primary rationale for the use of extreme measures. In distinction to this larger body of law scholarship, a smaller but still significant group of law scholars advances a more supportive view of extreme measures.²⁴ Authors in this group commonly ground their support of such measures on the greater threat posed by terrorism after 9/11. To substantiate this case, some draw upon work in secondary fields such as terrorism and security studies, or expert opinion on weapons of mass destruction.²⁵

Within this secondary literature, a further divide can be traced. For many, the threat of terror – particularly, terror involving WMD – has become more likely after 9/11, while others remain skeptical. The first category includes prominent scholars in the field of terrorism studies, including Walter Lacquer and Philip Bobbitt. They in turn draw on and contribute to a literature among security experts, such as Graham Allison and Matthew Bunn, who explore the nature and likelihood of terror involving WMD.²⁶ Soon after 9/11, a strong consensus emerged among both groups to the effect that terrorism had become more complex, ambitious, and menacing. And for many scholars, this meant

²⁴ See, e.g., Alan Dershowitz, *Preemption: a Knife that Cuts Both Ways* (New York: Norton, 2006); Richard Posner, *Not a Suicide Pact: the Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006); and John Yoo, *War By Other Means: An Insiders Account of the War on Terror* (New York: Atlantic Monthly Press, 2006).

²⁵ Chapter 4 explores this tendency in the work of Posner and Dershowitz.

²⁶ Walter Lacquer, *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (Oxford: Oxford University Press, 1998); *No End to War: Terrorism in the Twenty-first Century* (New York: Continuum, 2004); Philip Bobbitt, *Terror and Consent: The Wars for the Twenty First-Century* (New York: Knopf, 2008). On nuclear terror, see Graham Allison, *Nuclear Terror: the Ultimate Preventable Catastrophe* (New York, Henry Holt: 2005), Charles D. Ferguson and William C. Potter, *The Four Faces of Nuclear Terrorism* (London, Routledge: 2005), Mathew Bunn, *Securing the Bomb 2010: Securing All Nuclear Materials in Four Years*. Cambridge, Mass. And Washington, D.C.: Project on Managing the Atom, Belfer Center for Science and International Affairs, Harvard Kennedy School and Nuclear Threat Initiative, April 2010; online: <www.nti.org/e_research/Securing_The_Bomb_2010.pdf>. On biological terror, see Barry Kellman, *Bioviolence: Preventing Biological Terror and Crime* (Cambridge UP, 2007); Jim A. Davis, “A Biological Warfare Wake-Up Call: Prevalent Myths and Likely Scenarios”, in Jim A. Davis and Barry R. Schneider, eds., *The Gathering Biological Warfare Storm* (Praeger: Westport, Connecticut, 2004), and Frank Barnaby, *How to Build a Nuclear Bomb and other Weapons of Mass Destruction* (London: Granta Books, 2004).

that terror involving WMD, or another attack on the order of 9/11 or greater, had become both likely and imminent.

By contrast, a more critical approach to the question of current threats could be found elsewhere in the expert literature on WMD, and in work by more skeptical political scientists, historians of terror, and security theorists. Notable figures include John Mueller, Michael Levi, and William Clark.²⁷ For this group, mass terror involving WMD is highly improbable due to the complexity, expense, and variety of barriers and potential pitfalls involved in acquiring, building, or deploying such weapons. The prospect of a more serious attack also runs contrary to evidence about the capability of al Qaeda and other groups, and of past practices and events involving non-state actors.

Between these two bodies of secondary literature, however, there has been relatively little intersection or debate. Many scholars and experts taking an alarmist view of outstanding threats have also enjoyed a greater prominence or public profile. Perhaps in part as a consequence of this, the imminent prospect of mass terror has often been presented as self-evident or beyond serious dispute. In any case, as either a reflection or consequence of the prevalence of this view, liberal law scholars have made relatively little use of skeptical opinion on pending threats in their critique of counter-terror measures.

For various reasons, then, in much of the legal scholarship on counter-terrorism in the past decade, authors have either been reluctant to examine controversial measures in light of beliefs about pending threats, or – if they do acknowledge them – they tend to

²⁷ John Mueller, *Atomic Obsession: Nuclear Alarmism from Hiroshima to Al Qaeda* (Oxford: Oxford University Press, 2010); Michael Levi, *On Nuclear Terrorism* (Cambridge: Harvard University Press, 2007); and William Clark, *Bracing for Armageddon: the Science and Politics of Bioterrorism in America* (Oxford: Oxford UP, 2008).

assume that some form of catastrophic terror may be imminent. The tendency is visible on both sides of the spectrum – those in favour of illiberal measures and those opposed.

Put otherwise, few liberal law scholars have undertaken a critical exploration of assumptions and claims about the nature of current threats. And the few who have done so have relied primarily on arguments rooted in psychology. For example, co-authors David Cole and Jules Lobel, along with Cass Sunstein and others, have offered a critical view of the more dire threat assessments commonly invoked by advocates of extreme measures.²⁸ Their common approach, however, is to address assumptions about growing threats not by directly challenging them in a technical or scientific sense, but by characterizing them as effects of psychologically based misperceptions.²⁹ In short, liberal law scholars arguing against extreme measures have tended not to draw on a skeptical body of opinion on the *technical or practical plausibility* of pending “catastrophic” threats.

This study seeks to make a contribution to the debate about counter-terror law in three ways. One is to suggest that the measures at issue in law and policy after 9/11 can be characterized not only in terms of a departure from liberal constitutionalism, as many have argued, but also as an epochal shift in conceptions of legality itself. I suggest that the entrenchment of these measures marks a broad shift from the cultural currency of liberal legality to what might be called authoritarian legality.³⁰ Second, in distinction to the predominantly doctrinal focus of much of the scholarship on counter-terror law, I demonstrate how extraordinary measures have been justified and embraced in large part

²⁸ David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (New York: the New Press, 2009); Cass Sunstein, *Worst Case Scenarios* (Cambridge: Harvard UP, 2009). See also Dan Gardner, *Risk: the Science and Politics of Fear* (Toronto: McLelland and Stewart, 2008).

²⁹ These include what Sunstein calls “cognitive availability” (or fearing events that one can more easily imagine) and “probability neglect” (allowing strong emotions to distract from rational recognition of the low probability of an event). *Ibid*, at 26.

³⁰ I am indebted to my doctoral supervisor, Professor W. Wesley Pue, for suggesting this formulation, in favour of my earlier phrase: “post-liberal legality.”

due to the prevalence of a specific set of assumptions about the greater threat that terror had come to pose after 9/11. Third, I suggest that in contrast to earlier approaches to reform, a potentially more effective defence of liberal legality lies in being more critical of prevailing threat assessments, and I set out to model the kind of argument and evidence that might be used for this purpose.

1.2 An overview of this thesis

The inquiry begins with a chapter that surveys extraordinary measures in US and Canadian counter-terror law after 9/11. The survey is meant to support a larger argument about changing conceptions of legality. Together, I suggest, the measures can be seen as part of a deeper normative shift from a liberal to an authoritarian form of legality – in the area of national security. I begin by briefly defining liberal legality and exploring how liberal values can be distinguished from legality as such. I draw here upon the work of Joseph Raz, Lon Fuller, and Ronald Dworkin. I then define authoritarian legality in terms of its basic features. These include the repudiation of absolute or “non-derogable” human rights in practices such as torture, rendition, targeted killing, and indefinite detention without charge. It also entails the expansion and increased use of state secrecy and surveillance; judicial deference to executive discretion; and a reluctance to remedy serious rights violations, or to be held accountable for them. The remainder of the chapter provides examples of these elements in both US and Canadian law.

I offer two reasons at the outset for invoking the concept of authoritarian legality. One is to highlight the significance of the claim – on the part of governments and the courts – that the measures are legal and intended to be valid indefinitely. A theory of authoritarian legality is thus meant to draw attention — in a way that scholars have not done before — to the possibility that entrenching such measures in law and jurisprudence

has transformed cultural conceptions of legality itself. The second reason for introducing the concept is that it invites the reader to see the measures as part of a cohesive whole, or a closely interrelated set of developments. This second purpose is more critical to the broader argument of my thesis than the first.

The third and fourth chapters explore beliefs and assumptions about the threat of terror that made it possible to defend or entrench extreme measures in law and policy. I argue in both chapters that, after 9/11, a form of belief that I term the “catastrophic imagination” became prevalent in a series of discourses. It assumes a stronger and weaker form. The stronger form holds that al Qaeda or a related group may soon carry out an act of terror using a weapon of mass destruction, causing tens or hundreds of thousands of deaths, or even millions. The weaker form holds that an attack may soon occur on the scale of 9/11, not necessarily involving WMD, but still resulting in thousands of casualties rather than tens or hundreds, as in earlier attacks. In both the stronger and weaker form, therefore, a quantitative difference grounds an argument for a qualitative difference.

Chapter 3 surveys the role of the catastrophic imagination in political discourse and public opinion. It shows how members of government, security officials, and other policy makers consistently invoked the prospect of mass terror in defence of extreme measures. It draws on statements by members of the executive, submissions to congressional or Parliamentary committees; as well as policy statements, such as the bi-annual US *National Security Strategy*, and Canadian equivalents. The chapter also cites public opinion surveys in both nations to highlight the link between a widespread fear of mass terror and a high degree of public support for illiberal counter-terror measures.

Chapter 4 examines the role of the catastrophic imagination in three fields of scholarship: expert opinion on the prospect of nuclear, biological, and radiological terror;

the history of terrorism; and legal scholarship in support of extreme measures. My aim in exploring these fields in a single discussion is to show that experts on WMD and historians of terror helped to legitimize a belief in the imminent prospect of mass terror, which in turn bolstered the credibility of its use by law scholars arguing in support of extreme measures.

Experts on the use of WMD and historians of terror advance a common set of arguments for the imminent prospect of nuclear, biological, or radiological terror.³¹ Briefly, the case for why nuclear terror is a real possibility in the near future often begins with the collapse of the Soviet Union, and the proliferation of nuclear technology in recent decades. Both have given rise to a copious supply of poorly guarded fissile material, or fully functional bombs. At some point very soon, a terrorist group will either steal a bomb or obtain the material to build one. Since in the view of some experts the task of building a nuclear bomb is not thought to be onerous, stealing the material overcomes the greatest hurdle. The plans for building a bomb are readily available in the public domain, and constructing a crude but reliable “gun-type” nuclear weapon would not involve much technical expertise. Finally, an act of nuclear terror has seemed likely for much of the past decade given the fact that al Qaeda and other groups are known to be interested in this.

A similar set of arguments is often made about bio-terror. A number of known toxins offer the most lethal potential weapons in existence. Many can be produced with limited knowledge or equipment, from natural or readily accessible sources. Samples can be easily dispersed – at least in theory – to cause mass casualties.

³¹ See, e.g., Lacquer, Bobbitt, Allison, Bunn, Ferguson and Potter, Kellman, Davis, and Barnaby, *supra*, note 26.

Analogous arguments are often made in relation to radiological terror. Building and deploying a radiological or “dirty bomb” is relatively simple. Radioactive material is available in countless commercial and industrial settings. Constructing and using a ‘dispersal device’ would not be too complicated. It would likely cause fewer deaths than a nuclear or biological attack, but could easily cause large-scale disruption – *i.e.*, large portions of a major city becoming uninhabitable for decades.

A small but prominent group of jurists has drawn on these arguments to advance a credible and compelling case for a deeper preemptive turn in the law. John Yoo, Richard Posner, and Alan Dershowitz, among others, have invoked – with some frequency – images of nuclear explosions in Manhattan or Chicago, or aerosol dispersions of anthrax or radiological particles in large airports or subway stations, causing tens or hundreds of thousands of casualties. In light of the danger, each has made the case for the necessity of measures that include torture, targeted killing, or indefinite detention without charge. And while members of this group may represent a fringe element in the North American legal academy, the public profile that each enjoys, and the arguments they have circulated, have contributed some measure of legitimacy to the case for extreme measures among a wider public.

Chapter 5 returns to the field of legal scholarship and rights advocacy. It examines the role that liberal scholars and jurists have played in countering extreme or extraordinary measures. It begins by acknowledging that liberals have made a number of strong arguments in defence of rights. Key among them is the claim that there ought to be clearer proof that certain measures are necessary, proportionate, and effective – which is seldom seen, if ever. But while advancing these and other powerful arguments against extreme measures, liberals have also tended to be less inclined to challenge beliefs about

the gravity of current threats, or the claim that they *compel* the state to adopt a more preemptive approach. To demonstrate this, I survey various forms of rights advocacy, including reports by NGOs such as the International Commission of Jurists and the International Committee of the Red Cross. I also examine work by law scholars and legal journalists, including Jeremy Waldron, Kent Roach, David Cole and Jules Lobel, Mark Danner, Ronald Dworkin, Michael Ignatieff, and Bruce Ackerman.

I show that this reform-oriented literature divides into two camps. One group tends to downplay or ignore claims about the growing threat posed by terrorism, and often also the claim that it warrants the use of extraordinary measures. The other group highlights or pays deference to either or both claims. As a result, liberal law scholarship and advocacy has tended not to unsettle a deeper set of beliefs essential to authoritarian legality: namely, that current threats are catastrophic in nature, and as a result, a deeper “preemptive turn” is in order, involving more invasive or possibly extreme measures of one kind or another.

The sixth chapter sets out a blueprint for an alternative approach to advocating reform. It is comprised of two parts, corresponding to the two central assumptions of authoritarian legalism noted above (a growing threat, justifying extreme measures). The first part challenges the first assumption by focusing on claims about terror involving WMD. It does not, however, seek to establish a case against the imminent likelihood of WMD terror conclusively. It seeks instead to *model* the form of argument that reform advocates might advance to establish this claim. The model centers on technological and scientific evidence as to why nuclear and biological terror in particular are not likely to occur soon, if at all. This part highlights a contrary body of opinion to that explored in Chapter 4.

As noted earlier, the case for the imminence of nuclear terror often rests on a claim about the abundance of poorly guarded material; the simplicity of building and deploying a bomb; and al Qaeda's ambitions in this regard. In response, a body of skeptical experts, including Michael Levi,³² Steven Younger,³³ and co-authors Christoph Wirz and Immanuel Eggerts,³⁴ argue that in the various stages of acquiring or building, and then deploying a bomb, terrorists would face a host of significant challenges.³⁵ Together, they render the prospect of a nuclear attack far more complicated and improbable than some would suggest. To begin with, both nuclear terror alarmists and skeptics agree that the production of fissile material is beyond the capacity of a non-state actor. Acquiring a fully functional nuclear bomb, by theft or other means, is unlikely because most are stored disassembled or with elaborate codes closely guarded by a small few. In the seventy-year history of the bomb, no nuclear power has ever shared the technology with another state, let alone a non-state actor. And while there may be an abundance of fissile material, very little of it has been stolen. The danger posed by the occasional report of stolen fissile material, or a black market, is implausible for a host of reasons that range from better detection of radiological materials in transit to much increased security and surveillance around existing installations, and a high rate of success in arresting or tracking down such material within short order.

³² Michael Levi, *On Nuclear Terrorism* (Cambridge: Harvard UP, 2007).

³³ Steven Younger, *Endangered Species: How We Can Avoid Mass Destruction and Build a Lasting Peace* (New York: Harper Perennial, 2008).

³⁴ Christoph Wirz and Emmanuel Egger, "Use of Nuclear and Radiological Weapons by Terrorists?" *International Review of the Red Cross* 87: 859, 497 (2005).

³⁵ Other skeptical perspectives include the first report of the US Congressional "Gilmore Commission" (Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction), "First Annual Report: Assessing the Threat," (15 December 1999) ["Gilmore Commission Report"] www.rand.org/nsrd/terrpanel; and some of the contributions to Paul Leventhal and Yonah Alexander, eds, *Preventing Nuclear Terrorism: the Report and Papers of the International Task Force on Prevention of Nuclear Terrorism* (New York: Lexington Books, 1987), including J. Carson Mark, Theodore Taylor, Eugene Eyster, William Maraman, and Jacob Wechsler, "Can Terrorists Build Nuclear Weapons?"

Yet, even if fissile material of a sufficient quantity could be obtained – a significant hurdle in itself – non-state actors would confront several more challenges at the bomb building stage. These include the task of shaping the material to be used in a bomb device, and crafting the weapon itself. Creating a nuclear explosion involves not just the slamming together of two pieces of highly enriched uranium, as some have suggested, but slamming together two pieces of an appropriate size and shape, at the right speed.³⁶ The material would be highly challenging to shape or mold, requiring special expertise, equipment, and time. The tasks of crafting and transporting the bomb (and testing, if the group chose to do so) would furnish further opportunities for detection, accidents, or failure. Given all of these hurdles, concerns about the imminence of an act of nuclear terror on the part of al Qaeda, or one of its offshoots, seem largely overstated. Apart from an apparent attempt by bin Laden in 1993 to purchase what turned out to be a counterfeit sample of uranium, only a few further general expressions of interest on behalf of the group have been noted.

A similar set of arguments against the likelihood of biological terror have been made by, among others, William Clark,³⁷ Milton Leitenberg,³⁸ and Andreas Wenger.³⁹ Certain bio-toxins may be quite lethal, produced from natural materials, and widely dispersed to cause mass casualties. Yet, at each stage, the practical challenges are extensive – with no group ever succeeding in causing significant casualties, despite considerable effort in some cases, including and perhaps most notably the Japanese Aum Shinrikyo

³⁶ Levi, *On Nuclear Terrorism*, 36-42.

³⁷ William Clark, *Bracing for Armageddon: the Science and Politics of Bioterrorism in America* (Oxford: Oxford UP, 2008).

³⁸ Milton Leitenberg, “Evolution of the Current Threat,” in Andreas Wenger and Reto Wollenmann, eds, *Bioterrorism: Confronting a Complex Threat* (Boulder: Lynne Rienner Publishers, 2007).

³⁹ “Securing Society Against the Risk of Bioterrorism” in Andreas Wenger and Reto Wollenmann, *ibid.* See also the contributions to the same collection by Peter Lavoy and Marie Isabell Chevrier.

cult in the mid 1990s. A highly dangerous bio-toxin can indeed be produced from natural sources, or illicitly obtained from an industrial lab or other source. But the problem of cultivating it into sufficiently large quantities, and then stabilizing it, has proven exceedingly challenging to experts and military personnel in nations with the largest and most advanced militaries, including Russia and the United States.

If these hurdles can be surmounted, the act of dispersing the material in an effective manner presents a greater challenge still. The packaging, storage, and dissemination of a bioweapon would require considerable expertise in a range of fields, special equipment, and sufficient personnel and space in which to work. All of this would increase the prospect of detection, logistical error, or illness and death on the part of the participants. It would also entail a high likelihood of the material destabilizing or spoiling, or resulting in a much less lethal attack than planned. The Aum Shinrikyo group encountered all of these pitfalls, in ways that are instructive, including the key fact that the group did not succeed in producing a deadly strain of anthrax or any other bio-toxin. The sole example of a non-state actor's effective use of a deadly bio-toxin *in world history* was the 2001 congressional incident involving anthrax in letters addressed to Senators Tom Daschle and Patrick Leahy, which caused a total of five casualties.⁴⁰ An extensive FBI investigation concluded in 2010 that the likely source of the sample in this case was a senior bio-weapons researcher in the US military by the name of Bruce Edwards Ivans.⁴¹

Experts taking a critical view of radiological terror concede that it poses fewer hurdles than either nuclear or biological terror. Thus it may be more likely to happen. Yet, upon closer inspection, a wide gap exists here too between theory and practice. More

⁴⁰ Leitenberg, *ibid.*, at 65.

⁴¹ United States Department of Justice, "Amerithrax Investigative Summary," (19 February 2010) <http://www.justice.gov/amerithrax/docs/amx-investigative-summary.pdf>.

specifically, there are varying degrees of probability involved in accomplishing varying degrees of destruction. In theory, large samples of radioactive material can be easily obtained from universities, hospitals, or other industrial sites. These can be used in a bomb that might not kill many people, but could render a good portion of Manhattan or Toronto uninhabitable for decades. But significant hurdles would be faced at two stages. Building a bomb, or an effective dispersal device, would require substantial expertise, equipment, and time – along with an adequate amount of material, and material of an appropriate kind for use in the chosen device.⁴² Nuclear physicists Wirz and Egger contend that most of the material available in common industrial sources would be insufficient to cause extensive damage or disruption, due to the fact that they are found in metallic form and are thus not likely to be effectively dispersed by an explosive device.⁴³ In any case, the magnitude of the damage one might cause using a bomb or other dispersal method would still depend on a range of variables. In addition to the quantity and nature of the material used, much would depend on the quality of the device itself, meteorological conditions, and the speed of the natural decay of the material once dispersed. In short, theoretically, a simple bomb could cause mass disruption. In practice, several factors make it more likely that far less damage would be caused than is often feared.

The model for reform advocacy set out in the first part of Chapter 6 is thus meant to show how liberal jurists might have employed (and might still) a technologically informed skepticism about WMD to challenge claims about the imminent threat that they have often been said to pose. The model is also meant to show how a broader critical

⁴² Michael Levi and Henry Kelly, “Weapons of Mass Disruption,” *Scientific American* 77 (November 2002), 78; Peter Zimmerman and Cheryl Loeb, “Dirty Bombs: the Threat Revisited,” *Defense Horizons* 1 (January 2004), 5; and Christoph Wirz and Emmanuel Egger, “Use of Nuclear,” 505-6.

⁴³ Wirz and Egger, *ibid.*, 503.

spirit about threat assessments might play a more important role in challenging similar law in other areas. It would be especially useful where governments seek to justify authoritarian powers on the basis of new and “unprecedented” dangers that technology is said to have brought about.

The second part of Chapter 6 sketches the second part of the model. It focuses on the second key assumption in authoritarian legality: that current threats *warrant* the embrace of illiberal, preemptive measures. I argue that to respond to this claim more effectively, rights advocates should advance two counter-claims. First, in all likelihood, future acts of terror are going to be no more frequent or serious than acts prior to 2001. That is to say, the probability that future acts of terror will be larger in scale than the Oklahoma or Air India bombing (involving hundreds rather than thousands of deaths) is remote. Second, in the absence of a growing threat of terror – or a threat to national security of a much greater magnitude – the case for extraordinary measures becomes more difficult to sustain.

In brief, a strong argument against the “growing threat” theory can be made by drawing on skeptical evidence gathered over a series of works by John Mueller and Mark Stewart about the extent of the threat posed over much of the post-9/11 period by the core al Qaeda group (in Afghanistan and Pakistan) and more recently by its offshoots and ‘lone wolf’ imitators.⁴⁴ Over a decade after 9/11, the core al Qaeda group has not carried out a single attack in Canada or the US.⁴⁵ No al Qaeda cell since been discovered in either

⁴⁴ John Mueller and Mark Stewart, *Terror, Security, Money: Balancing the Risks, Benefits, and Costs of Homeland Security* (Oxford: Oxford UP, 2011); “Civil Liberties, Fear, and Terrorism,” *Notre Dame Journal of Int’l & Comp. Law* 2:2 (2012) 282; and “The Terrorism Delusion: America’s Overwrought Response to September 11,” *International Security*, 37:1, 81 (2012).

⁴⁵ *Ibid.*, “Civil Liberties, Fear, and Terrorism”, 285.

country.⁴⁶ And apart from seven Americans who were briefly persuaded to travel to a training camp in Afghanistan in the summer of 2001 (shortly after which six of them returned disillusioned), al Qaeda has failed to recruit anyone in either nation.⁴⁷ The few known cases in which westerners have sought links with the group resulted in what can best be described as a limited threat. For example, US citizen Najibullah Zazi, the would-be New York subway bomber (2008), and London-educated Umar Abdulmutallab, the underwear bomber (2009), were both involved in foiled plots that were much smaller in scale than 9/11 and much less skillfully attempted.⁴⁸

Documents obtained in 2001 from computers belonging to members of al Qaeda in Afghanistan revealed that the group's budget for WMD research and development at the time was only two to four thousand dollars.⁴⁹ Data obtained in 2011 from computers at bin Laden's compound confirmed the group's limited power and capacity in later years. Expecting to uncover a wealth of information about future attacks, investigators instead found that the group had been "primarily occupied in dodging drone missile attacks, complaining about lack of funds, and watching a lot of pornography."⁵⁰

Drawing on recent studies of political Islam, Mueller and Stewart also highlight a growing resistance to and unpopularity of al Qaeda and other radical groups in much of

⁴⁶ Ibid., see also Brian Ross, "Secret FBI Report Questions Al Qaeda Capabilities," *ABC News Online* (Mar. 9, 2005), <http://abcnews.go.com/WNT/Investigation/story?id=566425&page=1#.Ty0D366ryKw> (cited in Mueller and Stewart).

⁴⁷ Mueller and Stewart, "The Terrorism Delusion," 93.

⁴⁸ John Mueller, ed, "Terrorism Since 9/11: the American Cases" (Columbus: Mershon Centre, 2012), <http://polisci.osu.edu/faculty/jmueller/since.html>, 19.

⁴⁹ Mueller and Stewart, "The Terrorism Delusion," 98.

⁵⁰ Ibid., 82.

the Islamic world after 9/11.⁵¹ They note that nations such as Sudan, Syria, Libya, and Iran have made “diligent and aggressive” efforts against the group and its affiliates, given the threat posed to those regimes. This, together with increased US involvement in the region, has resulted in large numbers of suspects being arrested, detained, killed or otherwise deterred.⁵²

More recently, much official rhetoric on terrorism has shifted to groups affiliated with al Qaeda – primarily “al Qaeda in the Arab Peninsula.” While “al Shabaab” and other affiliates have focused mainly on local matters,⁵³ the threat that AQAP poses to North Americans is frequently substantiated with reference to the attempts to carry out bombings aboard aircraft bound for US cities – one in 2009 (the underwear bomb plot) and the other in 2010 (bombs in printer cartridges on two cargo flights from Yemen).⁵⁴ These events point in turn to the continuing threat posed by a supposed “mastermind” bomb-maker in Yemen. But given the failure of each plot, some have questioned the mastery involved, or the magnitude of the threat that AQAP poses.⁵⁵ Mueller and Stewart question whether the underwear bomber’s approach marked much of an advance on the approach taken in the shoe-bomb attempt of 2001. Both appear to have failed for the same reason: “the chosen explosive, PETN, is fairly stable and difficult to detonate, particularly because the most reliable detonators, like blasting caps, are metallic and

⁵¹ *Terror, Security, Money*, location 584 (Kindle edition). Mueller and Stewart draw here Fawaz Gerges, *The Rise and Fall of Al-Qaeda* (New York: Oxford UP, 2011) and Peter Bergen and Paul Cruickshank, “The Unraveling: The Jihadist Revolt against bin Laden,” *New Republic* (11 June 2008).

⁵² Mueller and Stewart, *Terror, Security, Money*, location 584 (Kindle edition).

⁵³ James Clapper, Director of National Intelligence, “Unclassified Statement for the Record on the Worldwide Threat Assessment of the US Intelligence Community for the Senate Committee on Armed Services,” (31 January 2012), <http://intelligence.senate.gov/120131/clapper.pdf>.

⁵⁴ See, e.g., James Clapper, *ibid.*, and Canada, “Building Resilience”, 7.

⁵⁵ Mueller and Stewart, “Terrorism and Counterterrorism Since 9/11” (Paper presented to the International Studies Association, April 2012), 7 (<http://polisci.osu.edu/faculty/jmueller/ISA12ter.pdf>); see also Peter Bergen, “And Now Only One Senior al Qaeda Leader Left,” CNN.com (6 June 2012) and Joshua Foust, “How Strong Is al Qaeda Today, Really?” *The Atlantic* (1 May 2012).

cannot be used because they are likely to be picked up even by screening methods in place before 9/11.”⁵⁶ And, as the authors note, a BBC investigation of the same explosive material on a decommissioned airplane similar to the one involved in the 2009 attempt suggests that the plane “would have been able to land safely even if the bomb had gone off.”⁵⁷ AQAP may well be capable of more than this, and thus certainly poses a danger; but it is one that ought to be placed in perspective.

This leaves the threat posed by smaller groups of “homegrown extremists” or “lone wolf” terrorists. To assess their potential impact, Mueller assembled a collection of case studies on 50 terror plots since 9/11 in which the US was a target.⁵⁸ Despite rhetoric that emphasizes the competence and effectiveness of terrorists involved in some of these attempts, as Mueller notes, the authors of the case studies “with remarkably few exceptions, describe their subjects with words like incompetent, ineffective, unintelligent, idiotic, ignorant, inadequate, unorganized, misguided, muddled, amateurish, dopey, unrealistic, moronic, irrational, and foolish.”⁵⁹ Some of the cases involved quite serious plots, including plans to topple the Sears Tower in Chicago, to bomb the Brooklyn Bridge, or to use radiological weapons. Yet, in each of these more serious cases, the plot proved well beyond the capacity of those involved, for a host of reasons ranging from a lack of expertise with explosives, a lack of access to material, weaponry, or funding, and poor planning.⁶⁰ “In ten years,” Mueller notes, “no terrorist in the US has been able successfully to detonate even a primitive bomb. ...[And] the only method by which Islamist terrorists have managed to kill anyone at all in the United States since 9/11 has been through the

⁵⁶ Mueller and Stewart, “Terrorism and Counterterrorism,” 7.

⁵⁷ Ibid.

⁵⁸ John Mueller, ed, “Terror Since 9/11”.

⁵⁹ Mueller and Stewart, “The Terrorism Delusion,” 88.

⁶⁰ Ibid.

firing of guns—inflicting a total of perhaps 16 deaths over the decade.”⁶¹ Homegrown terrorists are, of course, capable of setting off bombs and do pose a threat – but not a “cataclysmic” or “existential” threat to national security.

To summarize, ample evidence supports the view that terror involving WMD is highly unlikely, and that future acts are very likely to be no more grave or frequent than earlier acts. If so, the argument about current threats warranting new measures becomes much more difficult to sustain. Air India and other large attacks before 9/11 were properly understood, as Kent Roach has put it, not as failures of the criminal law, but of law enforcement.⁶² Those attacks have come to be seen, in hindsight, as anomalous, exceptional, and rare. They were not significant threats to national security, and were dealt with appropriately by both the criminal law and by incremental improvements to security practices.

A more persuasive case might therefore have been made – and might still be made – for the reform of counter-terror law by undertaking a more direct challenge to common claims and assumptions about current threats. Rights advocates have focused mainly on the excessive, illiberal, or unconstitutional nature of controversial measures. Much of the argument for reform has rested on the call for clearer proof of their necessity and proportionality. But a stronger case might be made by going further and demonstrating the *lack of necessity*.

In the Conclusion to this thesis, I attempt to address three potential counter-arguments. One is that a mass terror attack may still be imminent, because it can be easily done through simple technological methods (Molotov cocktails in the crowded subway,

⁶¹ Mueller and Stewart, “Terrorism and Counterterrorism,” 5. Twelve of these deaths occurred in the 2009 shooting at the military base at Fort Hood, Texas.

⁶² Kent Roach, *September 11*, *supra*, note 23.

suicide bombers in a large, busy urban space). Or it might be accomplished by carrying out several smaller attacks simultaneously. In response, I concede that many conventional methods of terror might be more readily employed than a weapon of mass destruction, and many are capable of inflicting large-scale harm or damage. I suggest that a technically-informed skepticism is still helpful in this context. Upon closer inspection, a host of obstacles and technical issues make it more likely that the real extent of the damage would be limited. For this reason, I argue that these and other low-tech possibilities do not alter the assessment set out, in Chapter 6, that mass terror – on the order of 9/11 or greater – is highly improbable.

The conclusion also considers two important alternative accounts of the cultural conditions for post-9/11 security policy. Instead of foregrounding the fear of mass terror as key, various scholars in political theory, critical race theory, and post-colonialism, such as Sherene Razack and Judith Butler, point to larger social and historical forces.⁶³ For example, Razack argues that extreme measures became possible due in large part to an underlying racism, xenophobia, or fear of a Muslim, Arab, or foreign other. Analogously, for contemporary criminologists, including David Garland, Lucia Zedner, and Jonathan Simon, the measures were not only a response to fears about current threats, but also part of an older shift toward a “culture of control,” a “pre-crime society,” or a pattern of “governing through crime.”⁶⁴ Each of these perspectives is nuanced and distinct. Yet, together, the authors offer a perspective on recent measures as an extension of a tendency,

⁶³ Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008); Judith Butler, *Precarious Life: Powers of Mourning and Life* (Verso: London, 2004) and *Frames of War: When is Life Grievable?* (Verso: London, 2010).

⁶⁴ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); Lucia Zedner, “Seeking Security by Eroding Rights: The Side-stepping of Due Process”, in Benjamin J. Goold and Liora Lazarus, eds., *Security and Human Rights* (Oxford: Hart Publishing, 2007); and Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford UP, 2007).

over the past three decades, for lawmakers to engage deeper fears about violence to impose greater forms of control, surveillance, and racial or class exclusion. The trend has also proven remarkably unreceptive to evidence-based reasoning, claims about equity, or appeals to liberal standards on appropriate limits on the state's use of force.

In response, I concede that these and other alternate explanations of the cultural conditions for authoritarian legality offer important insights. They also point to large obstacles for reform – not easily overcome by the model I propose in Chapter 6. It is likely true, for example, that racial, imperialist, and xenophobic attitudes render much of the North American electorate unsympathetic or indifferent to the mostly Muslim or Arab subjects of extreme measures – and thus, unlikely to mobilize in support of reform. It is also true that the thrust of criminal law reform in recent decades has clearly favoured victims' rights over those of the accused. Restoring fairness or due process for terror suspects in the current political climate is obviously a daunting challenge.

I argue in response that there is merit in distinguishing between these alternative accounts for why authoritarian measures were embraced and what can be called the official account. As I attempt to show throughout this thesis, the single recurring thread in the public and juridical defence of authoritarian measures – from the executive, to lawmakers, judges, and security officials – is that the catastrophic nature of current threats has rendered them necessary. The measures may therefore be part of a larger and older movement toward a “culture of control.” But they are not *justified* in this light. They may reflect racist or imperialist attitudes and beliefs. But they are not *defended* in this light. On the contrary, the argument to justify and defend the measures is consistent and *specific*. Therefore, while the argument in favour of the measures may be informed on some level by other beliefs and assumptions, the single recurring form of the official argument serves

as a compelling focal point for a direct response – which has not been forthcoming. I suggest that by addressing the “grave threat” argument more explicitly and directly, liberal advocates would offer a more persuasive case in defence of rights going forward.

My inquiry concludes with a sketch of recommended reforms and suggestions for how the approach to advocacy set out in this text might be applied in practical situations. I join many others in calling for a return to a more faithful adherence to absolute or non-derogable human rights – against extra-judicial killing, torture, and cruel or inhumane treatment. I also recommend reinstating a stricter threshold for granting state privilege and for lawful surveillance. Finally, I call for domestic law compensating victims of torture and other serious violations for state complicity in their injuries.

As noted earlier, I propose that rights advocates would offer a stronger defence of rights by employing a technologically informed skepticism about threats, wherever these are invoked in defence of new and more invasive measures. One place to do this is in the course of submissions to parliamentary or congressional committees tasked with assessing new measures, and their necessity in relation to perceived threats. Another place is in constitutional litigation, when questions are raised about reaching a reasonable balance between rights to due process and public safety. Lastly, I argue that NGOs, scholars, and activists advocating in defence of rights might make greater use of evidence and expertise on current threats in the course of scholarship and public advocacy.

Both Canada and the US continue to insist upon the validity of the measures based in large part on the gravity of current threats. Meaningful reform will therefore depend at least in part on unsettling this line of reasoning. This presents an opportunity for rights advocates, and a measure of hope for those committed to the future of constitutionalism and human rights.

2 From Extraordinary Measures to Authoritarian Legality

Over the course of the past decade, an extensive body of legal scholarship has explored the nature of a series of extraordinary counter-terror measures employed by the US and Canadian governments in response to the events of September 11. The thrust of the vast majority of this literature is to point out ways in which the measures mark a break from principles of liberal legality, or a commitment to upholding constitutionalism, human rights, and the rule of law. In distinction to those who view these measures as a violation of civil liberties, or as a departure from the rule of law, I suggest that, taken together, they can be understood in terms of a shift from a liberal form of legality to what might be called authoritarian legalism. The argument here is concerned, therefore, not with a break from legality as such but with a deeper shift in the idea of legality.

I will argue in later chapters that this shift was made possible in large part by the prevalence of two beliefs: (a) the imminent possibility of a mass terror attack that would pose an unprecedented danger to society or the state; and (b) the need to embrace a new, more pre-emptive and extreme set of measures to avert this.

This chapter begins with a brief discussion of liberal legalism and its constituent principles. It then examines the emergence of authoritarian legality in US and Canadian counter-terror law and policy in terms of its four basic features: (i) the suspension of absolute or non-derogable rights; (ii) the legislative entrenchment of greater powers of secrecy and surveillance; (iii) judicial deference to the executive; and (iv) the state's reluctance to remedy past violations of core human rights.

2.1 Defining liberal legalism

While there is no single, canonical definition of “liberal legalism” in legal scholarship, the phrase is often used to refer to procedures and principles that give legal expression to political and economic aspirations of liberalism.¹ I propose to use it here in a broader sense, to describe an approach to law that reflects a commitment to core philosophical as well as political precepts of Enlightenment liberalism; namely, the notion that each individual is to be treated humanely and with equal value in law, on the basis of the inherent dignity and equal value to be accorded to each human life. A liberal *legal* order seeks to foster these values by preserving the individual’s liberty to pursue self-defined goals of the good life, so long as they do not infringe unreasonably upon the freedoms of others. It also seeks to protect a sphere of individual dignity by respecting a person’s privacy and asserting limits on inhumane treatment or punishment. It assumes that all persons, citizens and foreigners alike, are equally entitled to due process or ‘natural justice’ when deciding questions that concern their core freedoms – so that truth rather than prejudice may form a basis for state action. Liberal legalism is therefore embodied in a commitment to democratic government, constitutionalism, human rights, and the rule of law – or, more profoundly, on the principle that government should not be arbitrary.

Yet all of these concepts have become so central to our understanding of law itself that some have questioned whether we can conceive of legality apart from them. A number of legal theorists have taken up this issue in the period after Nazi Germany, and the advent of other modern fascist or totalitarian regimes. Views on the issue are worth canvassing briefly to lend a clearer sense of the difference between legality and liberalism,

¹ See, e.g., Sanford Levinson, “Escaping Liberalism: Easier Said Than Done” (1983) 96:6 Harvard LR, 1466; see also Robert Gordon’s “Some Critical Theories of Law and Their Critics” in David Kairys, ed. *The Politics of Law: A Progressive Critique* (Basic Books: New York, 1982). Reviewing this collection, Sanford Levinson, *ibid.*, links liberal legalism to liberal individualism, the distinctions between the private and public sphere, and the notion of the rule of law as “a means for resolving the inevitable conflicts among the atomistic individuals who inhabit liberal society” (1467).

and how liberal beliefs might inform a legal framework — or, as in authoritarian legality, be notable by their absence.

For legal positivists, the rule of law, or legality as such, is indispensable to the notion of a liberal legal order, but is conceptually distinct from it. For example, Joseph Raz conceives of the rule of law as a “neutral” instrument, the essential features of which are equally amenable to a totalitarian state as they are to a liberal state. He asserts:

...the rule of law is just one of the virtues a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.²

For Raz, the rule of law entails only two propositions: (a) “that people should be ruled by the law and obey it” and (b) “that the law should be such that people will be able to be guided by it.”³ It is thus distinct from liberal ideals, yet its value consists in its promotion and support of them.⁴

By contrast to Raz and other positivists, another tradition maintains that the essential hallmarks of legality are inextricable from liberal ideals. Key figures in this tradition include the Victorian constitutional scholar A.V. Dicey and American law scholars Lon Fuller and Ronald Dworkin. In Dicey’s work, the rule of law is defined by three basic assumptions: (i) that discretion is the antithesis of law; (ii) that law should strive to protect individual rights through their application to all persons; and (iii) that disputes

² Joseph Raz, *The Authority of Law* (Oxford: Oxford UP, 2009; 2nd ed), at 211. See also H.L.A. Hart, *The Concept of Law* (Clarendon Press: Oxford, 1965).

³ Raz, *ibid*, at 213.

⁴ *Ibid*, at 221.

are to be resolved by courts rather than officials or councils exercising unreviewable administrative discretion.⁵ For Dicey, the function of the rule of law as a guarantor of stability and order is one facet of a larger project of creating a liberal state regime, based on a notion of liberal citizenship. With no one person standing above the law, and authority never being exercised beyond the law, it becomes possible to protect a sphere of individual liberty from arbitrary state power, and to govern the collective order through a set of laws democratically created and impartially enforced.

Writing in the wake of the Second World War, Lon Fuller sought to demonstrate the close connection of legality to liberal values by posing a question that took on a particular resonance after the Holocaust. What basic qualities must a legal system possess in order to be considered legitimate and just to contemporary observers?⁶ Such a system would, in his view, abhor the practice of arbitrary rule, vested in a single, unaccountable individual or group, who issued secret orders and applied the law selectively or retroactively. It would require instead that laws be, at the least, publicized, clear, coherent, general in nature, and non-retroactive.⁷ Although he spoke of these as amounting to a distinct “morality of law,” it is clear that the larger morality that law is meant to serve is liberal in nature. A system of secret, partial, or arbitrary law, as found in authoritarian or totalitarian states, would appear illegitimate to contemporary western sensibilities due in part to its inconsistency with a larger liberal ‘morality’ that values individual liberty and equality.

⁵ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan and Co, 1889). See also, H.W. Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17:1 Osgoode Hall LJ 1, at 22.

⁶ Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

⁷ *Ibid*, chapter 2.

The link between liberal values and the notion of legality becomes even more explicit in the work of Ronald Dworkin. In *Taking Rights Seriously*,⁸ Dworkin asserts that in contemporary western legal systems, “no ultimate distinction can be made between legal and moral standards, as positivism insists.”⁹ On the contrary, for Dworkin, we can neither create nor enforce law without reference to moral standards. Indeed, the very notion of constitutionalism “rests on a particular moral theory, namely that men have moral rights against the state. The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions”.¹⁰ At the heart of this morality are concepts of freedom and equality deeply rooted in the liberal Enlightenment:

Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect.¹¹

More recently, Dworkin has extended this logic to a theory of the nature and purpose of human rights. Such rights are, in his view, vehicles for preserving “two dimensions of human dignity”.¹² Each human life has “intrinsic value” by virtue of its “potentiality,” and each holds “personal responsibility” for “realizing the success of his or her own life”.¹³ We seek to uphold human rights on the assumption that to treat a person contrary to these principles is to offend their human dignity.

⁸ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

⁹ *Ibid*, at 47.

¹⁰ *Ibid*, at 147.

¹¹ *Ibid*, at 272-3.

¹² Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton UP, 2006), at 9.

¹³ *Ibid*.

Thus, although theorists may disagree about whether the notion of legality can be distinguished, in any meaningful sense, from liberal values, they generally agree on the *content* of liberal legalism. Canadian law scholar, W. Wesley Pue, has sought to distill these principles in a way that captures the broader scope of liberal legality:

- a. All law should seek to attain minimal infringement of civil liberty.
- b. There should be maximum clarity of definition regarding powers conferred, restrictions imposed, and offences created.
- c. All exercise of governmental power should be accountable, visible, and reviewable by the ordinary courts in the ordinary ways. The *core* constitutional principle of responsible government requires clear and effective channels of political and legal accountability.
- d. Secrecy should only be tolerated in the smallest possible zone, only as absolutely essential, and only for limited duration. Power exercised in secret is never accountable.
- e. Where extraordinary powers are invoked in times of perceived crisis, they should be of limited duration, renewable only by full reconsideration and re-enactment by Parliament.¹⁴

To Pue's list, one might add two further propositions that are not essential to legality as such, but are commonly embraced in a liberal legal framework.

One is the notion of absolute limits on the state's use of force against an individual, or what are called 'non-derogable' rights. As Jeremy Waldron, David Luban, and others have suggested, the absolute prohibition on torture, cruel or degrading treatment is not simply an important facet of liberal legalism but almost its very essence — a kind of archetype for legality itself.¹⁵ As Waldron writes, "in the heritage of Anglo-

¹⁴ W. Wesley Pue, "The War on Terror: Constitutional Governance in a State of Permanent Warfare" 2003 41 *OHLJ* No. 2&3, 267 at 270.

¹⁵ Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 *Colum. L. Rev.* 1681; at 1687: "the rule against torture operates in our law as an archetype — that is, as a rule which has significance not just in and of itself, but also as the embodiment of a pervasive principle." See also David Luban, "Liberalism, Torture, and the Ticking Bomb" (2005) 91 *Va. L. Rev.* 1425; Ronald Dworkin, *Is Democracy Possible Here?*, *supra*, note 12, chapter 2; and Tamar Meisels, "Torture and the Problem of Dirty Hands" (2008) XXI:1 *Can. J.L. & Jur* 149.

American law, there is a long tradition of rejecting torture and regarding it as alien to our jurisprudence... Actually, a case can be made that torture is now to be regarded as alien to *any* system of law.”¹⁶ The prohibition on torture is recognized in a series of treaties, including the *UN Declaration* and the Geneva Conventions. The 1984 U.N. *Convention Against Torture* is categorical in its prohibition, stating that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁷ Both Canada and the US are signatories to the convention; yet the prohibition is also arguably implied in the US Constitution and the *Canadian Charter of Rights and Freedoms*.¹⁸

A further aspect of liberal legality relates to the role of individuals in violent acts. Liberal jurists tend to assume that violent acts by individuals or groups of non-state actors are best understood in terms of the criminal law rather than the law of war.¹⁹ They also assume, however, that even if actions by non-state actors are believed to amount to a threat of war, human rights and other international humanitarian laws still apply.²⁰ In short, neither framework — crime or war — entails a space beyond law, with the law at issue always conceived in liberal terms. Yet, it is precisely the lack of a middle ground, a concept other than crime or war, which serves as an opening for an authoritarian form of legality.

¹⁶ Jeremy Waldron, *ibid*, at 1719.

¹⁷ Article 2(2), *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85, (entered into force 26 June 1987).

¹⁸ The constitutionality of torture is explored in the next section.

¹⁹ See, e.g., David Luban, “The War on Terrorism and the End of Human Rights” 22:3 (2002) *Philosophy and Public Policy Quarterly* 9.

²⁰ See, e.g., works explored in Chapter 5 by Ronald Dworkin, Jeremy Waldron, Kent Roach, and David Cole and Jules Lobel.

2:2 Defining authoritarian legalism

2:2:1 Qualifications and antecedents

A glance through some of the extensive literature on US and Canadian counter-terror measures after 9/11 will show that for a majority of commentators, at least some of the measures at issue have amounted to a departure from liberal legal principles. In this section, I propose to survey some of the most salient of these measures not in the negative terms of a departure but in the positive sense of a new conceptual formation. In making this claim, I assume that legality can be distinguished from liberal values, and that one can discern, from surveying some of the recent measures, the broad contours of a new and distinct concept of legality.²¹

I should note, however, that I advance an argument for the emergence of authoritarian legalism here in a provisional spirit. The reader may remain skeptical about whether legality can be distinguished from liberal values, or doubt the fact that a distinct, coherent, and widely shared conception of legality came into existence in this period. The larger argument in this thesis about the fear of mass terror as a motivator for extreme measures would still stand. On this view, beliefs about mass terror would serve as a key

²¹ The concept of authoritarian legality is not new in the sense that it has no antecedents, but new in the sense of marking a break with late modern Anglo-American legal beliefs and practices.

Other commentators have gestured in the direction of authoritarian legality by referring to a deeper conceptual shift in thinking about law and security. See, e.g., Jane Mayer, *The Dark Side: the Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Random House, 2008), referring to a “new paradigm” for the use of force in the wake of 9/11; and Alan Dershowitz, *Preemption: a Knife that Cuts Both Ways* (New York: Norton, 2006). Other commentators, including Oran Gross, David Dyzenhaus, Gabriella Blum and Philip Heymann have queried the relationship of extreme measures to legality. See, e.g., Oren Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?” (2003) 112:5 Yale L.J. 1011; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006); and Gabriella Blum and Philip Heymann, *Laws, Outlaws, and Terrorists: Lessons from the War on Terrorism* (Boston: MIT Press, 2010).

To my knowledge, however, no other commentator has proposed reading aspects of post-9/11 North American counter-terror law and policy as tantamount to a new conception of legality in itself.

factor in the embrace of extreme measures, if not of authoritarian legalism in a broader sense.

Why, then, is it necessary or useful to speak of an authoritarian legality rather than extreme or extraordinary measures on their own? I do so for two reasons. First, the concept is useful as an interpretive device — as a way of inviting the reader to see, in a brief survey of extreme measures, a coherent whole or larger pattern. Doing so leaves the theory open to the claim that any continuity or coherence it purports to find is illusory; that what we find instead is a series of laws with some superficial similarities, a disparate set of controversial court decisions, and a few regrettable but unusual policy decisions. But a few poor decisions and over-reactive laws do not make a coherent or rational paradigm — and to attempt to read them as such amounts to an effort to discern a larger intent where there is none.

While this is a forceful counter-argument to keep in mind, it must also contend with a second rationale for speaking in terms of a new, post-liberal form of legality. The laws and policies at issue have not evolved in isolation. They have evolved, to some extent, in response to each other, and to a deeper shift in assumptions about threats to national security and appropriate limits on the use of force. A theory of authoritarian legality seeks, therefore, to identify a common framework of belief that links the various laws and policies together in an evolving legal and juridical sensibility about pending threats and necessary measures.

I should also note at the outset that the theory of authoritarian legality proposed here is not tantamount to an expanded concept of presidential powers or executive discretion. While this may contribute to it, it remains conceptually distinct and viable without it. Nor does the concept rely on the belief that the threat of terror after 9/11

amounts to a war rather than a crime, or, as John Yoo and others have argued, that many of the controversial measures employed by Presidents Bush and Obama are incidental to their powers as Commander in Chief in a time of war. These are further important facets of authoritarian legality, but not synonymous with it.

Authoritarian legality arises in the US context in part as a result of the belief that the nation is at war, but that the “enemy combatants” in this war are entitled to neither the full protections of the laws of war, nor many of the basic privileges afforded by due process.²² More crucially, in both Canada and the US, it arises as a result of the belief that the nature of the threat facing the nation is sufficiently grave that it makes the use of extraordinary measures necessary.

The various measures contribute to a form of *legality* precisely to the extent that officials, jurists, and commentators conceive of them as lawful. Thus, while scholars may continue to debate the lawful character of these measures (on liberal legal standards), the measures in question possess a degree of positive legality by a number of indicia. Many of them are entrenched in legislation. Many have been constitutionally challenged but upheld. Others assume the form of court decisions that acquiesce in or approve of serious departures from constitutional or human rights principles. And finally, other measures bear a kind of official legality by virtue of the executive’s unchallenged insistence to this effect.²³

²² Gabriella Blum and Philip B. Heymann, *Laws, Outlaws, ibid*, at 3.

²³ Drawing on the work of Stephen Griffin, Tracey Lightcap argues that “actions by the executive in the United States can attain legal status in several ways. In the past, legal change has been straightforward; legislation is passed or the constitution revised. But this is not the only way legality can be established, especially in recent times. Actions taken by presidents exercising their executive discretion can also be informally legalized by becoming routine actions that are neither forbidden by specific legislation nor declared out of constitutional bounds by the courts.” Tracey Lightcap, Review of Kent Roach’s ‘The 9/11 Effect: Comparative Counter-terrorism’ (2012) 22:1 *Law and Politics Book Review*, 129 at 132. See also

An authoritarian form of legality has emerged gradually, then, through law, jurisprudence, executive policy and practice, and a wider public or cultural acceptance. I should note before proceeding, however, that this new form of legality has not emerged out of a vacuum – or should not be understood exclusively as a response to 9/11. Its cultural and conceptual antecedents are indeed much wider in scope and far older than the events of 9/11, and the debates about counter-terror policy that followed. The role of these antecedents is crucial, yet at this point I seek to canvas it briefly and to revisit it in the concluding chapter of this thesis.

Suffice it to say here that the emergence of authoritarian legality cannot be understood without reference to changing assumptions in Anglo-American criminology and crime prevention over the last third of the twentieth century. Tracing developments from roughly the 1970s onward, David Garland, Lucia Zedner, Jonathan Simon and others have noted a general shift in emphasis from a long-standing perception of crime as a social welfare problem, calling for the rehabilitation of disadvantaged populations, to one of risk and control of “dangerous predators” and “incorrigible career criminals.”²⁴ Throughout this period, the fear of crime and the idea of security had become primary preoccupations of politics and culture. As a part of this process, a tradition of protecting individual rights and civil liberties had come to be eclipsed in the US and the UK, and to a lesser extent in Canada, by a form of law making in which the role of the victim had become central. Criminal codes and statutes began to expand rapidly with new law

Stephen M. Griffin, “Constitutional Change in the United States,” in Dawn Oliver and C. Fusaro, eds., *How Constitutions Change: a Comparative Study* (Oxford: Hart Publishing, 2011).

²⁴ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001), at 10.

fashioned in what Kent Roach has described as a “narrative” style meant to “memorialize terrible crimes”.²⁵

As a corollary to the rising status of the victim, the figure of the prosecutor also became more central to the rhetoric of politics and government. As Simon has demonstrated, the role and identity of the stern and effective prosecutor had become an indispensable quality in perceptions of the able politician. Rather than seeking to strike a balance between public safety and civil liberties, presidents, governors, and other members of the executive were encouraged to foreground their earlier careers as prosecutors, or to embrace a kind of quasi-prosecutorial rhetoric in their approach to law and order. It had also become incumbent upon politicians of any political persuasion to emphasize a willingness to employ harsh measures – either as an expression of or response to the public’s fear, anger, and desire for retribution.²⁶

At the same time, the scope of criminal law and policy had vastly expanded. Broader racial, class and gender-based tensions would come to be addressed through penal and drug policies clearly discriminatory in their effects. There was also a growing criminalization of deviance in schools and of violence in family relations and in the workplace.²⁷ Zedner complements this analysis by exploring the emergence, before 9/11, of various “pre-crime” control measures, which seek to impose penal or other restrictive

²⁵ Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen’s University Press, 2003), at 25.

²⁶ Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford UP, 2007), chapter 2.

²⁷ *Ibid*, chapters 5, 6 and 7.

measures as a means of segregating and controlling disenfranchised, disadvantaged portions of the population.²⁸

In short, the practice of using the criminal law, or punitive measures, as a response to a set of social tensions or fears had long pre-dated 9/11 and the various amendments to criminal and immigration law that followed. Authoritarian legal measures should therefore be seen at least in part as elaborations of these earlier tendencies. A question I will explore in later chapters is how the legacy of 9/11, and beliefs about terrorism in particular, have come to shape authoritarian legality in ways unique from this earlier “culture of control,” or “governance through crime.”

2.2.2 Catalyzing events

Two legal developments in the wake of 9/11 have served as a catalyst for much of the law and policy that comprise authoritarian legality.

The first, pertaining to the United States, was congress’s passage of the “Authorization to Use Military Force” (AUMF) on September 18, 2001.²⁹ This “joint resolution” of both houses of congress functions as a declaration of war against the perpetrators of 9/11, and other possible targets. The document contains only a preamble and one substantive section. The preamble invokes the nation’s right to self-defence, in response to the “grave acts of violence” that occurred on September 11, and the fact that those responsible “continue to pose an unusual and extraordinary threat to the national security” of the United States. The main section is sweeping in its scope and not limited in duration:

²⁸ Lucia Zedner, “Seeking Security by Eroding Rights: The Side-stepping of Due Process”, in Benjamin J. Goold and Liora Lazarus, eds., *Security and Human Rights* (Oxford: Hart Publishing, 2007).

²⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

... the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.³⁰

The AUMF is worded broadly enough that it authorizes attacks against nations or groups that had not yet assisted terrorists in 2001, but may have begun to do so later (for example, groups operating in Yemen).³¹ The scope of its most important phrase – the authority to use “all necessary and appropriate force” – is also left unclear. Both the Bush and Obama administrations have taken the view that this allows the president to detain indefinitely and without charge either foreigners or citizens; to try detainees in military tribunals; and to carry out secret domestic surveillance and targeted killing.³²

There were, however, two limitations to the AUMF – but both appear to have been removed by recent legislation. The first limitation had to do with its open-ended nature. As some have argued, at some point, the Authorization would cease to be valid due to the passage of an implied time limit.³³ The second limitation was the nexus requirement. The president had to draw a connection between an individual, group, or nation and the attacks of September 11: *i.e.*, detainees or targets must have “planned, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons...”³⁴ Both administrations had taken the view

³⁰ *Ibid*, section 2(a).

³¹ I credit Oona Hathaway for noting this, in a presentation in the spring of 2011 at the Yale Law School.

³² The use of the AUMF as a basis for these practices is discussed further below, and in later chapters.

³³ See, *e.g.*, Deborah Perlstein, “More on the New AUMF” (26 June, 2011) *Opinio Juris*, online: <<http://opiniojuris.org/2011/05/26/more-on-the-new-aumf/>>; Bruce Ackerman and Oona Hathaway, “Did Congress Approve America’s Longest War?” (27 January 2011) *The Guardian*, online: <<http://www.guardian.co.uk/commentisfree/cifamerica/2011/jan/27/afghanistan-congress>>; John Bellinger, “A Counterterrorism Law in Need of Updating” (26 November 2010) *The Washington Post*.

³⁴ Oona Hathaway, Samuel Adelsberg, Spencer Amdur, Philip Levitz, Freya Pitts, and Sirine Shebaya, “The Power to Detain: Detention of Terrorism Suspects After 9/11” (forthcoming in the *Yale Journal of International Law* 2012); online, Yale Law School: <www.law.yale.edu/documents/pdf/Intellectual_Life/YLS_PowertoDetain.pdf>, at 8.

that if a person had not engaged directly in any of those acts, it would suffice if they were part of a group that did, or if they substantially supported such a group.³⁵ But in either case, the group itself had to be connected with the attacks of September 11.

In response to the first limitation, congress debated explicitly renewing the powers contemplated in the AUMF in a bill passed in 2011, but chose not to do so. However, while the *National Defence Authorization Act of 2012* (NDAA) does not explicitly renew the powers of the AUMF, it does affirm their continuing validity.³⁶

Section 1021 of the Act states:

Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons [...] pending disposition under the law of war.

The section is structured as a form of clarification – the AUMF “*includes*” the authority to detain a certain class of persons. But notably, the section speaks of the president’s powers under the AUMF in the present tense. By implication, then, the AUMF itself is not only still valid, but would appear to remain so for the foreseeable future. A further key provision of the NDAA supports this reading.

The section at issue is one that expands the president’s authority to detain.³⁷ Now, the president may detain not only those who planned, aided, or harbored those involved in the attacks of September 11, but also those who were “part of or substantially supported al-Qaeda, the Taliban or associated forces *that are engaged in hostilities against*

³⁵ *Ibid*, at 11.

³⁶ *National Defense Authorization Act for Fiscal Year 2012*, H.R. 1540, 112th Cong. (2011).

³⁷ *Ibid*, section 1021(b)(2).

*the United States or its coalition partners...*³⁸ A nexus to September 11 is no longer necessary. It will suffice if a person or group is substantially linked to an “associated force,” or what is called a “co-belligerent” force.³⁹ The detainee may be either a foreigner or a US citizen, and he or she can be detained “under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force.”⁴⁰

The second measure that has prompted new counter-terror law in response to 9/11 was the adoption of Resolution 1373 by the United Nations Security Council, on September 28, 2001.⁴¹ This called on member states of the UN to reform criminal law regimes to more effectively prevent “those who finance, plan, facilitate or commit terrorist acts”.⁴² It also called on states to establish “terrorist acts... as serious criminal offences in domestic laws”; to accelerate the exchange of information or evidence relevant to terror investigations,⁴³ and to “prevent the movement of terrorists [...] by effective border controls”.⁴⁴ Within a month, the US government had passed the *USA PATRIOT Act*,⁴⁵ and two and a half months later, Canada enacted the *Anti-terrorism Act*.⁴⁶ Through these and other acts, both governments sought to meet the demand to introduce new

³⁸ *Ibid.*

³⁹ See the discussion in Hathaway, *et al*, *supra*, note 34, at 12, of *Hamilly v. Obama*, 616 F. Supp. 2d. As Hathaway *et al* note, the D.C. District Court in *Hamilly* made clear that co-belligerents “do not include terrorist organizations who merely share an abstract philosophy or even a common purpose with al Qaeda – there must be an actual association in the current conflict with al Qaeda or the Taliban.” (*Hamilly* at 74.)

⁴⁰ *National Defense Authorization Act*, *supra*, note 36, section 1021(c)(1).

⁴¹ S/Res/1373 (2001) [“Resolution 1373”]. On the role of this resolution as a primary impetus for legislative responses to 9/11 by the United States, Canada and other commonwealth nations, see Kent Roach, “Sources and Trends in Post-9/11 Anti-terrorism Laws” in Benjamin J. Goold and Liora Lazarus, eds., *Security and Human Rights* (Oxford: Hart Publishing, 2007).

⁴² Resolution 1373, *ibid*, section 2(d), *ibid*.

⁴³ *Ibid*, section 3.

⁴⁴ *Ibid*, section 2(g).

⁴⁵ P.L. 107-56, 115 Stat. 272 (2001).

⁴⁶ S.C. 2001, c. 41.

terrorism offences, but also took the opportunity to expand the scope of state secrecy and surveillance, and powers of detention, in ways to be explored below.

In what follows, I define authoritarian legality in terms of four basic elements. Given the wealth of commentary on these measures, the intention here is only to provide a basic overview of law, policies, or court decisions that support essential facets of the paradigm. For a more detailed exploration of these developments, I refer the reader to earlier studies of both US⁴⁷ and Canadian law.⁴⁸

2.3 Defining characteristics of authoritarian legality

2.3.1 The abandonment of the concept of absolute or non-derogable rights

In authoritarian legality, there are no non-derogable rights. Put otherwise, all constitutional and human rights have proven to be derogable, including rights against torture, cruelty, and “extra-judicial” killing. Yet in every case where a government or

⁴⁷ See, e.g., Jules Lobel, “The War on Terrorism and Civil Liberties”, 63 U. PITT. L. REV. 767 (2002); Patricia Mell, “Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act”, 80 DENV. U. L. REV. 375 (2002); Kim Lane Scheppele, “Law in a Time of Emergency: Terrorism and States of Exception”, 6 U. PA. J. CONST. L. 2004; Stewart Baker and John Kavanagh, eds., *Patriot Debates: Experts Debate the USA PATRIOT Act* (Chicago: American Bar Association, 2005); Mark Tushnet, ed., *The Constitution in Wartime: Beyond Alarmism and Complacency* (Durham: Duke University Press, 2005); David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (New York: the New Press, 2007); Ronald Dworkin, “The Threat to Patriotism” (2002) *New York Review of Books* 49, 3 (February) and “Terror and the Attack on Civil Liberties” (2003) *New York Review of Books* 50, 17 (November); and Blum and Heymann, *Laws, Outlaws, supra*, note 21, at 3.

⁴⁸ Commentary on Canada’s primary legislative response to 9/11, the *Anti-terrorism Act* (S.C. 2001, c. 41) includes Ronald Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Canada’s Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001); David Daubney, ed., *Terrorism, Law and Democracy: How is Canada Changing Following September 11?* (Themis: Montreal, 2002). For commentary on Canadian counter-terror measures of a wider scope, see Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen’s University Press, 2003); W. Wesley Pue, “The War on Terror: Constitutional Governance in a State of Permanent Warfare?” (2003) 41:2&3 *Osgoode Hall L.J.* 267; Kent Roach, “Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain” (2006) 27 *Cardozo L. Rev.* 2151; W. Wesley Pue, “Protecting Constitutionalism in Treacherous Times: Why Rights’ Don’t Matter” in A. V. Narsimha Rao, ed., *Constitutionalism: an International Perspective* (Hyderabad: Amicus Books, 2008); and Robert Diab, *Guantanamo North: Terrorism and the Administration of Justice in Canada* (Fernwood Publishing: Halifax, 2008).

court violates an absolute prohibition, the violation is not acknowledged as such. That is to say, while the act or court decision may amount to a *de facto* violation of the prohibition, governments or courts have either ignored the fact or insisted upon the legality or reasonable character of their actions.⁴⁹ Thus, despite the fact that both the US and Canadian governments are constitutionally and by treaty bound to uphold the absolute prohibition on torture, cruelty, and extra-judicial killing, each government and each nation's courts have sanctioned the violation of these rights (with the exception of targeted killing in the case of Canada). In many cases, the violations were carried out either without prior judicial review, as conventionally understood in liberal democracies, or on lower evidentiary standards or thresholds than are found in a liberal legal paradigm.

A series of specific examples can be considered.

2.3.1.1 Indefinite detention in US law

With the AUMF as a backdrop, President Bush issued an order on the 13th of November, 2001, purporting to give himself the power to detain, indefinitely, any individual who is not a citizen of the United States and who there is “reason to believe” has engaged in or aided or abetted a terror group — or, more generally, anyone who “it is in the interest of the United States” to detain.⁵⁰ The order allows that detainees may be tried by a military tribunal for any violations of the laws of war, and if convicted could face the death penalty. Given the “danger to the safety of the United States” posed by

⁴⁹ By contrast, in November of 2001, when Britain sought to legislate the power to detain non-citizens without charge for extended periods under new immigration legislation, it invoked the emergency derogation clause under the *European Convention on Human Rights*, 213 U.N.T.S. 221. The measure was thus conceived of as a derogation from a core human right. The validity of the derogation, and thus the law on which it was based, was successfully challenged in *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

⁵⁰ Military Order of November 13, 2001; Federal Register: November 16, 2001 (Volume 66, Number 222) Presidential Documents, pp. 57831-57836; available online: <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html>>.

terrorism, the order states that it is “not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”⁵¹ The order also precludes a detainee’s right to seek “any remedy or maintain any proceeding, directly or indirectly ... in any court of any court of the United States”,⁵² or any other nation or international tribunal. Thus, a conviction and death sentence could follow from a split decision of a panel, and the only appeal would lie with the President or Secretary of Defence — the same officials carrying out the prosecution.⁵³ The order states that these measures are necessary given the fact that the attacks of 9/11 occurred “on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.”⁵⁴ The measures were also appropriate considering the “magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur”.⁵⁵

The day after the order was issued, Vice President Cheney asserted that detainees in America’s military initiative against al Qaeda and its affiliates did not “deserve to be treated as prisoners of war” and were not entitled to the protection of the Geneva Conventions.⁵⁶ In January of 2002, legal opinions corroborating this view were issued by Donald Rumsfeld, on behalf of the Department of Defence, and Jay Bybee, for the

⁵¹ *Ibid*, s. 1(f).

⁵² *Ibid*, s. 7(b).

⁵³ Mayer, *The Dark Side*, *supra*, note 21, at 87.

⁵⁴ Military Order of November 13, 2001, *supra*, note 50, section 1(a).

⁵⁵ *Ibid*, section 1(g).

⁵⁶ Barton Gellman and Jo Becker, “A Different Understanding with the President” (24 June 2007) *Washington Post*, online: <http://blog.washingtonpost.com/cheney/chapters/chapter_1/> .

Department of Justice.⁵⁷ On February 7th, President Bush gave these legal force by issuing an order stating “none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.”⁵⁸

As Jane Mayer notes, President Bush’s February 2002 order marked the first time the US has explicitly declined to uphold the Geneva Conventions for prisoners in an armed conflict. During the Vietnam war, the Conventions were applied to detainees of the Viet Cong despite the fact that the Viet Cong had ignored them.⁵⁹ Mayer also notes that in Vietnam, as with Guantanamo, there had been concerns that some of the detainees were innocent civilians. The US was able to devise a system of status hearings — known as “Article 5 tribunals” — to extend to prisoners the right to make a case against detention.⁶⁰ These tribunals were used again in Grenada, Panama, and the Gulf War. In the latter case, as Mayer points out, among the 1200 or so Iraqi combatants initially imprisoned, Article 5 tribunals would determine that only 310 detainees should be held as prisoners of war.⁶¹ Among the many protections afforded by the Geneva Conventions is a right against punishment for refusing to cooperate with interrogators. The Third Convention states that “No physical or mental torture nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever.”⁶²

⁵⁷ Rumsfeld’s January 19th memo is available online at ‘lawofwar.org’: http://www.lawofwar.org/Rumsfeld%20Torture%20memo_0001.jpg; Bybee’s memo of January 22nd: <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>.

⁵⁸ Section 2(a) of the order is available online at ‘lawofwar.org’: http://www.lawofwar.org/Bush_memo_Genevas.htm.

⁵⁹ Mayer, *The Dark Side*, *supra*, note 21, at 121.

⁶⁰ *Ibid*, at 121.

⁶¹ *Ibid*.

⁶² International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; article 17, available at:

In the post-9/11 period, the US would detain thousands of terror suspects, from battlegrounds in Afghanistan and Pakistan, and from a host of other Asian nations, and hold them at prisons in Iraq, Afghanistan, Guantanamo Bay in Cuba, and at various CIA “black sites.” Many were interrogated and tortured.⁶³ To focus for the moment on detainees at Guantanamo, beginning in January of 2002, the US would bring roughly 800 men to the base over the course of the past decade. While 7 have died in custody, 172 remain.⁶⁴ With the base situated on foreign soil, the Bush administration assumed that detainees were beyond the jurisdiction of American courts or the US constitution, for the purpose of challenging the grounds of their detention under a writ of habeas corpus, or their prosecution using military tribunals.

Through a series of decisions of the US Supreme Court, the scope of detainee rights has become clearer. The decisions can be roughly divided into two classes of cases. One set of cases concerns the right of detainees to habeas corpus, or some form of judicial review, to determine whether their detention is lawful. The question in these cases is whether a detainee is in fact the “enemy combatant” the government alleges he is, or an innocent bystander caught up in the initial sweep.⁶⁵ A second set of cases, dealing with a

<http://www.unhcr.org/refworld/docid/3ae6b36c8.html>; noted in Mayer, *The Dark Side*, *supra*, note 21, at 120.

⁶³ The issue of torture is explored in more detail below.

⁶⁴ On the deaths in custody, see Mayer, *The Dark Side*, *supra*, note 21, at 333.

⁶⁵ A 2006 report by scholars at Seton Hall School of Law found that “Only 8% of [Guantanamo] detainees were characterized as al Qaeda fighters. Of the remaining detainees, 40% have no definitive connection with al Qaeda at all and 18% are have no definitive affiliation with either al Qaeda or the Taliban”. It also found that “Fifty-five percent (55%) of the detainees are not determined to have committed any hostile acts against the United States or its coalition allies.” Most concerning, “Only 5% of the detainees were captured by United States forces. 86% of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody.” Commenting on this report, Jane Mayer, *ibid*, note 21, at 184-5, suspects that many if not most of the detainees arrested by non-US forces were handed over by bounty-hunters. See Mark Denbeaux and Joshua Denbeaux, et al, “Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defence Data”, Seton Hall Law School, 2006; online, Seton Hall: <<http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/Guantanamo-Reports.cfm>>.

smaller group of detainees charged with war crimes, concerns the validity of the military tribunal scheme set up to try them. The question in these latter cases was whether the Geneva Conventions do in fact apply, along with any other, more stringent, US laws dealing with the use of military tribunals.

With the exception of the US Supreme Court's decision in *Hamdan v. Rumsfeld*,⁶⁶ holding that the Geneva Conventions do apply to detainees held at Guantanamo, the courts have been largely deferential to the assertions of expanded executive authority. (The deferential role of the courts, as a key feature of authoritarian legality, is explored in more detail below. I canvas the cases briefly here to lend coherence to the present discussion of indefinite detention and torture.)

The first of these decisions involved the case of Yaser Hamdi, an American citizen who was captured in Afghanistan in late 2001 while fighting for the Taliban against Northern Alliance forces. Initially brought to Guantanamo for interrogation, authorities moved him, upon learning of his citizenship, to a Naval brig in Virginia for a period, then to a brig in South Carolina. In the view of the Bush administration, Hamdi's involvement in Afghanistan qualified him as an "enemy combatant". On this basis, the US could detain him indefinitely, as a lawful incident to the powers set out in the AUMF. But the US also asserted the right to keep him in solitary confinement, with no contact with anyone apart from the military, and to deprive him of access to counsel and to any judicial review of his detention. On a petition for habeas corpus brought by his father, the case made its way to the US Supreme Court.⁶⁷ A plurality of the court agreed with the government that the AUMF authorizes the detention of combatants captured abroad — including citizens —

⁶⁶ 415 F.3d 33 USSC (2006).

⁶⁷ *Hamdi et al. v. Rumsfeld, Secretary of Defence, et al*, 542 U.S. 507 (2004).

and that the detention could continue as long as hostilities lasted, which could be indefinitely. It also held that Hamdi was entitled to counsel and judicial review of his detention, but that the executive was entitled to considerable deference in the process. The standard of review could be lower, it could involve secret evidence or hearsay, and it could take place in a military tribunal rather than a civilian court.

In response to this decision, the US military put in place “Combatant Status Review Tribunals” [“CSRTs”] to provide detainees with a process for review that accorded with the *Hamdi* decision. However, detainees were appointed counsel by the tribunal (limited to members of the military); the military controlled who could be called as a witness; and detainees (or their counsel) were not able to examine government witnesses.⁶⁸ Hearsay was also admitted, and factual assertions by the military were assumed valid unless rebutted.⁶⁹

On the same day that *Hamdi* was decided, the Court issued its decision in *Rasul v. Bush*.⁷⁰ This case affirmed that a statutory right to bring a habeas corpus petition extended not only to those within the United States, but also to those held in territories under the authority or control of the US.⁷¹ In response, congress passed the *Detainee Treatment Act* (2005),⁷² which explicitly precluded detainees at Guantanamo from seeking habeas corpus under the former statutory scheme.⁷³ The act also limited review of decisions from the Combat Status Review Tribunal to the Court of Appeal for the District of Columbia, on the narrow grounds that the decision was “consistent with the standards and procedures

⁶⁸ Dworkin, “Why It Was A Great Victory”, (16 July, 2008) *New York Review of Books*.

⁶⁹ Dworkin, *ibid*.

⁷⁰ *Rasul v. Bush*, 542 U.S. 466 (2004).

⁷¹ Title 28, Part VI, Chapter 153, section 2241.

⁷² *Detainee Treatment Act of 2005* (H.R. 2863, Title X).

⁷³ Section 1005.

specified by the Secretary of Defence”, and with the US Constitution, to the extent that it applied.

Thus, by early 2006, detainees at Guantanamo seeking habeas corpus were limited to CSRTs, followed by an appeal to a single court in Washington D.C. The validity of the President’s military tribunals for those facing war crimes prosecutions under military tribunals remained unclear.

The latter question was addressed in *Hamdan v. Rumsfeld* (2006),⁷⁴ which dealt with a challenge to military tribunals brought by a detainee facing prosecution for the crime of conspiring to commit an act of terror against the US. The majority in this case held that Common Article 3 of the Geneva Conventions applied to detainees at Guantanamo, setting out minimal standards the US was obliged to uphold. This included a prohibition on “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁷⁵ The Bush administration’s intended military tribunal scheme contravened Article 3, because it allowed for the admission of any evidence that, in the opinion of the presiding officer, “would have probative value to a reasonable person”; the accused and his counsel could be denied access to evidence; and the accused and his counsel could be excluded from and prevented from ever learning what evidence was presented during any part of the proceeding the presiding officer decides to “close”.⁷⁶

⁷⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁷⁵ Common Article 3, section 2(d).

⁷⁶ *Hamdan*, *supra*, note 74, section vi(a)

In response, congress passed the *Military Commissions Act of 2006*.⁷⁷ This codified a revised scheme for *both* status review hearings and war crimes prosecutions. Statements obtained through coercive interrogations or torture could be admitted,⁷⁸ along with secret evidence, and detainees could be excluded from hearings altogether.⁷⁹

While the validity of the new military commission scheme for those facing prosecution remained unclear — *i.e.*, was it consistent with the Geneva Conventions? — detainees continued to litigate the issue of habeas corpus. In *Boumediene v. Bush* (2008),⁸⁰ the court was asked the more expansive question of whether the Constitution's guarantee of habeas corpus extended to non-citizens held by the US on foreign soil in its permanent control. And if so, was the scheme for review of detentions under the *Detainee Treatment Act of 2005* and in the *Military Commissions Act of 2006* consistent with this right? The court sided with the detainees, holding that they do have a constitutional right to seek habeas corpus in US federal court, and that the legislative scheme for review under both acts was not an adequate substitute for this. However, the court continued to sanction a form of habeas corpus favourable to the government (more on this below). And, although a series of habeas challenges have since been brought in US federal court, no prisoner has yet gained his freedom from a post-*Boumediene* habeas challenge.

At the time he campaigned for president, Barack Obama expressed the intention to try prisoners at Guantanamo in civilian US courts, for terrorism offences or crimes under the international law of war. In 2009, facing vigorous resistance in congress to holding trials in the United States, Obama reversed course and acquiesced in the plan to

⁷⁷ Public Law 109-366.

⁷⁸ s. 948r.

⁷⁹ s. 949.d(3)(f)(B)

⁸⁰ *Boumediene v. Bush* 476 F. 3d. 981 (2008).

hold trials in military tribunals. In the *Military Commissions Act of 2009*,⁸¹ congress amended the scheme set out in the 2006 MCA, to explicitly rule out the use of evidence obtained by torture or cruel treatment “whether or not under the color of law”, but it continued to allow for the use of hearsay and secret evidence.⁸²

To date, six detainees have been convicted in the military commission regime created by President Bush and continued, in modified form, by Obama.⁸³ A further five are due to be prosecuted, including Abd al Rahim al Nashiri (for his role in the bombing of the USS Cole in Yemen in 2000) and Khalid Shaikh Mohammed (for involvement in 9/11).⁸⁴ The US is seeking the death penalty in each of these pending cases. Only one detainee, Ahmed Ghailani, has been tried in a civilian court in New York for his involvement in the 1998 bombings of US embassies in Kenya and Tanzania.⁸⁵

The status of the other remaining Guantanamo detainees (some 165 men) remains unclear. The most recent explanation of the administration’s policy with respect to them was set out by President Obama in a May 2009 speech at the National Archives in Washington. He spoke of the detainees as falling into one of four categories. Some of them, he said, would be tried for criminal offences in American courts, for offences committed in the United States (an option since abandoned). Others, detained on battlefields abroad and whose cases concern sensitive evidence, would be tried by military commissions where greater secrecy could be maintained. A third group of some 20

⁸¹ P.L. 111-84, 2009.

⁸² *Ibid*, s. 1802, (4), and (5) and (7)

⁸³ Human Rights First, “Military Commissions,” online: <www.humanrightsfirst.org/our-work/law-and-security/military-commissions/>.

⁸⁴ Reed Brody, “No Real Justice in Guantanamo,” (19 April 2012) *Human Rights Watch*, online: <<http://www.hrw.org/news/2012/04/19/no-real-justice-guantanamo>>.

⁸⁵ The conviction was handed down in November of 2010. See the ACLU press release online: <<http://www.aclu.org/national-security/former-guantanamo-detainee-found-guilty-conspiracy-federal-court-terrorism-trial>>.

detainees would be released pursuant to habeas challenges (now under appeal, discussed below).

A fourth and final group, comprising some 40 to 50 detainees, posed the greatest challenge. These were men who “cannot be prosecuted yet who pose a clear danger to the American people.”⁸⁶ For persons in this category, there may be no offences against them to prosecute, or no untainted evidence on which to rely. These are people who may have “received extensive explosives training at al Qaeda training camps, or commanded Taliban troops in battle, or expressed their allegiance to Osama bin Laden, or otherwise made it clear that they want to kill Americans.” The conundrum for Obama was how to reconcile the indefinite detention of these detainees with the rule of law. Seeking to distinguish his own approach from the overreactive and “ad hoc” approach of the Bush administration, Obama stated that:

[...] we must recognize that these detention policies cannot be unbounded. They can’t be based simply on what I or the executive branch decide alone. That’s why my administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law. We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don’t make mistakes. We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.

The President sought to clarify these terms in an executive order of March 7, 2011.⁸⁷ The order sets out a framework for annual review of a detainee’s status, with a range of procedural protections. These include notice of the grounds for continued detention, the assistance of counsel, and the opportunity to make written and oral submissions. However, the information provided to the detainee is still to be limited to an “unclassified summary” of the material on which the person’s detention is based. The board may order

⁸⁶ “Text: Obama’s Speech on National Security” (21 May 2009) *The New York Times*, online: <<http://www.nytimes.com/2009/05/21/us/politics/21obama.text.html>>.

⁸⁷ Section 3, Executive Order 13567, F.R. v. 76, no. 47.

the person's continued detention on the vague standard that it is "necessary to protect against a significant threat to the security of the United States."⁸⁸ Thus, in both Obama's speech, and in his order, the rule of law here is conceived in terms that are compatible with the notion of *indefinite detention without charge on secret evidence*.

As a capstone to this long and tangled history of presidential powers to detain is congress's endorsement of the President's March 2011 order in the *National Defence Authorization Act of 2012*, discussed earlier.⁸⁹ The order, and the provisions endorsing it, provide a way for detainees to seek periodic review of their detention. But a point of larger significance, noted at the outset of this thesis, is the fact that section 1021 of the Act codifies the president's authority to indefinitely detain without charge *any* person – citizen or foreigner – who aided in the 9/11 attacks, or who assists al Qaeda or *any* "associated forces that are engaged in hostilities against the United States or its coalition partners".⁹⁰ This not only tacitly renews the powers of the AUMF, but also considerably extends the possible scope of the president's detention powers.

The *PATRIOT Act* provides one further notable means for indefinite detention. Section 412 allows the Attorney General of the United States to issue a certificate against an alien where there are "reasonable grounds to believe" that he or she has "engaged in

⁸⁸ Executive order, *ibid*, section 2.

⁸⁹ In addition to endorsing the scheme, Section 1023 of the Act requires the administration to issue a report on the implementation of the scheme within 180 days of the enactment of the *National Defence Authorization Act*, *supra*, note 36.

⁹⁰ Section 1021(b)(2), *National Defence Authorization Act*, *supra*, note 36. As Glenn Greenwald has noted, both Human Rights Watch and the American Civil Liberties Union observed in mid-December 2011, after Obama indicated a willingness to sign the NDAA into law, that the bill would mark the first time indefinite detention has been entrenched in US law since the *Internal Security Act of 1950* – an act that President Truman vetoed on the basis that it would "make a mockery of our Bill of Rights", and which congress passed by overriding the veto. As Greenwald also notes, the *ISA* was overturned by the *Non-Detention Act of 1971*, 18 U.S.C. 4001(a). Glenn Greenwald, "Obama to Sign Indefinite Detention Bill into Law" (15 December 2011) *Salon.com*; online: <www.salon.com/2011/12/15/obama_to_sign_indefinite_detention_bill_into_law/singleton/>

activity that endangers the national security of the United States.”⁹¹ Once certified, the Act requires the Attorney General to detain the person. Within 7 days, removal proceedings must be initiated, or the person must be charged with an offence or released. If removal proceedings have been initiated, or the person is charged, they can continue to be detained indefinitely, with review every six months. The person may continue to be held only if the Attorney General, or a court on a habeas corpus petition, finds that “the release of the alien will threaten the national security of the United States or the safety of the community or any person”. David Cole notes that largely in reliance on these provisions, the US government detained at least 5,000 mostly Arab or Muslim foreigners in the two years following 9/11.⁹²

2.3.1.2 Indefinite detention without charge in Canadian law

While Canada opted in the fall of 2001 to send troops to Afghanistan, in support of the US-led mission to defeat the Taliban and hunt down members of al Qaeda, it has not sought to detain terror suspects in a foreign base equivalent to Guantanamo.⁹³ It has, however, employed a set of immigration laws to accomplish an analogous purpose within Canada: to indefinitely detain, without charge, non-citizens suspected of involvement in terror, on secret evidence.

The focus of these laws involves a scheme for the issuance of “security certificates,” which act as warrants for the arrest and detention of persons pending their removal from

⁹¹ *PATRIOT Act*, P.L. 107-56, 115 Stat. 272 (2001), section 412(a), adding 236A(3)(A) to 8 U.S.C. 1101. The full title of the Act is: “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

⁹² David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: The New Press, 2003), at 25-6.

⁹³ Canada’s handling of detainees in Afghanistan has been the subject of long-standing controversy, but lies beyond the scope of the present argument for authoritarian legality. In distinction to the measures canvassed here, such transfers have not occurred, explicitly or impliedly, for reasons that fall within a framework of belief about threats to national security and necessary measures.

Canada. The certificate regime has been a part of immigration law since the late 1970s. It was added to the *Immigration Act* in something close to its present form in 1988, and was carried over in substantially the same form in the *Immigration and Refugee Protection Act* of 2002.⁹⁴ Although it had been used in various cases prior to 2001, it became an important tool in Canada's counter-terror policy after 9/11. Between 2000 and 2003, the government issued certificates to arrest five Muslim men believed to be associated with terrorism and has detained them for periods ranging from two to ten years.⁹⁵

Briefly, during the period when these detentions first occurred, the security certificate regime worked as follows. Section 34 of the *Immigration and Refugee Protection Act*⁹⁶ stated that a permanent resident or foreign national is 'inadmissible' to Canada "on security grounds" for a number of possible reasons, including "engaging in terrorism," or being involved with an organization that is engaged in terrorism, or simply "being a danger to the security of Canada". Section 77 ordered the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness, together, to sign a certificate stating that a permanent resident or foreign national is inadmissible to Canada on grounds of "security" or "serious criminality," among others, and to refer the matter to Federal Court for review. Once signed, the certificate functioned as a warrant for the person's arrest and detention.

A hearing in Federal Court then had to be held within 48 hours of arrest in the case of a permanent resident. For a foreigner, it could be as late as 120 days.⁹⁷ The question for the court on review of the certificate was whether, "on the basis of the

⁹⁴ Kent Roach and Gary Trotter note that as of 2005, Canada had issued 27 security certificates: "Miscarriages of Justice in the War Against Terror" (2005) 109 *Penn State Law Review* 109, 967.

⁹⁵ For a discussion of these cases, see Robert Diab, *Guantanamo North*, *supra*, note 48, Introduction.

⁹⁶ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

⁹⁷ *Ibid*, the previous section 77.

information and evidence available,” it was “reasonable”.⁹⁸ If it were found reasonable, deportation proceedings would begin. In practice, however, deportations could be deferred indefinitely where there were concerns that detainees would face the risk of torture or death if deported.

The process itself placed the detainee at a serious disadvantage. The court could conduct the hearing *in camera*; prevent the disclosure of information to detainee; consider information or evidence in private (and for up to seven days after the matter has been referred for determination); and could hear all or part of the evidence in the absence of the person named in the certificate.⁹⁹ The court could receive into evidence “anything that, in the opinion of the judge, is appropriate”. The person named in the certificate was provided only a summary of the information or evidence against them sufficient to “enable them to be reasonably informed of the circumstances giving rise to the certificate” – but excluding anything which, if disclosed, would be “injurious to national security”.¹⁰⁰ As Craig Forcece notes, in some cases, the summary provided was “of the most general sort”.¹⁰¹ He also points out that the framework did not call for a “balancing of the secrecy interest against the fair trial imperative” – as does the *Canada Evidence Act*.¹⁰² And where the use of secret evidence did lead to a serious violation of procedural fairness, there was no provision for dismissing the government’s case (as there is in the *CEA*, with a power to grant a judicial stay in criminal proceedings).¹⁰³

⁹⁸ *Ibid*, section 80(1).

⁹⁹ *Ibid*, the previous section 78(1).

¹⁰⁰ *Ibid*.

¹⁰¹ Craig Forcece, “Assessing Secrecy Rules” (2009) Institute for Research on Public Policy: Choices, 15:5, at 15.

¹⁰² *Ibid*. See the discussion of section 38 of the *CEA* below.

¹⁰³ *Ibid*.

Separately, the five men detained since 2000 brought a number of court challenges to the certificate regime.¹⁰⁴ The central question in these cases was whether the scheme violated the detainee's right in section 9 of the *Charter* to be free from arbitrary detention, the right in section 12 to be free from cruel and unusual treatment, and the broader and more comprehensive right in section 7 to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."¹⁰⁵ In *Re: Charkaoui*¹⁰⁶ the Federal Court of Appeal upheld the constitutionality of the regime. This decision was appealed to the Supreme Court of Canada, in a case combining the appeals of two other detainees, giving rise to the most significant judicial assessment of the certificate regime to date.¹⁰⁷

A unanimous court of nine justices held that the scheme was unconstitutional, but that with a few slight modifications, this could be rectified. First, the regime violated the right against arbitrary detention, because it lacked an immediate initial review in all cases (*i.e.*, sooner than 120 days), and timely reviews thereafter. Second, given the psychological stress caused by indefinite detention without timely review, the framework also violated the right against cruel or unusual treatment. The court suggested that if Parliament amended the scheme to include timelier, periodic reviews, these violations could be remedied. Parliament took up this invitation in Bill C-3 a year later.¹⁰⁸

¹⁰⁴ In addition to Adil Charkaoui, the following have been detained and have launched challenges to various aspects of the security certificate regime: Hassan Almrei, Mohammed Harkat, Mohammad Mahjoub, and Mahmoud Jaballah. See, *e.g.*, *Almrei v. Canada (Minister of Citizenship and Immigration)* 2005 FCA 54; *Harkat v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1104; *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, 2004 FC 1028; *Re: Jaballah* 2005 FC 399.

¹⁰⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁰⁶ *Charkaoui (Re)* 2004 FCA 421, [2005] 2 F.C.R. 299.

¹⁰⁷ *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350.

¹⁰⁸ Revisions were included in Bill C-3, *An Act to amend the Immigration and Refugee Protection Act*, S.C. 2008, c. 3.

However, the court also held that the scheme violated section 7 of the *Charter* because it failed to provide the detained person a fair hearing, as required by “the principles of fundamental justice.” A fair hearing is one that is held before an independent and impartial judge, where a detainee enjoys the right to know the case he has to meet and has an opportunity to respond. In this case, the judge presiding over a certificate hearing maintains independence and impartiality, but because of the provision for the use of secret evidence and *in camera* hearings that exclude the detainee, the right to know the case and to make full answer and defence is violated. The court recognized the real danger that a judge could decide matters without all of the relevant information, precisely because the detainee was unable to speak to or contradict a point raised by the secret evidence. To satisfy the requirements of section 7, the court held, “either the person must be given the necessary information, or a substantial substitute for that information must be found.”

The question, then, was whether a “substantial substitute” could be found. One possibility appealed to the court: the use of “special advocates.” These are lawyers with security clearances who would have access to both the detainee and the secret evidence, on the promise that in the process of obtaining instruction from detainees, they would not divulge the evidence. In this curious position, they should, in theory, still be able to carry out an effective cross-examination of government witnesses. And on this basis, the court found that a regime modified for the use of special advocates would indeed present a “substantial substitute” for full disclosure. Given the availability of this less intrusive way of breaching the right in question, the violation of section 7 here could not be justified as a “reasonable limit” on the rights set out in section 1 of the *Charter*. In Bill C-3, Parliament amended the certificate regime to include the use of special advocates.

Yet the decision, and the later amendments to the scheme, give rise to two general concerns. The first is that special advocates alone would not guarantee a fair hearing. The judge could still receive evidence, and hold hearings with respect to it, in the detainee's absence. Disclosure to the detainee would also continue to be as limited as before — indeed, in Bill C-3 (the act amending the certificate regime), after having seen the secret evidence, a special advocate may not disclose it to the detainee, and may not even speak to the detainee without the court's approval.¹⁰⁹ Commenting on the bill, Craig Forcese writes:

A special advocate can never share the secret information with the interested person. Thus, there will never be a case in which that person can inform a special advocate that the government's chief witness (say, a secret detainee interrogated by an allied intelligence agency) has a personal animus prompting him to fabricate a story. For this reason, issues of credibility — the meat and potatoes of a fair trial — cannot be effectively raised by advocates.¹¹⁰

Forcese also notes that Bill C-3 fails to provide special advocates with a basis on which to “seek and review government records not already disclosed to the court.” Advocates must therefore rely on the government's own decisions about what may or may not be relevant. This is a significant concern because, as Forcese writes,

...what the government considers ‘relevant’ and what a special advocate charged with defending the best interest of the detained person considers ‘relevant’ will not always correspond. This discrepancy of views has arisen in Britain, where the government has sometimes failed to give special advocates relevant (and exculpatory) information. It is also an observation affirmed by the Arar commission experiences: Commission counsel (because they were able to compel everything from the government) found information the government initially had declined to disclose.¹¹¹

¹⁰⁹ See Bill C-3, s. 85.2(c). The test for speaking to a detainee after seeing the evidence is whether the court finds it “necessary to protect the interests of the permanent resident or foreign national”. Kent Roach notes: “This in itself is a fairly stringent standard that requires the judge to conclude that the requested power is necessary and not just advisable in order to protect the interests of the non-citizen.” Kent Roach, “*Charkaoui* and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislatures” (2008), 42 *S.C.L.R.* (2d) 281, at 315.

¹¹⁰ Craig Forcese, “Is Bill C-3 the Security Way to Go?” (6 February, 2008) *Globe and Mail*, A17.

¹¹¹ *Ibid.*

Forcese also raises the concern that Bill C-3 does not expressly affirm the “ability of the advocate to meet the interested person once the former has seen the secret information.” A judge has the discretion to allow this, but as Forcese points out, a similar provision in Britain has resulted in “little or no contact, hurting the advocate’s effectiveness.”¹¹²

Regardless of whether special advocates make the process fairer, a more serious concern remains. The court’s decision in *Charkaoui* has the effect of deeming the remainder of the scheme constitutional. Thus, with an earlier initial review, followed by periodic reviews, and the use of special advocates, all of the other concerns raised about the scheme have been held consistent with “fundamental justice.” In essence, *Charkaoui* confirms the constitutional validity a framework allowing for *indefinite detention without charge on secret evidence*. The amending legislation, Bill C-3, confirms this inference by virtue of the fact that, with one exception, it deals only with the concerns raised by the court in *Charkaoui*.¹¹³ This remains valid law in Canada, with ongoing consequences for the liberty interests of three of the five subjects of the certificates.¹¹⁴

¹¹² *Ibid.* Forcese and Roach have noted that Bill C-3 employs the most restrictive of the options before Parliament in terms of how to craft a scheme for the use of special advocates. Other models, including one employed by Canada’s Security Intelligence Review Committee, allow special counsel the freedom to communicate with clients after having seen secret information (with an obligation to maintain secrecy). As Forcese writes: “for reasons that have never been satisfactorily explained to this author, the government opted for the secrecy-maximizing and fair-trial-minimizing United Kingdom approach.” Craig Forcese, “Assessing Secrecy Rules” (2009) Institute for Research on Public Policy: Choices, 15:5, at 26. See also Kent Roach, “*Charkaoui* and Bill C-3”, *supra*, note 109, at 305.

¹¹³ Section 83(1.1) of the bill also includes a provision stating that the prohibition in section 269.1 of *Criminal Code* on the use of evidence obtained by torture or ‘inhuman or degrading treatment’ also applies to security certificate hearings.

¹¹⁴ At present, Mohammad Mahjoub, Mahmoud Jaballah, and Mohamed Harkat remain subject to onerous terms of community supervision as part of their pending security certificates. In a June of 2011 profile of Mahjoub, Sara Falconer writes: “Despite a recent detention review that relaxed his conditions slightly, Mahjoub is still held under surveillance that is completely unprecedented in the judicial system in Canada. He wears a GPS tracking bracelet at all times. A camera outside his door monitors his every move, and he is only permitted to leave the house for four hours a day, and only within a few blocks of his apartment. CSIS monitors every phone call -- in fact, they were caught listening to protected solicitor-client phone calls between Mahjoub and his lawyer, contrary to a court order.” Sara Falconer, “Mohammad Mahjoub: the Life of a Security Certificate Detainee” (June 1, 2011) *Rabble.ca*, online: <<http://rabble.ca/news/2011/06/mohammad-mahjoub-life-security-certificate-detainee>>.

An important caveat to add to this is that, as Kent Roach has noted,¹¹⁵ the court was not, strictly speaking, passing judgment on the constitutionality of indefinite detention *per se*. It was asked only whether indefinite detention *pending deportation* violated the *Charter*. A more precise reading of the central holding of this decision is that indefinite detention on secret evidence, pending deportation, is constitutional if a special advocate scheme can be employed.¹¹⁶

2.3.1.3 Torture or cruel and unusual treatment in the American context

The Bush administration has continuously denied ever having resorted to torture.¹¹⁷ It has conceded the use of “special” or “enhanced” coercive interrogation methods, or “alternative procedures,” including waterboarding, and has also admitted to the detention of prisoners at “black sites” run by the CIA.¹¹⁸ Yet in each case that the use of these

¹¹⁵ Roach, *supra*, note 94.

¹¹⁶ The court avoided the larger question of indefinite detention *per se*, but did note in passing that, in an individual case, where a person could not be deported, given the risk of deportation to torture, the prospect of *their* indefinite detention could be found to violate section 7 or 12 of the *Charter*. This would, however, remain to be determined on a case by case basis. McLachlin, C.J., at para. 123, *Charkaoui*, *supra*, note 107: “I conclude that extended periods of detention pending deportation under the certificate provisions of the IRPA do not violate s. 7 or s. 12 of the Charter, provided that reviewing courts adhere to the guidelines set out above. Thus, the IRPA procedure itself is not unconstitutional on this ground. However, this does not preclude the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the Charter in a manner that is remediable under s. 24(1) of the Charter.”

¹¹⁷ For example, in an interview with the *New York Times*, in January 2005, Bush stated that “torture is never acceptable, nor do we hand over people to countries that do torture” (cited in Jane Mayer, “Outsourcing Torture: The Secret History of America’s ‘Extraordinary Rendition’ Program” 14 February 2005, *The New Yorker*). In a speech on September 6, 2006, Bush described the detention and use by the CIA of an “alternative set of procedures” in the interrogation of suspects at prisons in undisclosed places abroad and at Guantanamo. Bush insisted on the need to keep the specifics of the techniques used confidential but affirmed that “the procedures were tough and they were safe and lawful and necessary.” For the text of the speech, see the *New York Times* online: http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all

¹¹⁸ In addition to Bush’s speech on Sept 6, 2006, *ibid*, in February of 2008, CIA Director Michael Hayden confirmed that Guantanamo detainees Khalid Sheikh Mohammed, Abu Zubaydah and Abd al-Rahim al-Nashiri were waterboarded in 2002 and 2003: Associated Press, “White House Defends Use of Waterboarding” 6 February 2008, online: http://www.msnbc.msn.com/id/23030663/ns/politics-white_house/t/white-house-defends-use-waterboarding/. On February 7, 2008, White House spokesman Tony Fratto impliedly conceded the past use of waterboarding by describing it as a legal technique that the President might reauthorize “under certain circumstances”, including when there is a “belief that an attack might be imminent” (cited in Greg Miller, “Waterboarding Is Still An Option” 7 February 2008, *Los Angeles*

measures was conceded, the administration insisted that they never amounted to torture or cruel or unusual treatment.¹¹⁹ President Obama has made numerous pronouncements to the effect that under his administration, the United States does not torture.¹²⁰ In one sense, then, torture, or cruel and unusual treatment, has played no part in official or explicit US counter terror law or policy after 9/11, and strictly speaking forms no part of an authoritarian legal paradigm. On another reading, however, ample evidence suggests that the United States has resorted to, and continues to resort to, torture or cruel treatment—and that by seeking to inscribe the legality of its conduct through euphemistic phrases and concepts such as “enhanced,” “robust,” or “special” interrogation, its handling of torture and cruel treatment exemplifies authoritarian legality.

Evidence of the use of torture by US officials, after 9/11, has been investigated by various rights groups, jurists, and journalists.¹²¹ A 2011 report by Human Rights Watch,

Times). In July 2008, Attorney General John Ashcroft affirmed that waterboarding, and other harsh interrogation techniques, had served a “valuable” purpose: CNN, “Ashcroft Defends Waterboarding before House Panel” 17 July 2008, online: <http://articles.cnn.com/2008-07-17/politics/ashcroft.waterboarding_1_waterboarding-interrogation-technique-torture?_s=PM:POLITICS>.

¹¹⁹ See, e.g., Bush’s speech in February 2006, and the Hayden and Ashcroft appearances, *ibid*.

¹²⁰ See, e.g., Obama’s archive speech, *supra*, note 86, “I can stand here today, as President of the United States, and say without exception or equivocation that we do not torture...”. See also: “Statement of President Barack Obama on Release of OLC Memos” (Apr. 16, 2009), online: <http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos>; and Obama’s speech in Cairo, “I have unequivocally prohibited the use of torture by the United States...”: online, *New York Times* 4 June 2009, online: <<http://www.nytimes.com/2009/06/04/us/politics/04obama.text.html?pagewanted=all>>

¹²¹ See, e.g., Human Rights Watch, “Getting Away with Torture: the Bush Administration and Mistreatment of Detainees” July 2011, HRW, online: <<http://www.hrw.org/en/node/100262/section/1>>; The International Commission of Jurists, “Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism, and Human Rights” February 2009, ICJ, online: <<http://ejp.icj.org/IMG/EJP-Report.pdf>>; the International Committee of the Red Cross, “Report on the Treatment of Fourteen ‘High Value’ Detainees in CIA Custody”, February 2007, ICRC, online: <<http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>>; the United Nations’ Commission on Human Rights, “Situation of the Detainees at Guantanamo” February 2006, UNHCR, E/CN.4/2006/120, online: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement>>; Human Rights Watch, “By the Numbers: Findings of the Detainee Abuse and Accountability Project” April 2006, HRW, online: <<http://www.hrw.org/en/node/11352/section/1>>. See also Mayer, *The Dark Side*, *supra*, note 21; Karen Greenberg, *The Least Worst Place: Guantanamo’s First 100 Days* (London: Oxford University Press, 2009); and David Cole and Jules Lobel, *Less Safe, Less Free*, *supra*, note 47.

drawing upon various earlier reports, alleges that “[a]s a direct result of Bush administration decisions, detainees in US custody were beaten, thrown into walls, forced into small boxes, and waterboarded—subjected to mock executions in which they endured the sensation of drowning. Two alleged senior al Qaeda prisoners, Khalid Sheikh Mohammed and Abu Zubaydah, were waterboarded 183 and 83 times respectively.”¹²² The report also alleges that other techniques used on prisoners at Guantanamo and at sites in Iraq and Afghanistan included “painful ‘stress’ positions; prolonged nudity; sleep, food, and water deprivation; exposure to extreme cold or heat”; and also “beatings, near suffocation, [and] sexual abuse”.¹²³

In a series of memos authored in 2002 and 2003,¹²⁴ the Bush administration took the position that conduct amounted to torture only if it caused *physical* pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”¹²⁵ It also held the view that, given reservations and qualifications with which the United States had agreed to enter into the 1984 UN *Convention Against Torture*, the President remained free to determine acceptable interrogation techniques, to the limit of those that would “shock the conscience” of a court.¹²⁶ John Yoo authored a memo in March of 2003 arguing for the legality of dousing a prisoner with “scalding water, corrosive acid, or [a] caustic substance,” or even “slitting an ear, nose, or lip, or disabling a tongue or limb.”¹²⁷ As late as the spring of 2005, the

¹²² Human Rights Watch, “Getting Away with Torture” (2011) *supra*, note 121, at 4.

¹²³ *Ibid.*

¹²⁴ The *New York Times* provides links to each memo, with a chronology and explanation at: <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html>.

¹²⁵ See, *ibid*, the August 1, 2002 memo from Office of Legal Counsel to Alberto Gonzales, Counsel to the President.

¹²⁶ See, *ibid*, the memo of March 14, 2003, from Office of Legal Counsel to William Hanes, General Counsel of the Department of Defence, online: <http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf>.

¹²⁷ Mayer, *The Dark Side*, *supra*, note 21, at 230.

Office of Legal Counsel in the Department of Justice received memos from Steven Bradbury, Assistant Attorney General, purporting to endorse the legality of several techniques and their use simultaneously, including: “waterboarding, head and belly slapping, sensory deprivation, sleep deprivation, temperature extremes, and stress positions”.¹²⁸ Officials employing these techniques would remain beyond the scope of criminal prosecution, or could avail themselves of the defence of necessity if prosecuted.¹²⁹ In short, the torture carried out by the Bush administration was either not torture in law, or if indeed it was torture or cruelty in law, it was a justifiable use of the President’s power as Commander in Chief in a time of war.

A further aspect of US counter-terror policy that represents a suspension of the right against torture or cruelty is the practice of extraordinary rendition. This involves the kidnapping of suspects and their covert transportation either to third countries for imprisonment, interrogation and torture, or to CIA “black sites” for interrogation and torture by US officials.¹³⁰ In both cases, all activity unfolds beyond the purview of the law. As Jane Mayer explains, the practice of kidnapping and covert transport has its roots in the Reagan administration, in a program “aimed at a small, discrete set of suspects — people against whom there were outstanding foreign arrest warrants”.¹³¹ After 9/11, “the

¹²⁸ *Ibid*, at 309; the memos are available online: <<http://www.aclu.org/accountability/olc.html>>.

¹²⁹ Further protections against criminal liability set out in the *Detainee Treatment Act of 2005* are explored below.

¹³⁰ Mayer, *The Dark Side*, *supra*, note 21. At 320, Mayer notes that the existence and use of CIA Black sites was first reported in the American press in Dana Priest’s article “CIA Holds Terror Suspects in Secret Prisons” (2 November 2005), *Washington Post*, online: <<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>>.

¹³¹ Mayer, *The Dark Side*, *supra*, note 21, at 108. Human Rights Watch, “Getting Away with Torture” (2011) *supra*, note 121, at 33 to 38, lists a series of cases, including those involving the October 2001 arrest of Australian citizen Mamdouh Habib in Pakistan; the November 2001 arrest of German citizen Muhammad Zammar in Morocco; the December 2001 arrest of Egyptians Ahmed Agiza and Mohammed al-Zari in Stockholm; the November 2003 arrest of Italian citizen Osama Nasr (‘Abu Omar’) in Milan; and the January 2002 arrest of Pakistani citizen Muhammad Madni in Jakarta. See also Leila Sadat, “Extraordinary Rendition, Torture and Other Nightmares from the War on Terror” 75:05/06 *George Washington Law Review* 105.

program expanded beyond recognition”, and would soon include “the wide and ill-defined population that the administration terms ‘illegal enemy combatants’.”¹³² In contrast to extradition, therefore, the rendition program would have the effect “disappearing” detainees into secret CIA sites, or the hands of foreign governments, for torture and lengthy detention.

Among the most notorious and well-documented cases of rendition is that involving Canadian citizen Maher Arar. In 2003, CSIS and the RCMP had provided US customs officials with erroneous information that tied Arar to a person of interest in Montreal. On his return from a family vacation in Tunisia, Arar was detained on a stopover in New York. After holding Arar for 13 days in an immigration detention centre, initially without counsel, then with counsel who was provided almost no information, US authorities rendered Arar to Jordanian custody, who interrogated him, then turned him over to Syria. He was interrogated further, tortured repeatedly, and imprisoned for a year. Months after news of the case had surfaced, Arar continued to languish in a small, damp, windowless, underground cell. Due in large part to the persistent efforts of Arar’s wife, the Canadian government eventually intervened and lobbied for his release.

One further case worth noting involved the CIA’s kidnapping of a Muslim cleric, Abu Omar, from Milan in 2003. Upon detaining Omar, CIA operatives flew him from an American air base in Italy to a base in Germany, then to Egypt, where he was tortured and detained for *four* years. Following his release, the Italian government initiated a prosecution of the CIA base chief in Italy, and 22 others, mostly CIA operatives, on the

¹³² Mayer, *The Dark Side*, *supra*, note 21, at 108.

charge of kidnapping. A trial in Italy was held with the accused *in absentia*, and in November of 2009, all were found guilty.¹³³

In August of 2009, officials in the Obama administration confirmed that the United States would continue the practice of rendition, but with greater oversight of interrogations conducted abroad to ensure that detainees were not tortured.¹³⁴ The policy raises the obvious question of why the US would continue to render suspects to the third countries if not to avoid its obligation to comply with US law. A recent report by *The Nation* supports this view. It alleges that in July of 2011, the CIA has set up a compound behind the presidential palace in Mogadishu, Somalia, at which it is running a “counterterrorism training program for Somali intelligence agents and operatives aimed at building an indigenous strike force capable of snatch operations and targeted ‘combat’ operations against members of Al Shabab, an Islamic militant group with close ties to Al Qaeda.”¹³⁵ In the basement of the compound, prisoners are being held who have been “snatched off the streets of Kenya and rendered by plane to Mogadishu.”¹³⁶ The article also alleges that prisoners are being interrogated and held in small, damp, windowless cells, some for well over a year, and none has been charged with an offence or provided any form of judicial process.

¹³³ Rachel Donadio, “Italy Convicts 23 Americans for C.I.A. Renditions” (4 November 2009) *New York Times*.

¹³⁴ David Johnson, “U.S. Says Rendition to Continue, but With More Oversight” (24 August, 2009) *New York Times*.

¹³⁵ Jeremy Scahill, “The CIA’s Secret Sites in Somalia” (12 July 2011) *The Nation*, online: <<http://www.thenation.com/article/161936/cias-secret-sites-somalia>>.

¹³⁶ *Ibid.*

2.3.1.4 Torture or cruel and unusual treatment in the Canadian context

A significant statement about torture was made in the unanimous 2002 decision of the Supreme Court of Canada in *Suresh v. Canada*.¹³⁷ The case concerned Manickavasagam Suresh, a Sri Lankan refugee whom the Canadian Security and Intelligence Service (CSIS) believed to be a member of, and fundraiser for, a group known as the ‘Liberation Tigers of Tamil Eelam.’ The Canadian government believed this group to be involved in terrorism, but also knew that members of the group had been tortured in Sri Lanka.¹³⁸ Suresh, who was detained on a security certificate in 1995, was awaiting deportation.¹³⁹

At the review of Suresh’s detention in Federal Court, Justice Teitelbaum found that Suresh had been a member of the Tamil Tigers; the group had been involved in terrorist activities; and some members of the group had been subject to torture by the Sri Lankan government.¹⁴⁰ Despite these findings, deportations proceedings followed. The challenge to these proceedings at the Supreme Court of Canada concerned several issues that Suresh raised about the process of arriving at the decision to deport. Among them was the larger constitutional question of whether “returning a refugee to the risk of torture because of security concerns violates the principles of fundamental justice [*i.e.*, section 7 of the *Charter*] where the deportation is effected for reasons of national security”.¹⁴¹

The court surveyed various international law instruments and treaties to which Canada is a party, including the *International Covenant on Civil and Political Rights*

¹³⁷ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

¹³⁸ The Court in *Suresh*, at paragraph 11, refers to a 2001 report from Amnesty International attesting to the use of torture in Sri Lanka.

¹³⁹ R.S.C. 1985, c. 1-2.

¹⁴⁰ This is noted at paragraph 13 of the Supreme Court of Canada decision; see also the trial decision at (1999), 173 F.T.R. 1.

¹⁴¹ *Ibid*, para. 49.

(1966), and the *Convention Against Torture*. It held that the court's interpretation of *Charter* rights could be guided by these treaties, but was not determined by them. It also acknowledged that international law absolutely prohibited the practice of deporting people to face the risk of torture — a point on which the court below had disagreed. In its conclusions, however, the court introduced a subtle twist in logic:

...both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*.¹⁴²

In other words, although the deportation to torture was generally prohibited under the *Charter*, it was not absolutely prohibited. Although no explanation was provided for the decision to introduce a measure of executive discretion here, the court sought to confine this discretion to a small ambit of cases, yet to be encountered:

We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1. [...] the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.¹⁴³

In short, the court held that in some cases, national security will trump a person's right to be free from torture – and the outcome would still be consistent with the *Charter's* guarantee of “fundamental justice”.

The *Suresh* exception was applied by the Federal Court in *Nlandu-Nsoki v. Canada* (2005),¹⁴⁴ suggesting that it may become more than an academic curiosity. Nsoki was a

¹⁴² *Suresh*, *supra*, note 137, at para. 76.

¹⁴³ *Ibid*, para. 78.

¹⁴⁴ *Nlandu-Nsoki v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 17.

refugee claimant from Angola who was found inadmissible to Canada on the basis of his membership in an Angolan terror group. He sought a stay of deportation on the basis of a risk of torture upon his return to Angola. An opinion issued by a “pre-removal risk-assessment officer” had concluded that there was in fact a “very serious risk of torture and severe sanctions” if he were returned. Nsoki brought a *Charter* challenge to the order, which Mr. Justice Shore dismissed, citing *Suresh* and its holding that deportation could proceed despite the risk of torture in “exceptional circumstances”. A notable fact here is how broadly the exception was conceived. As Shore J. asserted, “In this case exceptional circumstances do exist, namely the need to protect Canada’s security.”¹⁴⁵ In support of this, the decision cites a passage in the deportation order noting that the group to which Nsoki is alleged to be involved had tortured and killed unarmed civilians. Although Nsoki denied involvement, the panel had “serious reasons to believe that the claimant was complicit, that he had information and knew the plans of attack.” No further argument was made about the danger he posed to the security of Canada.

One further example can be noted of a shift in Canada’s policy in relation to torture. In December of 2010, Public Safety Minister Vic Toews issued a directive (uncovered by the Canadian Press) to the Canadian Security and Intelligence Service.¹⁴⁶ In “exceptional circumstances,” it states, CSIS should “share the most complete information available at the time with relevant authorities, including information based on intelligence provided by foreign agencies that may have been derived from the use of torture or mistreatment.”¹⁴⁷ Exceptional circumstances include “situations where a

¹⁴⁵ *Ibid*, at para. 22.

¹⁴⁶ Jim Bronskill, “Ottawa Tells Spies to Use Possible Torture Info in ‘Exceptional’ Cases,” (7 February 2012) *The Globe and Mail*.

¹⁴⁷ Directive, cited in Bronskill, *ibid*.

serious risk to public safety exists, and where lives may be at stake”.¹⁴⁸ In such cases, the Minister states, “I expect and thus direct CSIS to make the protection of life and property its overriding priority, and share the necessary information – properly described and qualified – with appropriate authorities.”¹⁴⁹ Prior to this directive, the Ministry had taken the position that CSIS should discount any information known to have originated from torture,¹⁵⁰ and presumably to resist sharing it. Although this policy shift relates only to the sharing of information in Canada’s possession, the concern, as Alex Neve of Amnesty International Canada has pointed out, is that “as long as torturers continue to find a market for the fruit of their crimes, torture will continue.”¹⁵¹

2.3.1.5 Targeted killing

The practice of targeted killing on the part of the US has roots that extend to at least the early 1960s, with CIA plots to assassinate Cuban leader Fidel Castro, and later plots to assassinate leaders in Vietnam and Chile.¹⁵² In the late 1990s, following attacks on US embassies in Kenya and Tanzania, President Clinton approved the use of “lethal force in self defence” against members of al Qaeda in Afghanistan.¹⁵³ After 9/11, however, President Bush would authorize targeted killing against a wider class of targets, in a range of countries.¹⁵⁴ Targets could include US citizens, where, as intelligence officials speaking to the *Washington Post* explained, there was “strong evidence that an American was

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ Cited in Bronskill, *ibid.*

¹⁵² Blum and Heymann, *Laws, Outlaws, supra*, note 21, at 73.

¹⁵³ *Ibid.*, at 74.

¹⁵⁴ *Ibid.*

involved in organizing and carrying out acts of terrorism against the US”.¹⁵⁵ In November of 2002, CIA operatives are alleged to have killed six members of al Qaeda traveling in a vehicle through the Yemeni desert, including a US citizen whom the CIA knew was in the vehicle.¹⁵⁶ Targeting killing using unmanned Predator aircraft continued throughout the Bush administration in Afghanistan, Iraq, Pakistan and Yemen.¹⁵⁷ On at least two occasions, Bush administration officials claimed the AUMF as a sufficient legal basis for the practice.¹⁵⁸ The Obama administration has not only escalated the use of targeted killing, but also explicitly endorsed the view that American citizens involved in terrorist activity against the US are appropriate targets.¹⁵⁹

In 2010, Philip Alston, Special Rapporteur on Extrajudicial Executions, authored a report on targeted killing for the UN Human Rights Council. He articulated a series of concerns raised by the US and other nations engaging in targeted killing as a form of counter-terrorism:

[T]he States concerned have often failed to specify the legal justification for their policies, to disclose the safeguards in place to ensure that targeted killings are in fact legal and accurate, or to provide accountability mechanisms for violations. Most troublingly, they have refused to disclose who has been killed, for what reason, and with what collateral

¹⁵⁵ Dana Priest, “US Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes” (27 January 2010) Washington Post, online: <<http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239.html?sid=ST2010012700394>>; cited in Blum and Heymann, *Laws, Outlaws*, *supra*, note 21, at 74.

¹⁵⁶ Priest, *ibid.*

¹⁵⁷ Blum and Heymann, *Laws, Outlaws*, *supra*, note 21, at 74.

¹⁵⁸ Eban Kaplan, “Q&A: Targeted Killings,” (25 January 2006) *New York Times*.

¹⁵⁹ Dana Priest, *supra*, note 155.

consequences. The result has been the displacement of clear legal standards with a vaguely defined licence to kill, and the creation of a major accountability vacuum.¹⁶⁰

Recent cases involving the United States highlight all of these concerns.

In 2010, the Washington Post reported that the CIA was targeting at least three American citizens, including Anwar al-Aulaqi, a radicalized imam born in New Mexico then residing in Yemen. Al-Aulaqi was wanted in part due to an alleged link to a military psychologist accused of killing 12 soldiers and a civilian at a base in Fort Hood Texas.¹⁶¹ Seeking to stop the Obama administration from targeting his son, al-Aulaqi's father filed an action in US federal court.¹⁶² In December of 2010, the case was dismissed, for a lack of standing on the father's part.¹⁶³ Yet the court noted that the case had raised a host of unresolved issues, including whether the program was unconstitutional where it targeted US citizens (violating the "due process" clause of the 5th Amendment); whether it ought to be subjected to some form of legal process, in the selection of targets and the timing of killings; and whether mechanisms should be provided for compensating the families of the many innocent victims of the drone attacks.¹⁶⁴

The targeted killing of Osama bin Laden on May 1, 2011, is perhaps the most notorious example of the practice to date. Bin Laden had been a fugitive of the US justice system since his indictment in 1998 for his involvement in the US embassy bombings in

¹⁶⁰ Philip Alston, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions" (UN General Assembly, Human Rights Council 14th Session) A/HRC/14/24/Add.6 (28 May 2010) para. 1. (I am indebted to Ben Goold, Caitlan Goss, and Liora Lazarus for this source.)

¹⁶¹ *Ibid.*

¹⁶² Charlie Savage, "Suit Over Targeted Killing Is Thrown Out" (7 December 2010) *New York Times*, online: <<http://www.nytimes.com/2010/12/08/world/middleeast/08killing.html>>.

¹⁶³ *Nasser Al-Aulaqi v. Obama et al.* US District Court for District of Columbia, 2010, online: <http://www.investigativeproject.org/documents/case_docs/1436.pdf>.

¹⁶⁴ These issues have provoked considerable debate among legal scholars. See, e.g., chapter 4 of Blum and Heymann, *Laws, Outlaws, supra*, note 21, and Jeremy Waldron "Targeted Killing" 7 May 2011, *LRB Blog*, *London Review of Books*, online: <<http://www.lrb.co.uk/blog/2011/05/07/jeremy-waldron/targeted-killing/>>.

Tanzania and Kenya that year. But after 9/11, one reading of the AUMF would suggest that he had become a legitimate target of assassination.

Yet circumstances around bin Laden's killing, and more recent assassinations involving US citizens have raised significant questions about the necessity or justification for the practice – even on the government's own terms. For example, there is credible evidence to suggest that bin Laden might have been detained rather than killed, given the limited threat he personally posed to US security forces carrying out the raid on his compound. Thus, when announcing the event at a late-night press conference, the President explained that US agents had located bin Laden, and that he was killed “after a firefight”.¹⁶⁵ But administration officials soon offered conflicting accounts, including one suggesting that the firefight in question had taken place earlier in the incident, in an adjacent guesthouse, and did not involve bin Laden.¹⁶⁶ When he was killed, bin Laden was alleged to be only “within reach of an assault rifle and pistol.” He may not have been killed, therefore, in an act of self-defence or a necessary use of force on the part of US operatives, but in a deliberate effort to assassinate him.¹⁶⁷ This account is not contradicted by the President's own initial report.

Jane Mayer offers a suggestive contrast between the Clinton and Obama approaches to bin Laden that illustrates the shift in legal frameworks. In 1998, prior to bombings of the US embassies in Kenya and Tanzania, CIA officials had approached Janet Reno, Attorney General in the Clinton administration, with a plan to locate bin Laden in Afghanistan and transport him to Egypt for “rough” interrogation that would likely result

¹⁶⁵ Peter Baker, Helene Cooper and Mark Mazzetti, “Bin Laden is Dead, Obama Says” 1 May 2011, *New York Times*, online: <<http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html>>.

¹⁶⁶ Robert Booth, “The Killing of Osama bin Laden: How the White House Changed Its Story” 4 May 2011, *The Guardian*, online: <<http://www.guardian.co.uk/world/2011/may/04/osama-bin-laden-killing-us-story-change>>.

¹⁶⁷ See also Yochi Dreazen, Aamer Madhani and Marac Ambinder, “The Goal Was Never to Capture bin Laden,” (4 May 2011) *The Atlantic*.

in his death. Reno is said to have balked at the proposal. Even though evidence of bin Laden's involvement in attacks on the World Trade Centre in 1993, and on US service men in Somalia in the mid-90s, was well known at the time, in Reno's view, any operation to capture and remove bin Laden from Afghanistan could only be approved if he were first indicted and the goal of the operation was to bring him to the US to stand trial for criminal offences.¹⁶⁸ In contrast to this approach, there has been no discussion on the part of the Obama administration – of an explicit nature – as to why it was necessary to kill rather than capture bin Laden.¹⁶⁹ The President's late-night announcement of the killing as having followed a "fire-fight" suggested a rationale for the killing, but notably, the President did not state this explicitly. A justification was implied here, and in later administration accounts, but not offered. The reasonable inference to draw is that, in the administration's view, for most Americans, a justification for killing rather than capturing was neither necessary nor expected nor possibly even appropriate.

In September of 2011 another important threshold was crossed when the United States carried out drone strikes killing two American citizens, the radical cleric Anwar al-Awlaki, and Samir Khan.¹⁷⁰ Following the event, the President described Awlaki as "the leader of external operations for al Qaeda in the Arabian Peninsula" and claimed that he had taken "the lead role in planning and directing the efforts to murder innocent American abroad."¹⁷¹ He also suggested that Awlaki had encouraged or inspired militants in several plots, including the 2009 attempt to blow up a passenger jet flying to Detroit.¹⁷²

¹⁶⁸ *The Dark Side*, *supra*, note 21, at 38.

¹⁶⁹ See Robert Booth, *supra*, note 166, on the administration's varying accounts of the deadly force that commandos encountered, which impliedly made the killing necessary.

¹⁷⁰ Laura Kasinof, Mark Mazzetti, and Alan Cowell, "U.S.-Born Qaeda Leader Killed in Yemen" (30 September, 2011) *The New York Times*.

¹⁷¹ Mark Mazzetti, Eric Schmitt, and Robert Worth, "Two-Year Manhunt Led to Killing of Awlaki in Yemen" (20 September, 2011).

¹⁷² *Ibid.*

Yet no proof was offered in support of these claims. In addition, as the *New York Times* has noted, the administration has refused to disclose a memo from the Office of Legal Counsel setting out the President's purported legal grounding for the authority to include Americans on its list of targets, and its criteria for doing so.¹⁷³ The paper had earlier reported that officials with access to the memo had explained that it authorized Awlaki's killing "because he was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans".¹⁷⁴ The action was also lawful given the imminent risk posed by the target, on the assumption that imminent risks "could include those by an enemy leader who is in the business of attacking the United States whenever possible, even if he is not in the midst of launching an attack at the precise moment he is located."¹⁷⁵

Samir Kahn was the editor of a radical online news organ and was not explicitly targeted, making his death a collateral casualty.¹⁷⁶ Weeks later, in another drone attack Awlaki's 16-year-old son, Abulrahman, was killed along with eight others.¹⁷⁷ The administration has not indicated whom it sought to target in the attack, and initially claimed that Abulrahman was 21 years old at the time.¹⁷⁸ The Washington Post soon published the boy's Colorado birth certificate, dating to 1995.¹⁷⁹ Constitutional scholar and journalist Glenn Greenwald has suggested that the failure to disclose the target in this

¹⁷³ Editorial board, "Justifying the Killing of an American" (11 October 2011) *The New York Times*.

¹⁷⁴ Charlie Savage, "Secret U.S. Memo Made Legal Case to Kill a Citizen" (8 October 2011) *The New York Times*.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Peter Finn and Greg Miller, "Anwar al-Awlaki's Family Speaks Out Against His Son's Death in Airstrike" (17 October 2011) *The Washington Post*.

¹⁷⁸ *Ibid.*

¹⁷⁹ Available online, *The Washington Post*: <<http://www.washingtonpost.com/wp-srv/world/documents/abdulrahman-al-awlaki-birth-certificate.html>>

case indicates at least the possibility that Awlaki's son was explicitly targeted.¹⁸⁰ It also highlights the failure to take accountability for what occurred.

2.3.2 Legislative entrenchment of expanded secrecy and surveillance

In addition to a suspension of core human rights, authoritarian legality is marked by the entrenchment of a greater scope for state secrecy and surveillance. Canadian law provides a better example of the former, and American law a better example of the latter.

2.3.2.1 Expanded scope for secrecy and surveillance in US law

An early example of the expanded scope of both secrecy and surveillance concerns an order that Attorney General John Ashcroft issued in October of 2001, under a power pursuant to federal legislation governing US prisons and military tribunals.¹⁸¹ The order authorizes the Attorney General to monitor communications between prisoners or detainees and their lawyers that would otherwise be private and subject to attorney and client privilege. The order also allows for monitoring where "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism".¹⁸² The Attorney General may issue an order for monitoring in a given case without judicial approval, if notice is provided. But with a court's approval, a client's communication with his or her counsel could be monitored without either being aware of it. The order has been the subject of considerable

¹⁸⁰ Glenn Greenwald, "The Killing of Awlaki's 16-year-old son" (20 October 2011) *Salon.com*.

¹⁸¹ "National Security; Prevention of Acts of Violence and Terrorism," 66 Fed. Reg. 55,062 (October 31, 2001), codified at 28 C.F.R. 501.2, 501.3 (2003).

¹⁸² Section 501.3(d) of the order, *Ibid*.

opposition from civil liberties groups,¹⁸³ and has been challenged in two cases,¹⁸⁴ but remains in effect.

Through other new laws, the US government has expanded the scope of surveillance in ways that are not in themselves inconsistent with an earlier liberal legality, but together suggest a shift toward an authoritarian legal framework. The *PATRIOT Act*, for example, contains provisions that expand the scope of availability of warrants under both the *Foreign Investigation and Surveillance Act* of 1978 [“FISA”] and the *Wiretap Act of 1968* (“Title III”).¹⁸⁵ Prior to the *PATRIOT Act*, a warrant could be issued under FISA on the lower threshold of probable cause to believe that the target of surveillance is a “foreign power” or an agent of a foreign power.¹⁸⁶ By contrast, for ordinary criminal investigations targeting citizens or foreigners, a ‘Title III’ warrant required reasonable grounds to believe that a crime has been committed, or is about to be, and that the search or surveillance is likely to yield relevant evidence.¹⁸⁷ After the *PATRIOT Act*, warrants can now be issued under FISA to surveil a person of unknown identity, and to follow their movement across jurisdictions, communication instruments and providers (“roving wiretaps”).¹⁸⁸ FISA warrants can also be issued for wiretapping, electronic surveillance and physical searches of property of both citizens and aliens within the US where “foreign intelligence” is not the primary purpose of an investigation, as before, but where it is only a “significant

¹⁸³ Ellen Podgor and John Wesley Hall, “Government Surveillance of Attorney-Client Communications: Involved in the Name of Fighting Terrorism” 17 *Geo. J. Legal Ethics* 145 2003-2004, at 148.

¹⁸⁴ *Ibid*, at 150.

¹⁸⁵ *PATRIOT Act*, *supra*, note 91, sections 206, 207, 214, and 216.

¹⁸⁶ 50 U.S.C. ch. 36, S. 1566; section 1805(a)(2).

¹⁸⁷ John Whitehead and Steven Aden, “Forfeiting ‘Enduring Freedom’ for ‘Homeland Security: A Constitutional Analysis of the USA PATRIOT Act and the Justice Department’s Anti-terrorism Initiatives” 51 *Am. U. L. Rev.* 1081 2001-2002, at 1103 to 1107.

¹⁸⁸ *PATRIOT Act*, *supra*, note 91, section 206.

purpose.”¹⁸⁹ A FISA warrant can thus be issued in many more domestic criminal cases than before. The *PATRIOT Act* also amends the *Wiretap Act* to allow law enforcement or other government officials access to information gleaned under a Title III search carried out for some other purpose, if the information relates to “the ability of the United States to protect against” a potential terrorist attack.¹⁹⁰

The *PATRIOT Act* contains a further notable expansion of the scope of surveillance. Section 213 allows that where a warrant is issued for the search of a premises, for electronic surveillance, or for the seizure of material, notice of the warrant may be withheld if it would otherwise risk destroying evidence, result in bodily injury, or jeopardize an investigation. Notice of the warrant must be provided “within a reasonable period of its execution”; however, this period “may thereafter be extended by the court for good cause shown.” The section therefore contemplates a person’s indefinite surveillance without their knowledge.

Despite these expanded powers for surveillance, the Bush administration saw the need to go further, and to do so covertly. In late 2001 or early 2002, the President issued a secret Executive Order authorizing the National Security Agency — a body tasked with gathering foreign intelligence — to wiretap or monitor phone calls and other electronic communication between individuals in the United States and persons abroad, without a warrant under FISA or any other legislation.¹⁹¹ The program, and the order authorizing it, came to light in an article in the *New York Times* in 2005.¹⁹² The Bush administration claimed that the President possessed the implied authority to issue the order under the

¹⁸⁹ *Ibid*, s. 218.

¹⁹⁰ *ibid*, s. 203.

¹⁹¹ Jennifer Wispinski, “The USA PATRIOT Act and Canada’s Anti-terrorism Act: Key Differences in Legislative Approach” (Ottawa: Parliamentary Information and Research Service, 2006), at 11.

¹⁹² E. Lichtblau and J. Risen, “Bush Lets U.S. Spy on Callers Without Courts,” 16 December 2005, *The New York Times*; cited in Wispinski, *ibid*.

powers set out in the AUMF, and the direct authority as Commander in Chief of the armed forces in Article II of the US Constitution.¹⁹³ Critics of the program argued against this view on the basis that FISA explicitly states that the procedure for obtaining a warrant set out in that statute, along with provisions of the federal criminal code (for wiretaps in criminal cases), are the “exclusive means by which electronic surveillance ... may be conducted”.¹⁹⁴ In 2006, a member of a Muslim charity and two of his lawyers filed a tort claim against the government for its warrantless surveillance of them. A US district court in California ruled in the plaintiffs’ favour in March of 2010, dismissing the government’s claim to authority for warrantless surveillance.¹⁹⁵

FISA was amended in 2008 to make clear that the President does not have the authority to carry out warrantless surveillance. But the act now authorizes some of the powers the administration claimed under the secret NSA program.¹⁹⁶ The amendment increases the period of warrantless surveillance from 48 hours to 7 days, on an emergency notice application, where communication involves a person outside of the US who there is probable cause to believe is a member or agent of a foreign power.¹⁹⁷ It also allows for warranted surveillance of Americans abroad.¹⁹⁸ The American Civil Liberties Union has challenged the constitutionality of the Act in a case still pending.¹⁹⁹

¹⁹³ Wispinski, *supra*, note 191, at 11.

¹⁹⁴ FISA, 18 U.S.C. § 2511(2)(f), cited in Ronald Dworkin, Kathleen Sullivan, Lawrence Tribe, David Cole, and Curtis Bradley, *et al*, “On NSA Spying: A Letter to Congress”, (9 February, 2006) *New York Review of Books*.

¹⁹⁵ *Al-Haramain et al v. Obama et al*, US District Court for Northern District of California 2010, online: <<http://jurist.law.pitt.edu/paperchase/2010/04/federal-judge-rules-for-islamic-charity.php>>.

¹⁹⁶ *Foreign Surveillance Act of 1978 Amendments Act of 2008*, H.R. 6304.

¹⁹⁷ *Ibid*, s. 702.

¹⁹⁸ *Ibid*, s. 704.

¹⁹⁹ A primer on the case, and the various decisions thus far handed down, see the ACLU, online: <<http://www.aclu.org/national-security/amnesty-et-al-v-clapper>>.

2.3.2.2 Expanded scope for state secrecy and surveillance in Canadian law

The *Anti-terrorism Act* of 2001 amended the *Canada Evidence Act*,²⁰⁰ and other legislation, to expand considerably the scope of the assertion of state privilege, and curtail the right to appeal it.²⁰¹

The new provisions replaced the earlier statutory scheme for the state's assertion of 'public interest immunity' and qualifies aspects of the common law doctrine on point.²⁰² Before the bill was enacted, sections 37 to 39 of the *Canada Evidence Act* allowed for a process by which the Crown could object to requests for disclosure, or the requirement that a witness answer certain questions, on the basis that disclosure would be contrary to the public interest – or that the information was a cabinet secret. If it belonged to the former category, the court would adjudicate the claim, balancing the public's general interest in disclosure with the specific public interest at issue in the claim for protection. One of the possible grounds of public interest was that "the disclosure would be injurious to international relations or national defence or security."²⁰³ A considerable body of case law had evolved over time, and it tended to demonstrate less deference toward the executive when balancing these interests.²⁰⁴

If the information belonged in the second category (a cabinet secret), the Clerk of the Privy Counsel for Canada could issue a certificate, pursuant to section 39 of the

²⁰⁰ R.S.C. 1985, c. C-5 [CEA].

²⁰¹ For this portion of the chapter, I draw upon Hamish Stewart "Rule of Law or Executive Fiat? Bill C-36 and Public Interest Immunity" in R. Daniels and P. Macklem (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*. Toronto: University of Toronto Press, 2001), and Hamish Stewart, "Public Interest Immunity after Bill C-36" (2003) *Criminal Law Quarterly* 47, 249. On other legislation amended by the *Anti-terrorism Act* to allow for expanded state secrecy, see Craig Forcece, "Canada's National Security Complex: Assessing Secrecy Rules" (2009) *Institute for Research on Public Policy: Choices*, 15:5

²⁰² Stewart, 2001, *ibid*, at 217.

²⁰³ *Ibid*, at 220. See also the former section 37(1). An attempt to assert privilege on that ground could be adjudicated only by the Chief Justice of the Federal Court, or his or her designate (see the former section 37(2)).

²⁰⁴ Stewart, 2001, *supra*, note, 201, at 219.

Canada Evidence Act, declaring the information to be a cabinet confidence, and the assertion was beyond review. It was an extraordinary power, but was limited to cabinet secrets.²⁰⁵

The *Anti-terrorism Act* amended sections 37 and 38 of the *Canada Evidence Act* in a number of ways. The former procedure for adjudicating claims of privilege is mostly intact in the new version of section 37, but it is now subject to the procedure contemplated in sections 38 to 38.16.²⁰⁶ Those sections feature two new and broad categories of information: “potentially injurious information,” which is defined as information that, if disclosed, “could injure international relations or national defence or national security”; and “sensitive information,” which is defined as information “relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.”²⁰⁷

In the earlier version of the Act, the government official involved in a proceeding was the person responsible for asserting privilege. This is also the case in the new scheme, but in addition, “participants” in proceedings, whoever they may be, now have a positive obligation to bring to the attention of the Attorney General (or the Crown) the fact that they possess sensitive or potentially injurious information that may be disclosed, or that they are seeking to have disclosed.²⁰⁸ A person possessing such information is prohibited from disclosing that information except in accordance with the scheme set out in the section.²⁰⁹

²⁰⁵ Stewart, *ibid*; see also the former section 39.

²⁰⁶ CEA, *supra*, note 200, Section 37(1).

²⁰⁷ *Ibid*, section 38.

²⁰⁸ *Ibid*, section 38.01(1) and (2).

²⁰⁹ *Ibid*, section 38.02(1).

Once the Crown receives notice of potentially injurious or sensitive information in the hands of a party to a proceeding, or if the Crown possesses such information and seeks to have it declared privileged, it may apply for an order under sections 38.04 to 38.06. As was the case in the past, the matter is to be heard by a judge of the Federal Court. This means that a separate proceeding must begin if the matter arises out of a case already in progress – for instance, a civil or criminal case in the superior court of a Canadian province. Once before the Federal Court, the test for privilege is found in 38.06, which gives the court the discretion to grant privilege if the court concludes that the disclosure of the information would be “injurious to international relations or national defence or national security”. If the court concludes that the information falls within any of these categories, all or some of it may still be disclosed – subject to conditions where appropriate – *if* the court decides that “the public interest in disclosure outweighs in importance the public interest in non-disclosure.”²¹⁰

The test itself is not new. What is new is the fact that if the court has considered a matter under section 37 or 38 and decides that information should be disclosed, the Attorney General of Canada has the power under section 38.13 to issue a certificate that prohibits the disclosure. The certificate effectively trumps the decision of the court, or as Hamish Stewart has put it, it “permits the federal Attorney General to second-guess the result of any judicial determination concerning disclosure.”²¹¹ In an earlier draft of the bill, the issuance of a certificate under this section marked the end of the process. This provoked considerable criticism by a number of commentators, including Hamish Stewart and Kent Roach.²¹² The final version of the bill subjects the Crown’s certificate to

²¹⁰ *Ibid*, section 38.06(2).

²¹¹ Stewart (2003), *supra*, note 201, at 255.

²¹² See, e.g., their contributions to the Daniels and Macklem collection (2001), *supra*, note 201.

what Roach has called a “light form of judicial review”²¹³ by a single judge in the Federal Court of Appeal.²¹⁴ The test on appeal is whether *any* of the information has been “obtained in confidence from, or in relation to, a foreign entity ... or [or *whether it relates to*] national defence or national security...”²¹⁵ So long as the information “relates to” *any* of the permitted grounds for issuing the certificate, the court must uphold it – and the decision is final.²¹⁶ For Stewart,

Sections 38.13 and 38.131 as enacted represent an improvement over the earlier version. But the right of appeal is still extremely limited, both institutionally and in the scope of the grounds. It is not the person presiding over the proceeding who makes the decision either to issue the certificate or to vary or cancel the certificate; indeed these sections apply only after the person presiding *and* a judge of the Federal Court, Trial Division have done whatever they can do. Furthermore, the new provisions still provide no mechanism for correcting any error by the Attorney General in assessing the balance between the interests in non-disclosure. In short, under ss. 38.13 and 38.131 the Attorney General is permitted to second-guess the outcome of a proceeding to which he was a party.²¹⁷

This power gives the state something close to the last word on what will be kept secret in any matter relating to national security.

After 9/11, the Canadian government also moved to expand its powers of surveillance. The *Anti-terrorism Act* amended the *National Defence Act* to provide for warrantless interception of communication involving foreign entities outside of Canada.²¹⁸ In addition to this, amendments to the *Criminal Code* were made at that time which allow for secret surveillance of suspected terrorists or a criminal organization

²¹³ Kent Roach, “Better Late Than Never: the Canadian Parliamentary Review of the Anti-Terrorism Act” (2007) *Choices* 13, 5. Montreal: Institute for Research on Public Policy, at 7.

²¹⁴ *Ibid*, section 38.131. Craig Forcese, “Assessing Secrecy Rules” (2009) Institute for Research on Public Policy: *Choices*, 15:5, at 12.

²¹⁵ Section 38.131(8)-(10).

²¹⁶ Section 38.131(11).

²¹⁷ Stewart 2003, *supra*, note 201, at 255.

²¹⁸ R.S.C., 1985, c. N-5, section 273.65. I credit Philippa Lawson for noting this, in “Moving toward a Surveillance Society – Proposals to Expand ‘Lawful Access’ in Canada” (Vancouver: British Columbia Civil Liberties Association, 2011) at 74.

without the Crown having to demonstrate the urgency or necessity of this method of investigation, as was previously the case.²¹⁹ Warrants of this sort have been extended from 60 days to one year, with the required notice period (to the subject of the surveillance) also being extended from 60 days to one year.²²⁰

Finally, a series of bills over the course of the decade have attempted to codify expanded powers of surveillance of online or network activity, though cellphones, computers, and other devices. Bill C-30, the most recent of these bills, currently in first reading before Parliament, would considerably expand the scope of state surveillance of internet and cellphone usage in Canada.²²¹ The bill allows law enforcement officials to demand, without a warrant, a variety of information from a third-party service provider relating to an individual's identity and online or network activity. The demand may be made without notice to the individual and without the need to establish reasonable or probable grounds to believe that an offence had been committed.²²²

2.3.3 Judicial deference to executive discretion in national security

Traditionally, courts have been deferential to the executive in matters of national security and foreign policy. In an authoritarian legal framework, courts show an even greater deference through a willingness to suspend various core liberal legal principles. Courts have thus come to condone a more limited use of habeas corpus, or a modified procedure

²¹⁹ *Criminal Code*, R.S.C., 1985, c. C-46, sections 185 and 186. See also Lawson, *ibid.*

²²⁰ *Ibid.*

²²¹ *Protecting Children from Internet Predator's Act*, bill C-30 (41st Parliament, 1st session, spring 2012). A ministerial press-release makes clear that among the concerns the bill is meant to address is the threat of terrorism: "Rapid changes in technology mean crimes and national security threats are more difficult to investigate. As a result, criminals, gangs and terrorists have found ways to exploit technological innovations to hide their illegal activities [...]. This legislation would give law enforcement and CSIS the investigative tools they need to do their jobs and keep our communities safe." Public Safety Canada, "Harper government introduces *Protecting Children from Internet Predators Act*" (14 February 2012), online: <www.publicsafety.gc.ca/media/nr/2012/nr20120214-eng.aspx?rss=true>

²²² Lawson, *supra*, note 218, provides an extensive overview of key provisions of Bill C-30 in their earlier iterations.

that places those in administrative detention at a significant disadvantage. Courts are also deferential in ways that help shield government from accountability for its involvement in kidnapping, torture, and other forms of cruelty.

It is important to note, however, that the judiciary has not been deferential in every case on national security, or even in most of the jurisprudence in this area, over the course of the past decade. In many cases, judges have sought to craft jurisprudence in accordance with liberal legal assumptions.²²³ Yet a number of critical decisions have contributed to a jurisprudence more readily associated with authoritarian rather than liberal values.

2.3.3.1 Judicial deference in the US context: *Hamdi*, *Boumediene*, and habeas corpus

The reader will recall the *Hamdi* decision, concerning a US citizen detained in Afghanistan and held without charge in a naval brig in Virginia. Justice O'Connor's decision in the case, on behalf of a plurality of the court, marked an important instance of judicial deference to the executive in two respects.

First, while O'Connor conceded that "the national security underpinnings of the 'war on terror' although crucially important, are broad and malleable",²²⁴ she agreed that both the conflict and Hamdi's detention could carry on indefinitely; possibly for the "rest of his life."²²⁵ She also accepted the government's argument that the AUMF served as sufficient authority, in itself — *i.e.*, without further reliance on US legislation, the Geneva

²²³ A notable decision in this respect is *Hamdan v. Rumsfeld*, *supra*, note 53, holding that the Geneva Conventions do apply to Guantanamo detainees and striking down the validity of the existing military tribunal scheme.

²²⁴ *Hamdi*, *supra*, note 67, at 12.

²²⁵ *Ibid*, at 12.

Conventions, or any other instrument — to indefinitely detain, without charge, US citizens apprehended abroad for as long as hostilities lasted. This impliedly affirmed the broader proposition that the AUMF allowed for the indefinite detention of all non-citizen combatants captured abroad in the same conflict.

The second point pertains to due process. The Fifth Amendment guarantees against citizens being deprived of their liberty “without due process of law.” Justice O’Connor held that while President Bush was authorized to detain citizen combatants, the constitution required that the citizen be given notice of the “factual basis” for his detention and a “fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.”²²⁶ However, she was deferential to the executive in finding that a military commission, employing hearsay evidence, or only a summary of the evidence, could be sufficient. In her words, “the exigencies of the circumstances may demand that, aside from these core elements [notice and a neutral decision-maker], enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”²²⁷ Hearsay could be used, and “the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.”²²⁸ Thus, after the government had advanced a credible case, relying in whole or in part on secret evidence, the onus could shift to the petitioner for rebuttal.²²⁹

²²⁶ *Ibid*, at 26.

²²⁷ *Ibid*, at 26-7.

²²⁸ *Ibid*, at 27.

²²⁹ *Ibid*, at 26-7.

The US Supreme Court had occasion to revisit the question of combatant detention reviews in *Boumediene v. Bush*.²³⁰ The case marked a high-profile victory for the non-citizen detainees at Guantanamo because the majority found that detainees possessed a right under the US Constitution to challenge the validity of their detention by seeking habeas corpus review in US federal court. However, the decision also extended the deferential logic of the plurality in *Hamdi* by conceding that the procedure in habeas corpus cases involving Guantanamo detainees could involve a less onerous process and set of standards for the government to meet. Justice Kennedy, for the majority, was vague on the specifics, stating only that the process “need not resemble a criminal trial”,²³¹ and that “certain accommodations [had to] be made to reduce the burden habeas corpus proceedings will place on the military.”²³² Notably, the dissenting opinion of Justice Roberts (signed by all three other justices in dissent) was more deferential to the government’s position. He held that the constitution did not apply to alien detainees held outside the US, and that the government’s scheme for review of detainee detentions through CSRTs, and the limited route of appeal (in the Military Commissions Act of 2006) to the DC Circuit Court, had satisfied Justice O’Connor’s requirements in *Hamdi*.

2.3.3.2 Post-Boumediene habeas challenges

In the wake of *Boumediene*, a number of Guantanamo detainees brought habeas challenges in federal court. Thirty-eight of the petitioners were successful at the District Court or trial level. However, as the *Washington Post* noted in July of 2011, the US Court of Appeals “has not affirmed a single decision ordering the release of a detainee, nor has it

²³⁰ *Supra*, note 80.

²³¹ *Ibid*, at 2269.

²³² *Ibid*, at 2276.

reversed any decision that favoured government lawyers.”²³³ This is due partly to appellate courts taking a different view of the evidence, but also in part to a view of the applicable law that is deferential to the government’s position.

In *Al-Bihani v. Obama*,²³⁴ a leading decision among these appellate cases, the court sought to clarify the precise procedural elements and standards to apply in habeas cases by detainees, given the holdings in *Hamdi* and *Boumediene* — decisions in which the Supreme Court explicitly called for “creativity” in the court’s approach. Having been denied his release at the court below, al-Bihani argued that the process at the district court was flawed because it had applied the civil standard of a preponderance of the evidence rather than the criminal standard of evidence beyond a reasonable doubt; it shifted the burden to him to prove the unlawfulness of his detention; and it admitted hearsay. The court dismissed all three grounds. A survey of the history of habeas corpus in the US, the court noted, shows how malleable the process can be, and how different approaches have been deemed suitable in different circumstances. Citing the majority’s decision in *Boumediene*, the court held that the criminal standard of evidence was too onerous for the state to meet and thus inappropriate in this context. It also suggested that the plurality in *Hamdi* had “indirectly endorsed a preponderance standard when it suggested that due process requirements may have been satisfied by a military tribunal, the regulations of which adopt a preponderance standard.”²³⁵ Finally, it also held that hearsay had always

²³³ Peter Finn and Del Quentin Wilber, “Guantanamo Detainees See Legal Process Reversed” 5 July 2011, *Washington Post*, online: <http://www.washingtonpost.com/national/national-security/guantanamo-detainees-see-legal-progress-reversed/2011/06/21/AGr71ljH_story.html>. To be clear, not all of the favourable habeas decisions at the lower level were appealed. However, as Linda Greenberg of the *New York Times* notes, of the dozens of detainees that have been released in relation to this process, “[a]ll releases, even those preceded by court orders, have been exercises of executive branch discretion.” I take her to mean that avenues of appeal remained open to the government in cases where detainees were granted release orders. See Linda Greenberg, “Gitmo Fatigue at the Supreme Court” (6 April 2011) *New York Times*.

²³⁴ *Al-Bihani v. Obama et al* USCA for District of Columbia Circuit, 2010.

²³⁵ *Ibid*, at 19.

been admissible in habeas applications, with doubts about the reliability of the evidence going to the weight to be accorded to the evidence rather than to its admissibility.²³⁶ In April of 2011, the US Supreme Court declined an appeal of *Al-Bihani v. Obama*, and two other appeal decisions relating to the proper process in Guantanamo habeas cases.²³⁷

The collective effect of *Hamdi*, *Boumediene*, and *Al-Bihani* is thus to entrench a process of judicial review in which it is far more challenging for petitioners to succeed than in a conventional, liberal legal, due process model.

2.3.3.4 Executive privilege in tort actions:

A further facet of authoritarian legality involves the government's use of the "state secrets" doctrine in tort litigation by victims of rendition. The outcome in these cases is determined, in large part, by the broad scope of the doctrine in US law, and the low threshold for its application. In this sense, courts are not being deferential to the executive in applying the doctrine to dismiss cases. The important contribution these cases make to authoritarian legality consists, rather, in a combination of the government's frequent reliance upon the doctrine, together with the court's ready acceptance of it *in the context of tort claims for torture, kidnapping, and other forms of cruelty*. Having successfully invoked it in three high profile cases involving victims of rendition, the government has not only protected state secrets but also shielded itself from transparency or accountability for egregious conduct. Precedents of this kind play a critical role in normalizing and making permanent the expanded scope of state secrecy, and thus the exercise of unchecked executive discretion.

²³⁶ *Ibid*, at 22.

²³⁷ Warren Richey, "Supreme Court Rejects Guantanamo Detainees' Appeals for Better Protections" (4 April 2011), *Christian Science Monitor*, online: <<http://www.csmonitor.com/USA/Justice/2011/0404/Supreme-Court-rejects-Guantanamo-detainees-appeals-for-better-protections>>.

Briefly, the state secrets doctrine holds that in exceptional cases, the courts must place a priority on the importance of protecting national security secrets, even if doing so will result in the dismissal of an otherwise legitimate tort claim. The doctrine evolved in a series of cases in which plaintiffs sought to adduce evidence pertaining to military secrets, such as the development of the B-29 bomber,²³⁸ the location of a nuclear warhead,²³⁹ and a contract for espionage services.²⁴⁰ In each of these earlier cases, the subject matter the government sought to keep secret was not in itself controversial or of questionable legality, as is the case here.

The doctrine can be applied in two ways, with the threshold of applicability, in both cases, being relatively low. The court can bar a claim, from the outset, on the basis that its further litigation “would inevitably lead to the disclosure of matters which the law itself regards as confidential” (the ‘Totten’ bar).²⁴¹ In 1953, the US Supreme Court held that the Totten bar could apply “where the very subject matter of the action ... [is] a matter of state secret”.²⁴² Alternatively, the court can grant an evidentiary privilege over critical evidence in a case, possibly resulting in the dismissal of that case (the ‘Reynolds privilege’).²⁴³ The Reynolds privilege applies to, among other things, any evidence that would reveal the “means, sources and methods of intelligence gathering”.²⁴⁴ The Court of Appeal has emphasized the importance of the court’s role in “critically examining” the

²³⁸ *United States v. Reynolds*, 345 U.S. 1. (1953)

²³⁹ *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981).

²⁴⁰ *Doe v. Tenet*, 329 F.3d 1135 (9th Cir. 2003).

²⁴¹ *Totten v. United States*, 92 U.S. 105, at 107 (1876).

²⁴² *Reynolds*, *supra*, note 238, at 11.

²⁴³ *Ibid.*

²⁴⁴ *Al-Haramain v. Obama et al*, 507 F.3d (2009) at 1203.

government's assertion of privilege,²⁴⁵ and has held that the government cannot obtain privilege by merely asserting that information is classified.²⁴⁶ Recent decisions belie this.

In *El-Masri v. the United States*,²⁴⁷ *Mohamed, v. Jeppesen Dataplan*,²⁴⁸ and *Arar v. Ashcroft*,²⁴⁹ victims of rendition sought damages for kidnapping or detention, torture, and other forms of abuse involving the CIA, other US government agencies, or private corporations facilitating the flight and transfer of detainees on their behalf. In two of the cases, plaintiffs were detained — El Masri in a case of mistaken identity — and were transported to a secret CIA prison in a third country, where they were tortured and imprisoned at length. El-Masri argued that the state secrets doctrine should not apply in his case on the basis that no substantive secrecy issues remained. By the time the case had reached the US Court of Appeal, the Council of Europe had published the findings of a detailed investigation of the events at issue, and President Bush had publicly confirmed the existence of the rendition program. Despite this, the Court of Appeal affirmed the dismissal of El-Masri's action on the basis of the Totten bar, on the view that the litigation would likely disclose operational details, identities and roles of the various defendants, along with details of confidential CIA agreements. In *Mohamed v. Jeppesen*, the Court of Appeal applied the Reynolds privilege to uphold a dismissal of the action, on the basis that there was “no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets.”²⁵⁰ The state secrets doctrine was also invoked

²⁴⁵ *Ellsberg et al v. Mitchell et al*, 709 F.2d (1982) at 58.

²⁴⁶ *Ibid* at 57.

²⁴⁷ 479 F.3d 296 (4th Cir. 2007).

²⁴⁸ No. 08-15693, USCA (9th Cir, 2010).

²⁴⁹ No. 06-4216, USCA (2nd Cir, 2009).

²⁵⁰ *Infra*, note 263, at 13548.

in *Arar v. Ashcroft*, but the case was dismissed on other grounds, enabling the court to forego ruling on the issue.

In May, 2011, leave to appeal *Jeppesen* to the Supreme Court of the United States was dismissed without reason. An editorial in the *New York Times* asserted: “The court’s choice is a major stain on American justice. By slamming its door on these victims without explanation, it removed the essential judicial block against the executive branch’s use of claims of secrecy to cover up misconduct that shocks the conscience.”²⁵¹ The *Times* was making a similar argument to one made by the plaintiff in *El-Masri*, at the Court of Appeal. Applying the state secrets doctrine in his case is, he argued, tantamount to shielding “egregious executive misconduct”²⁵² from any accountability. In response, the court held that El-Masri’s position “fundamentally misunderstands the nature of our relationship to the executive branch.”²⁵³ The courts are meant to decide cases, not to provide a “roving writ to ferret out and strike down executive excess.”²⁵⁴ To attempt to deal with the merits of the government’s conduct would make the court “guilty of excess in our own right ... especially when the challenged action pertains to military or foreign policy.”²⁵⁵ Yet, the court’s reluctance in this context creates a wide ambit for unchecked executive power, amounting, in essence, to a kind of common law immunity from tort liability for rendition and other acts of cruelty carried out in terrorist interrogations.

Authoritarian legality is therefore marked by a deference to assertions of state secrecy relating not only to conventional questions of military operation (the design of a

²⁵¹ “Malign Neglect” 21 May 2011, *New York Times*, online: <<http://www.nytimes.com/2011/05/22/opinion/22sun1.html>>.

²⁵² *Infra*, note 263, at 312.

²⁵³ *Ibid.*, at 312.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

bomber, the location of a military installation, an espionage contract), but to cases of kidnapping, torture, and even murder.

2.3.3.5 Judicial deference in the Canadian context:

Among the most notable examples of judicial deference to the executive in areas of national security are the Supreme Court of Canada's decisions in *Suresh*,²⁵⁶ *Charkaoui*,²⁵⁷ and *Canada v. Khadr*.²⁵⁸

The court was conspicuously deferential in *Suresh* by seeking to preserve a measure of executive discretion to carry out deportations in the face of a risk of torture — despite obligations under international law to uphold an absolute ban against this. In *Charkaoui*, the court was deferential in two ways. One was to agree with the government that sensitive information could be relied upon to justify detention, yet still remain confidential. In this way, the court paired indefinite detention without charge with something less than a full and fair hearing. The court was also deferential in agreeing that the use of special advocates amounts to a “substantial substitute” for non-disclosure.²⁵⁹ In the penultimate paragraph of the decision, the court makes its rationale for this deference clear:

In the context of national security, non-disclosure, which may be extensive, coupled with the grave intrusions on liberty imposed on a detainee, makes it difficult, if not impossible, to find substitute procedures that will satisfy s. 7. Fundamental justice requires substantial compliance with the venerable principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case. Yet the imperative of the protection of society may

²⁵⁶ *Supra*, note 137.

²⁵⁷ *Supra*, note 107.

²⁵⁸ *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44. Other examples include the court's decision in *Re: Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248 (upholding the judicial investigation provisions of the *Anti-terrorism Act*); and *R. v. Ahmad*, 2011 SCC 6, (upholding the constitutionality of aspects of state secrecy provisions of the *Canada Evidence Act*).

²⁵⁹ *Charkaoui*, *supra*, note 137, para 61.

preclude this. Information may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. This is a reality of our modern world.²⁶⁰

While it may be necessary to keep information confidential, it does not follow from this that special advocates are a “substantial substitute” for disclosure. In finding that they are, the court is simply following the example set in *Hamdi* — of deferring to the government’s claim that a fundamentally unfair process is both adequate and necessary.

Khadr concerned an unusual set of facts. In 2003 and 2004, Canadian intelligence agents visited Omar Khadr, a Canadian citizen who was a minor at the time, in custody at Guantanamo. They interrogated Khadr knowing that he had been deprived of sleep and that the fruits of the interrogation would be shared with US prosecutors in a war crimes matter before a military tribunal. The court held that information gathered from the interrogation contributed to his continuing detention. It also held that Canada’s conduct violated international human rights obligations and amounted to a violation of the right under section 7 of the *Charter* not to be deprived of liberty except in accordance with the principles of fundamental justice. As a remedy for these breaches, Khadr had sought an order compelling the government to seek his repatriation. The court instead opted to declare that Khadr’s *Charter* rights had been violated, and left it to the government to “decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the Charter.”²⁶¹

The court reasoned that although the government is bound to follow the constitution in foreign affairs, it must be granted wide discretion in how it does so. To go further and order the executive to seek Khadr’s repatriation would give “too little weight

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*, at para 39.

to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests."²⁶² In short, a fundamental right has been breached, but since this matter pertains to foreign affairs, the government must be trusted to rectify the breach in whatever manner it sees fit.

2.3.4 Resisting accountability or redress for human rights violations

A fourth element in authoritarian legality is a tendency on the part of the executive to resist accountability for serious violations of human rights. This takes the form of both a reluctance to compensate victims of torture, rendition, or other abuses, and a reluctance to expose state involvement in these events to greater transparency.

The tendency is more readily apparent in the United States than in Canada, but is discernible in both contexts. Perhaps the best example of the tendency can be seen in the vigorous opposition that both the Bush and Obama administrations have exercised in all tort claims by victims of rendition, abuse at Guantanamo, and the secret NSA wiretapping program.²⁶³ Both have also refused to settle cases, or to pursue other avenues of redress. For example, either administration might have sought passage of law providing for compensation, or an exception to the states secrets doctrine in a given case. Either government might have ordered an inquiry or an investigation.²⁶⁴ Each government has

²⁶² *Ibid.*

²⁶³ In addition to the cases of *El-Masri v the United States*, 479 F.3d 296 (USCA 4th Cir. 2007), *Mohamed v Jeppesen Dataplan*, No. 08-15693 (USCA 9th Cir, 2010), and *Arar v Ashcroft*, No. 06-4216, (USCA 2nd Cir, 2009), US appeal courts have dismissed tort claims by former Guantanamo detainees Shafiq Rasul, Asif Iqbal, Rhuhe Ahmed, and Jamal Al-Harith, and an action for damages for wiretapping (Al-Haramain).

²⁶⁴ Although congress has conducted investigative hearings into the NSA wiretapping program, the conduct of US officials at Guantanamo and at CIA sites abroad, no congressional or other official US investigation has been ordered to address the treatment of individual victims of torture. Human Rights Watch contends that the failure to do provide redress to victims contravenes US obligations under Article 14 of the *Convention Against Torture*, which requires signatories to the treaty to provide redress and compensation to

instead sought to avoid accountability by shielding its actions through the use of the state secrets doctrine, as discussed above, and in the case of the Obama administration, has actively hindered investigations by foreign states or jurists.²⁶⁵

Both the Bush and Obama administrations have been reluctant to hold individuals criminally responsible for acts of torture or cruelty. A 2006 report by Human Rights Watch alleged that at least 600 US personnel were implicated in the abuse of 460 detainees in Guantanamo, Iraq, and Afghanistan.²⁶⁶ Looking back on the progress of these cases in 2011, it reported that “[d]espite numerous and systematic abuses, few military personnel had been punished and not a single CIA official held accountable. The highest-ranking officer prosecuted for the abuse of prisoners was a lieutenant colonel, Steven Jordan, court-martialed in 2006 for his role in the Abu Ghraib scandal, but acquitted in 2007.”²⁶⁷

The 2011 Human Rights Watch report concluded that responsibility for abusive practices against detainees lies with officials at the highest levels of the Bush administration, given their direct knowledge and authorization of such practices. It urges the Obama administration to initiate criminal investigations into the role of President Bush, Vice President Cheney, Secretary of Defence Rumsfeld, and CIA director George Tenet, along with legal counsel who rendered opinions on the legality of torture, including David Addington, John Yoo, and Jay Bybee. However, several factors make this unlikely.

victims of torture, or their dependents where the victim is deceased. See “Getting Away with Torture” (2011) *supra*, note 99, at 70.

²⁶⁵ Human Rights Watch cites evidence of efforts by US officials to hinder progress of a prosecution of high level Bush administration officials presided over by Judge Garzón in 2007. The report states that “[r]ecently released diplomatic cables reveal that US officials privately and repeatedly attempted to influence Spanish prosecutors and government officials to curtail the investigations and to have them taken away from Judge Garzón.” “Getting Away with Torture” (2011) *supra*, note 121, at 100.

²⁶⁶ Human Rights Watch, “By the Numbers” (2006), *supra*, note 121, at 2.

²⁶⁷ *Ibid*, at 6.

One is that in many cases, evidence surrounding the interrogations has been destroyed. For example, the CIA has admitted to destroying videotapes of the interrogation of ‘high-value’ Guantanamo detainee, Abu Zubaydah, among others.²⁶⁸ Although a criminal probe into the destruction of video evidence eventually followed, the Justice Department confirmed in 2010 that no charges would be laid.²⁶⁹ Another factor is that days before his inauguration, President Obama indicated his reluctance to investigate illegal practices by officials in the Bush administration, preferring to “look forward as opposed to looking backwards”.²⁷⁰ The only noticeable shift in position was the administration’s announcement in June of 2011 to launch criminal investigations into the deaths of two prisoners in CIA custody during the Bush years, including one who died in US custody in Iraq.²⁷¹

Another factor rendering the prospect of successful prosecutions unlikely relates to a provision in the *Detainee Treatment Act of 2005*. The act provides a defence to involvement in abuse on the basis that an official “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.”²⁷² The Justice Department signaled its reliance on this section in August 2009, when Attorney General

²⁶⁸ *Ibid*, at 27.

²⁶⁹ *Ibid*.

²⁷⁰ David Johnston and Charlie Savage, “Obama Reluctant to Look Into Bush Programs” 11 January 2009, *New York Times*, online: <<http://www.nytimes.com/2009/01/12/us/politics/12inquire.html>>.

²⁷¹ The Justice Department also announced, however, that it was closing its inquiries into the abuse of approximately 100 other detainees in CIA custody over the course of the past decade. Eric Lichtblau and Eric Schmitt, “U.S. Widens Inquiry Into 2 Jail Deaths” 30 June 2011, *New York Times*, online: <<http://www.nytimes.com/2011/07/01/us/politics/01DETAIN.html?pagewanted=all>>.

²⁷² *Detainee Treatment Act of 2005*, *supra*, note 59, section 1004(a).

Eric Holder announced the administration's intention to investigate abuses at CIA sites abroad, in response to a "heavily redacted" report published earlier in the year by the CIA's inspector general.²⁷³ Holder stated that although incidents noted in the report would be investigated, the department "will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel (OLC) regarding the interrogation of detainees."²⁷⁴

The Canadian government ordered two inquiries to examine its involvement in cases involving the torture of its citizens abroad. The Arar Inquiry cleared Arar of wrongdoing and confirmed the RCMP's direct responsibility for providing US officials with the faulty information that formed the basis of Arar's rendition to Syria. With litigation and a substantial damage award likely to follow, the Canadian government reached a settlement with Arar for \$10.5 million. This was an admirable gesture of accountability, but it also helped to avoid a larger measure transparency. Almost all of the RCMP and CSIS testimony at the Arar Inquiry was censored under section 38 of the *Canada Evidence Act*, as were significant portions relating to this evidence in the Arar Inquiry's final report.²⁷⁵ With its damage award to Arar, the government avoided the further possibility of exposing its conduct to public scrutiny through discoveries, witness testimony, or the contentious use of section 38 in such litigation.

Following the Arar Inquiry, a further inquiry, headed by former Supreme Court Justice Frank Iacobucci, was tasked with examining the involvement of Canadian officials in the cases of Canadian citizens Abdullah Almalki, Ahmad Abou-Elmaati and Muiyed Nureddin. The three were traveling independently through Syria in 2002 when they were

²⁷³ Human Rights Watch, "Getting Away with Torture" (2011) *supra*, note 121, at 7.

²⁷⁴ Cited, *ibid*, at 7.

²⁷⁵ See discussion in Diab, *Guantanamo North*, *supra*, note 48, chapter 3.

arrested, detained, and tortured by Syrian officials. Justice Iacobucci found that while information that CSIS gave to Syria did not directly result in their imprisonment and torture, in two of the cases, it clearly contributed to it. Consular officials and intelligence agents in all three of the cases acted in ways that Justice Iacobucci found seriously “deficient.”²⁷⁶ In one of the cases, as was done with Maher Arar, and would later occur with Abousfian Abdelrazik, CSIS provided questions be put to a Canadian citizen in foreign custody. The Iacobucci Inquiry lasted some twenty-two months. All but four days of it were held in private, and those four days dealt mostly with issues of standing.²⁷⁷ In response to a Parliamentary sub-committee’s recommendations, a majority of the House of Commons voted to issue the three men an official apology and provide compensation. But the minority Conservative government at the time declined to do so.²⁷⁸

Prior to the Iacobucci Inquiry, Almalki, Abou-Elmaati, and Nureddin had filed a civil suit against Canada, which had been suspended pending the outcome of the inquiry. Following the inquiry, the plaintiffs brought a motion in the civil action, in the Ontario Superior Court, for disclosure of material referred to in final report of the inquiry. The Attorney General of Canada then sought an order, in the Federal Court of Canada, barring disclosure of the materials pursuant to the “national security” privilege in section 38 of the *Canada Evidence Act*. The Federal Court ordered the disclosure or summaries of some of the material, and ordered that the rest remain privileged.²⁷⁹ The order for some of what was disclosed was made on the basis that the state had failed to establish that

²⁷⁶ Final Report of the Iacobucci Inquiry: *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin*; online: < http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/en/documents/final-report.htm >

²⁷⁷ Jasminka Kalajdzik, “Outsiders: The Sources and Impact of Secrecy at the Iacobucci Inquiry” (2010) 36 *Queen’s L.J.* 160, at 163.

²⁷⁸ *Ibid.*, at 170.

²⁷⁹ *Canada v. Almalki*, 2010 FC 1106.

disclosure would cause injury. The government appealed this ruling, and the Federal Court of Appeal overturned it.²⁸⁰ In the view of the appeal court, the lower court had given “undue weight to the public interest in disclosure of the information.”²⁸¹ The plaintiffs’ appeal to the Supreme Court of Canada was refused. The status of the civil action remains to be determined, but is much less likely to succeed without access to critical evidence in the government’s possession.²⁸²

A final case worth noting involves the ordeal of Sudanese Canadian Aboufian Abdelrazik.²⁸³ Having come to Canada in the mid-90s as a political refugee from Sudan, Abdelrazik chose to return there in 2003 to visit his ailing mother. At this time, CSIS was investigating him for suspected ties to terrorism, given his acquaintance with Ahmad Rassam and Adil Charkaoui. A later Federal Court decision would find that CSIS agents provided the Sudanese government with information leading to Abdelrazik’s arrest, and that the agents then traveled to Sudan to interrogate him in Sudanese custody.²⁸⁴ Abdelrazik alleges that, following these events, he was tortured, detained without charge for several months, and eventually released — only to be detained for another nine months partly due to the involvement of Canadian officials. By the time of his release, Abdelrazik’s passport had expired, yet he was also added (at the behest of the United States) to a UN no-fly list. Canada refused to renew his passport, which stranded him in Sudan for a further 18 months. The court held that the decision to refuse him a new passport was contrary to his *Charter* right to return to Canada, and compelled the

²⁸⁰ *Canada v. Almalki*, 2011 FCA 199.

²⁸¹ *Ibid.*, at para. 37.

²⁸² For an exploration of the impact of section 38 of the *Canada Evidence Act* in this case, and other obstacles the plaintiffs face, see Jasminka Kalajdzik, “Access to Justice for the Wrongfully Accused in National Security Investigations” (2009) 27 *Windsor Y.B. Access Just* 171, at 197-203.

²⁸³ The following narrative draws on the factual summary in *Abdelrazik v. Canada*, 2009 FC 580.

²⁸⁴ *Ibid.*

government to arrange his immediate return.²⁸⁵ Abdelrazik is now suing the Canadian government for damages for its complicity in his torture and detention in Sudan, and for mental anguish suffered for the delay in receiving the passport (*i.e.*, the breach of sections 6 and 7 of the *Charter*).²⁸⁶

The lawsuit rests partly on the argument that Canadian courts ought to recognize a new cause of action — torture as a tort — and should apply it in this case on the basis of Canada’s complicity in torture. The grounds for recognizing this new tort rest, in Abdelrazik’s view, on the basis that Canada has a duty, under both international and domestic law, to uphold the prohibition against torture, and that it violates this duty where it fails to take preventive measures.²⁸⁷ In pretrial motions still unfolding, the government has resisted these claims vigorously. Its resistance is consistent with an authoritarian legal framework in which the state seeks to preserve the widest possible space for counter-terror measures that function without accountability or transparency.

Indeed, in a broader sense, two inferences about the conduct of the Canadian and American governments in this context seem unavoidable. Each seeks to preserve the secrecy of its operational methods so as to continue making use of them. Each also seeks to preserve the widest possible ambit of discretion to employ techniques for gathering and concealing information — on the assumption that the current “threat environment” continues to warrant this.

²⁸⁵ *Ibid.*

²⁸⁶ See August 30, 2010 decision of Madam Prothonotary Aronovitch in *Abdelrazik v. Attorney General of Canada and Lawrence Cannon*, Federal Court of Canada (T-1580-09), online at ‘peoplescommision.org’: <<http://www.peoplescommission.org/files/abousfianMedia/Aug30Judgement.pdf>>. See also Paul Koring, “Abdelrazik Sues Ottawa for \$27-million” 24 September 2009, *Globe and Mail*, online: <<http://www.theglobeandmail.com/news/politics/abdelrazik-sues-ottawa-for-27-million/article1299382/>>.

²⁸⁷ *Ibid.*, Federal Court decision, at 13.

2.4 Conclusion

It might be said that in distinction to Canada, all of the controversial counter-terror measures the US has employed since 9/11 can be accounted for by the argument that, in law and in fact, the nation is at war, and the measures used have been authorized either by the AUMF or by the President's powers as Commander in Chief. No further explanation is needed. The measures are either legal or illegal, and if they are legal, it is in accordance with the same legal framework that governs other facets of contemporary liberal democracy.

But taking this conventional approach overlooks a claim that lies at the core of authoritarian legality: *i.e.*, that extraordinary measures — torture, cruelty, extra-judicial killing, indefinite detention without charge on secret evidence, and expanded state secrecy — are all consistent with the rule of law. The survey in this chapter was meant to highlight not only the ways in which these various measures depart from liberal legality, but also the effort that governments and courts have expended in establishing their *legality*. This suggests a distinct concept of legality — one that may indeed be tied to an earlier tradition of over-reactive law-making in times of emergency (the US civil war, the arrests following the Red Scare of 1919, and the Japanese internment, among others), but one that is also in many respects new and unique to the current cultural and political context.

In what follows, I proceed to examine the role that fears of mass terror have played in a wider political argument for authoritarian legality.

3 The Fear of Mass Terror as a Political Rationale for Authoritarian Legality

In chapter 2, I sought to characterize the entrenchment of a series of extreme counter-terror measures in terms of a shift from a liberal to an authoritarian form of legality. In this chapter and the next, I explore the assumptions and beliefs that have formed a context for this shift.

I argue that an essential part of this context was the prevalence of what I call the catastrophic imagination. In its stronger form, this is marked by a belief that al Qaeda, or an affiliated or analogous group, will soon make use of a weapon of mass destruction (WMD), with cataclysmic or possibly existential consequences for the state. Its weaker form assumes a belief in the imminence of mass terror not involving WMD but still entailing something on the scale of 9/11 or greater. It would thus involve casualties in the thousands rather than the tens or hundreds, as in previous acts of terror.

In this chapter, I contend that the fear of a catastrophic attack became a central motif in statements about terrorism by members of government and security officials in both the US and Canada in the decade following 9/11. It has served as a foundation for asserting the necessity of authoritarian measures, on the implied assumption that the prospect of mass terror posed a threat that the state cannot abide. I also argue that the catastrophic imagination has resonated with large portions of the public, and that this belief has played a central role in supporting a politics consistent with authoritarian legality.

The chapter highlights four aspects of the role that catastrophic fears play in this context. First, primarily in the US but also to a degree in Canada, the frequency,

consistency, and nature of references to WMD reflect a commonly held belief that mass terror is not merely a remote possibility, but a real and pressing threat. Second, the rhetoric consistently supports the argument that the nature of the threat posed calls for a fundamentally different approach to security — one that can neither be contained within a criminological model (due process, prosecution), nor within a law of war model. Third, the fear of catastrophe is invoked more overtly in the early years following 9/11, but continues to be employed on various levels, though primarily in the United States. Fourth, as is the case in much of the background literature (surveyed in the next chapter), the prospect of imminent mass terror is frequently asserted as a fact, without reliance on evidence or authority.¹

3.1 The Catastrophic Imagination in US Political Discourse and Public Opinion

3.1.1 Statements by members of the executive

Bush administration officials began to invoke the prospect of WMD terror in support of extraordinary measures immediately after 9/11. Initially, the approach was to raise the prospect of mass terror in the context of a discussion of counter-terror policy. Perhaps the most notorious early example involves an interview that Vice President Cheney gave to Tim Russert on NBC's Meet the Press, on September 16, 2001. Henceforth, Cheney asserted, the US would need to operate by a new set of rules:

¹ The evidence for this point can be gleaned from the fact that, with one or two exceptions, none of the references to WMD terror in public discourse noted in this chapter are accompanied by reference to expert opinion on point. (The exceptions to this pertain to statements by figures who are considered experts on terrorism, such as Paul Wilkinson or Martin Rudner, who invoke the possibility of WMD terror in appearances before Canadian Parliamentary committees.)

We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.²

Later in the interview, he invoked the prospect of nuclear terror. "A ballistic missile equipped with a weapon of mass destruction, a nuke, for example, a nuclear weapon would be far more devastating than what we just went through. If one of those was to hit one of our cities or to hit a major base overseas where US forces are deployed, the casualty list would be higher. The consequences would be even greater than the terrible tragedy we've just been through." On September 25th, Attorney General John Ashcroft appeared before a senate committee to defend the administration's call for amendments that would eventually be found in the *USA Patriot Act* — expanded surveillance and administrative detention, among others.³ He began by warning that FBI intelligence had indicated "a potential for additional terrorist incidents", including the "possibility of attacks using crop dusting aircraft."⁴

The administration's references to mass terror would soon become more overt. In the President's own rhetoric, the approach was to begin by linking the threat posed by al Qaeda with the idea of WMD terror, and later to invoke this association in an argument for extraordinary measures. The first link is made clear in his State of the Union address in January of 2002. The speech is best known for Bush's claims about the dangers that Saddam Hussein's Iraq and other rogue nations posed in relation to WMD. Yet it was also an important moment in which Bush forged a connection between the prospect of further

² Vice President Dick Cheney, interview by Tim Russert, Meet the Press, NBC News, September 16, 2001, transcript available online: <<http://emperors-clothes.com/9-11backups/nbcmp.htm>> (accessed December 1, 2011)

³ See the transcript of the hearing of the Committee on the Judiciary, United States Senate, 107th Congress, First Session, September 25, 2001, No. J-107-40, at 8-11.

⁴ *Ibid*, at 9.

terror at the hands of al Qaeda and the use of WMD. The speech was strewn with references to the imminent prospect of mass terror — references that cast both rogue nations and terror groups as an equal or inextricable threat:

Thousands of dangerous killers, schooled in the methods of murder, often supported by outlaw regimes, are now spread throughout the world like ticking time bombs, set to go off without warning.

...we must prevent the terrorists and regimes who seek chemical, biological or nuclear weapons from threatening the United States and the world.

...Our second goal is to prevent regimes that sponsor terror from threatening America or our friends and allies with weapons of mass destruction.

By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.⁵

The President would then tie the prospect of mass terror to extraordinary measures in his 2002 “National Security Strategy”.⁶ “The gravest danger our Nation faces,” he wrote, “lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination.”⁷ The document suggests that an older criminological approach is no longer tenable:

Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit that option. We cannot let our enemies strike first.⁸

⁵ “Text of President Bush’s 2002 State of the Union Address” (29 January 2002) *The Washington Post*, online: <<http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/sou012902.htm>>.

⁶ *The National Security Strategy of the United States of America* (Washington, DC: The White House, September 2002).

⁷ Preface, *ibid.*

⁸ *Ibid.*, at 15. A similar caution about the imminent prospect of WMD terror is set out in the President’s *National Strategy to Combat Weapons of Mass Destruction* (Washington, DC: The White House, December 2002). At 1: “...terrorist groups are seeking to acquire WMD with the stated purpose of killing large numbers of our people and those of friends and allies – without compunction and without warning.”

Nor, however, could the US be constrained by existing law of war doctrine requiring an imminent threat before using deadly force or acting in self defence: “We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”⁹

These include “the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.” At this stage, the case for extreme measures was understated because many of the measures — warrantless wiretapping, waterboarding, black sites, targeted killing — had not yet come to light.

By 2006, when knowledge of some these measures had surfaced, the administration made the case for them, based on imminent WMD terror, more explicitly. In January of that year, Bush urged congress to renew the sun-setting provisions of the *Patriot Act*. He also sought to justify the now public but formerly secret NSA wiretapping program (discussed in Chapter 2). Both were needed in light of the threat posed by “terrorists like bin Laden” who seek to “arm themselves with weapons of mass murder.”¹⁰ In September of that year, Bush gave a speech dealing specifically with counter-terror policy.¹¹ Seeking to respond to growing concerns about the use of waterboarding, CIA black sites, and military commissions for Guantanamo detainees, he attempted to offer a context and a rationale for the administration’s actions. In the months after 9/11, Bush explained, there was a real concern that a second attack would soon follow, possibly involving WMD. The US had indeed carried out secret detentions and interrogations. Some involved high level al Qaeda figures, such as Abu Zubaydah. He and others were resistant, and had clearly received training to this effect. The US had no choice but to employ “an alternative set of procedures.” These were “tough [and] safe and lawful and

⁹ *Ibid.*

¹⁰ Text of the President’s 2006 State of the Union, “We Strive To Be A Compassionate, Decent, Hopeful, Society” (31 January 2006) *The New York Times*, online: <<http://www.nytimes.com/2006/01/31/politics/text-bush.html?pagewanted=all>>

¹¹ *Ibid.*

necessary”. The information gleaned “saved innocent lives by helping us stop new attacks” — attacks involving cells in east Asia, the UK, and the US. From one detainee, interrogators learned about the group’s “efforts to obtain biological weapons,” and gleaned the admission that he had “met three individuals involved in al Qaeda’s effort to produce anthrax”. More broadly, Bush asserted that there had been no further attacks in the US since 9/11 because “our government has changed its policies and given our military, intelligence and law enforcement personnel the tools they need to fight this enemy and protect our people and preserve our freedoms.”¹²

The Bush administration’s second and final National Security Strategy statement in 2006 reaffirmed the argument set out in the September speech.¹³ The document asserts that terrorists “continue to pursue WMD”.¹⁴ It warns of the danger posed by the poor protection of fissile material, and by advances in biotechnology that heighten the likelihood of nefarious uses. It also affirms the need to embrace a preemptive strategy, which includes the virtually limitless use of force under wide executive discretion: “The hard core of the terrorists cannot be deterred or reformed; they must be tracked down, killed, or captured. They must be cut off from the network of individuals and institutions on which they depend for support. That network must in turn be deterred, disrupted, and disabled by using a broad range of tools.”¹⁵

Following President Obama’s inauguration in 2009, former Vice President Cheney continued to rationalize the earlier policies he helped to shape. Speaking with editors of

¹² For critical analysis of the assertion that CIA interrogations yielded intelligence that helped avoid future attacks, see Jane Mayer, *Dark Side: the Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Random House, 2008), at chapter X. See also, Human Rights Watch, “Getting Away with Torture: the Bush Administration and Mistreatment of Detainees” July 2011, HRW, online: <<http://www.hrw.org/en/node/100262/section/1>>.

¹³ *The National Security Strategy of the United States of America* (Washington, DC: The White House, September 2006), online: <<http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/>>.

¹⁴ *Ibid*, part V.

¹⁵ *Ibid*, part III.

Politico.com in February of that year, only weeks into the new administration, Cheney warned of the “high probability” of a “9/11-type event where the terrorists are armed with something much more dangerous than an airline ticket and a box cutter – a nuclear weapon or a biological agent of some kind”.¹⁶ Likely to take place in a large American city, the attack would involve “the deaths of perhaps hundreds of thousands of people”. With a view to responding to Obama’s progressive supporters, Cheney asserted: “If it hadn’t been for what we did — with respect to the terrorist surveillance program, or enhanced interrogation techniques for high-value detainees, the Patriot Act, and so forth — then we would have been attacked again. [...] Those policies we put in place, in my opinion, were absolutely crucial to getting us through the last seven-plus years without a major-casualty attack on the U.S.”

In May of 2009, Cheney expanded upon his position in an address given at the American Enterprise Institute, in response to President Obama’s speech on national security given the same day at the National Archives. Cheney began by asserting that “Nine-eleven made necessary a shift of policy, aimed at a clear strategic threat – what the Congress called ‘an unusual and extraordinary threat to the national security and foreign policy of the United States.’”¹⁷ With follow up attacks involving anthrax, the knowledge that al Qaeda was pursuing nuclear weapons, and A.Q. Kahn’s underground network having just been discovered, the threat was unprecedented: “foremost on our minds was the prospect of the very worst coming to pass – a 9/11 with nuclear weapons.”¹⁸ From that

¹⁶ John Harris, Mike Allen, and Jim Vandehei, “Cheney Warns of New Attacks” *Politico*, online: <<http://www.politico.com/news/stories/0209/18390.html>>.

¹⁷ Richard Cheney, “Vice President Cheney’s Remarks at the American Enterprise Institute” *Council on Foreign Relations* (May 21, 2009) online: <<http://www.cfr.org/defense-strategy/vice-president-cheney-remarks-american-enterprise-institute/p19470>>.

¹⁸ *Ibid.*

point onward, the White House embraced a shift from a reactive to a preemptive approach. With no domestic attacks having followed since, Cheney asserts:

we're left to draw one of two conclusions – and here is the great dividing line in our current debate over national security. You can look at the facts and conclude that the comprehensive strategy has worked, and therefore needs to be continued as vigilantly as ever. Or you can look at the same set of facts and conclude that 9/11 was a one-off event – coordinated, devastating, but also unique and not sufficient to justify a sustained wartime effort.¹⁹

In order to know which is closer to the truth, it would be necessary to know all the facts—pertaining to both the measures used and the intelligence gathered. Yet, for obvious reasons, a disclosure of this nature cannot occur. However, in the wake of the Obama administration's decision to release redacted versions of memos pertaining to coercive interrogation and other measures, the public, he suggests, has been left with a skewed impression. What is not known is how much useful information was in fact gleaned, including some pertaining to “specific terrorist plots that were averted”.²⁰ The value of this secret information has been confirmed by other insiders, including CIA director George Tenet, whom Cheney cites as having said, “I know that this program [coercive interrogations] has saved lives. I know we've disrupted plots. I know this program alone is worth more than the FBI, the Central Intelligence Agency, and the National Security Agency put together have been able to tell us.”²¹ The “enhanced interrogations” were not only necessary and effective, they were also carried out sparingly and for the strict purpose of gleaning intelligence. Although the public has “heard endlessly about waterboarding[,] it happened to three terrorists.”²²

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

Cheney also affirms the ongoing necessity of extreme measures. In his view, “to completely rule out enhanced interrogation methods in the future is unwise in the extreme. It is recklessness cloaked in righteousness, and would make the American people less safe.”²³ The measures remain necessary because of the stakes at issue: “you cannot keep just some nuclear-armed terrorists out of the United States, you must keep every nuclear-armed terrorist out of the United States.”²⁴ Obama understands this and for this reason has “reserved unto himself the right to order the use of enhanced interrogation should he deem it appropriate.”²⁵

Speaking the same day, President Obama’s speech on national security sought to convey a contrary spirit. The Bush administration, “faced with an uncertain threat” had made “a series of hasty decisions”.²⁶ The Obama administration would begin by banning “so-called enhanced interrogation techniques”, and “categorically rejecting” the argument that “brutal methods like waterboarding were necessary to keep us safe.”²⁷ Torture would be prohibited, and the detention and interrogation of suspects would hereafter be subjected to the rule of law.

Yet, for reasons noted in the previous chapter, Obama’s rhetorical embrace of liberal legalism was questionable from the outset. His policy on the long-term fate of Guantanamo detainees, set out in his National Archives speech, continued to allow for indefinite detention without charge on secret evidence. He would also soon confirm his intention to maintain the practice of extraordinary rendition, and dramatically increase

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ “Text: Obama’s Speech on National Security” (21 May 2009) *The New York Times*, online: <<http://www.nytimes.com/2009/05/21/us/politics/21obama.text.html?pagewanted=all>>.

²⁷ *Ibid.*

the use of targeted killing.²⁸ In later statements, his administration would make clear that the rationale for maintaining these practices, together with the insistence on their legality, would closely resemble the basic outline of the Bush-Cheney framework.

One indication of this is found in the Obama administration's "National Security Strategy" of 2010, which frames the nature of the threat in the same terms as found in the two earlier statements of the Bush administration. "The American people face no greater or more urgent danger than a terrorist attack with a nuclear weapon," the document asserts.²⁹ The usual reasons are cited: excessive stockpiles remain; a black market trade in material and know-how continues; and "terrorists are determined to buy, build, or steal a nuclear weapon."³⁰ Additional threats are also still posed by biological and other WMD.³¹ On this basis, the administration intends to employ a wide range of measures. It will prosecute where possible, but reserves the right to indefinitely detain those who "pose a danger to the American people" and who cannot be prosecuted for lack of evidence.³² It will seek to exhaust all reasonable alternatives before employing military force, but reserves the right to "act unilaterally if necessary to defend our nation and our interests".³³ It seeks to balance secrecy and transparency, but affirms "some information must be protected from public disclosure—for instance, to protect our troops, our sources and methods of intelligence-gathering or confidential actions that keep the American people safe."³⁴ There is no discussion of how any of this relates to the practice of targeted killing,

²⁸ See discussion in Chapter 2.

²⁹ *The National Security Strategy of the United States of America* (Washington, DC: The White House, May 2010), at 23.

³⁰ *Ibid.*

³¹ *Ibid.*, at 20.

³² *Ibid.*, at 36.

³³ *Ibid.*, at 22.

³⁴ *Ibid.*, at 36-7.

rendition, or the administration's aggressive insistence on the state secrets doctrine in the litigation discussed in the previous chapter.

The same argument can be found in the administration's most recent statement — dating to June 2011 (*i.e.*, after the targeted killing of bin Laden) — titled the “National Strategy for Counterterrorism”.³⁵ In its preface, President Obama notes that in “[i]n the past two and a half years, we have eliminated more key al-Qa’ida leaders in rapid succession than at any time since September 11, 2001,” yet despite this, “we continue to face a significant terrorist threat from al-Qa’ida.” Without any attempt to substantiate the assertion, the administration continues to insist that the “danger of nuclear terrorism is the greatest threat to national security. Terrorist organizations, including al-Qa’ida, have engaged in efforts to develop and acquire weapons of mass destruction (WMD)—and if successful, they are likely to use them.”³⁶ Counter-terror measures must, however, adhere to US values — the rule of law, transparency, the prohibition on torture. These values will somehow be upheld despite the administration's intention to continue with the “elimination” of al Qaida leaders, euphemistically described as a “degrading” of the power of its leadership.³⁷

3.1.2 Statements by security officials

The statements made by key figures in the Bush and Obama administrations were further corroborated, disseminated, and legitimized by key security officials and departments. The same pattern could often be found: catastrophic threats justifying the need for more invasive security measures.

³⁵ *National Strategy for Counterterrorism* (Washington, DC: The White House, June 2011).

³⁶ *Ibid*, at 8.

³⁷ *Ibid*, at 12.

Notable statements of this kind were set out in the 2002 and 2007 “National Strategy for Homeland Security”.³⁸ The first of these documents asserted that “[u]nless we act to prevent it, a new wave of terrorism, potentially involving the world’s most destructive weapons, looms in America’s future.”³⁹ The enemies were “working to obtain chemical, biological, radiological, and nuclear weapons for the purpose of wreaking unprecedented damage on America.”⁴⁰ The department lauds the passage of the *Patriot Act*, but calls for further law reform to make information sharing among agencies and governments easier. It also calls for amendments to extradition laws to allow for its use in a wider range of offences, and to “review authority for military assistance in domestic security”.⁴¹ The 2007 statement reiterates the fear of WMD use and urges, among other reforms, changes to the *Foreign Intelligence Surveillance Act*.⁴²

Other notable pronouncements were made in appearances by key security officials before congress. In 2003, CIA Director George Tenet told congress that “bin Laden has a sophisticated biological weapons capability”,⁴³ while Secretary of Homeland Security Tom Ridge wrote that “extremists abroad are anticipating near-term attacks that they believe will either rival, or exceed” those of September 11.⁴⁴ In February of 2005, CIA director Porter Goss, testifying before the Senate Intelligence Committee, asserted that “it may be only a matter of time before Al Qaeda or another group attempts to use chemical,

³⁸ *The National Strategy for Homeland Security* (Washington, DC: Office of Homeland Security, July 2002) and *The National Strategy for Homeland Security* (Washington, DC: Homeland Security Council, October 2007)

³⁹ *Ibid* (2002), at vii.

⁴⁰ *Ibid*.

⁴¹ *Ibid*, at 47-49.

⁴² *Supra*, note 35, (2007) at 7.

⁴³ Testimony, U.S. Senate, Committee on Armed Services, Hearing: Current and Future Worldwide Threats to the National Security of the United States, February 12, 2003.

⁴⁴ Thomas Ridge, “Threat Level Raised,” Press Office Release: Department of Homeland Security (21 December 2003).

biological, radiological and nuclear weapons”.⁴⁵ The argument was based in part on an earlier senate report casting doubt on whether all Soviet stockpiles of nuclear material had been accounted for after the end of the cold war. Goss urged the committee to continue to support that CIA’s paramilitary operations, contrary to the 9/11 Commission’s recommendation that they be dismantled. FBI Director, Robert Mueller, addressing congress in June of 2007, stated that the “economics of supply and demand dictate that someone, somewhere, will provide nuclear material to the highest bidder, and that material will end up in the hands of terrorists”.⁴⁶ In March of 2010, he told a congressional committee that “Al Qaeda’s continued effort to access chemical, biological, radiological or nuclear material pose a serious threat to the United States.”⁴⁷

Other officials, once out of office and speaking in a personal capacity, would make authoritative statements about mass terror based in part on their presumed past access to confidential information. For example, Stewart Baker, former Assistant Secretary for Homeland Defence from 2005 to 2009, spoke of the imminence of biological terror in his 2010 book *Skating on Stilts: Why We Aren’t Stopping Tomorrow’s Terrorism*.⁴⁸ Without drawing on expert authority, Baker asserted that “[w]ithin ten years, any competent biologist with a good lab and up-to-date DNA synthesis skills will be able to recreate the

⁴⁵ “Prepared Statement of Porter J. Goss, Director of Central Intelligence.” Submission to: “Current and Projected National Security Threats to the United States 16 February 2005 - Senate Select Committee on Intelligence”, at 2. Online: Federation of American Scientists, <http://www.fas.org/irp/congress/2005_hr/021605goss.pdf>

⁴⁶ A transcript of Mueller’s remarks is contained in Susan Cornwell, “FBI’s Mueller: Al-Qaida Has Intent to Use Nuclear Weapons” (11 June 2007), *Prison Planet.com*, online: <http://www.prisonplanet.com/articles/june2007/110607_b_Mueller.htm>.

⁴⁷ Ken Timmerman, “FBI Director Mueller: Al-Qaida Still Wants Nuclear Bomb” (18 March 2010) *Newsmax.com*, online: <<http://www.newsmax.com/Newsfront/mueller-fbi-alqaida-nuclear/2010/03/18/id/353169>>.

⁴⁸ Stewart Baker, *Skating on Stilts: Why We Aren’t Stopping Tomorrow’s Terrorism* (Stanford: Hoover Institution Press, 2010). Other examples in this genre would include Garrett Graff, *Threat Matrix: the FBI at War in the Age of Global Terror* (New York: Little, Brown and Company, 2011); George Tenet with Bill Harlow, *At the Centre of the Storm the CIA During America’s Time of Crisis* (New York: Harper Collins, 2007); and John Yoo’s, *War by Other Means: An Insider’s Account of the War on Terror* (New York: Atlantic Monthly Press, 2006).

smallpox virus from scratch. Millions of people will have it in their power to waft this cruel death into the air, where it can feed on a world that has given up its immunity.”⁴⁹ Although we cannot know when an attack will occur, we can infer that “every year biological attacks become more probable”.⁵⁰ Given the urgency and nature of the threat, and the various ways that existing bioterror security law and policy fall short, Baker proposes, among other measures, greater scrutiny and surveillance of the sale and transfer of material, and the training and employment of foreign researchers.⁵¹

Since bin Laden’s death in May of 2011, the tenor of the rhetoric on the part of both administration and other security officials has begun to shift. Although the risk of terror involving WMD remains – as noted in the President’s “National Strategy for Counterterrorism” of June 2011, cited above – the administration has begun to describe the threat in more vague, but still menacing terms. Thus, despite the administration’s “many successes” in the “war” against the group, it “continues to pose a direct and significant threat” to the nation.⁵² The locus of the threat has also shifted from the core al Qaeda group in Afghanistan and Pakistan to its affiliates – primarily al Qaeda in the Arab Peninsula – but with a continuing insistence that, together, these new groups pose a “serious threat to the homeland”,⁵³ a “direct and significant threat,”⁵⁴ or an “urgent and

⁴⁹ Baker, *ibid*, at 277.

⁵⁰ *Ibid*, at 280.

⁵¹ *Ibid*, at 290-305.

⁵² *National Strategy for Counterterrorism*, *supra*, note 35, at 3.

⁵³ Matthew Olsen, Director of the National Counterterrorism Center, in submission to House Permanent Select Committee on Intelligence, cited in Jason Ryan, “After Awlaki’s Death, al Qaeda Still a Major Threat,” *ABC News* (6 October 2011). See also FBI Director, Robert Mueller’s comments on the same occasion.

⁵⁴ John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, on Ensuring al-Qa’ida’s Demise, text of remarks at Paul H. Nitze School of Advanced International Studies, Washington, D.C., June 2011.

undeniable” danger.⁵⁵ By using these terms, the administration thus seeks to continue justifying the use of extraordinary measures in light of a larger threat, possibly comparable in magnitude to 9/11. In March of 2012, Attorney General Eric Holder lent a sense of this when he offered the administration’s first extended defence of the practice of targeted killing at a speech at Northwestern law school: “As we learned on 9/11, al Qaeda has demonstrated the ability to strike with little or no notice – and to cause devastating casualties... Given these facts, the Constitution does not require the President to delay action until some theoretical end-stage of planning – when the precise time, place, and manner of an attack become clear.”⁵⁶

3.1.3 Wider public perceptions of WMD terror and security policy

A detailed exploration of public perceptions about terror and security is beyond the scope of this chapter. I seek only to establish that (a) throughout the post-9/11 and to the present, large portions of the US public have held a belief in the *imminent* possibility of a large-scale terror attack, and (b) that this belief has played a role in supporting a politics consistent with authoritarian legality.

To begin with the first point, polls conducted from 2004 to 2006 shed light on public perceptions of the threat of WMD terror in particular.⁵⁷ A Hart-Teeter poll in 2004 asked Americans to “consider ways in which terrorists might attack the United States and

⁵⁵ Secretary of State, Hillary Rodham Clinton, “Opening Remarks at the Global Counterterrorism Forum,” Istanbul Turkey (7 June 2012), US Department of State, <http://www.state.gov/secretary/rm/2012/06/191912.htm#>.

⁵⁶ “Attorney General Eric Holder Speaks at Northwestern University School of Law” (5 March 2012), US Department of Justice, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

⁵⁷ For pointing me to two of these polls, I credit Dan Gardiner’s chapter on terrorism in *Risk: Why We Fear the Things We Shouldn’t — and Put Ourselves in Greater Dangers* (Toronto: McLelland and Stewart, 2008).

say which one or two worry them most.”⁵⁸ Forty-eight percent named bioterrorism as their primary concern; 37% most feared an attack involving chemical weapons; and 23% feared a nuclear attack. A 2006 Gallup poll asked: “Do you think it is likely — or not likely — that terrorists will set off a bomb that contains nuclear or biological material in the US within the next five years?”⁵⁹ Forty-seven percent believed that it was. (Notably, the consensus was even stronger among certain intellectual quarters. A Foreign Policy survey of “100 of America’s top foreign policy experts” found that “[m]ore than 8 in 10 expect an attack on the scale of 9/11 within a decade.”⁶⁰)

The 2004 Hart-Teeter poll had also sought opinion on recent counter-terror law and policy. Fifty-six percent of respondents expressed support for the *Patriot Act* and agreed that it is “a necessary and effective tool in preventing terrorist attacks.”⁶¹ Two-thirds (65%) of Americans said they were “very or somewhat satisfied with the government’s job of protecting their civil liberties.”⁶² As many as 75% of Americans said they were “very or somewhat satisfied with the government’s performance on preventing terrorist attacks.”⁶³

A series of Gallup polls since 2005 has explored the public’s response to the use of extreme measures by both the Bush and Obama administrations. In 2005, Gallup found that 65% of Americans supported the US government’s assassination of known terrorists

⁵⁸ Hart-Teeter, “From the Home Front to the Front Lines: America Speaks Out About Homeland Security” (Council for Excellence in Government, March 2004), at 3.

⁵⁹ “Terrorism in the United States” (2006) *Gallup*, online: <<http://www.gallup.com/poll/4909/Terrorism-United-States.aspx>>.

⁶⁰ Foreign Policy and The Centre for American Progress, “The Terrorism Index”, http://web1.foreignpolicy.com/issue_julyaug_2006/TI-index/index.html; cited in John Mueller, “New Years Brings Good News on Terrorism: Experts Wrong Again,” *The National Interest* (3 January 2012).

⁶¹ Hart-Teeter, *supra*, note 58, at 7; by contrast, only 33% of Americans believe “the Patriot Act is bad for America, agreeing with those who say that it goes too far and could violate average Americans’ civil liberties.”

⁶² *Ibid.*

⁶³ *Ibid.*

— down from 77% who held this view in October of 2001.⁶⁴ Thirty-nine percent supported the US government's use of torture against known terrorists "if the terrorists know details about planned attacks on the US".⁶⁵ (A majority, 59%, were opposed).

A Gallup poll in May of 2009 found that while a majority approved of Obama's ban on coercive interrogation,⁶⁶ substantial support for other Bush administration's tactics continued: for example, 65% of Americans believed that the US should not close Guantanamo and move some prisoners to US prisons;⁶⁷ 59% believed that Khalid Sheikh Mohammed should be tried in a military rather than civilian court;⁶⁸ 77% believed he should get the death penalty if convicted; 40% believed the prison at Guantanamo had "strengthened US national security", as opposed to 37% that said it had not much effect, and 18% that believe it had weakened it.⁶⁹ In response to the release of the torture memos in April of 2009, respondents were asked whether they thought "the use of harsh interrogation techniques for terrorism suspects was justified or not justified?"⁷⁰ Fifty-five percent believed they were; only 36% believed they were not. In an August 2009 poll, respondents were asked: "As you may know, Attorney General Eric Holder has appointed a special prosecutor to investigate the U.S. government's use of harsh interrogation techniques against terrorism suspects during the Bush administration. From what you

⁶⁴ Darren Carlson, "Would Americans Fight Terrorism By Any Means Necessary?" (1 March 2005) *Gallup*, online at: <<http://www.gallup.com/poll/15073/Would-Americans-Fight-Terrorism-Any-Means-Necessary.aspx>>.

⁶⁵ *Ibid.*

⁶⁶ "War on Terror" (May 2009) *Gallup*, online at: <<http://www.gallup.com/poll/5257/War-Terrorism.aspx>>. Seventy-four percent were in favour of limiting interrogations to the US Military's Field Manual.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Jeffrey Jones, "Slim majority Wants Bush-Era Interrogations Investigated" (27 April 2009) *Gallup*, online: <<http://www.gallup.com/poll/118006/Slim-Majority-Wants-Bush-Era-Interrogations-Investigated.aspx>>.

know or have read, do you approve or disapprove of this investigation?” While 47% approved, 49% disapproved.⁷¹

More recent poll data suggests that many of these views have remained consistent. A CNN poll in 2010 found that 60% of respondents believed that “terrorists will always find a way to launch major attacks no matter what government does.”⁷² A poll in May of 2011, days after bin Laden’s death, asked “How likely is it that there will be further acts of terrorism over the next several weeks?” Twenty-six percent believed it was “very likely,” while 42% thought it “somewhat likely.”⁷³ In a poll of May of 2012, 27% of respondents said that bin Laden’s death had “increased the threat of terrorism against the United States,” and 38% said it had no effect.⁷⁴ In terms of support for policy, a Washington Post-ABC poll of February 2012 (noted at the outset of this thesis) found that 70% of respondents approved of the president’s decision to keep the prison at Guantanamo Bay open.⁷⁵ Eighty three percent of those polled approved of his drone policy, including 77% of Democrats.⁷⁶

In light of these opinions, it has been crucial for both Democratic and Republican candidates for national office in the post-9/11 period to maintain the appearance of a clear awareness of the catastrophic threats facing the nation, and a firm resolve to address

⁷¹ Gallup, “War on Terror,” *supra*, note 66.

⁷² CNN/Opinion Research Corporation Poll (January 2011), <http://i2.cdn.turner.com/cnn/2010/images/01/11/rel1aa.pdf>.

⁷³ CNN/Opinion Research Corporation Poll (May 2, 2011), <http://i2.cdn.turner.com/cnn/2011/images/05/03/rel8a.pdf>.

⁷⁴ Associated Press-GfK Roper Public Affairs & Corporate Communications, “The AP-GfK Poll,” (May 2012) http://ap-gfkipoll.com/main/wp-content/uploads/2012/05/AP-GfK-Poll-May-2012-Topline-final_AFGHANISTAN.pdf.

⁷⁵ Scott Wilson and Jon Cohen, “Poll Finds Broad Support for Obama’s Counterterrorism Policies,” *The Washington Post* (7 February 2012).

⁷⁶ *Ibid.*

them.⁷⁷ As late as the 2006 congressional elections, the politics of security remained strikingly and crudely evocative of catastrophic imagery. As Dan Gardner writes, “One Republican television ad used the primal imaginary of hungry wolves gathering in a dark forest. Another featured the sound of ticking along with real quotations from an al-Qaeda leader — ‘we purchased some suitcase bombs’ and 9/11 was ‘nothing compared to what you will see next’ — followed by what looks like a close-up of a nuclear fireball.”⁷⁸ Vice President Cheney, campaigning on behalf of congressional republicans, repeatedly spoke of the prospect of “mass death in the United States,” and the ongoing “danger to civilization” posed by terror.⁷⁹ In a speech delivered in various locations, he asserted that al Qaeda was “still lethal, still desperately trying to hit us again.” Contrary to the policies of the Bush administration, the Democrats, in his view, were advocating a “strategy of resignation and defeatism in the face of determined enemies.”⁸⁰

The politics of fear in the 2008 presidential election appeared to break the pattern set in 2004 and 2006, but only somewhat. Although fear mongering was less overt, both Barack Obama and John McCain affirmed that catastrophic threats remained. Obama spoke of nuclear terror being the “gravest danger we face”,⁸¹ while McCain spoke of the rising threat posed by a nuclear Iran, aiding Hezbollah and al Qaeda.⁸² And while both candidates ruled out coercive interrogations, Obama emphatically endorsed targeted killing. “I don’t believe in assassinations,” he said during a debate with Democratic

⁷⁷ Gardner, *supra*, note 57, at 309.

⁷⁸ *Ibid.*

⁷⁹ Peter Baker, “Cheney Back Delivering the Grim Campaign Speech” (8 October 2006) *The Washington Post*.

⁸⁰ *Ibid.*

⁸¹ Alexander Mooney, “Obama Says Time to Rid World of Nuclear Weapons” (16 July 2008) *CNN Politics.com*.

⁸² Alfred de Montesquiou, “McCain Errs in Saying Iran Backs al-Qaida in Iraq” (18 March 2008) *Associated Press*.

candidates in June 2007, “but Osama bin Laden has declared war on us, killed 3,000 people, and under existing law, including international law, when you’ve got a military target like bin Laden, you take him out. And if you have 20 minutes, you do it swiftly and surely.”⁸³

In summary, throughout the post-9/11 period, a sizable portion of the US public held a belief in the imminent possibility of large-scale terror and often expressed support for the use of extraordinary measures in light of it.

3.2 The catastrophic imagination in Canadian political discourse and public opinion

The analysis set out above cannot be mapped on to the Canadian context in a simple way. There are, however, some similarities. Although Canada was not attacked on 9/11, during the fall of 2001, Parliament passed the *Anti-terrorism Act*, which at the time was understood to be a law of profound significance, with far reaching political and legal consequences. As with the *Patriot Act*, the *Anti-terrorism Act* does not contain all the measures associated with authoritarian legality (for example, the security certificate regime was already in place, in the *Immigration Act*). Yet, the Parliamentary debates and committee hearings surrounding the passage of the Act, and later Parliamentary reviews of it, furnish a primary setting for statements by government and security officials that tie counter-terror policy to fears of catastrophe. Government statements made in other contexts, along with public opinion on terror threats and responses, also pertain more closely to the *Anti-terrorism Act*, given its centrality in Canada’s counter-terror law and policy.

⁸³ “Drone Warfare in Pakistan” (May 2010) *Reuters*, online: <<http://www.breconder.com/pdf/Drones.pdf>>

3.2.1 Statements by members of the executive

In the period following 9/11, the government's two primary spokespersons on counter-terror policy were Anne McLellan and Irwin Cotler. Both acted for a period as Minister of Justice, and McLellan also served as Minister of Public Safety and Emergency Preparedness. Of the two, Cotler played a role more analogous to that played by US officials such as Cheney or Bush in making frequent reference to the prospect of mass terror. But both McLellan and Cotler invoked fears of catastrophe to justify the need for new, more preemptive measures.

McLellan's rhetoric, upon the introduction of the *Anti-terrorism Act*, and its defence before House and Senate committees in the fall of 2001, was relatively subtle. References to the prospect of mass terror were few, and more subdued, in favour of the suggestion that the pending threat was more likely to be something akin to another 9/11. For example, soon after the bill was first tabled, she told a Parliamentary committee: "We must be able to disable organizations before they are able to put hijackers on planes or threaten our sense of security, as we have seen in recent days with the scare of anthrax."⁸⁴

⁸⁴ Canada. Parliament. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*. (Meeting No. 29, October 18, 2001) 37th Parliament, 1st Session. (Online). Available: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=652657&Language=E&Mode=1&Parl=37&Ses=1> [December, 2011].

The reference to anthrax was not simply a dramatic gesture, but an allusion to a concern about bio-terror raised in question period on the 15th, following first reading of the anti-terror bill. Canadian Alliance Member Diane Ablonczy asked: "Mr. Speaker, the sergeant-at-arms has just informed us that an envelope opened by a staff member in the journals branch in this building contained some type of substance that caused a rash on her arms. We know that in the U.S. there has been one death from anthrax and 11 others have tested positive. The U.S. government says that it has enough medicine to treat up to two million people but here in Canada, health and rescue professionals say that there is not enough medicine to save more than about 2,000 people from an attack. Is this the health minister's idea of doing a good job for Canadians?" Moments later, Ablonczy asked "Mr. Speaker, I know the Minister [of Health, Art Eggleton] is intending to do his best but the fact of the matter is that our own professionals in health and rescue are sounding the alarm and have been for some time. They are saying that we really do not have the resources to treat a serious biochemical attack. We all hope there will not be one and maybe there will not but we have to be prepared. If we only have enough preparation to treat 2,000 people that is not enough. What will the minister be doing about it?" Canada. Parliament. House of Commons. *Debates*, 37th Parliament, 1st Session, 094, October 15th. (Online). Available: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=37&Ses=1&DocId=1227567>. [December, 2011].

And yet, three ideas were clear in her discourse: 9/11 represented a significant shift in the security landscape; it did so because it raised the prospect of mass terror; and this required and justified a shift from a reactive to preemptive approach.

Thus, on October 15th, introducing the bill on first reading, she asserted that 9/11 constituted a “substantial threat to domestic and international stability”;⁸⁵ on second reading, she stated that “[o]ur world changed dramatically on September 11;” and before committee on the 18th, she explained:

One of the fundamental questions posed this week is: why do we need Bill C-36? Why do we need new tools to fight terrorism? Yes, we have hijackings, sabotage, and murder offences already in the Criminal Code. They do remain available to us. But terrorism, ladies and gentlemen, is a special threat to our way of life. When dealing with groups that are willing to commit suicidal acts of mass destruction against innocent civilians, it is necessary to consider whether existing legislative tools are adequate to the challenge.⁸⁶

Given the stakes at issue, the tools would have to be preventive in nature: “The insidious nature of terrorism has dictated the need for new measures. These measures must have a preventative focus, because punishing terrorist crimes after they occur is not enough.

Ladies and gentlemen, the way I very simply explain this is, if we don’t stop the terrorists getting on the plane, it’s too late.”⁸⁷

Irwin Cotler was more explicit about the prospect of mass terror. In November of 2001, while Parliament continued to debate the *Anti-terrorism Act*, the University of Toronto held a conference that brought together numerous academics, security experts and officials to consider the bill. Cotler gave a paper in which he spoke of 9/11 triggering

⁸⁵ House Hansard, October 15, *ibid.* McLellan employs both a phrase and a sentiment that would appear in the pre-amble to the *Anti-terrorism Act*: “Whereas acts of terrorism constitute a substantial threat to both domestic and international peace and security; Whereas acts of terrorism threaten Canada’s political institutions, the stability of the economy and the general welfare of the nation”.

⁸⁶ House Standing Committee, October 18, *supra*, note 84.

⁸⁷ *Ibid.*

the passage of a “juridical watershed”.⁸⁸ From herein, counter-terror law “must be appreciated and assessed in the context of the existential threat of this terrorism, including the lethal face of terrorism as in the deliberate mass murder of civilians in public places [and ...] the potential use of weapons of mass destruction”.⁸⁹ Cotler would reiterate a concern about mass terror in several venues over the coming years. For example, he told the *Ottawa Citizen* in 2004: “...we’re not talking here about your ordinary domestic criminal. We’re talking about your transnational super-terrorist. We’re not talking about domestic crime, as serious as that is, we’re talking about a transnational, existential threat of the character that 9/11 was.”⁹⁰

Cotler also raised the prospect of mass terror repeatedly before a House of Commons committee at its belated three-year review of the *Anti-terrorism Act* in 2005. In March of that year, he urged that anti-terror law and policy should take account of contextual factors including “the potential access to, if not prospective use, of weapons of mass destruction”.⁹¹ In November, he sought to justify the Act as a means of “denying terrorists the capacity to carry out their attacks or to, above all, access weapons of mass

⁸⁸ Irwin Cotler, “Thinking Outside the Box: Foundational Principles for a Counter-Terror Law and Policy” in Ronald Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Canada’s Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001), at 114.

⁸⁹ *Ibid.*

⁹⁰ Ian Macleod and Andrew Duffy, “A Question of Balance: Canada’s Justice Minister Says New Anti-terror Laws Protect Human Rights. Critics Beg to Differ” (11 December 2004) *The Ottawa Citizen*. Substantially the same statement was made on February 21, 2005, in a submission to the Special Committee of the Senate on the Anti-terrorism Act, online: < http://www.justice.gc.ca/eng/news-nouv/spe-disc/2005/doc_31398.html>. See also Cotler’s address to the Fifth Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas (April 28th, 2004) online: < http://www.oas.org/juridico/english/moj_v_can.pdf>.

⁹¹ Canada. Parliament. House of Commons. Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. *Evidence*. (Meeting No. 8, March 23, 2005) 38th Parliament, 1st Session. (Online). Available: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1711584&Language=E&Mode=1&Parl=38&Ses=1>. [December, 2011].

destruction...”⁹² In each iteration of his argument, the prospect of mass terror was invoked to justify a range of measures including new terrorism offences, the expansion of state privilege, and the use of administrative detention.

One further statement worth noting in this category is a 2004 policy paper published by the Privy Council Office that serves as a parallel to the American “National Security Strategy” statements noted above. Titled “Securing an Open Society: Canada’s National Security Policy,”⁹³ the document identifies a series of threats to national security.⁹⁴ Among them are the “proliferation of weapons of mass destruction”, which is an issue “whether or not Canada [is] the primary target of such an attack, [since] the impact on our security could be immense.” A primary concern within this category is bioterrorism and the prospect of a “pandemic ... if groups seek to spread disease deliberately.”⁹⁵ The document advocates a range of measures, including new terrorism offences, expanded privilege, and greater information sharing among foreign and domestic agencies.

3.2.2 Statements by security officials and experts

In the United States, prominent security officials — from the CIA, FBI, and Homeland Security — had occasionally appeared before congress to portray the threat of terror in catastrophic terms. Academic experts on terrorism and other security officials played a roughly analogous role in Canada, in submissions before Parliamentary committees in the

⁹² Canada. Parliament. House of Commons. Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. *Evidence*. (Meeting No. 28, November 16, 2005) 38th Parliament, 1st Session. (Online). Available: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2115848&Language=E&Mode=1&Parl=38&Ses=1>. [December, 2011].

⁹³ Canada. Privy Council Office, 2004.

⁹⁴ *Ibid*, at 8.

⁹⁵ *Ibid*.

lead up to, and later reviews of, the *Anti-terrorism Act*. While these appearances may not have garnered significant media attention, they helped shape perspectives on the nature of the threat at issue and supported the government's case for the urgency of new and radical policy.

For example, in October of 2001, Joseph Magnet, a constitutional law scholar from the University of Ottawa, told the House Standing Committee on Justice and Human Rights that terrorism was evolving along “three long-term trends”.⁹⁶ Before 2001, there had been fewer annual incidents of terror, but they were becoming more lethal. They were also now beginning to embrace a “war paradigm”. This entailed “asymmetric warfare against states by non-state networks”, one in which no demands are made, no negotiation takes place, and non-combatants are targeted. Although Magnet did not invoke the prospect of WMD terror, his overview suggested that terror was only becoming more destructive and ambitious in its aims. By virtue of these developments, preemptive measures had become more critical. RCMP Chief Giuliano Zaccardelli emphasized the limitless nature of terrorists' ambitions, and the danger posed by their willingness to “commit suicidal acts of mass destruction against innocent civilians.”⁹⁷ Terrorism, in his view, “poses an extraordinary threat to society” and calling for “extraordinary action.”

Perhaps the most prominent expert on terrorism in committee hearings that fall was Professor Paul Wilkinson of the University of Saint Andrew's Centre for the Study of Terrorism and Political Violence. Speaking to the House Committee on Justice on October 24th, he asserted that “[w]e have crossed the threshold [...] into the era of mass

⁹⁶ Canada. Parliament. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*. (Meeting No. 38, October 30, 2001) 37th Parliament, 1st Session. (Online). Available: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041091&Language=E&Mode=1&Parl=37&Ses=1> [December, 2011].

⁹⁷ Canada. Parliament. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*. (Meeting No. 30, October 23, 2001) 37th Parliament, 1st Session. (Online). Available: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041091&Language=E&Mode=1&Parl=37&Ses=1> [December, 2011].

terrorism, and we see a group that is actually hell-bent upon killing large numbers of people.”⁹⁸ The first stages of this might have been in the process of unfolding at present:

What I think we have seen in the case of the American atrocities is a group that really does have no compunction about massive lethality, and so we are a major step closer to the use of weapons of mass destruction by a terrorist group. We do not yet know enough about the anthrax that is being used in the United States and has turned up in some other countries, for example, in Argentina. We don't yet know whether it is part of the al-Qaeda network's efforts or whether it is something being done by some other group or groups or by a rogue state. There is a great debate about that. However, in the information we already have about the acts carried out by the bin Laden al-Qaeda network we can certainly see that if they had access to a means of dispersing chemical, nuclear, or biological weapons, there is no reason to think they would be in any way deterred from doing it by moral constraints.⁹⁹

Before a Senate committee the same day, he emphasized that the 9/11 attacks were “the worst cases of mass terrorism we have experienced in modern history”, but possibly less severe than they might have been. As he explained: “Many of the specialists involved in the investigation of the suicide hijackings in the United States are of the opinion that there was a plan to fly one of the airliners at 500 miles an hour into a civilian nuclear reactor. If that had happened, and the action had caused a major disaster at that plant, the consequences would have been experienced by many of the urban areas on the Canadian side of the border as well as within the United States.”¹⁰⁰

Later committee hearings, on reviews held in both 2005 and in 2010, featured further expert opinion on the prospect of WMD. In 2005, Dr. Boaz Gainer of the International Policy Institute for Counter-terrorism mused about the prospects of nuclear

⁹⁸ Canada. Parliament. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*. (Meeting No. 31, October 24, 2001) 37th Parliament, 1st Session. (Online). Available: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1041055&Language=E&Mode=1&Parl=37&Ses=1> [December, 2011].

⁹⁹ *Ibid.*

¹⁰⁰ Canada. Parliament. Senate. Special Senate Committee on the Subject Matter of Bill C-36 *Evidence*. (Meeting No. 31, October 24, 2001) 37th Parliament, 1st Session, issue 3. (Online). Available: <http://www.parl.gc.ca/Content/SEN/Committee/371/sm36/pdf/03issue.pdf> [December, 2011].

and biological terrorism,¹⁰¹ while Professor Gavin Cameron of the University of Calgary was asked about nuclear terror in Canada.¹⁰² Cameron conceded that “[w]e have almost no evidence of weapons-usable material, let alone a weapon itself, reaching the hands of a terrorist organization.” In his view, “the bigger threat, the more likely threat anyway, particularly in the context of Canada, is things like radiological terrorism, the use of a radiological dispersal device — it is very easy to do, it uses nuclear material that’s widely available — or an attack on a nuclear facility, of which obviously Canada has a number.” Biological or chemical terror also posed a significant threat given the “large body of people who have the technical expertise to create those sorts of weapons,” and the large membership and significant funds at the disposal of al Qaeda and other groups. As recently as 2010, when asked by a Senate committee tasked to consider the “current status of terrorism” and its relevance to Canada, Tom Quiggin of the Canadian Centre of Intelligence and Security Studies at Carleton University asserted that “[w]hen I look five to ten years down the road, the things that keep me awake at night are chemical and biological weapons in the hands of terrorist groups driven by scientists who have an environmental or global outlook.”¹⁰³

An important further class of statements made outside of Parliamentary debates and discussions can be found in the annual reports of the Canadian Security Intelligence Service. Both their 2003 and 2004 reports list terrorism as a primary concern, noting

¹⁰¹ See Canada. Parliament. House of Commons. Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. *Evidence*. (Meeting No. 27, November 2, 2005) 38th Parliament, 1st Session.

¹⁰² *Ibid*, (Meeting No. 27, October 5, 2005).

¹⁰³ Canada. Parliament. Senate. Special Senate Committee on Anti-terrorism. *Evidence*. (Issue 4, June 21, 2010) 40th Parliament, 3rd Session. Online: http://www.parl.gc.ca/Content/SEN/Committee/403/anti/04ev-e.htm?comm_id=597&Language=E&Parl=40&Ses=3 [December 2011]

WMD terror as both a direct and indirect threat to Canadian security.¹⁰⁴ Later reports confirm that the “proliferation of chemical, biological, radiological, nuclear and explosive (CBRNE) weapons — also collectively referred to as weapons of mass destruction (WMD) — and their delivery vehicles (whether to states or non-state actors) poses a grave threat to the security of Canada, its allies, and to the international community.”¹⁰⁵

A shift in recent rhetoric

In 2012, the federal government published its first policy statement dealing explicitly with counter-terrorism.¹⁰⁶ While the “proliferation of more sophisticated weaponry—including weapons of mass destruction,”¹⁰⁷ remains a concern, Canada appears to be following the American pattern of describing terrorism in vague but ominous terms as a “serious and persistent threat to the security of Canada”,¹⁰⁸ “a significant threat to Canada, Canadians and Canadian interests abroad”,¹⁰⁹ or, in the case of the “Sunni Islamist groups affiliated with al Qaeda” – in particular AQAP and al Shabaab – “a substantial threat to Canada”.¹¹⁰ While AQAP has “pursued international attacks that may have affected Canada, such as their failed December bombing of Northwest Airlines Flight 253 in Canadian air space”, al Shabaab poses a threat in part because “[s]everal Canadians are

¹⁰⁴ The papers are no longer available online. I rely for this point on a summary of them by Livianna Tossutti, Osvaldo Croci and Amy Verdun, “National Threat Perception: Survey Results from Canada” (Garnet Working Paper, 18.2; May 2007), at 5.

¹⁰⁵ Canadian Security and Intelligence Service “2009-2010 Public Report”, online: <<http://www.csis-scrs.gc.ca/pblctns/nnlrprt/2009-2010/rprt2009-2010-eng.asp#activities5>>. See also the previous year’s report, in which inexplicably, the threat appears less serious: “Chemical, biological, radiological, nuclear and explosive (CBRNE) weapons are an ongoing concern for the Service”⁹⁴ “2008-2009 Public Report”, online: <<http://www.csis-scrs.gc.ca/pblctns/nnlrprt/2008/rprt2008-eng.asp>>.

¹⁰⁶ Canada, “Building Resilience Against Terrorism: Canada’s Counter-terrorism Strategy,” (Ministry of Public Safety, 2012).

¹⁰⁷ *Ibid.*, 9.

¹⁰⁸ *Ibid.*, 6.

¹⁰⁹ *Ibid.*, 7.

¹¹⁰ *Ibid.*

believed to have left Canada to join the group.”¹¹¹ In light of the continuing danger posed by those groups and by “violent homegrown extremists,” the document affirms a larger preemptive strategy that includes greater state secrecy and the use of security certificates under the Immigration and Refugee Protection Act.¹¹²

3.2.3 Wider public perceptions of WMD terror and security policy

In the United States, as noted above, a widespread belief in the possibility of WMD terror played a supporting role in a politics consistent with authoritarian legality. Unfortunately, I could find no public opinion data to indicate the extent of a belief in the possibility of WMD terror among Canadians during this period. But there is evidence of a substantial fear of terror among Canadians, and strong support for aggressive anti-terror measures. Both are important contextual factors in the emergence of authoritarian legality in Canada.

Polls suggest that early after 9/11 concerns among Canadians related primarily to beliefs about the threat posed to US rather to Canadian security. A 2002 poll conducted by Pollara found that only 14% of Canadians believed a terror attack on Canadian soil was likely.¹¹³ But an Ekos poll that year found that 45% of Canadians believed it to be very likely that “the U.S. will experience another similar scaled or worst terrorist disaster in the coming year.”¹¹⁴ Forty-eight per cent agreed with the statement “I can trust the Government of Canada to strike the right balance of security and civil liberties.”¹¹⁵ Only 31% disagreed.

¹¹¹ Ibid.

¹¹² Ibid., Annex B.

¹¹³ Clark Campbell, “Canadians Want Strict Security, Poll Finds” (11 August 2005) *Globe and Mail*.

¹¹⁴ “September 11th in Hindsight: Recovery and Resolve” (30 August 2002) *Ekos*, online: <<http://www.ekos.com/admin/articles/9sept2002.pdf>>

¹¹⁵ Ibid.

By 2005, concerns about Canadian security were growing. Support for the government's approach to counter-terror also remained high, along with support for authoritarian measures. A Strategic Council poll found that 62% of Canadians believed a terrorist attack in Canada was likely — with that number rising to 71% in a poll conducted a year later.¹¹⁶ The Strategic Council also found that 62% strongly supported “[g]iving the U.S. any information it requests about Canadian citizens whom they suspect of being terrorists.”¹¹⁷ Seventy-two percent strongly supported “having video cameras in all public places.” Eight-one per cent were strongly in favour of “deporting or jailing anyone who publicly supports terrorists”.

In November of 2005, in a joint submission to a House of Commons subcommittee holding hearings for the belated three-year review of the *Anti-terrorism Act*, Irwin Cotler and Anne McLellan drew upon public opinion to bolster their advocacy of the Act, and the government's approach to security. They asserted that:

Canadians realize that the risk of terrorists attacking Canadian targets at home and abroad is an emerging reality. Poll after poll has shown that Canadians, by and large, approve of measures aimed at improving public security. According to Ekos, over 90% of Canadians think Canada's security response to terrorism has either been appropriate or not gone far enough. Almost 60% of Canadians think it is somewhat or very likely that Canada will suffer from a terror attack in the coming year.

A poll conducted by the Strategic Counsel in August 2005 found that only 10% think Canada has put too much emphasis on measures to combat terrorism at the expense of civil liberties. A majority of Canadians (51%) believe that we have struck the right balance between anti-terror measures and protecting civil liberties, while 25% of Canadians believe that too much emphasis has been put on protecting civil liberties.¹¹⁸

¹¹⁶ Pollara poll, cited in Tossutti, Croci, and Verdun, *supra*, note 104, at 11.

¹¹⁷ *Ibid.*

¹¹⁸ Department of Justice, Canada, “Joint Statement by the Hon. Anne McLellan, Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness & the Hon. Irwin Cotler, Minister of Justice and Attorney General of Canada: On the Occasion of Appearances before the Senate Special Committee on the Anti-terrorism Act and the House of Commons Subcommittee on Public Safety and National Security” (14 November, 2005), online: <http://www.justice.gc.ca/eng/news-nouv/spe-disc/2005/doc_31726.html>

Commentators have suggested that by invoking public opinion in this way, Cotler and McLellan confirmed that the government's counter-terror policy in this period "followed rather than led public opinion".¹¹⁹ While this may be true to some extent, what is not clear from the data cited is how well informed members of the Canadian public were about the measures that were taken. Yet, even with this qualification, the reliance on public opinion here still points to a shared set of assumptions. Both the government and a large portion of the public assumed that the threat of terror was growing, and that it required new measures that *might* entail a compromise of basic rights and freedoms.

Later polls suggest a consistency in public opinion on these issues. An Ipsos Reid survey of 2011 found that 58% of Canadians affirmed "they are more concerned about a terrorist attack in Canada now than before 9/11."¹²⁰ A full 77% of respondents disagreed that "Canada and the U.S. can relax security measures now that there hasn't been an attack in 10 years". And 74% believed "the Canadian government's response has been 'appropriate'."

A final point relates to opinion among government officials and civil servants. As noted above, evidence of public opinion on WMD terror in Canada appears to be lacking. However, some evidence exists to suggest that members of Parliament, civil servants, and security officials generally did share a concern about mass terror in the period at issue.

In the summer of 2006, three academic researchers conducted a survey in the form of a written questionnaire to 77 Parliamentarians (House and Senate) with a "security, defence, or foreign affairs remit";¹²¹ 22 "senior civil servants from the Departments of

¹¹⁹ Campbell Clark, "Canadians Want Strict Security: Poll" (11 August 2005) *The Globe and Mail*.

¹²⁰ Amy Chung, "Canadians' Fears of Terror Rose Post 9/11," *Postmedia News* (7 September 2011).

¹²¹ Tossutti, Croci, and Verdun, *supra*, note 104, at 7.

Citizenship and Immigration, Public Safety and Emergency Preparedness, Foreign Affairs and International Trade, National Defence, and the Canada Border Services Agency”; and 37 academics working on security issues in Canadian universities. Although response was generally low,¹²² and uneven among different age groups, party-affiliations, and segments of the survey population, the survey provides an indication — however tentative — of common concerns among these various groups.

The survey asked respondents to rank the “five gravest threats facing the country in 2006 and in 2010”. The authors found that “terrorist strikes against critical infrastructure and state or society”¹²³ were among the highest ranked, along with natural disasters and man-made environmental threats. The survey also notes variations among the different groups in terms of primary fears, but suggests the prevalence of a fear of WMD among all groups. When asked about current threats, “Parliamentarians assigned higher average rankings to biological/chemical attacks and migratory pressures in 2006 than members of the bureaucratic and academic elites”. When asked about future threats, “Civil servants were more likely than security experts and parliamentarians to forecast that cyber attacks and nuclear/radiological attacks would constitute graver threats to Canadian security in 2010.”¹²⁴

The survey did not canvas opinions about extraordinary measures as a response to these threats. Yet it noted a set of preferences that could be compatible with either authoritarian legality or liberal legality. Thus, “[p]olice cooperation and intelligence sharing were the most commonly-cited approaches for dealing with seven issue areas

¹²² *Ibid.* The authors conjecture, at 9: “Several factors may account for the low participation rates, particularly the sensitive nature of information about security perceptions (some who declined to participate wrote that their opinions were based on confidential information), a lack of knowledge about some of the specialized questionnaire items (indicated by some respondents), and the overall decline in survey participation rates that has been observed since the early 1990s.”

¹²³ *Ibid.*, at 10.

¹²⁴ *Ibid.*, at 14.

including: biological/chemical attacks [and] nuclear/radiological attacks”.¹²⁵ And while few respondents supported “traditional military solutions” to pending threats, there was a “tendency to prefer special operations to deal with both forms of terrorism, biological/chemical attacks, and nuclear/radiological attacks.”¹²⁶

3.3 Conclusion

In the United States, public officials often made a clear case for authoritarian measures based on fears of mass terror. Public opinion appears to have been both shaped by this politics and a condition of its possibility. Fears of WMD terror and support of authoritarian measures were widespread. A similar pattern can be found in Canada, though to a lesser degree. Catastrophic fears played a role in government rhetoric and public opinion, and these at least formed a relevant part of the context for public discussion and debate about counter-terror law and policy. Ultimately, in both the US and Canada, a belief in the growing and unprecedented threat that terror posed served as a ground for a larger argument about the need to embrace a new, more radical approach to security. In what follows, I explore the wider resonance of this logic in expert literature and legal scholarship.

¹²⁵ *Ibid*, at 15.

¹²⁶ *Ibid*.

4 Mass Terror in Expert Literature and the Advocacy of Extreme Measures

The focus in this chapter shifts from the role of the catastrophic imagination in political and security discourse to its role in scholarly literature. I argue that over the course of the past decade, the catastrophic imagination has played an important contextual role in the emergence of authoritarian legalism by gaining legitimacy in a number of interrelated fields of scholarship. I focus on three of them: expert opinion on the technology of weapons of mass destruction (WMD); the history and evolving nature of terrorism; and advocacy of extreme measures in legal scholarship.

I want to suggest, more specifically, that the prevalence of the catastrophic imagination in the first two bodies of literature has served to bolster its role in the third. Thus, due in part to the fact that experts on WMD and the history of terror have leant legitimacy and authority to the claim that acts of mass terror are becoming more likely, advocates of extreme measures have argued with greater plausibility that, on the basis of the growing threat, the limits on state power of an older, liberal legality are no longer reasonable. Over the past decade, this view has, in turn, played a critical role in shaping public debate, law, and policy.

I advance this argument in three parts. First, I survey recent literature dealing with the prospect of nuclear and biological terror. Focusing on nuclear terror, I trace the outlines of a consensus among a prominent group of experts who contend that the prospect that non-state actors will use these weapons is relatively new, possibly imminent, and apocalyptic in its potential import. All three beliefs are also often held out as uncontroversial, or the subject of wide agreement about the evidence – contrary to a body of opinion explored in Chapter 6. Turning briefly to recent literature on biological terror,

I argue that although the field lacks an analogous ‘consensus view’ about the likelihood or magnitude of a bioterror attack, a number of experts, writing after 2001, have argued for the increasing danger that it poses. The cause for concern here stems from rapid advances in biotechnology, greater accessibility of materials, and evidence of the recent use and interest in bioweaponry by terrorist groups.

In the second part of the chapter, the focus shifts to work by historians and scholars of the evolving nature of terrorism itself. The catastrophic imagination makes its appearance here in the form of a shared sense that global terror groups are becoming more ambitious and genocidal, as technologies of terror are becoming more accessible and lethal. Notable here is the confidence with which experts assert a belief in the inevitability of mass terror, and the claim that the historical trajectory of terror – to become more ambitious and destructive over time – supports this view.

The final part of the chapter explores the catastrophic imagination among a prominent group of American jurists who advocate the use of extreme measures in national security. A common approach for the figures under review here – Richard Posner, Alan Dershowitz, and John Yoo – is to invoke the imminent prospect of WMD use as self-evident or beyond debate; and, thus, not a claim in need of supporting opinion, or critical assessment in the few cases where authority is cited. This widely accepted, imminent threat of WMD terror forms the basis of the claim that given the magnitude of the threat, conventional or liberal legal limits on state power must be set aside in favour of extreme or preemptive measures.

The purpose of surveying these three bodies of literature is to demonstrate how the catastrophic imagination has functioned, throughout the past decade, across discourses and disciplines, both to validate a set of beliefs about the nature of current threats and to justify a certain set of responses to them. These in turn form an important

context for understanding the embrace of authoritarian legalism by governments, legislatures, and courts, as explored in the next chapter.

4.1 Apocalyptic fear among experts on mass terror

4.1.1 The imminent prospect of nuclear terror

The prospect of nuclear terror has been a concern from the time that nuclear weapons were first tested.¹ Throughout the cold war, there was a long-standing debate about whether a non-state actor could deploy such a weapon, by obtaining fissile material and building a crude device on its own, or by stealing a bomb itself.² The debate was never settled, however, as many continued to doubt that a non-state actor, in possession of fissile material, could build and effectively deploy a nuclear device without facing enormous, possibly insurmountable challenges.³

After 9/11, however, the nature of the discussion had changed. Much of the discussion had coalesced around a belief that the prospect of nuclear terror had become real and immediate, on the basis that certain variables had altered the situation, rendering the threat new and unprecedented. In advancing this claim, some new facts were relied upon, but the contentious nature of certain older claims had often been glossed over. And in keeping with an older tradition of assessing the nuclear question, experts inclined to believe in an imminent threat of nuclear terror tended to lend emotional – and thus

¹ Leo Szilard, a Hungarian physicist and contributor to the Manhattan Project, wrote about nuclear bombs in 1945: “The position of the United States in the world may be adversely affected by their existence.... Clearly if such bombs are available, it will not be necessary to bomb our cities from the air in order to destroy them. All that is necessary is to place a comparatively small number in major cities and detonate them at some later time.... The long coastline, the structure of our society, and the heterogeneity of our population may make effective controls of such ‘traffic’ virtually impossible.” Cited in Jonathan Schell, *A Hole in the World: An Unfolding Story of War, Protest and the New American Order* (New York: Nation Books, 2004), at 67.

² For a survey of cold-war opinion for and against the possibility of nuclear terror, see Stanley S. Jacobs, “The Nuclear Threat as a Terrorist Option” (1998) *Terrorism and Political Violence* 10: 4, 149-163.

³ *Ibid*, at 152.

persuasive – force to their fears by framing their discussion in vivid and apocalyptic imagery.

Figures representative of this new consensus view on nuclear terror include Graham Allison and Matthew Bunn of Harvard's Belfer Center for Science and International Affairs, and co-authors Charles Ferguson and William Potter of the Monterey Institute's Center for Nonproliferation Studies.⁴ In a widely read, mainstream non-fiction work in 2004, *Nuclear Terrorism: The Ultimate Preventable Catastrophe*, Allison asserted, without qualification, that “a nuclear terrorist attack on America in the decade ahead is more likely than not”⁵ – a claim he would repeat in 2006 without altering the timeframe.⁶ (Elsewhere, he has extended his concerns to Canada.⁷) In 2005, writing for a more technical and scholarly audience, Ferguson and Potter concluded that the US “has faced the threat of nuclear terrorism for many years, but this peril looms larger today than ever before”.⁸ In 2009, confirming the currency of a claim he had made in a number

⁴ For other contributions to this consensus view, Frank Barnaby, *How to Build a Nuclear Bomb and other Weapons of Mass Destruction* (London: Granta Books, 2004), and Michael Levi, *On Nuclear Terrorism* (Cambridge: Harvard University Press, 2007). Also worth mentioning here is the work of the US congress's Commission on the Prevention of WMD Proliferation and Terrorism, of which Graham Allison was a member, along with US Senators Bob Graham and Jim Talent, and others: *World At Risk* (New York: Vintage Books, 2008). For a comprehensive survey of the literature on nuclear terror, see, e.g., Brian Jenkins, *Will Terrorists Go Nuclear* (New York, Prometheus Books, 2008).

⁵ Graham Allison, *Nuclear Terror: the Ultimate Preventable Catastrophe* (New York, Henry Holt: 2005), at 15.

⁶ Graham Allison, “The Ongoing Failure of Imagination” (2006) *Bulletin of the Atomic Scientists* September/October: 36-41; cited in John Mueller, *Atomic Obsession: Nuclear Alarmism from Hiroshima to Al Qaeda* (Oxford: Oxford University Press, 2010) at 181. Mueller also notes that in 1995, Allison asserted that an act of nuclear terror against “American targets” would occur “before the decade is out.” Mueller citing Allison at 181; see Graham Allison, “Must We Wait for the Nuclear Morning After?” *Washington Post* (30 April, 1995) C7. Adopting Allison's sense of urgency, the *World at Risk* report, *supra*, note 4, at xv, states: “The Commission believes that unless the world community acts decisively and with great urgency, it is more likely than not that a weapon of mass destruction will be used in a terrorist attack somewhere in the world by the end of 2013.”

⁷ Graham Allison, “Is Nuclear Terrorism a Threat to Canada's National Security?” 2005 *International Journal* 713, at 714-171: “... nuclear terrorism is a very serious threat to Canada, as well as to the US and the world. [...] Directly, Montreal or Toronto or Vancouver could be the target of a nuclear terrorist bomb. [...] Given its close ties with the United States and the support it provides in the global war on terrorism, Canada is undoubtedly on al Qaeda's target list.”

⁸ Charles D. Ferguson and William C. Potter, *The Four Faces of Nuclear Terrorism* (London, Routledge: 2005), at 1.

of reports, articles, and speeches (and continues to make), Matthew Bunn opined that: “There remains a very real danger that terrorists could get and use a nuclear bomb, turning the heart of a major city into a smoldering radioactive ruin.”⁹

Each of these authors agrees that the task of producing fissile material lies beyond the present scope of a non-state actor. But each also agrees that nuclear terror seems viable in the short term based on four facts. The first is the prodigious supply of poorly guarded fissile materials throughout the world, in the form of both weapons and reactors, in sites where sensitive materials are often easily open to theft, sale, or (in the case of a nuclear reactor) attack by airplane or other means.¹⁰ Frequent reports of theft, loss, or illicit transfer of material lend substance to these fears – making the prospect of material eventually falling into the hands of terrorists seem all but inevitable. A second factor in support of the terrorists is the claim that, having obtained fissile material, building a viable nuclear weapon does not pose a significant hurdle, since the necessary knowledge is readily available in the public domain, and the requisite skill is readily attainable. A third factor is the ease with which fissile material could be concealed and delivered, or the difficulty of detecting its transit across the world’s many porous and open borders. Fourth and finally, each of the authors points out that Al Qaeda and other global terror groups

⁹ Matthew Bunn, “Reducing the Greatest Risks of Nuclear Theft and Terrorism” *Daedalus* (Fall 2009) 112; see also Mathew Bunn, *Securing the Bomb 2010: Securing All Nuclear Materials in Four Years*. Cambridge, Mass. And Washington, D.C.: Project on Managing the Atom, Belfer Center for Science and International Affairs, Harvard Kennedy School and Nuclear Threat Initiative, April 2010; online: <www.nti.org/e_research/Securing_The_Bomb_2010.pdf>. For more recent pronouncements, see, e.g., “Next Steps to Strengthen Nuclear Security and Prevent Nuclear Terrorism,” presentation notes of April, 2011, at a Vienna meeting of the Fissile Materials Working Group; available online at the Belfer Center: <http://belfercenter.ksg.harvard.edu/experts/368/matthew_bunn.html>

¹⁰ Graham Allison, *Nuclear Terror*, *supra*, note 5, at 98; Ferguson and Potter, *Four Faces*, *supra*, note 8, at 119; Bunn, *Securing the Bomb 2010*, *ibid*, at 6. Ferguson and Potter add, at 107, that fissile materials are easier to obtain than bombs because both “the amount of fissile material that might theoretically be accessible to terrorists is staggering”, and that “fissile materials are often handled in in difficult-to-measure bulk form, introducing measurement uncertainties that can mask repeated diversions of small quantities”. They also note although a number of thefts of fissile materials have been reported in the past decade, but none have involved stolen bombs.

have been known to seek WMD, including nuclear bomb technology, since at least the mid-90s, making the threat less abstract and hypothetical.¹¹

The strongest argument of the consensus school is the danger posed by copious supplies of poorly guarded fissile material. Ferguson and Potter envision a range of acquisition scenarios ranging from a state “voluntarily shar[ing] material”; to a “senior official... for ideological or mercenary motives” providing it; to the keepers of the material being “bribed or coerced”; to terrorists obtaining it in a period of political unrest.¹² The frequency and number of thefts, in recent years, of weapons-grade material from Russia and other states of the former Soviet Union lend some of these scenarios further plausibility. After 1989, Allison writes, “there have been hundreds of confirmed cases of successful theft of nuclear materials in which the thieves were captured, sometimes in Russia, on other occasions in the Czech Republic, Germany and elsewhere.”¹³ Every month, reports surface of “yet another occasion in which nuclear material was stolen or a theft attempted”.¹⁴ Indeed, as Allison notes, between 1989 and 1992, German officials reported over 700 cases of “attempted nuclear sales, including sixty instances that involved seizure of nuclear materials.”¹⁵ Although none of these reported thefts have resulted in the loss of a known quantity of fissile material, he asserts (without substantiation) that “there can be no doubt about the fact that enough nuclear material to

¹¹ Allison, *Nuclear Terror*, *supra*, note 5, at 12-14; Bunn, *Securing the Bomb 2010*, *supra*, note 9, at 13; Ferguson and Potter, *Four Faces*, *supra*, note 8, at 116-117.

¹² Ferguson and Potter, *ibid*, at 118.

¹³ Allison, *Nuclear Terror*, *supra*, note 5, at 9; see also p. 68-74. Ferguson and Potter set out a similar series of concerns in *Four Faces*, *supra*, note 8, at 54-61, 107-110, and 126-131.

¹⁴ Allison, *Nuclear Terror*, *supra*, note 5, at 9.

¹⁵ Allison, *ibid*, at 71.

build more than twenty nuclear weapons was lost in the transition from the Soviet Union to Russia.”¹⁶

A further concern lies with nations that have tenuous or insecure political orders, such as Pakistan, North Korea, Iran and possibly China. There remains a danger, with at least the first three countries, that officials might assist terrorists in the theft or sale of material or knowledge.¹⁷ For many observers, the case of Pakistani nuclear scientist A.Q. Kahn confirms this fear. While working with the Dutch government in the 1970s, Kahn obtained designs for uranium enrichment processes, which enabled him to fast-track Pakistan’s controversial nuclear program in the 1980s, and to play an instrumental role in its success in building a nuclear bomb by 1998.¹⁸ Yet in 2003, American intelligence agents uncovered that for many years Kahn had also been operating a private nuclear consulting firm ‘on the side’—supplying parts and blue prints for uranium enrichment to the governments of Libya, Iran, and North Korea. Many in Pakistan and abroad have speculated that a network as large and sophisticated as the one in which Kahn was involved could not have existed without at least some knowledge or complicity on the part of the Pakistani government.¹⁹ For Alison and others, an equally pressing concern to the one posed by a figure such as Kahn is the prospect that, at some point soon, Islamic radicals may succeed in toppling the western-friendly regime in Pakistan, thus placing nuclear weapons and materials directly into the hands of a regime sympathetic to al

¹⁶ Allison, *ibid*, at 10. Bunn, *Securing the Bomb 2010*, *supra*, note 9, at v., provides an updated (but somewhat vague) tally of such activity: “There have been over 18 documented cases of theft or loss of plutonium or highly enriched uranium (HEU), the essential ingredients of nuclear weapons. Peace activists have broken into a Belgian base where U.S. nuclear weapons are reportedly stored; two teams of armed men attacked a site in South Africa where hundreds of kilograms of HEU are stored; and Russian officials have confirmed that terrorist teams have carried out reconnaissance at Russian nuclear weapon storage facilities.”

¹⁷ Allison, *Nuclear Terror*, *supra*, note 5, at 76-81.

¹⁸ For an account of Kahn’s involvement in nuclear affairs, from the 1970’s onward, see William Langeweische, *The Atomic Bazaar* (New York: Farrar, Straus and Giroux, 2008).

¹⁹ Allison, *Nuclear Terror*, *supra*, note 5, at 63.

Qaeda.²⁰ Pakistan is understood to have some fifty nuclear bombs and enough highly enriched uranium for fifty more.²¹

Another compelling claim from this school of experts is the ease with which a bomb or fissile material could be transited, given the difficulty of detecting its movement. Alison and Bunn believe that, as Bunn puts it, the “small size and weak radiation signal” of the material, together with the “myriad potential pathways” into a country – through a shipping container, an open port, an open border – make detection all but impossible.²² Ferguson and Potter are only slightly more cautious on this point. If theft of material came to light, a “massive hunt” would follow, along with “greatly intensified security over transportation links and points of entry.”²³ But many conceivable scenarios would remain in which material could easily avoid detection.

The more contentious, but critical, claim from this school is that once in possession of fissile material, the task of building and effectively deploying a crude nuclear weapon would not pose a significant hurdle. I will defer until Chapter 6 the question of how and why this is a contentious claim. I seek here to establish two more basic points. First, members of the consensus school believe that nuclear bomb building is readily within reach of non-state actors in possession of fissile material because of its technical, theoretical simplicity. The second point is that members of this school present the simplicity claim as “widely acknowledged” and beyond debate, when in fact there is a vigorous debate about the issue (to be explored in Chapter 6).

Taking up these points in reverse, Alison begins his discussion of the issue by positing that “in the popular imagination, the belief persists that building a nuclear

²⁰ Alison, *ibid*, at 78; Bunn, *Securing the Bomb 2010*, *supra*, note 9, at vi.

²¹ Allison, *Nuclear Terror*, *supra*, note 5, at 75.

²² Bunn, *Securing the Bomb 2010*, *supra*, note 9, at v; Alison, *ibid*, at 107.

²³ Ferguson and Potter, *Four Faces*, *supra*, note 8, at 138-9.

weapon requires Manhattan Project-style science. Those who work with nuclear weapons have always known better.”²⁴ Citing David Lilienthal, chairman of the Atomic Energy Commission in the late 1940s, and Theodore Taylor, a nuclear physicist credited with designing “the smallest and largest” US atomic arsenals, Alison suggests that in the view of those intimately involved in US nuclear bomb-building programs, the process involves basic knowledge that is widely available, and is commonly understood to be, as Taylor puts it, “very easy. Double underline. Very easy.”²⁵ Ferguson and Potter make a more sweeping claim: “Most physicists and nuclear weapons analysts have concluded that construction of a gun-type device would pose few technological barriers to technically competent terrorists.”²⁶ In support, they cite a series of government reports and expert opinions,²⁷ including passages from a 2002 US National Research Council report stating that “Crude HEU [highly enriched uranium] weapons could be fabricated without state assistance”;²⁸ a 2003 open letter by the Union of Concerned Scientists stating that HEU is “the easiest material in the world for terrorist to use to make a nuclear bomb”;²⁹ and Frank von Hippel, a physicist in the employ of the Bush administration’s Office of Science and Technology Policy, who stated in 2001, “It is generally agreed, however, that educated terrorists could turn weapon-grade uranium...into a gun type nuclear explosive.”³⁰

²⁴ Allison, *Nuclear Terror*, *supra*, note 5, at 93.

²⁵ Alison, *ibid.* Alison’s source for Taylor’s statement is Dan Stober, “No Experience Necessary” (2003) *Bulletin of the Atomic Scientists* March/April 57, at 62.

²⁶ Ferguson and Potter, *Four Faces*, *supra*, note 8, at 132.

²⁷ See the sources cited at note 52, in Ferguson and Potter, *ibid.*

²⁸ Committee on Science and Technology for Countering Terrorism, *Making the Nation Safer* (Washington: National Academies Press, 2002) at 45, cited in Ferguson and Potter, *Four Faces*, *supra*, note 8, at 132.

²⁹ Union of Concerned Scientists, “Scientists’ Letter on Exporting Nuclear Material,” to W.J. ‘Billy Tauzin, September 25, 2003, online: <http://www.ucsusa.org/nuclear_weapons_and_global_security/nuclear_terrorism/policy_issues/scientists-letter-on.html>, cited in Ferg and Potter, at 132.

³⁰ Frank von Hippel, “Recommendations for Preventing Nuclear Terrorism,” Federation of American Scientists Public Interest Report, November/December 2001, cited in Ferguson and Potter, *Four Faces*, *supra*, note 8, at 132.

Writing in 2010, Mathew Bunn characterizes the literature on this point in similar terms: “Repeated assessments by the U.S. government and other governments have concluded that it is plausible that a sophisticated terrorist group could make a crude nuclear explosive—capable of destroying the heart of a major city—if they got enough plutonium or HEU.”³¹

Ferguson and Potter’s case for the simplicity of building a crude nuclear device may be taken as representative, given the concurrence of Alison, Bunn and Weir, and others, on its essential points.³² They begin by noting that the most likely method that terrorists would employ for building a bomb is a ‘gun-type’ device, which involves the firing, within a tubular shell, of one piece of HEU into another, causing the chain-reaction of sub-atomic particles that sets off a nuclear explosion.³³ A viable weapon would require only 40 to 50 kilograms of HEU, an amount small enough to envision being easily transported.³⁴ Designs for a gun-type weapon are widely available online.³⁵ A small group would likely need to be assembled that had knowledge of explosives, metalworking and chemistry, and the group would need between several weeks and several months to test and refine the parts of the bomb.³⁶ Ferguson and Potter conclude that:

Because of the inherent simplicity of a gun-type device, designing and constructing it would be relatively straightforward. Testing the non-nuclear parts of the device would likely be required, and an appropriate testing area would be needed (such as a terrorist training camp...) to avoid arousing suspicion. Assuming such tests could be

³¹ Bunn, *Securing the Bomb 2010*, *supra*, note 9, at 16.

³² See, e.g., Frank Barnaby, *How to Build*, *supra*, note 4, at 78-83; Matthew Bunn and Anthony Wier “Terrorist Nuclear Weapon Construction: How Difficult?” (2006) *ANNALS of the American Academy of Political and Social Science* 607: 133, at 144; and Michael Levi, *On Nuclear Terrorism*, *supra*, note 4 at 35-45. Although Levi agrees that the technical steps in bomb building are theoretically straightforward, he raises various potential practical issues that may be encountered at each stage.

³³ Ferguson and Potter, *Four Faces*, *supra*, note 8, at 131. Allison, *Nuclear Terror*, *supra*, note 5, at 96; Bunn, *Securing the Bomb 2010*, *supra*, note 9, at 16.

³⁴ Ferguson and Potter, *ibid*, at 132; Alison, *ibid*, at 95-6; Bunn, *ibid*, at 16.

³⁵ Ferguson and Potter, *ibid*, at 133; Alison, *ibid*, at 94-5. Bunn, *ibid*, at 16.

³⁶ Ferguson and Potter, *ibid*, at 133.

accomplished and a sufficient amount of HEU obtained in the appropriate form, terrorists could have a moderate degree of confidence that their IND would result in a substantial nuclear yield.³⁷

To corroborate the plausibility of this scenario, Ferguson and Potter, along with Alison, Bunn and Weir, cite the use of the gun-type design by the US at Hiroshima and by the South African government in the construction of a small arsenal of nuclear weapons the late 1980s.³⁸

Finally, members of the consensus school are often intent on conveying the prospect of imminent nuclear terror in vividly catastrophic terms – which is to say, in ways that are sure to stir the emotions. Alison is particularly effective at this by spelling out for his mostly non-specialist readers the impact that the epicenter of the blast would have on specific cities, from New York to Houston to Washington and Los Angeles. He writes, for example, that

[i]f Al Qaeda was to rent a van to carry the ten-kiloton Russian weapon into the heart of Times Square and detonate it adjacent to the Morgan Stanley headquarters at 1585 Broadway, Times Square would vanish in the twinkling of an eye. [...] The fireball and blast wave would destroy instantaneously the theatre district, the New York Times building, Grand Central Terminal, and every other structure within a third of a mile of the point of detonation. [...] On a normal workday, more than half a million people crowd the area within a half-mile radius of Times Square. A noon detonation in midtown Manhattan could kill them all. Hundreds of thousands of others would die from collapsing building, fire, and fallout in the ensuing hours...³⁹

Bunn envisions the consequences of an attack on a world historical scale, in language that exemplifies the catastrophic imagination:

It is important to understand the full history-changing scope of the catastrophe that even a single terrorist nuclear bomb could cause. The heart of a major city could be reduced to a smoldering radioactive ruin, leaving tens or hundreds of thousands of people dead. Terrorists—either those who committed the attack or others—would

³⁷ *Ibid.*, at 134.

³⁸ Ferguson and Potter, *ibid.*, at 134; Matthew Bunn and Anthony Wier “Terrorist Nuclear Weapon Construction”, *supra*, note 32, at 139-140; Allison, *Nuclear Terror*, *supra*, note 5, at 96.

³⁹ Alison, *ibid.*, at 4.

probably claim they had more bombs already hidden in other cities (whether they did nor not), and the fear that this might be true could lead to panicked evacuations, creating widespread havoc and economic disruption.⁴⁰

Finally, Potter and Ferguson cast the impact in broader political terms:

Consequences stemming from a terrorist-detonated nuclear weapon in an American city would emanate beyond the immediate tens or hundreds of thousands of fatalities and the massive property and financial damage. Americans who were not killed or injured by the explosion would live in fear that they could die from future nuclear terrorist attacks. Such fear would erode public confidence in the government and could spark the downfall of the administration in power.⁴¹

In short, the threat is conceived of in extreme terms. As Alison puts it: “Nuclear terrorism is not only an existential threat to the idea of America it is also a threat to civilization as we know it.”⁴²

4.1.2 The imminence of biological terror

By contrast to the recent literature on nuclear terror, there is no clear ‘consensus view’ among recent opinion on bioterror as to the likelihood and magnitude of an attack in the near future.⁴³ However, many experts have emphasized the growing nature of the threat, based on the evolving state of biotechnology, the relatively greater accessibility of materials in contrast to nuclear and other forms of WMD, and evidence of interest in bioweaponry among terror groups.

⁴⁰ Bunn, *Securing the Bomb 2010*, *supra*, note 9, at 3.

⁴¹ From Ferguson and Potter, *Four Faces*, *supra*, note 8, at 3. Imagining Ottawa as a potential target of nuclear terror, Allison, “Is Nuclear Terrorism a Threat” (2005), *supra*, note 7, at 717, writes: “A nuclear bomb going off on Parliament Hill in Ottawa would cause everything from the supreme court to the Ottawa Congress Centre to disappear; everything for several blocks past the National Archives and the Canadian War Museum would be left in rubble; and fires would consume the Canadian Museum of Nature. Tens of thousands of people would die immediately and the seriously injured would number in the hundreds of thousands. Fallout from the blast would be carried by winds across Canada, contaminating farmland and cities alike and creating thousands of additional casualties.”

⁴² Allison, *Nuclear Terror*, *supra*, note 5, at 212.

⁴³ On the scope and divided nature of opinion on the question, see Andreas Wenger and Reto Wollenmann, “Bioterrorism: A Complex Threat,” in Wenger and Wollenmann, eds., *Bioterrorism: Confronting a Complex Threat* (London: Lynne Reinner Publishers, 2007).

Discussions of bioterror range across a wide spectrum of possible uses of airborne pathogens, viruses, bacteria, and synthetic chemicals meant to cause widespread harm or death to humans and other life forms. Experts are divided over the level the difficulty involved in making and discharging bioweaponry, but they agree on the basic stages in production. An effective act of bioterror would first entail cultivating the substance in question from natural sources, or obtaining it from an existing laboratory, and preserving it in its lethal state, or growing it, pending its transportation to its target destination.⁴⁴ This would involve, at the least, the use of a laboratory, and a team of skilled biochemists and other experts. In order to effectively spread a pathogen by airborne means, for example, a terror group would require expertise in meteorology and techniques of airborne dispersal.⁴⁵ Finally, the deployment of the weapon would require specific weather conditions and would initially have limited geographic scope – raising the possibility of containment or failure.

Yet, despite these constraints, some have argued that because it is less complex, expensive, and elaborate for non-state actors with genocidal ambitions to make and use biological weapons – at least relative to nuclear weapons – bioterror poses a real and pending threat. Barry Kellman, a special advisor to Interpol on biocrime and a member of a US National Academy of Science committee on destructive uses of biotechnology, advances this view in *Bioviolence: Preventing Biological Terror and Crime* (2007). For Kellman, “making a lethal bioweapon is well within many people’s capability.”⁴⁶ While it bears similarities with the process of making a dirty bomb (with radioactive material), “a

⁴⁴ See William R. Clark’s discussion of the technical steps involved in the Aum Shinrikyo attack of 1995 and the anthrax attacks in November 2001 in the United States, chapter 10, *Bracing for Armageddon? The Science and Politics of Bioterrorism in America* (Oxford: Oxford UP, 2008).

⁴⁵ *Ibid.*, at 166.

⁴⁶ Barry Kellman, *Bioviolence: Preventing Biological Terror and Crime* (Cambridge UP, 2007), at 16.

bioweapon can kill many more people than a dirty bomb.”⁴⁷ Kelman also notes that “[p]reparing and effectively weaponizing pathogens might require sophisticated equipment and scientific expertise but far less than what would be required to produce even a rudimentary nuclear weapon. Pathogens are naturally available, and refined seed stocks of potentially weaponizable agents are found widely in laboratories around the world. Getting weapons-grade nuclear material is, by contrast, extraordinarily difficult and far more expensive.”⁴⁸

Frank Barnaby, member of an Oxford Research Group on the terrorist use of weapons of mass destruction, concurs.⁴⁹ Making biological weapons, he argues, involves fewer “facilities and resources” than what is required for building a nuclear bomb; moreover, “the organisms used in the weapons reproduce themselves so that only a small quantity of them are needed to start the production process.”⁵⁰ Many of the necessary tools and equipment for making biological weapons are “dual purpose, very similar to that used in, for example, a brewery for making beer. [They] can therefore be bought from commercial suppliers without raising suspicions.”⁵¹ Both medical research laboratories and nature itself offer ready sources of material for the would be terrorist, including, in the latter case, anthrax, brucellosis, and plague.⁵² In Barnaby’s view: “A reasonably sophisticated terrorist group with access to financial and technical resources

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* The authors of *World at Risk*, (the report of a 2008 US congressional committee on the proliferation of WMD, *supra*, note 4), make a similar point, at 11: “We accept the validity of intelligence estimates about the current rudimentary nature of terrorist capabilities in the area of biological weapons but caution that the terrorists are trying to upgrade their capabilities and could do so by recruiting skilled scientists. In this respect the biological threat is greater than the nuclear; the acquisition of deadly pathogens, and their weaponization and dissemination in aerosol form, would entail fewer technical hurdles than the theft or production of weapons-grade uranium or plutonium and its assembly into an improvised nuclear device.”

⁴⁹ Frank Barnaby, *How to Build a Nuclear Bomb*, *supra*, note 32.

⁵⁰ *Ibid.*, at 48.

⁵¹ *Ibid.*, at 51.

⁵² *Ibid.*, at 53.

able to employ people adequately trained in biology and in handling biological material will be able to acquire a biological-warfare agent and establish a programme to produce an effective biological weapon using it.”⁵³ This serves to ground his conclusion that “There is a serious risk that terrorist groups will acquire and use WMDs.”⁵⁴

For other commentators, the danger is imminent. Jim Davis, a director of the US Air Force’s Counterproliferation Centre, asserts that the “likelihood that biological weapons will be used against our nation continues to rise.”⁵⁵ His view is based in part on the claim that bioweapons are becoming easier to make, with the necessary knowledge and skill more readily available. There are, he fears, “many thousands of highly educated microbiologists or other health science professionals worldwide that are capable of growing, weaponizing, and employing a [bioweapon] agent. Much of the technical information is now readily available on the Internet, in libraries, and through mail-order channels that provide ‘how-to’ manuals.”⁵⁶ Noting al Qaeda’s interest in using bioweaponry, and citing the Anthrax attacks on US Senate and government offices in the fall of 2001 as a precedent, Davis sets out two scenarios as the “most likely [bioweaponry] scenarios that the United States and its allies might face in the future”.⁵⁷ One involves the deployment of a host of bioweapon agents over a span of years, targeting the US agriculture industry, causing significant economic disruption and widespread panic. Another involves the use of anthrax, or an analogous substance, to carry out airborne bio-terror on US cities:

⁵³ *Ibid*, at 124.

⁵⁴ *Ibid*, at 136.

⁵⁵ Jim A. Davis, “A Biological Warfare Wake-Up Call: Prevalent Myths and Likely Scenarios”, in Jim A. Davis and Barry R. Schneider, eds., *The Gathering Biological Warfare Storm* (Praeger: Westport, Connecticut, 2004), at 187.

⁵⁶ *Ibid*, at 190.

⁵⁷ *Ibid*, at 192.

Five 100-pound bags of anthrax could easily be smuggled in grain sacks on one of many shipments that arrive in US ports everyday. These bags could be lined with plastic so no powder was prematurely released. Three to five major cities, on the order of Houston or Los Angeles, would be targeted, each requiring only a 100-pound bag. Appropriate aerosolizing devices could be easily procured in the United States to mount on an automobile, airplane, or boat.⁵⁸

This would lead to the infection and death of “hundreds of thousands” of people, which would “overwhelm the US medical system,” causing a “human, economic, and political catastrophe” of the first order.⁵⁹

Michael Ainscough, a physician with the US Air Force and Surgeon General Chair at Air University, argues that it is “increasingly likely that non-state terrorists will use biological attacks”.⁶⁰ Of particular concern for Ainscough is the possibility of “genetically engineered agents that may resist known therapies.”⁶¹ Advances in genetics have enabled the creation of substances with “new pathogenic characteristics,” including “increased survivability, infectivity, virulence, [and] drug resistance”, giving rise to “one of the gravest threats we will face”.⁶² Whereas previous bioterror attacks, including those attempted by the Aum Shinrikyo group in Japan in the 1990s, had been modest in their effects, Ainscough suggests that “with the capabilities of biological engineering and a new

⁵⁸ *Ibid*, at 200.

⁵⁹ *Ibid*. For similarly cautious assessments in the period from 2001 to 2005, see Marie Isabelle Chevrier, “Why Do Conclusions from the Experts Vary?”, in Wenger and Wollenmann, eds., *Bioterrorism: Confronting a Complex Threat* (London: Lynne Reinner Publishers, 2007), at 140 to 143. Among the sources cited are Jonathan B. Tucker’s *Biosecurity: Limiting Terrorist Access to Deadly Pathogens*, *Peaceworks*, no. 52 (Washington, DC: United States Institute of Peace, 2003). At 11, Tucker writes: “Recent evidence suggests that the threat of bioterrorism is real and growing. Documents and computer hard drives seized during the March 1, 2003, capture of Khalid Shaikh Mohammed, a key operational planner for Al Qaeda, revealed that the organization had recruited a Pakistani microbiologist, acquired materials to manufacture botulinum toxin, and developed a workable plan for anthrax production.”

⁶⁰ Michael Ainscough, “Next Generation Bioweapons: Genetic Engineering and Biological Warfare”, in Jim A. Davis and Barry R. Schneider, eds., *The Gathering Biological Warfare Storm* (Praeger: Westport, Connecticut, 2004), at 176.

⁶¹ *Ibid*, at 165.

⁶² *Ibid*. Tucker, *supra*, note 59, at 11, expresses a similar concern: “Rapid advances in biological science and technology are also changing the nature of the bioterrorism threat. Genetic engineering has made it theoretically possible to render natural disease agents more lethal, contagious, or environmentally persistent, evade detection and diagnosis, and defeat existing drugs and vaccines.”

generation of weapons, this may change.”⁶³ Indeed, in his view, the threat posed “can only increase as technology develops.”⁶⁴ Among various possible “paths to enhance biothreats”, Ainscough notes that the genome sequences for a number of viruses, plasmids, and bacteria have now been published; thus, “it seems only a matter of time until microbiologists develop synthetic genes, synthetic viruses, or even complete new organisms. Some of them could be specifically produced for biological warfare or terrorism purposes”.⁶⁵

Bioweaponry also presents a unique set of challenges to existing defences. Kellman argues that in “the vast majority of cities in the world, detection capabilities are essentially nonexistent, and available medical response capacities are already overburdened with a host of natural epidemics.”⁶⁶ While an attack involving multiple or complex forms of weaponry in the US, or a similarly developed nation, “might be devastating,” he suggests that it could be “many orders of magnitude more catastrophic where populations are crowded and public health capabilities are already strained and ineffective.”⁶⁷ A 2003 report by the US Central Intelligence Agency entitled “The Darker Bioweapons Future” supports this view.⁶⁸ Summarizing research provided to the CIA by the National Academy of Science, the report states that “[a]ccording to experts, the biotechnology underlying the development of advanced biological agents is likely to advance very rapidly, causing a diverse and elusive threat spectrum. The resulting diversity of new [bioweapon] agents could enable such a broad range of attack scenarios that it would be virtually impossible

⁶³ *Ibid*, at 176.

⁶⁴ *Ibid*, at 185.

⁶⁵ *Ibid*, at 178.

⁶⁶ Kellman, *supra*, note 46, at 14.

⁶⁷ *Ibid*.

⁶⁸ CIA Directorate of Intelligence, “The Darker Bioweapons Future” (2003), online, Federation of American Scientists: < <http://www.fas.org/irp/cia/product/bw1103.pdf>>

to anticipate and defend against”.⁶⁹ Ainscough adds to these concerns the difficulty of responding to new and unknown forms of bioweaponry. “A terrorist attack with a biologically engineered agent,” he writes, “may unfold unlike any previous event. The pathogen may be released clandestinely so there will be a delay between exposure and onset of symptoms. Days to weeks later, when people do develop symptoms, they could immediately start spreading contagious diseases.”⁷⁰ Many of the infected would by then have travelled around the country or the world, vastly expanding the scope of the affected populations, and “public anxiety” in response.

The potential consequences of bioterror also place this category of weapon in a class of its own. Kellman suggests that bioweapons may exceed both chemical and atomic weapons in their potential for lethal harm:

A well-planned attack using chemicals or explosives could be devastating, but it is hard to conceive an attack with casualties exceeding ten thousand victims. By contrast, it has been estimated that release of 250 pounds of highly refined anthrax spores over a major American city could infect up to three million people. In truth, the potential number of victims is unknowable – it depends on where it happens, the type of pathogen, and the sophistication of the weapon maker. Yet, there is a widespread consensus among experts that a high end bioattack would inflict casualties exponentially greater than any chemical or conventional attack.⁷¹

Bioweapons are also distinguished by their capacity to be spread through contagion: “no other type of weapon can replicate itself and spread.”⁷² They are also likely sources of “mass panic”, given the potentially slow and drawn out period of time in which they might take effect.⁷³

⁶⁹ *Ibid.*

⁷⁰ Ainscough, *supra*, note 60, at 176.

⁷¹ Kellman, *supra*, note 46, at 15-6.

⁷² *Ibid.*, at 17.

⁷³ *Ibid.*

I return in Chapter 6 to the question of bioterror and the contentious nature of the claims canvassed here. At this stage, I have sought only to emphasize the presence of a school of opinion, in the period after 2001, which conflates fears about Al Qaeda and other terror groups with concerns about advances in biotechnology, and lends authority to a belief in the imminent threat of bioterror in ways that are analogous to recent work on nuclear terror.

Shifting focus to the recent literature on the history and evolving nature of terrorism, we find that dissenting voices on the imminence of bioterror often disappear from view altogether. Drawing primarily on the more cautious or alarmist bioterror prognoses, recent historians of terror often present the imminent prospect of bioterror as a matter beyond debate.

4.2 Scholarship on the evolving nature of terrorism

With their imagination exercised by the horror of September 11, many scholars who have sought to grapple with the evolving nature of terrorism – as a historical, social, and political phenomenon – have tended to see it becoming a more catastrophic, menacing threat than ever before. Frequently expressed in the literature is the sense that WMD use is now likely imminent, for a host of reasons. Relevant to this chapter, however, is the way that this claim functions in tandem with the consensus that global terror is only becoming more frequent, ambitious, and genocidal.

Walter Laqueur is a long-time contributor to the field of terrorism studies, beginning with *Terrorism* (1974), through a series of more recent studies, including *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (1999) and *No End to War:*

Terrorism in the Twenty-first Century (2004).⁷⁴ Laqueur believes the threat of WMD use by terror groups is a relatively recent development in the narrative of global terror – something that would not have seemed plausible as recently as the early 1990s. Tracing the development of terrorism in the post-war period, he argues that among both left and right-wing political groups and separatists, terrorist activity was primarily regional and internally-focused. This form of activity peaked in the 1970s and began to wane globally by the late 1980s.⁷⁵ Then, in the 1990s, the internal or regional focus of terrorist activity gave way to the broader, non-regional movements of Islamic extremists. These drew upon a much wider pool of recruits, and made use of much more sophisticated tools for communication and dissemination. The aim of this newer form of terror was “no longer to conduct propaganda but to effect maximum destruction.”⁷⁶

While the scope and ambition of global terror was expanding, so were the technologies of terror. Writing in 1999, Walter Laqueur asserted: “there has been a radical transformation, if not a revolution, in the character of terrorism ... [f]or the first time in history, weapons of enormous destructive power are both readily acquired and harder to track.”⁷⁷ The technical knowledge and skills required for building weapons of mass terror were becoming less complex and “not that rare or expensive.”⁷⁸ Revisiting the issue in 2004, Laqueur asserts with greater certainty:

[i]t is only a question of time until radiological, chemical, or biological weapons will be used more or less systematically by terrorist groups. [...] There is much reason to

⁷⁴ Walter Laqueur, *Terrorism* (New York: Little, Brown, 1977); “Postmodern Terrorism: New Rules for an Old Game” (1996) *Foreign Affairs* September/October; *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (Oxford: Oxford University Press, 1998); *No End to War: Terrorism in the Twenty-first Century* (New York: Continuum, 2004); and “The Terrorism to Come” (2004) 126 *Policy Review* August 2004.

⁷⁵ *No End to War*, *ibid*, at 28.

⁷⁶ *Ibid*, at 9.

⁷⁷ *The New Terrorism*, *supra*, note 74, at 4.

⁷⁸ *Ibid*, at 5.

believe that if such attacks should be carried out in the near future, many, perhaps the great majority, will fail, or will have a smaller effect than anticipated. But it should also be clear that if only one out of ten, one out of a hundred such attempts succeeds, the damage caused, the number of victims will be infinitely higher than at any time in the past.⁷⁹

The prospect of mass terror at the hands of religiously motivated, non-regional terror groups thus assumes a central role in Laqueur's conception of contemporary terror. The threat seems more plausible, for Laqueur, because of both technological change and the broader scope of terrorist ambitions. While "[m]ost of the terrorist groups of the past would not have used such weapons," given moral or political constraints to the notion of killing hundreds of thousands or even millions of people, for the newer, more fanatical groups, these restraints "have become weaker or are no longer existent."⁸⁰

Philip Bobbitt offers a similar but more intricate theory of the evolving nature of global terror. Bobbitt has acted as counsel to President Carter and the State Department, he was a member of the National Security Council, and is also a legal scholar and historian of warfare. Writing in 2008, he approaches the contemporary threat in terms of a larger transition from an older geo-political order defined by sovereign nation states and conventional protectionist economies to a globalized, post-sovereign order based on what he calls the "market state".⁸¹ The goal of the market state is to maximize the economic welfare and opportunity of its citizens, and thus it embraces, at all levels of its legal and social make-up, technologies and regulatory mechanisms that expand access to the world market. The transition is changing the nature of terrorism because "[d]ifferent constitutional orders spawn different terrorisms".⁸² The rise of the market state, in Bobbitt's view, will "radically redistribute the availability of [WMD] owing to the

⁷⁹ *No End to War*, *supra*, note 74, at 226-7.

⁸⁰ *Ibid.*, at 227.

⁸¹ Philip Bobbitt, *Terror and Consent: The Wars for the Twenty First-Century* (New York: Knopf, 2008), at 9.

⁸² *Ibid.*

development of clandestine markets.”⁸³ Bobbitt asserts that “nuclear weapons will become commodified ... while biological weapons will be easily and cheaply created owing to the Internet-assisted dispersal of knowledge, which will allow developers to bypass the difficult initial stages of recombinant DNA techniques, and even the need to culture viruses and bacteria.”⁸⁴

“Market state terrorism” will differ from “nation state terrorism” in a number of ways. It will be more lethal.⁸⁵ Whereas nation state terror was marked by a desire for a large audience, but typically involved relatively few casualties, Bobbitt notes that the annual number of casualties in international terrorism has steadily risen since the early 1990s.⁸⁶ Drawing on a wider range of sources for funding, market state terrorists are better financed.⁸⁷ They also “outsource” portions of their operation to local groups – in the way that al Qaeda works with operatives in places ranging from Bali, Morocco, Egypt, Turkey, Spain, Iraq, and Britain.⁸⁸ Bobbitt also suggests that “market state terrorist structures more greatly resemble VISA or Mastercard organization charts than they do centralized, hierarchical structures of nation state governmental organizations, including nation state terror groups”.⁸⁹ Thus, in distinction to groups such as the Irish Republican Army or the ETA (Basque Homeland and Freedom), newer forms of terror involve associations among wider networks of smaller groups, over larger expanses of space, with more tenuous social, ideological or economic links.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, at 46.

⁸⁶ *Ibid.*, at 46. In support of this claim, Bobbitt cites Anna Pluta and Peter Zimmerman, “Nuclear Terror: A Disheartening Dissent,” *Survival* 48, no. 2 (2006) at 55, and Brent Ellis, “Countering Complexity: An Analytical Framework to Guide Counter-terrorism Policy-Making,” *Journal of Military and Strategic Studies* 6, No. 1 (2003) at 3.

⁸⁷ *Ibid.*, at 49.

⁸⁸ *Ibid.*, at 50.

⁸⁹ *Ibid.*, at 51.

Bobbitt also argues that market state terrorists are more likely to seek and use WMD than their predecessors.⁹⁰ Neither the PLO nor the IRA was interested in such a weapon because they feared international opinion or a negative reaction against or within their own membership. By contrast, weapons of mass terror suit the tendency on the part of market state terrorists to be “more theatrical, producing vivid dramas and tableaux” for a world connected by network technology.⁹¹ “Market state terrorists want a lot of people dead *and* a lot of people watching.”⁹² The target is also no longer a single nation-state or leadership, but something more expansive: “anti-globalization”, “anti-Americanism”, “anti-liberalism” – rendering civilian populations in both the US and Europe more vulnerable to indiscriminate attack. Finally, Bobbitt suggests that the new terrorism is distinct because it is “no longer simply a technique but is also an end in itself.”⁹³ The goal is not to seize control of a national government, or to gain sovereignty or independence over a certain territory, but instead to promote a “constant state of terror”.⁹⁴

Richard Falk complements Laqueur and Bobbitt’s analyses by advancing a case for a break in the history of terrorism represented by the events of September 11 in particular.⁹⁵ These events were distinguished, in his view, by the “perpetrators’ daring method”, the choice of “prime targets of power and wealth,” and the “astonishing degree of success in carrying out the deadly mission”.⁹⁶ They also caused “extraordinary shock effects of the overall spectacle of death and destruction, as well as the acute sense of continuing danger and vulnerability along with a grudging acknowledgment of the ingenuity and resolve

⁹⁰ *Ibid*, at 58.

⁹¹ *Ibid*, at 60.

⁹² *Ibid*.

⁹³ *Ibid*, at 62.

⁹⁴ *Ibid*.

⁹⁵ Richard Falk, *The Great Terror War* (New York: Olive Branch Press, 2003), chapter 2.

⁹⁶ *Ibid*, at 38.

displayed by the attack.”⁹⁷ In contrast to earlier acts of terror, the intent of these attacks was “genocidal.”⁹⁸ They gave rise to what Falk calls “megaterrorism,” which “differ[s] from earlier expressions of global terrorism, by magnitude, scope and ideology, representing a serious effort to transform world order as a whole, and not merely change the power structure of one or more states.”⁹⁹ They also validated the notion that terrorism would “shift from a primary emphasis on shock and symbolic vulnerability to a new stress on the scale of harm and substantive vulnerability of the target state, thereby blurring the boundary between war and terrorism.”¹⁰⁰

Yet, for Falk, September 11 had demonstrated that this shift could occur without the use, as many had predicted (including Laqueur), of WMD.¹⁰¹ “Never in the history of terrorism had an operation of such stunning proportions been pulled off,” he asserts. The “technical ingenuity” and simplicity of the operation – the use of “virtually no instruments of violence” aside from box cutters, and a relatively small monetary cost (under a half million dollars, as he notes) – suggested that the threat of a catastrophic attack “required no special technological sophistication other than the rather easily acquired knowledge to pilot and navigate large commercial airliners while in the air.”¹⁰² The primary lesson of the event was that “[s]uddenly, relations of power between enemies could no longer be measured by financial capacity or shaped by the balance of capabilities.”¹⁰³ A new level of vulnerability had become apparent – one that could not be addressed by the nation’s conventional military arsenal, which was designed to pursue

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, at 43.

⁹⁹ *Ibid.*, at 39.

¹⁰⁰ *Ibid.*, at 53.

¹⁰¹ *Ibid.*, at 53.

¹⁰² *Ibid.*, at 52.

¹⁰³ *Ibid.*

“territorial actors”. Instead, it now seemed “entirely possible that future megaterrorism would produce even greater damage than the September 11 attacks simply by aiming at nuclear power plants, water supply systems, electricity grids, major tunnels and bridges, seaports, crowded sports arenas, and IT networks.”¹⁰⁴

One final thread in historical accounts of the evolution of terror is worth noting. This is the notion that what is at stake in the prospect of a mass terror attack in a developed western nation is the very survival of the state, or its viability as a liberal democracy. Walter Laqueur points at this in asserting that the widespread panic following an attack involving WMD could cause “as much damage as the terrorist act itself”,¹⁰⁵ leading to a “paralysis of normal life, epidemics, post-traumatic stress, and tremendous anxiety, especially if the nature and the extent of the danger remains unknown.”¹⁰⁶ In this case, the “economic consequences could be disastrous and the political consequences horrible.”¹⁰⁷

Michael Ignatieff presents the argument more explicitly. In *The Lesser Evil* (2004), after surveying the modern history of terrorism from its roots in late-19th century anarchism to the present, he writes: “inexorably, terrorism, like war, is moving beyond the conventional to the apocalyptic”.¹⁰⁸ An act of nuclear terror, he suggests, would mark a break in the modern history of terror – a history in which earlier acts were unsuccessful in defeating “liberal democracy”. In the nightmare scenario, indeed, “we *could* lose.”¹⁰⁹ But defeat would assume an unprecedented form:

¹⁰⁴ *Ibid*, at 53.

¹⁰⁵ *The New Terrorism*, *supra*, note 74, at 271.

¹⁰⁶ *Ibid*, at 272.

¹⁰⁷ *Ibid*.

¹⁰⁸ Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004), at 147.

¹⁰⁹ *Ibid*, at 153.

It would not be like an invasion, conquest, or occupation, of course, but rather would entail the disintegration of our institutions and way of life. A succession of mass casualty attacks, using weapons of mass destruction, would leave behind zones of devastation sealed off for years and a pall of mourning, anger, and fear hanging over our public and private lives.¹¹⁰

The notion of nuclear or mass terror as an existential threat to a society or a nation resonates across the three bodies of literature under review here,¹¹¹ but also beyond. Two further examples are worth noting, to demonstrate the extent to which remarkably similar scenarios are feared.

US Senator Sam Nunn, speaking to Atlanta journalist, Tom Sabulis, in the course of promoting his film *Nuclear Tipping Point* (2010), was asked: “Is the thinking that if terrorists got their hands on a bomb they would automatically use it?” Nunn replied:

I think they’d probably do it in a calculating way. My worst case [scenario] is, they would set off one explosion. It would be a crude weapon; it wouldn’t come in on a missile. It would probably come in on the back of a truck to a city. And if one went off and killed hundreds of thousands of people, they’d basically probably announce they had six or eight more in cities around the country or around the globe. That would have huge devastating impact, certainly on the people who were the original victims, but also the whole world economy. You’d have people dumping out of cities all over the world like nothing we’ve ever seen.¹¹²

¹¹⁰ *Ibid.*

¹¹¹ Graham Allison, for example, in *Nuclear Terrorism*, *supra*, note 74, at 212, writes: “Nuclear terrorism is not only an existential threat to the idea of America it is also a threat to civilization as we know it.” See also the discussion of John Yoo, below; in *War By Other Means: An Insiders Account of the War on Terror* (New York: Atlantic Monthly Press, 2006), at xii, Yoo asserts: “We (along with Israel) are the first to face a terrorist enemy intent on carrying out the catastrophic destruction of our nation.” The threat is real in part due to the fact, as Yoo asserts at 62, that “[w]eapons of mass destruction have increased the potential casualties a single terrorist attack can wreak, from the hundreds or thousands of innocent lives into the hundreds of thousands or even millions. This does not even count the profound, long-term destruction to cities, contamination of the environment, and long-term death or disease for large segments of the civilian population.”

¹¹² Tom Sabulis, “Ex-senator Nunn Warns of Nuclear Terror Threat”, *Atlanta Journal-Constitution* (15 February 2010).

Jonathan Schell, writing in 2007, provides a second example.¹¹³ The prodigious supply of nuclear technology throughout the world raises the “terrifying specter of a terrorist group that acquires and uses a nuclear weapon, or perhaps several of them, to lash out against a great city somewhere in the world.”¹¹⁴ He fears that:

Tens of thousands or perhaps hundreds of thousands might die. The city would be rendered uninhabitable by radiation for decades. If it were a national capital, the nation’s government could be destroyed. Beyond these direct consequences lie indirect ones that are no less real for being veiled in great uncertainty. For example, if that country were the United States, would the government survive? What emergency measures might it adopt, and for how long? Would the Constitution remain in effect, and, if it were suspended, would it ever be restored? Would liberty around the globe be taken away by governments straining every nerve to prevent new attacks? Would terror-stricken populations of other cities flee to the countryside? Might the global economy collapse?¹¹⁵

Both Nunn and Schell may be considered contributors to the expert literature on nuclear terror, but are also making statements here in the course of public advocacy for policy shifts on nuclear weapons. And, as with Ignatieff and other historians of terror, their scenarios gain credibility when read in the context of a wider consensus about both the increasingly violent trajectory of global terror and the inevitability of WMD use.

4.3 The catastrophic imagination in the advocacy of extreme measures

Moving from the literature on WMD and the history of terror, to work by law scholars and jurists, we begin to trace the impact of the catastrophic imagination on the formation of law and policy itself. I focus here on the work of American jurists Richard Posner, Alan Dershowitz, and John Yoo as prominent voices in a wider scholarly and public discourse about the use of extreme measures in national security. It should be

¹¹³ Jonathan Schell, *The Seventh Decade: the New Shape of Nuclear Danger* (New York: Henry Holt, 2007)

¹¹⁴ *Ibid*, at 6.

¹¹⁵ *Ibid*, 6-7.

noted, however, that although these authors are not alone in supporting the use of extreme measures, their views runs against the grain of prevailing opinion among North American law scholars.¹¹⁶

As was noted in Chapter 2, most jurists writing on counter-terror law after 9/11 view torture, indefinite detention without charge, and targeted killing as a clear departure from constitutionalism and the rule of law. And for many, the measures are either not easily reconcilable with those principles, or altogether abhorrent to them. In ways to be explored, Posner, Dershowitz and Yoo conceive of these measures as either not contrary to core constitutional principles, or justifiable exceptions to them. Yet the significance of their views, and the importance of canvassing them, relates to their position in both the academy and in the larger public debate on security policy. Holding posts at the University of Chicago, Harvard, and Berkeley, respectively, and drawing on accomplishments in various fields, each enjoys a degree of celebrity both inside and outside of the academic world, providing them with frequent access to media and other opportunities to communicate their position to a wider audience. As a consequence of this notoriety, together, they have played an important role in transforming the prohibition on torture and other extreme measures from their previous status as undebatable and beyond question, to issues very much open to serious public debate.

I attempt to show how the catastrophic imagination plays an important role in their work by informing what might be called a common framework or architecture of belief.¹¹⁷

¹¹⁶ Other figures supportive of extreme or illiberal measures to one extent or another include Oren Gross, Bruce Ackerman, Eric Posner, and Adrian Vermeule. See, e.g., Oren Gross, "The Prohibition on Torture and the Limits of the Law" in Samuel Levinson, ed., *Torture: a Collection* (Oxford University Press, 2004); Bruce Ackerman's *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale UP, 2006); and Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (New York: Oxford U P, 2007).

¹¹⁷ I borrow the notion of a framework or architecture of belief from Paul Kahn's *Cultural Study of Law* (Chicago: University of Chicago Press, 1999) and *Sacred Violence: Torture, Terror, and Sovereignty* (Ann Arbor, University of Michigan Press, 2008).

At the core of this framework are three inter-related beliefs. First, an attack involving WMD, most likely at the hands al Qaeda or its affiliates, is a real possibility in one or more large North American cities in the near future. The possibility of such an attack poses an unprecedented, catastrophic, and possibly existential threat to the state. Finally, given the magnitude of the threat, it is reasonable and prudent to employ a series of preemptive or extreme measures. More appropriate to a military campaign than to law enforcement, these measures are justified on the assumption that the threat of mass terror entails something closer in nature to an act of war than a crime.

One other key aspect of the framework – the glue that binds it together, so to speak – is the uncritical acceptance of the technological claims on which it rests, despite the controversial character of those claims. Each of the figures explored here continuously evokes the increasing possibility of mass terror, either as a self-evident fact or as a claim unequivocally supported by favourable authority. Thus, across this influential body of work, mass terror assumes the character of a pending threat beyond serious dispute. This, in turn, I suggest, has played an important role in making the argument for preemptive, illiberal measures more persuasive to a larger public.

4.3.1 Richard Posner and the poetics of catastrophe

Richard Posner is both a US federal appeal court judge and a legal academic. He gained prominence in academic circles as a pioneer of one of the predominant theoretical paradigms in legal scholarship, “law and economics.” Much of his scholarship looks at legal issues through the lens of cost-benefit analyses, probability theory, and other conceptual tools of economics. Some of these tools are brought to bear in his discussion of mass terror.

Among the most notable is his distinction between frequencies of events and their probabilities. In drawing this distinction, Posner offers insightful criticism of figures who are skeptical of fears about terrorism for failing to recognize that the probability of an attack may be high or low regardless of its statistical frequency. Thus, as Posner argues, when the political scientist John Mueller questions the merit of the US government's multi-billion dollar counter-terror effort when "the lifetime chance of an American being killed by international terrorism is one in 80,000",¹¹⁸ he fails to distinguish a frequency from a probability. As Posner points out, "the 'chance' of one in 80,000 is not the odds of a terrorist attack, that is a probability; it is a frequency."¹¹⁹ Frequencies tell us only about the past. They are relevant to the future only if there are "solid grounds for expecting the future to be like the past."¹²⁰ Our real concern, then, is with probabilities, but because of the many variables at play, this too is hard to measure with any certainty. Therefore, the larger challenge, in Posner's view, is that the "analysis of terrorist threats and counterterrorist responses must be framed in terms of probabilities – even when probabilities cannot be computed."¹²¹

However, although we lack precise statistical *knowledge* of the probability of mass terror, there are, in Posner's view, a host of reasons to believe that it is increasing. The potential supply of terrorists is "larger than it has ever been";¹²² the frequency of large-scale attacks suggests that "Islamic extremists are on a roll" (he cites events in Iran, Iraq,

¹¹⁸ John Mueller, "Is There Still a Terrorist Threat?" (2006) *Foreign Affairs*, September/October, 2, at 8; cited in Richard Posner, *Countering Terrorism: Blurred Focus, Halting Steps* (Maryland: Rowman and Littlefield, 2007), at 4.

¹¹⁹ Posner, *Countering Terrorism*, *ibid*, at 4.

¹²⁰ *Ibid*.

¹²¹ *Ibid*, at 1.

¹²² *Ibid*, at 8.

Pakistan, Afghanistan, Lebanon, and the Toronto and Heathrow plots, among others);¹²³ and the “lethality and availability of highly destructive weaponry are growing.”¹²⁴ The case for extreme measures is also premised upon arguments about the potential impact of mass terror. Both the likelihood and impact of an attack are subjects that Posner has explored in some detail.

His most extended treatment of them is set out in *Catastrophe* (2004),¹²⁵ where he draws on expert opinion on nuclear and biological terror. The probability of nuclear terror is growing for the same reasons offer by Allison and others, explored above: copious, poorly guarded supplies in Russia and Pakistan, ready availability of bomb designs, and ease of bomb construction.¹²⁶ Yet, just as Allison and other experts in the consensus school have done, Posner presents an impression of scientific opinion on the matter as more or less unanimous. Moreover, the sources on which Posner relies lend a similar impression. For example, when first introducing the possibility of nuclear terror, Posner asserts that while building a bomb “is costly and requires considerable engineering sophistication, it may not be beyond the ability of a well-financed group if it can get its hands on plutonium or highly enriched uranium”.¹²⁷ Posner supports this claim by citing three sources: a report of the National Research Council, a study by researchers at MIT, and a source he describes as “skeptical,” an online FAQ posted by the Council on Foreign Relations.¹²⁸ The FAQ is unfortunately no longer available, but a survey of other FAQs on

¹²³ *Ibid.*, at 9.

¹²⁴ *Ibid.*

¹²⁵ Richard Posner, *Catastrophe: Risk and Response* (Oxford: Oxford University Press, 2004).

¹²⁶ *Ibid.*, at 73-4.

¹²⁷ *Ibid.*, at 74.

¹²⁸ National Research Council of the National Academies, *Making the Nation Safer: The Role of Science and Technology in Countering Terrorism* (Washington: National Academies Press, 2002); John Deutch, et al, *The Future of Nuclear Power* (Boston, MIT Press, 2003); and the skeptical source was the Council on Foreign Relations, “Terrorism: Questions and Answers: Making a Bomb”: online <<http://terrorismanswers.com/weapons/making2.html>>.

related topics on the same website suggests that the source at issue was not likely a primary text containing expert or scientific opinion.¹²⁹ Apart from this single citation, mentioned in a footnote, in passing, Posner gives no further consideration to contrary opinion on nuclear terror.

The positive sources he cites are, upon closer examination, not much more authoritative than Posner's own assertions. The National Council report states only that "[t]he basic technical information needed to construct a workable nuclear device is readily available in the open literature. The primary impediment that prevents countries or technically competent terrorist groups from developing nuclear weapons is the availability of [fissile material]."¹³⁰ No opinion is rendered or mention made of the practical, technical challenges posed at the bomb-making stage, or contrary views that raise questions in this respect.¹³¹ The MIT study states only that following 9/11, a concern has grown over the possibility of a "sub-national group" acquiring "nuclear weapons capability", and that "[t]errorist or organized crime groups are not expected to be able to produce nuclear weapons material themselves; the concern is their direct acquisition of nuclear materials by theft or through a state sponsor."¹³²

Further on in *Catastrophe*, Posner cites Frank Barnaby in support of a more ambitious claim: a group "as small as 'two or three people with appropriate skills could design and fabricate a crude nuclear explosive [...]'"¹³³ Barnaby asserts further that:

¹²⁹ See, e.g., the Council's background on al Qaeda, online: < <http://www.cfr.org/terrorist-organizations/al-qaeda-k-al-qaeda-al-qaeda/p9126>>.

¹³⁰ National Research Council, *ibid*, at 40. Posner cites pages 40-41.

¹³¹ These are explored in Chapter 6.

¹³² *The Future of Nuclear Power*, at 65-66. Posner cites pages 65-66.

¹³³ Posner, *Catastrophe*, *supra*, note 125, at 74, citing Barnaby, *How to Build a Nuclear Bomb*, *supra*, note 4, at 36.

It is a sobering fact that the fabrication of a primitive nuclear explosion using plutonium or suitable uranium would require no greater skill than that required for the production and use of the nerve agent produced by the AUM group and released in the Tokyo underground.¹³⁴

Yet, Barnaby presents no evidence for this claim, and omits any mention of contrary opinion. Once again, I defer for the moment the issue of how and why this claim is contentious. I seek to emphasize here only the point that claims about nuclear bomb building — and thus the prospect of nuclear terror itself — are made to seem more persuasive by being repeatedly presented, in both Posner and his sources, as non-contentious.

Turning to the issue of the consequences of mass terror, Posner offers frightening scenarios about both nuclear and radiological explosions, and bioweaponry. A “crude nuclear explosive” crafted by a small group could “set off the energy equivalent to 100 tons of TNT, or 50 times that used in the Oklahoma City bombing of 1995.”¹³⁵ If terrorists were to crash a plane into a nuclear reactor, or to use a coated conventional bomb, they could cause “extensive radioactive contamination” that might disrupt or destroy a large metropolitan centre, or a significant portion of the nation.¹³⁶ But in the most extreme scenario, the potential impact is almost unlimited:

A terrorist who got hold of smallpox virus, gene spliced it... grew the virus in living cells, and extracted modest quantities of the virus in fluid form could place the fluid in aerosolizers that he would unobtrusively deposit in airport departure lounges, shopping malls, movie theatres, indoor stadiums, and other enclosed spaces in which people congregate. The aerosolizers would spray an invisible mist that could infect hundreds or even thousands of people within a few minutes at each location, all of whom would then be carriers. Within weeks, hundreds of millions of people around the world would be infected, and the disease would be unstoppable.¹³⁷

¹³⁴ Barnaby, *ibid.*

¹³⁵ Posner, *Catastrophe*, *supra*, note 125, at 74. Posner draws again here on Barnaby, *supra*, note 4a.

¹³⁶ Posner, *ibid.*, at 74.

¹³⁷ *Ibid.*, at 79-80.

At this furthest extreme, not only is the existence of the state at issue, but a large portion of the human race itself. Yet, in formulating this scenario, Posner draws on bioterror authorities in the same selective fashion in which he drew on the literature by nuclear experts. A lengthy discussion about making bioweapons, gene splicing, and airborne dissemination is based exclusively on authorities representing one side of a larger, contentious debate.¹³⁸

Posner's findings in *Catastrophe* would soon come to play an important role in his work on counter-terror law and policy. At the outset of *Not a Suicide Pact: the Constitution in a Time of National Emergency* (2006),¹³⁹ Posner asserts: "[t]he research I have been conducting for the past several years on catastrophic risks, international terrorism, and national security intelligence has persuaded me that we live in a time of grave and increasing danger, comparable to what the nation faced at the outset of World War II."¹⁴⁰ The danger is posed by "Islamic terrorists" who are:

numerous, fanatical, implacable, elusive, resourceful, resilient, utterly ruthless, seemingly fearless, apocalyptic in their aims, and eager to get their hands on weapons of mass destruction and use them against us. [...] [f]or all we know, we may be quite safe. But we cannot afford to act on that optimistic assumption.¹⁴¹

We cannot be complacent precisely because of the stakes at issue. Setting a tone of fear and terror that frames his entire discussion, Posner sets out a series of vivid catastrophic scenarios that demonstrate a measure of both technological sophistication and ingenuity:

¹³⁸ At 288, *ibid*, Posner cites the Committee on Research Standards and Practices to Prevent Destructive Application of Biotechnology and National Research Council of the National Academies, *Biotechnology Research in an Age of Terrorism* (Washington: National Academies Press, 2004); Michael Ainscough's contribution to *The Gathering Biological Warfare Storm*, *supra*, note 60; Sidney Drell, et al, eds., *The New Terror: Facing the Threat of Biological and Chemical Weapons* (Stanford: Hoover Institution Press, 1999); and Judith Miller, et al, *Germs: Biological Weapons and America's Secret War* (New York: Simon and Schuster, 2001).

¹³⁹ Richard Posner, *Not a Suicide Pact: the Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006).

¹⁴⁰ *Ibid*, at 3. Posner is referring here to *Catastrophe*, *supra*, note 125, and *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (Maryland: Rowman and Littlefield, 2005).

¹⁴¹ Posner, *Not a Suicide Pact*, *supra*, note 139, at 5.

Now, in the early years of the twenty-first century, the nation faces the intertwined menaces of global terrorism and proliferation of weapons of mass destruction. A city can be destroyed by an atomic bomb the size of a melon, which if coated with lead would be undetectable. Large stretches of a city can be rendered uninhabitable, perhaps for decades, merely by the explosion of a conventional bomb that has been coated with radioactive material. Smallpox virus bioengineered to make it even more toxic and vaccines ineffectual, then aerosolized and sprayed in a major airport, might kill millions of people.¹⁴²

The threat of mass terror is therefore increasing, but is not precisely quantifiable. Given its potential gravity, certain measures are justified in response.

The range of measures that Posner proceeds to advocate, in this and other works, include indefinite detention without charge,¹⁴³ a presidential power to suspend habeas corpus,¹⁴⁴ the use of military tribunals,¹⁴⁵ increased surveillance,¹⁴⁶ limits on free speech, and torture.¹⁴⁷

Throughout his discussion of these measures, the idea of mass terror is frequently evoked. Consider, for example, his advocacy of torture. In an essay entitled “Torture, Terrorism and Interrogation” (2004), Posner argues: “...what is required is a balance between the costs and the benefits of particular methods of interrogation...the costs can be outweighed by the benefits if torture is the only means by which to save the lives of thousands, perhaps tens or hundreds of thousands, of people. In so extreme a case, it seems to me, torture must be allowed.”¹⁴⁸ Elsewhere, Posner asserts: “If it is dire enough and the value of the information great enough, only a die-hard civil libertarian will deny the propriety of using a high degree of coercion to elicit the information. It might be the

¹⁴² *Ibid*, at 2.

¹⁴³ NASP, 65.

¹⁴⁴ *Ibid*. at 39.

¹⁴⁵ *Ibid*, at 73.

¹⁴⁶ *Ibid*, chapter 4.

¹⁴⁷ *Ibid*, at 12.

¹⁴⁸ Richard Posner, “Torture, Terrorism and Interrogation” in Sanford Levinson, ed. *Torture: A Collection* (Oxford: Oxford University Press, 2004), at 293.

whereabouts of a kidnapping victim, the location of a ticking time bomb, the site of a biological weapon about to be deployed, the identity of key terrorist leaders, or the details of terrorist plots.”¹⁴⁹ But Posner is careful to distinguish between the justified use of torture and its legalization. While the practice of torture may sometimes be “absolutely vital to averting a catastrophic attack,” giving rise to a “moral duty to torture”,¹⁵⁰ he contends that it “should not be considered *legally* justified.”¹⁵¹ Posner would prefer that the fate of the public officer who orders torture in an extreme scenario be left to politics and democratic accountability, rather than “codify[ing] the instances in which such conduct is allowed.”¹⁵²

Posner’s concerns about mass terror also frame his critique of the role of the criminal justice system in countering terrorism. While criminal justice has a role to play, the current threat requires the state to act more swiftly, in greater secrecy, and often with less information or evidence than is called for in a system committed to due process. Essential features of due process that ensure the accused a range of protections – probable cause for detention and charge, disclosure, an open trial, the opportunity to confront witnesses, the limited use of hearsay, and the higher standard for a conviction – present those who would defend us from a catastrophic attack with numerous obstacles.¹⁵³ In some cases, due process “forces the government to tip its hand and impairs its ability to extract information from a suspect.” In other cases, open hearings or trials might “yield clues to the government’s investigative methods and reveal classified information.”¹⁵⁴

¹⁴⁹ Posner, *Not a Suicide Pact*, *supra*, note 139, at 81.

¹⁵⁰ *Ibid*, at 38.

¹⁵¹ *Ibid*, at 12.

¹⁵² *Ibid*, at 86.

¹⁵³ Posner, *Countering Terrorism*, *supra*, note 118, at chapter 7.

¹⁵⁴ *Ibid*, at 174.

But Posner's deeper contention with the criminal justice system is the implied trade-off that it makes between liberty and security. The requirement for proof beyond a reasonable doubt and other facets of due process, such as the excludability of improperly obtained evidence, "weights false positives (convicting innocent persons) much more heavily than false negatives (acquitting guilty persons)".¹⁵⁵ Anticipating Dershowitz's notion of a turn toward preemption in western jurisprudence, Posner argues that this weighting becomes "questionable when the defendant is a terrorist determined to wreak mayhem on a large scale and likely to do so if acquitted."¹⁵⁶

In response, Posner calls for a "coherent jurisprudence" and new law that is more deferential to the executive and those gathering intelligence; more expansive in its reading of the constitution; and takes into account the limited expertise of the judiciary in national security matters.¹⁵⁷ This new body of law would draw on a "tradition of flexible interpretation of the Constitution that permits judicial departures from, as well as judicial elaborations of, the actual language of the document, and the balancing of competing interests".¹⁵⁸

Thus, in Posner's view, the Bill of Rights would not prevent the codification of a power to detain terror suspects without charge or probable cause beyond 48 hours,¹⁵⁹ to authorize coercive interrogation techniques,¹⁶⁰ to hold trials without juries (or with military commissions),¹⁶¹ or to carry out *reasonable* surveillance of terror suspects without

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*, at 175.

¹⁵⁷ *Ibid.*, at 173, 177.

¹⁵⁸ *Ibid.*, at 177.

¹⁵⁹ *Ibid.*, at 180.

¹⁶⁰ *Ibid.*, at 193.

¹⁶¹ *Ibid.*, at 181.

a warrant.¹⁶² Legislation on administrative detention could fashion an initial upper limit of 28 days, with periodic reviews to follow, in which the government must show why the detention continues to be reasonable.¹⁶³ And rather than seeking to codify the limits on interrogation in counter-terror investigations, a law could simply require that “methods forbidden in an ordinary criminal investigation be expressly authorized in writing by the Secretary of Defense, the Attorney General, or the President himself.”¹⁶⁴ (Accountability would, in this way, “be substituted for deniability and legal hair splitting.”¹⁶⁵)

With respect to surveillance, Posner suggests that the National Security Agency’s Terrorist Surveillance Program could be given a wide authority to conduct “initial sifting” and data mining of all domestic electronic communication without a warrant. “Human searches”, or the reading of “purely domestic” communications, might also be done on a warrant obtained on lower standards than is presently permitted.¹⁶⁶ The *Foreign Intelligence Surveillance Act* of 1978¹⁶⁷ forbids such searches without probable cause to believe that one party is a spy or a terrorist. But Posner believes the Act could be amended to require ‘reasonable suspicion’, or go further and adopt the test applicable to the Canadian Security Intelligence Service: “belief, on reasonable grounds, that a warrant – is required to enable the Service to investigate a threat to the security of Canada.”¹⁶⁸ The difference here is that while the Fourth Amendment requires probable cause for the issuance of a warrant, it does not, as Posner notes, stipulate what it is that one must have

¹⁶² *Ibid*, at 192-3.

¹⁶³ *Ibid*, at 181.

¹⁶⁴ *Ibid*, at 193.

¹⁶⁵ *Ibid*.

¹⁶⁶ *Ibid*, at 195-6.

¹⁶⁷ 50 U.S.C. ch. 36, S. 1566.

¹⁶⁸ *Canadian Security Intelligence Service Act* (R.S.C., 1985, c. C-23), section 21(2)(a); cited in Posner at 196.

cause to believe. It is therefore likely to permit a test as broad as that found in Canadian law.

Posner also offers a number of suggestions for what increased surveillance might entail. With a view to exercising greater oversight over scientific research, he proposes that laws be enacted requiring “all scientific research projects in specific areas, such as nanotechnology and experimental high-energy physics, to be reviewed by a federal catastrophic risks assessment board and forbidden if the board found that the project would create undue risk to human survival.”¹⁶⁹ He moots the argument that “citizens of foreign countries that are hostile to the United States, and citizens of countries (mainly Muslim) in which a significant fraction of the population is deeply hostile to the United States even if the government is friendly, should not be admitted to the advanced study of dangerous technologies, such as nuclear engineering, nanotechnology, molecular biology, computer science, and artificial intelligence.”¹⁷⁰ To assist in these approaches, the state should address an oversight in US law: the lack of an equivalent to the United Kingdom’s *Official Secrets Act*.¹⁷¹ An analogous law would allow the US government to “prevent or punish the knowing publication or other dissemination of classified material concerning national security, provided that the material was classified in accordance with properly statutory criteria (which do not yet exist).”¹⁷² It would also be prudent, in his view, to expand the scope of public surveillance in what he considers to be sensitive areas. FBI agents or informants should, for example, be encouraged to attend mosques where known radical imams preach, and to photograph or record events.¹⁷³

¹⁶⁹ Posner, *Catastrophe*, *supra*, note 125, at, 221.

¹⁷⁰ *Ibid*, at 222.

¹⁷¹ 1989, c. 6, UK.

¹⁷² Posner, *Not a Suicide Pact*, *supra*, note 139, at 110.

¹⁷³ *Ibid*, at 112.

In summary, for Posner, the threat of mass terror at the hands of al Qaeda, or a related group, is growing. The fact is well-supported by expert opinion, and has profound implications. It presents both law enforcement and national security with a new kind of problem. “I prefer to regard it as *sui generis*,” he writes, “than to try to squeeze it into familiar preexisting categories such as ‘war’ or ‘crime’.”¹⁷⁴ Lawmakers and judges can assist in countering the threat by crafting a new set of tools that would set due process to one side, and the laws of war to the other.

4.3.2 Alan Dershowitz and the preemptive turn

By contrast to Posner, Alan Dershowitz sees the threat of mass terror as both a crime *and* a war, in ways that fundamentally challenge our understanding of both. As will be seen, for Dershowitz, the best response may well be a blurring of the two bodies of law together.

His contribution to these debates is significant, given his position as member of the Harvard law faculty and his profile as a public intellectual. The role of the catastrophic imagination is notable in two of his recent works on countering terrorism.¹⁷⁵ The earlier book, *Why Terrorism Works*, begins with an attempt to understand how terror became legitimized in the period before September 11, and what might have been done to avoid it. His explanation helps to contextualize his reading of the current threat facing the United States and Israel.

When the PLO and other regional groups began to resort to terror, in earnest, in the late 1960s and 1970s, they quickly discovered that it gained them a greater measure of recognition by European nations, the US, and, above all, the UN than they were able to

¹⁷⁴ Posner, *Countering Terrorism*, *supra*, note 118, at 227.

¹⁷⁵ Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2003); and *Preemption: A Knife that Cuts Both Ways* (New York: W.W. Norton, 2006).

gain through years of less violent efforts. This helped to legitimize the practice of terror, and only encouraged more of it. It would have been more prudent, Dershowitz suggests, to respond to acts of terror with an overwhelming show of force and a denial of any recognition whatsoever – precisely the strategy that Israel has employed since the second Intifada, leading to a sharp decline in attacks. As terrorism continues to evolve, however, it has become untethered to a specific national agenda, making it more dangerous and difficult to confront. We have now reached a point at which the struggle against terror could result in “cataclysmic defeat – the nuclear, chemical, or biological destruction of the planet or large segments of it.”¹⁷⁶

Liberal democracies are thus left with two options. One is to seek to minimize all conceivable risk by suspending all constitutional and human rights, and then employing unlimited surveillance, torture, and other police and military measures.¹⁷⁷ The other option, which Dershowitz favours, is to strive to maintain a commitment to civil liberties, but with greater limits than we have been accustomed to in recent decades. Thus, in one chapter, he supports the use of torture in a ticking bomb scenario and the use of “judicial torture warrants” in other, less extreme situations.¹⁷⁸ In another chapter, he promotes the use of national ID cards, military tribunals, expanded surveillance, tighter border controls, greater exchanges of information among agencies, and greater limits on free speech.¹⁷⁹

As with Posner, a pending sense of apocalypse is central to Dershowitz’s argument throughout. Yet his references to mass terror are often more carefully worded than either Posner’s or Yoo’s. There are a few direct assertions that an attack is imminent, although his rhetoric and tone clearly suggest this. The opening sentence of the book states: “The

¹⁷⁶ Dershowitz, *Why Terrorism Works*, *ibid*, at 12.

¹⁷⁷ *Ibid*, chapter 3.

¹⁷⁸ *Ibid*, chapter 4.

¹⁷⁹ *Ibid*, chapter 5.

greatest danger facing the world today comes from religiously inspired terrorist groups ... that are seeking to develop weapons of mass destruction for use against civilian targets.”¹⁸⁰

Speaking of the evolving nature of terror after September 11, he writes “... their object is massive destruction and mass murder of hundreds, even thousands, of civilians.

Tomorrow we may be faced with terrorist mass weapons – nuclear, chemical, and biological – capable of destroying entire cities and more.”¹⁸¹ Later in the book, speculating on a possible follow up to September 11, he writes: “[t]he real problem is that a comparable catastrophic attack could be carried out in the future for even less money, with even fewer people, from almost any country in the world. If the apocalyptic terrorists seek to escalate the damage they cause to include nuclear, chemical, or biological disaster, it will probably require some state support...”¹⁸² Assessing the merits of various extreme measures, he wonders how acts of mass terror would change public perceptions of them:

“[...] what if matters were to get considerably worse? What if bioterrorism were to expand from sporadic outbreaks of anthrax to systematic spreading of lethal diseases?

What if a nuclear or chemical explosion seemed imminent?”¹⁸³ In the book’s closing pages,

Dershowitz becomes more direct:

I believe there is a small but significant possibility that Islamic radicals could succeed in killing hundreds of thousands – perhaps even more – Americans and Israelis. If they manage to secure access to weapons of mass destruction, I have little doubt there will be some who would try to use them against New York, Los Angeles, Washington, D.C., or Tel Aviv. [...] Whether they succeed or fail will depend on many factors, including our preparedness to prevent such an attack. It may also depend somewhat on dumb luck. We can do little about the latter, but we can do much about the former.¹⁸⁴

¹⁸⁰ *Ibid*, at 1.

¹⁸¹ *Ibid*, at 9-10.

¹⁸² *Ibid*, at 182-83.

¹⁸³ *Ibid*, at 195-6.

¹⁸⁴ *Ibid*, at 226.

What is noteworthy about these references to mass terror, aside from their careful wording, is that none of them is supported by citations to expert opinion on point. Like Yoo in this respect (as will be seen), Dershowitz is not interested in the technical debate about the real prospect of mass terror. He chooses instead to emphasize the less contentious fact of its theoretical possibility.

By continuously invoking this possibility, the many references to mass terror play a critical role in framing Dershowitz's discussion of torture and other measures. His advocacy of judicially sanctioned torture is the most contentious of his recommendations. It rests on two arguments. The first is a claim that in extreme situations, torture has always been used and always will be; and, therefore, the pretense, on the part of Western states, to have abolished it is hypocritical. For this reason, contrary to our constitutional tenets, or to those who have argued that modern legal systems derive their very character from the prohibition on torture, liberal society is not in fact *committed* to abolishing torture.¹⁸⁵ It represents an important ideal, but one that we easily abandon when forced with the tragic choice of the ticking bomb scenario. Should we remain hypocritical or naive and continue to ignore or acquiesce in this persistent underground use of torture, turning a blind eye to much crueler and more arbitrary uses of state violence? The prudent course would be to subject its use to the rule of law by condoning "non-lethal" forms of physical coercion and requiring authorities to seek a warrant to carry them out. Dershowitz offers only one example of what he has in mind by non-lethal torture: a

¹⁸⁵ See, e.g., David Luban, "Liberalism, Torture, and the Ticking Bomb" (2005) 91 Va. L. Rev. 1425; and Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 Colum. L. Rev. 1681. At 1687, Waldron writes: "the rule against torture operates in our law as an *archetype* – that is, as a rule which has significance not just in and of itself, but also as the embodiment of a pervasive principle." He also notes, at 1719, "...in the heritage of Anglo-American law, there is a long tradition of rejecting torture and regarding it as alien to our jurisprudence... Actually, a case can be made that torture is now to be regarded as alien to *any* system of law."

“sterilized needle being shoved under the fingernails”.¹⁸⁶ Later, he speaks in more general terms of submitting suspects to “judicially monitored physical measures designed to cause excruciating pain without leaving any lasting damage.”¹⁸⁷ Whatever the method, he argues that “a formal, visible, accountable, and centralized system” would lead to suspects being subjected to less violence precisely because such a system would be “somewhat easier to control than an ad hoc, off-the-books, and under-the-radar-screen nonsystem.”¹⁸⁸

But Dershowitz’s core argument for torture is the older consequentialist claim on which Posner and others have relied.¹⁸⁹ For Dershowitz, “[t]he simple cost-benefit analysis for employing such non-lethal torture seems overwhelming: it is surely better to inflict nonlethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die.”¹⁹⁰ The argument becomes more persuasive in the context of mass terror.

Dershowitz relates that in the weeks after September 11, the US intelligence received information that “a ten-kiloton nuclear weapon may have been stolen from Russia and was on its way to New York City, where it would have been detonated and kill hundreds of thousands of people.”¹⁹¹ The source of the information proved unreliable, but Dershowitz invites the reader to imagine that the source did appear to be credible and that it was a captured terror suspect. In such a case, it is “not absolutely certain torture

¹⁸⁶ Dershowitz, *Why Terrorism Works*, *supra*, note 175, at 148.

¹⁸⁷ *Ibid*, at 159.

¹⁸⁸ *Ibid*, at 158.

¹⁸⁹ See Richard Posner, “Torture, Terrorism and Interrogation” in *Torture*, *supra*, note 148. At 295, Posner asserts: “if the stakes are high enough torture is permissible. No one who doubts that should be in a position of responsibility.” See also Orin Gross’s contribution to the same collection, “The Prohibition on Torture and the Limits of the Law”.

¹⁹⁰ Dershowitz, *Why Terrorism Works*, *supra*, note 175, at 144.

¹⁹¹ *Ibid*.

will work, but it is our last, best hope for preventing a cataclysmic nuclear devastation in a city too large to evacuate in time.”¹⁹²

In *Preemption* (2006), Dershowitz develops a line of argument already present in the later chapters of his earlier book. Due to its catastrophic potential, the contemporary threat of terror has given rise to a paradigm shift in perceptions of crime and security, best encapsulated in the notion of “preemption.” The emergence of the concept is tied to a larger cultural shift, in which western states are “moving away from [their] traditional reliance on deterrent and reactive approaches and toward more preventive and proactive approaches.”¹⁹³ These include “the use of force, power, compulsion, censorship, incarceration, and death”.¹⁹⁴ The preemptive paradigm marks a break with an earlier criminological framework premised upon a rational actor who may be deterred by the prospect of punishment, and “society’s ability (and willingness) to withstand the blows we seek to deter”.¹⁹⁵ But both assumptions are, as he asserts, “now being widely questioned as the threat of weapons of mass destruction in the hands of suicide terrorists becomes more realistic and as our ability to deter such harms by classic rational cost-benefit threats and promises becomes less realistic”.¹⁹⁶

The shift in favour of preemption thus entails two general propositions. One is that the “calculus” of risk and harm prevalent in the criminal law is no longer appropriate. In the past, western jurists preferred that ten guilty men go free rather than convicting one innocent person. They are now prepared to contemplate the need to detain or even kill an

¹⁹² *Ibid*, at 145.

¹⁹³ Dershowitz, *Preemption*, *supra*, note 175, at 2.

¹⁹⁴ *Ibid*, at 27.

¹⁹⁵ *Ibid*, at 7.

¹⁹⁶ *Ibid*, at 8.

innocent person rather than allow “ten possibly preventable terrorist attacks to occur”.¹⁹⁷ This implies that “preemptive decisions” – about detention, torture, or targeted killing – will be based on “uncertain predictions, which will rarely be anywhere close to 100 percent accurate.”¹⁹⁸ It may also entail the need to posit “some false positives (predictions of harms that would not have occurred) in order to prevent some predicted harms from causing irreparable damage.”¹⁹⁹

A second proposition holds that because terrorism is no longer susceptible to deterrence, and because the stakes are so grave, the older limits on the state’s use of force against individuals no longer apply. Terrorists who present a credible threat of using WMD blur the line between combatants and criminals. The result is not that we are at war, but that we may apply both military force and the laws of war selectively. “The reality,” Dershowitz asserts, “is that terrorists involved in an ongoing insurgency or campaign of terror are in a hybrid status that may well justify treating them as combatants for the purposes of targeted killings but not as prisoners of war once they are captured.”²⁰⁰ Other preemptive measures that are now appropriate include preventive detention, destruction of sites where WMD are being built, and military occupation of regions known to support terror (Iraq, Afghanistan).

As with the later chapters of *Why Terrorism Works*, Dershowitz’s discussion of preemptive measures in this book are framed by frequent allusions to mass terror.²⁰¹ Yet, with only two exceptions, none of these references are substantiated by citations to authorities on the use of WMD. The two exceptions involve newspaper articles that

¹⁹⁷ *Ibid*, at 12.

¹⁹⁸ *Ibid*, at 11.

¹⁹⁹ *Ibid*, at 11.

²⁰⁰ *Ibid*, at 126.

²⁰¹ References to WMD or mass terror are found in *Preemption*, *supra*, note 175, at 2, 8, 10, 18, 19, 23, 140-145 (a detailed discussion of bioterrorism), and 235.

summarize the views of others. Dershowitz's use of these sources is worth addressing briefly, to demonstrate its consistency with the selective or strategic way that Posner and other commentators on WMD have dealt with authority.

The first is an article from *Forward* on a 2004 study published by the National Intelligence Council (an organization linked to the CIA and operating under the auspices of the US government).²⁰² Dershowitz cites a passage from the article, which summarizes the NIC's study as "predicting that America is 'likely' to be hit by bio-terrorist attacks at some point in the next 15 years."²⁰³ The passage also suggests that a bioterrorist laboratory "could well be the size of a household kitchen, and the weapon built there could be smaller than a toaster." Drawing from the same article, Dershowitz' continues: "A leading expert on bioterrorism, who serves as a consultant to the Pentagon, warned that although biological agents have 'the potential to be much more life-threatening [than nuclear weapons], we are not prepared to prevent or control this threat.'"²⁰⁴ The suggestion here is that credible experts have concluded that (a) an attack is imminent; (b) because of the simplicity of creating a bioweapon and the difficulty of detecting it; and (c) that the weapon itself poses a potentially greater danger than a nuclear bomb. Neither Dershowitz, nor the article cited, indicates whether the predications in the report were qualified in any way; nor does he seek to contextualize or balance them against contrary opinion. The likelihood of a bio-terror attack "in the next 15 years", and the assumptions on which this

²⁰² Ori Nir, Marc Perelman, "CIA-Linked Study Warns of Bio-Terrorst Attacks During Next 15 Years." *Forward* (21 January 2005): online < <http://www.forward.com/articles/4161/>> . The report at issue is *Mapping the Global Future: Report of the National Intelligence Council's 2020 Project* (online: < http://www.dni.gov/nic/NIC_globaltrend2020.html>)

²⁰³ Dershowitz, *Preemption*, *supra*, note 175, at 140, citing Ori Nir, Marc Perelman, "CIA-Linked Study Warns of Bio-Terrorst Attacks During Next 15 Years." *Forward* (21 January 2005): online <www.forward.com/articles/4161/>

²⁰⁴ Nir and Perelman, *ibid*, citing an interview with Richard Danzig.

claim rests, are thus presented as a scientific certainty despite the casual approach to research and evidence that Dershowitz adopts.

Dershowitz's use of the second source is still more questionable. Dealing with a more extreme scenario involving the weaponization of smallpox, he cites a *New York Times* article that fails to support the claim he seeks to make. He writes: "...recent advances in synthesizing long molecules of DNA have made it more likely that 'the technique might be used to make the genome of the smallpox virus' and weaponizing it."²⁰⁵ Yet the cited article does not state that it is "more likely" that smallpox will be manufactured; it states only that the technique in question "puts within reach the manufacture of small genomes, such as those of viruses" including smallpox. Thus, the use of the word "more" here does a good deal of work, not all of it entirely faithful to the meaning of the original source. The article also states that "[s]ome biologists fear that the technique might be used to make the genome of the smallpox virus". It does not state that the discovery of the technique makes the production by terrorists "more likely", or comment upon the merits of the biologists' fears. It fails to do this precisely because it does not address the question of what is involved in making a virus. The article simply suggests that the *theoretical possibility* of making smallpox virus is now "within reach". Ignoring these distinctions, Dershowitz then writes: "What is known is that if terrorists can manage to introduce smallpox into our borders, the devastation may be catastrophic since most Americans are not currently immunized against that killer disease." Once again, this may be true, but much turns on the phrase "manage to introduce ... into our borders". What would this involve? And how likely is it? Without considering better informed opinion on the matter, Dershowitz suggests that relatively little is involved. In

²⁰⁵ Dershowitz, *Preemption*, *supra*, note 175, at 143, citing Nicholas Wade, "A DNA Success Raises Bioterror Concerns," *New York Times* (12 January 2005), online: <<http://www.nytimes.com/2005/01/12/national/nationalspecial3/12gene.html>>

this way, the imminent possibility of a smallpox attack, or one involving another extremely virulent bioweapon, is once again framed as a scientific certainty – when in fact the scientific state of the question is much less clear.²⁰⁶

4.3.3 John Yoo and the exigencies of war

Turning next to John Yoo, we find that the role of authority in assertions of the likelihood of mass terror disappears altogether. In contrast to Posner and Dershowitz, Yoo is both more certain about the imminence of mass terror and decisive in asserting that the threat posed by terrorists who would use WMD is tantamount to war.

Yoo is a law scholar at Berkeley who gained notoriety for his work as counsel in the Department of Justice from 2001 to 2003. While there, he co-authored a series of memos on the legality of certain extreme counter-terror measures, including coercive interrogation. Since his return to Berkeley, Yoo has sought to defend the Bush administration's response to terror through a series of books, articles, and editorials. His most comprehensive treatment of the subject is set out in *War By Other Means* (2006).²⁰⁷

The central claim in this book is that the events of September 11, and the ongoing threat of attack by al Qaeda and its affiliates, is best understood as a form of war, and best addressed as such. A critical part of this claim is that the groups involved pose a credible threat of obtaining WMD and using them against us in the short term. The threat is therefore much more serious than a crime – it even bears an existential import: “We (along with Israel) are the first to face a terrorist enemy intent on carrying out the catastrophic destruction of our nation”.²⁰⁸ Despite the fact that this enemy is a non-state

²⁰⁶ Expert debates on bioterror are explored in Chapter 6.

²⁰⁷ John Yoo, *War By Other Means: An Insiders Account of the War on Terror* (New York: Atlantic Monthly Press, 2006).

²⁰⁸ *Ibid*, at xii.

actor, it can “inflict violence at a level once only in the hands of nations.”²⁰⁹ Al Qaeda, acting in “small guerilla bands, aided by the spread into the global public domain of virulent technologies – chemical, biological, and nuclear – can wreak destruction such as no small group has ever been able to before.”²¹⁰ Maintaining a strong link between al Qaeda and mass terror, Yoo alludes to WMD a total of nine times throughout the text.²¹¹

According to Yoo, the threat posed by al Qaeda is tantamount to war not only given the group’s capacity to carry out a catastrophic attack, but also because if a nation-state had carried out the attacks of September 11, there would have been no debate as to whether we were at war.²¹² As with a nation at war, “al Qaeda’s attacks are highly organized, military in nature, and aimed at achieving ideological and political objectives.”²¹³ Congress has also agreed to view this as a war, having enacted the ‘Authorization for Use of Military Force’ [AUMF] on Sept 18, 2001.²¹⁴ In Yoo’s view, this was, in effect, the congressional declaration of war called for in the US Constitution. As Yoo notes, the text of the authorization refers explicitly to “grave acts of violence” that “pose an unusual and extraordinary threat to the national security and foreign policy of the United States”.²¹⁵ The authorization provides the only necessary legal authorization for addressing September 11 as an act of war rather than a crime, and thus employing the appropriate military tactics.

Against those who would deny that the US is at war, either in fact or in law, Yoo also makes the case for taking a war-like approach on practical grounds. Restricting the

²⁰⁹ *Ibid*, at 3.

²¹⁰ *Ibid*, at 7.

²¹¹ *Ibid*, at 7, 45, 62, 172, 173, 181, 188, 199, and 232.

²¹² *Ibid*, at 4.

²¹³ *Ibid*, at 9.

²¹⁴ Pub. L. 107-40, 115 Stat. 224 (2001).

²¹⁵ Yoo, *War*, *supra*, note 207, at 11. Other aspects of the AUMF are explored in Chapter 3.

nation's response to the tools of law enforcement would unnecessarily burden its defenses. Yoo's arguments here mirror those of Posner. Police must have probable cause to arrest; they must inform suspects of their right to silence and to counsel; if detained, suspects must be charged, and if charged, they require a trial by jury, disclosure, and the chance to face their accusers in open court. "Applying criminal justice rules to al Qaeda terrorists would gravely impede the killing or capture of the enemy, as well as compromise the secrecy of the United State's military efforts."²¹⁶ Seen as a war, the US is entitled deploy a wider set of tools:

A nation at war may kill members of the enemy's armed forces. But law enforcement personnel may use force only in defense of their lives or those of others. Once captured, an enemy combatant can be detained until the end of the conflict. Combatants have no right to a lawyer or a criminal trial to determine their guilt or innocence under the usual laws of war. They are simply being held to prevent them from returning to the fight.²¹⁷

And since the Geneva Conventions apply only to "high contracting parties" or to those who voluntarily accept their terms, in Yoo's view, they do not apply to captured members of al Qaeda because that group is neither a signatory to the treaty nor a voluntary subscriber.²¹⁸ Al Qaeda is instead an "unprecedented enemy",²¹⁹ one consisting of only a "covert network of cells with no territory to defend, no population to protect, no armed forces to attack."²²⁰ Its only purpose and modus operandi is to launch "surprise attacks on purely civilian targets."²²¹ Our best defense is to gain intelligence by capturing and interrogating their leaders, or intercepting their communications.²²²

²¹⁶ *Ibid*, at 16.

²¹⁷ *Ibid*, at 16-17.

²¹⁸ *Ibid*, at 23.

²¹⁹ *Ibid*, at 21.

²²⁰ *Ibid*, at 21.

²²¹ *Ibid*, at 21.

²²² *Ibid*, at 21, 39.

The threat is so grave that it justifies not only indefinite detention without charge, and coercive interrogation bordering on torture, but also targeted killing. As technology has improved, the practice of targeted killing has become more humane; targets can be more effectively pinpointed and collateral damage minimized.²²³ Errors do still occur, but we can “only ask that our soldiers and policy makers make reasonable decisions under the circumstances.”²²⁴ A further justification for this practice lies in a liberal reading of the UN Charter. Article 51 of the UN Charter recognizes a state’s “inherent right of individual or collective self-defence ... if an armed attack occurs”. Yoo reads into this passage a state’s right to use force in the face of “imminent attack,”²²⁵ and proceeds to question what ‘imminence’ might entail in this context. On Yoo’s reading, the magnitude and nature of current threats call for a more expansive interpretation; imminence “should not be understood as a purely temporal concept.”²²⁶ The trouble lies in the fact that “[i]mmminence as a concept does not address cases in which an attack is likely to happen, but we are not sure when.”²²⁷ The right to self-defense must also take into account “the degree of expected harm, [which is] a function of the probability of the attack and the estimated casualties and damage.”²²⁸ To support his reading of this key provision of international law, Yoo draws on the catastrophic imagination:

The speed and severity of attack possible today means that the right to preempt now should be greater than in the past. Weapons of mass destruction have increased the potential casualties a single terrorist attack can wreak, from the hundreds or thousands of innocent lives into the hundreds of thousands or even millions. This does not even count the profound, long-term destruction to cities, contamination of

²²³ *Ibid*, at 49.

²²⁴ *Ibid*, at 57.

²²⁵ *Charter of the United Nations* (1945), Ch. VII, Art. 51.

²²⁶ *Ibid*, at 61.

²²⁷ *Ibid*, at 62.

²²⁸ *Ibid*.

the environment, and long-term death or disease for large segments of the civilian population. WMDs can today be delivered with ease — a suicide bomber could detonate a ‘dirty bomb’ using a truck or spread a biological agent with a small airplane. Detection is difficult, as no broad mobilization and deployment of regular armed forces will be visible, and imminent attacks will be virtually impossible to prevent using conventional military force. Probability, magnitude, and timing must all be relevant factors in which to use force against the enemy.²²⁹

Notably, none of these assertions about WMD use are supported with reference to expert opinion or other evidence. Indeed, the entire text contains no attempt to ground assertions about the technology or likelihood of WMD in authority or evidence. The claims are thus asserted as though they were self-evident or beyond dispute.

On the assumption, then, that this is indeed a war, involving the most serious threats, the argument for holding captured combatants at Guantanamo seems, from Yoo’s perspective, uncontroversial. Nations at war have traditionally imprisoned enemy combatants, not as a form of punishment but as a means of incapacitation, which is permissible “until the end of hostilities”.²³⁰ Yoo contends that both American citizens, such as Jose Padilla, and alien detainees at Guantanamo are prisoners of war subject to the President’s unfettered discretion to detain or imprison as Commander in Chief, for the duration of the conflict.²³¹ In Yoo’s view, the AUMF “implicitly included the power to detain enemy combatants.”²³² As prisoners of war, detainees do not have a right to counsel, except when facing charges in a military tribunal, or elsewhere, for violating the laws of war.²³³

Yoo argues that the practice of coercive interrogation is critical. He asserts that the 2002 capture and interrogation Abu Zubaydah (a high ranking member of al Qaeda in

²²⁹ *Ibid*, at 62-3.

²³⁰ *Ibid*, at 129.

²³¹ *Ibid*, at 144-5.

²³² *Ibid*, at 149.

²³³ *Ibid*, at 152.

Pakistan) yielded information leading to the capture of Ramzi bin al Shibh (another key al Qaeda figure), which lead in turn to the capture of Khalid Sheikh Mohammed (“architect” of the 9/11 attacks).²³⁴ Assessing the significance of these actions, Yoo writes “[n]ot only did their capture take significant parts of the al Qaeda leadership out of action, they led to the recovery of much information that prevented future terrorist attacks and helped American intelligence more fully understand the operation of the terrorist network.”²³⁵ A notorious aspect of these interrogations is that they were the subject of advice in an August 2002 memo that Yoo authored with Jay Bybee, Assistant Attorney General, for Alberto Gonzales, counsel to the President. The memo authorized conduct falling short of torture, which was defined in this way:

...physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For mental pain or suffering to amount to torture [under U.S. law ratifying the UN *Convention Against Torture*²³⁶], it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.”²³⁷

Yoo affirms that “the advice was entirely accurate.”²³⁸ Interrogators, he suggests, are not held to the same standards as those applicable to suspects held at “an American police station.” The argument for interrogation bordering on torture is, once again, purely consequential: “What if, as the popular Fox television program *24* recently portrayed, a high-level terrorist leader is caught who knows the location of a nuclear weapon in an American city? Should it be illegal for the President to use harsh interrogation short of

²³⁴ *Ibid*, at 167.

²³⁵ *Ibid*, at 167.

²³⁶ 18 U.S.C.A. §§ 2340A(a); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85.

²³⁷ Cited in Yoo, *War*, *supra*, note 207, at 169.

²³⁸ *Ibid*, at 169.

torture to elicit this information?”²³⁹ For Yoo, the question is not academic:

“Unfortunately, these are no longer hypothetical questions. We do face an enemy that is intent on carrying out surprise attacks on innocent civilians, with WMDs if possible, by using covert cells of operatives hidden within the United States.”²⁴⁰

Other measures that Yoo supports include military commissions for trying combatants, expanded surveillance in the *Patriot Act*, and warrantless wiretapping by the National Security Agency. Military commissions are necessary for greater secrecy, but also provide for a fair trial, despite allowing for relaxed rules of evidence.²⁴¹ They also allow for closing portions of proceedings, without compromising the defendant’s rights, since his attorneys remain present.²⁴² The *Patriot Act*’s expanded scope for searches with warrants issued on lower standards, and the increased sharing of information obtained surreptitiously, are justified, but both measures fall short of what is necessary. The *Patriot Act* assumes that “government already has enough information to believe that a target is the ‘agent of a foreign power’ before it even asks for a warrant”, and FISA functions “within a framework that assumes that foreign intelligence agents are relatively simple to detect.”²⁴³ In Yoo’s view, both are relics of the cold war era, when the targets for surveillance often worked in the embassies of foreign governments. Intelligence officials have a much harder time identifying members of al Qaeda and therefore often lack the necessary “individual suspicion”.²⁴⁴ As Posner had argued, Yoo suggests the law should be

²³⁹ *Ibid*, at 172.

²⁴⁰ *Ibid*, at 173.

²⁴¹ *Ibid*, at 206.

²⁴² *Ibid*, at 217.

²⁴³ *Ibid*, at 104-5.

²⁴⁴ *Ibid*, at 111.

amended to allow the wiretapping of domestic and foreign targets with greater latitude or on lower thresholds of suspicion.²⁴⁵

4.4 Conclusion

The three bodies of literature explored in this chapter – expert opinion on WMD, the history of terror, and argument for extreme measures – share several significant characteristics. Among them is a frequent manifestation of the catastrophic imagination, and a tendency, in many instances, to ground claims about the prospect of WMD terror upon a selective reading of a narrow range of authority and evidence. Yet the readings are often moving and persuasive precisely because they emphasize hypothetical technological possibilities of mass terror that cannot be ruled out, at least in theory. The readings thus retain a degree of plausibility despite the existence of a vigorous debate about the likelihood of WMD use (a point I have deferred to Chapter 6), precisely because it remains *theoretically* possible that terrorists could use WMD in the short term, and with immense consequences.

Before exploring debates on these issues, I turn in the next chapter to the question of how liberal jurists and scholars in the period tended to respond to claims about the exceptional nature of outstanding threats.

²⁴⁵ *Ibid*, at 116.

5 The Lack of Threat Skepticism in Rights Advocacy and Liberal Law Scholarship

To sum up my argument to this point: I began by exploring the emergence of authoritarian legality. I then looked at the role that the fear of mass terror has played in political discourse, public perception, and expert literature on threats to national security. I have sought to show how this fear has contributed to the widespread assumption, in the decade after 9/11, that due to the gravity of the outstanding threat, a new set of rules that allow for a more preemptive approach had become necessary.

The focus in this chapter is on the defence of liberal legality in scholarship and rights advocacy after 9/11 — and its role in helping or hindering the acceptance of authoritarian legal measures.

I begin with the assumption that scholars, jurists, and rights advocates have made a number of strong arguments in defence of rights. These include the claim that rights are not incompatible with security; that extraordinary measures ought to be used only where demonstrably justified; and that many if not most such measures used thus far have been ineffective or unnecessary.

I will argue, however, that while liberal jurists and activists have sought to approach the question of security with caution and critical judgment, they have generally not gone far enough. That is to say, rights advocates have tended to be less inclined to challenge beliefs about the unprecedented gravity of outstanding threats — or the belief that they *compel* the state to adopt a more preemptive, extreme set of rules. There are, of course, some exceptions — some who have resisted these claims. But even in these cases, authors have not attempted to challenge core assumptions on which these claims rest:

namely, that a mass terror attack may be imminent, and it could have a potentially catastrophic impact on the state. Thus, in most rights advocacy, either fears of catastrophe remain intact, or authors concede the need for certain exceptions to core liberal principles. I suggest that in either case, this aspect of the work is less persuasive as a source of argument for liberal reform, since both beliefs support the need to depart in some way from a liberal legal framework.

The broader argument of this chapter, then, is that liberals have been effective in exposing the misunderstandings that underlie a belief in the need to trade liberty for security, or the futility of many measures used thus far. But they have tended not to unsettle a deeper belief that current threats warrant a new approach to security (often involving extreme or illiberal measures). This belief continues to serve as a critical basis for authoritarian legality.

I advance this argument by looking at two classes of documents that are intended on some level to advance a liberal reform agenda. The first group downplays or ignores arguments about (a) the gravity of current threats and/or (b) why this warrants a new approach to security. The second groups highlights or pays deference to either or both claims.

The purpose of this examination is twofold. One is to explain in part why a deferential approach by rights advocates has inadvertently helped to condition (or failed to hinder) a larger shift toward authoritarian legality. The second is to set the context for the next chapter. There, I propose an argumentative strategy for reform that seeks to address this problem. The strategy consists of a more direct challenge to claims about the imminence of mass terror, and the belief that such a threat calls for a new set of rules.

5.1 Common arguments in defence of liberal legality

Part 1 of this chapter looks at arguments made in a range of discourse — from NGO declarations and legal scholarship to journalism. The common theme in these texts is the need for a return to liberal legality, or a close adherence to its core precepts.

Four closely related arguments recur. I set them out here to highlight the foundation on which most liberal advocacy in the post 9/11 period has been based. I also seek to show how these arguments can be advanced without challenging assumptions about the catastrophic nature of current threats, or the need for a larger “preemptive turn.”

Thus, advocates of liberal legality commonly draw on a variation the following:

- i. *The compatibility argument* holds that the tasks of upholding human rights, due process, and constitutionalism are compatible with countering-terrorism because rights can be upheld without significantly hindering security;
- ii. *The argument that the notion of balancing is misleading: i.e.,* that talk of rights and security being balanced or traded-off often conceals or overlooks the fact that we do not necessarily gain more of one by having less of the other.
- iii. *The necessity and proportionality argument* contends that we are only justified in infringing rights when, and to the extent that, the need to do so can be demonstrated and the extent of the breach is proportionate to the benefit derived; and finally,
- iv. *The practical futility argument* holds that most if not all of the extreme measures used thus far have been ineffective or unnecessary – yielding no new information or further protection not available by other means.

The arguments are closely related and mutually supportive. Partly for this reason, each of the cases surveyed below employs two or more of them, and many employ all four.

In a broader sense, however, most rights advocates rely on two core strategies: an attempt to dispel confusion about the relationship between rights and security, and a call for clearer evidence that a given measure is necessary. Many authors thus concede the need for additional or new measures, but seek proof of the necessity and proportionality of certain extreme measures. Others debate the need to qualify or revisit fundamental aspects of liberal legality — in the hope of better preserving it. Yet the approach of neither group involves a serious challenge to beliefs about the catastrophic threat that terror now poses.

5.2 Approaches to reform that ignore or play down the question of mass terror

5.2.1 Examples from juridical advocacy

Over the course of the decade, NGOs, associations of jurists, and other activist groups have produced an extensive body of material — reports, books, films, websites, and so forth — supporting a campaign for reform of authoritarian measures. Broadly speaking, they fall within two categories. One consists of investigations, exposés or reports of violations, coupled with arguments in favour of reform. Another consists of declaratory statements or affirmations of liberal legal principles. I highlight one exemplary document from each category.

5.2.1.1 The 2009 ICJ Report

The first is the 2009 report of the Geneva-based International Commission of Jurists on human rights and counter-terrorism.¹ The report stands out in terms of its scope and the scale of the investigation on which it is based. It is also a kind of paradigm case of liberal rights advocacy, raising many of the arguments and issues about effective reform strategies that arise in other works under review here. For this reason, I foreground the report and examine its approach in some detail.

The report draws on hearings held over the course of three years by a panel of Commission members in sixteen regions, relating to forty countries, representing all parts of the globe. The ICJ published its 200-page report in February of 2009, with press conferences and presentations in New York, Washington, Toronto, London, and elsewhere, featuring prominent jurists, including former Canadian Supreme Court of Canada Justice Ian Binnie, former Irish President and UN High Commissioner for Human Rights, Mary Robinson, and others. In other words, this was intended to be something more than an academic exercise. It was an earnest attempt by liberal jurists to make a public case for liberal legality to the widest possible audience.

¹ “Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights” [*hereafter*, “ICJ Report”] (16 February 2009), online: International Commission of Jurists <<http://ejp.icj.org/IMG/EJP-Report.pdf>>. The International Commission of Jurists is a non-governmental organization founded in 1952, consisting of sixty senior judges, counsel, and academics. Its mandate is to advance the principles of human rights and the international rule of law. In 2005, it convened an eight-member panel to study the question of counter-terrorism and human rights in part as a result of a concern that “a security-dominated agenda” following September 11f (*hereafter*, “9/11”) resulted in an attempt by many governments to “bypass well-established human rights and rule of law principles.” Members of the Panel were Arthur Chaskalson, former Chief Justice of South Africa; Mary Robinson, former President of Ireland and former United Nations High Commissioner for Human Rights; former president of the European Commission on Human Rights, Stefan Trechsel; Robert K. Goldman, Professor of the American University’s Washington College of Law; Pakistani Supreme Court counsel, Hina Jilani; Georges Abi-Saab, an international law scholar and former judge of the Appeals Chamber of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and of the International Court of Justice; Professor Muntarbhorn of Chulalongkorn University in Bangkok; and E. Raul Zaffaroni of the Supreme Court of Argentina. (See the “Eminent Jurists’ Panel 2009 information brochure”, online: <http://ejp.icj.org/IMG/EJP_Broch_second_print.pdf>.

The panel found that after 9/11, the US and other western nations had lost sight of, or in some cases had consciously abandoned, a post-war paradigm of international law that assumed the centrality of absolute or non-derogable rights.² Nations had now shifted away from this framework under the assumption that recent events have made it obsolete. The phenomenon is universal. “From New York to Nairobi,” the authors write, “from Brussels to Bogotá, and from Moscow to the Maghreb, the voices heard by the Panel spoke with disturbing consistency and regularity that well-established principles of international law are being ignored.”³ Encapsulating the thrust of their findings, the Panel states:

Terrorism sows terror, and many States have fallen into a trap set by the terrorists. Ignoring lessons from the past, they have allowed themselves to be rushed into hasty responses, introducing an array of measures which undermine cherished values as well as the international legal framework carefully developed since the Second World War. These measures have resulted in human rights violations, including torture, enforced disappearances, secret and arbitrary detentions, and unfair trials. There has been little accountability for these abuses or justice for their victims.⁴

Many chose to abandon the earlier framework in the belief that “the current threat posed by terrorism was not, and could not have been, envisioned before”.⁵ Moreover, the threat is said to be “so unprecedented and exceptional that the world is facing a genuine emergency, and that in the face of such an emergency, the rules must change, and

² The primary instruments of the paradigm include the *Universal Declaration of Human Rights*, G.A. Res. 217A (III) 1948, U.N. Doc. A/810 at 71 [*hereinafter*, *Universal Declaration*]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287; the *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316; 75 U.N.T.S. 135; the *International Covenant on Civil and Political Rights*, 19 September 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]; the *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); 6 I.L.M. 360 (1967); and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, 85.

³ ICJ Report, *supra*, note 1, at 10.

⁴ *Ibid*, at 2.

⁵ *Ibid*, at 18.

individuals must forego many of their liberties for the greater good.”⁶ The issues for the Panel were therefore whether the threat is indeed exceptional, and if so, whether the older rights framework poses an undue constraint when dealing with it.

The panel responded to the first question by drawing a historical comparison to earlier claims about terror. Current threats share “important parallels” with past terror crises.⁷ In earlier historical moments (Chile, Argentina, the United Kingdom), terror threats were also believed to be unprecedented, serious, and long-lasting. And in each of those cases, the arguments served as a basis for serious rights violations that in retrospect are widely considered excessive and unnecessary.

Applying this lesson to the present, the Panel makes use of the necessity and proportionality argument. If present talk of the threat being serious and unprecedented resonates with earlier beliefs and practices, citizens and governments ought to demand stronger evidence of the claim. They should also demand proof that the rights framework is no longer adequate, and that any new measures are in fact necessary. On the basis of its hearings and discussions with government and security officials in many nations, the Panel concludes that such evidence has been lacking: “Whether the [current terror] threat is exceptional or not, the Panel heard no persuasive evidence that the tried-and-tested framework of international law was inadequate.”⁸ The extreme measures surveyed in the report cannot therefore be justified. Later in the text, the Panel becomes more explicit:

⁶ *Ibid*, at 22.

⁷ *Ibid*, chapter 2.

⁸ *Ibid*, at 24.

“counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination.”⁹

Designed in the early post-war period, the older rights framework is still relevant precisely because it was crafted with emergencies in mind. In other words, non-derogable rights were neither designed for government in times of peace, nor meant to be limited to threats in the ordinary course. They were meant as a tool for preserving liberal ideals in a way that still gave states the necessary flexibility to respond to national emergencies. On this view, the magnitude or nature of the threat could not be the basis for asserting the framework’s obsolescence.

A third claim is more abstract – the compatibility of rights and security. As the authors state:

There is no inherent contradiction between, on the one hand, upholding human rights and the rule of law and, on the other, ensuring people’s safety by countering terrorism. The Panel does not accept the characterisation of “human rights” and “security from terrorism” as being somehow at opposing poles, and the duty imposed on States as one of balancing these antithetical demands.¹⁰

The ICJ’s use of the argument is typical of a wide range of rights advocacy, from scholarship on counter-terror policy at national and international levels;¹¹ declarations or reports by other associations of rights advocates;¹² and statements by non-governmental organizations.¹³

⁹ *Ibid*, at 169.

¹⁰ ICJ Report, *supra*, note 1, at 21.

¹¹ See, e.g., David Dyzenhaus, ed., *Civil Rights and Security* (Farnham, Surrey: Ashgate, 2009) and Benjamin Goold & Liora Lazarus, eds., *Security and Human Rights* (London: Hart Publishing, 2007) which both contain contributions with respect to counter-terror law in the US, Canada, and Britain.

¹² See the International Commission of Jurist’s 2004 *Berlin Declaration* (“Upholding Human Rights and the Rule of Law in Combating Terrorism”; online: International Commission of Jurists <www.icj.org/IMG/pdf/Berlin_Declaration.pdf>); and also the ICJ Report, *supra*, note 1. See also the “Ottawa Principles on Anti-terrorism and Human Rights” in Craig Forcece and Nicole Violette, eds., *The Human Rights of Anti-terrorism* (Toronto: Irwin Law, 2008) and the International Bar Association’s 2003

The report concludes with the Panel's call for a "stocktaking and repairing the damage" at all levels – national, regional, and international – with a view to making "a fresh start".¹⁴ It urges that we "prevent the normalization of the exceptional" by revisiting post-9/11 law and policy, overhauling of much of it in accordance with the principle of necessity and proportionality, and strengthening procedural safeguards.¹⁵

The persuasive limits of the ICJ report

Among the many strengths of the report is the Panel's recognition that a pervasive break from liberal principles is due in large part to a widespread belief in the exceptional nature of current threats. Yet instead of challenging this belief, or interrogating it in much detail, the Panel seeks to dismiss or defuse it by historicizing it. Consistent with an older pattern of threat inflation, the Panel implies that it can be safely cast aside as an overreaction.

To historicize the claim is not, however, to refute it. Indeed, in only one instance does the report address the reasons commonly cited for claiming that the current threat is exceptional. As the authors write:

it has been argued that groups like al-Qaeda are international in character; have access to more dangerous technologies of killing (e.g. "dirty" bombs etc.); utilise highly sophisticated communication technologies to carry out attacks and thwart law enforcement measures; have individuals who employ tactics, such as suicide bombing, which require different tactics on the part of law enforcement personnel; and/or have ill-defined, existential, or unrealisable demands, making negotiation difficult.¹⁶

report "International Terrorism: Legal Challenges and Responses", International Bar Association, "Task Force on International Terrorism" (Ardsey, New York: Transnational Publishers, 2003).

¹³ See Amnesty International's "Counter Terror with Justice" campaign, online: Amnesty International <www.amnestyusa.org/war-on-terror/page.do?id=1011329>.

¹⁴ Report, *supra*, note 1, at 164.

¹⁵ See recommendations at 155 of the Report, *ibid*.

¹⁶ ICJ Report, *supra*, note 1, at 22.

The prospect of mass terror is itself touched on only obliquely. More “dangerous technologies of killing” may exist, but have no significance in and of themselves. The Panel then draws a striking conclusion: “it is irrelevant for immediate purposes to determine if there is one terrorist threat or multiple threats, or *if this threat is quantitatively or qualitatively different to past threats*. Suffice to say that in different parts of the world terrorism poses a real and substantial threat needing to be effectively countered in accordance with international law.”¹⁷ (Emphasis added.)

The conclusion is striking because throughout the report, the Panel identifies a belief in the unprecedented nature of current threats as paramount. Yet not only is this belief unchallenged, it is also largely affirmed (“a real and substantial threat”). The ICJ’s larger case for reform rests therefore on the following argument. The threat that terrorism poses may indeed be unprecedented, but this issue is irrelevant. What is important is whether we can establish that an older liberal framework hinders the task of national security. And we cannot. Therefore, we should remain committed to it and abandon illiberal practices. The argument thus shifts the focus from a fear of terror to a demand for evidence. Without clearer proof that the old rules are ill-suited to national defence, any departures from them are suspect.

For the fearful skeptic, however, the rationale for a new set of rules lies precisely in assumptions and beliefs about the nature of the threat at issue. Due to its profound gravity, we must act preemptively. And in many instances, this will entail extreme measures – which are justified not in terms of their proven effect, but in terms of the *need to be preemptive*. In other words, we carry out targeted killing and hold detainees indefinitely without charge not because we can be certain that this will prevent a

¹⁷ *Ibid*, chapter 24.

catastrophic attack, but because we believe that we cannot afford to experiment. We may lack evidence that these measures are necessary or effective, and thus we may be perpetrating a grave injustice. But we must err on the side of caution. The stakes are too great.

The skeptic's logic is questionable on many fronts. The authors of the report would argue, for example, that while they remain agnostic about the magnitude and nature of current threats, they have at least unsettled the more important claim that current threats *warrant* a new set of rules. My point is that the *persuasive force* of this argument is diminished so long as other assumptions about the nature and potential impact of mass terror remain intact. So long as one believes that some form of mass terror is imminent and would be catastrophic, the choice is clear. Pre-emptive but extreme measures will seem more compelling than a call to remain committed to firm limits on the state's use of force.

But perhaps more importantly, the ICJ does not take issue with the need to embrace a larger preemptive paradigm. It only takes issue with violations of international law that this might entail. In ways to be explored below, other liberal advocates take a similar approach. They advance a case for reform by challenging the apparent incompatibility of liberal legalism and certain pre-emptive measures – rather than challenging deeper assumptions about the need for a wholesale shift toward “pre-emption” as a primary legal and political principle.

5.2.1.2 The ‘Ottawa Principles’

A second category of rights advocacy among jurists, NGOs, and other groups can be found in declarations of principle and other affirmative statements. Several have been

issued over the course of the past decade.¹⁸ In some respects the “Ottawa Principles on Anti-terrorism and Human Rights” is representative.¹⁹ Emerging from an international colloquium held in 2006, it assumes the form of a quasi-statutory set of declaratory rules or principles. A sense of its style can be gleaned from section 1.1.2, which states: “All measures taken by states to fight terrorism must respect human rights and the rule of law, while excluding any form of arbitrariness as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.”

The introduction to the document affirms a version of the compatibility argument noted earlier. The authors:

shared a common view that the preservation of human rights – not least the right to life – is the central motivator of anti-terrorism. They also believed that human rights constitute an elemental and immutable constraint on how anti-terrorism is conducted. The struggle for collective security must not be an assault on the individual’s life, liberty and security of the person.²⁰

The remainder of the document affirms that “[a]s a general rule, terrorist acts are criminal acts subject to applicable domestic, transnational and/or international criminal law enforcement measures”;²¹ the need to submit states of emergencies or derogations from core rights to the rule of law;²² the absolute prohibition on torture;²³ and various limits on the gathering, exchange, and assertion of privilege over intelligence.²⁴ It also

¹⁸ See, e.g., *supra*, note 12.

¹⁹ The Ottawa Principles are included in Craig Forcese and Nicole Violette, eds., *The Human Rights of Anti-terrorism*, *supra*, note 12.

²⁰ *Ibid*, at 18.

²¹ *Ibid*, Principle 3.1.

²² *Ibid*, Principle 2.4,

²³ *Ibid*, Principle 4.1.

²⁴ *Ibid*, Principles 7 and 8.

affirms that any deployment of force by a state acting in self-defence must be “necessary and proportionate in accordance with international law.”²⁵

The Ottawa Principles, and other such statements, are primarily assertive or expressive. Their purpose is less to persuade than to publically affirm. They also serve to amplify certain rhetorical strategies in favour of reform. They seek, that is, to reframe public debates about rights and security in terms favourable to liberal legal principles.

In this case, for example, the authors propose a conceptual link between the idea of national security and the preservation of human rights: *i.e.*, rights as a “central motivator of anti-terrorism”. Not only are rights compatible with security, they are also the very object of security. By protecting rights, we are not hindering our security, but advancing it.

To be clear, these are important and worthwhile contributions to the project of reform. But while they focus on the compatibility of rights and security, the Ottawa Principles, and other such statements, marginalize or ignore other critical assumptions that motivate illiberal measures. This in turn affects how skeptical audiences respond (if they take notice of them at all). For those who believe that extreme measures are warranted by the gravity of current threats, affirmations about the compatibility of rights and security would appear to miss the point. So long as beliefs about mass terror and the need for greater preemptive measures remain unchallenged and widespread, an idea of human rights as an “immutable constraint” will seem neither self-evident nor persuasive to many.

²⁵ *Ibid*, Principle 3.2.3

5.2.2 Examples from reform-oriented law scholarship

In this section, I focus briefly on work by two notable North American law scholars, Jeremy Waldron and Kent Roach. I chose their work as both representations and outstanding examples of common approaches taken in a larger body of reform-oriented liberal law scholarship.²⁶

Their approach is representative in three respects. Both avoid challenging assumptions about the catastrophic nature of pending threats, as well as the claim that those threats *may* warrant the use of more invasive measures.²⁷ They also rely in large part on a form of the necessity and proportionality argument in assessing the validity of such measures.

5.2.2.1 Jeremey Waldron

Waldron's "Security and Liberty: the Image of Balance" is a widely cited theoretical examination of the relationship between rights and security.²⁸ Waldron begins his inquiry by questioning the claim that "a change in the scale and nature of the harms that threaten us explains and justifies a change in our scheme of civil liberties" such that a "new balance" between rights and security ought now to be struck.²⁹ The claim implies that we have "an idea of the maximum risk we are prepared to bear as a result of people's liberty" and that we should limit liberty downward as the risk rises.³⁰ He proposes that the converse would

²⁶ I have in mind here a general commonality of approach among scholars that include David Luban, Ronald Dworkin, and David Cole in the US; and Don Stuart, Audrey Macklin, and Craig Forcese in Canada.

²⁷ See, e.g., David Luban, "Eight Fallacies About Liberty and Security", in *Human Rights in the "War on Terror"* 242-257 (Richard Ashby Wilson ed., New York: Cambridge University Press 2005); "Terror and the Attack on Civil Liberties." 2003 *New York Review of Books* 50, 17 (November).

²⁸ Jeremy Waldron, "Security and Liberty: The Image of Balance." (2003) *Journal of Political Philosophy* 11 (2):191-210.

²⁹ *Ibid.*, at 192.

³⁰ *Ibid.*, at 193-4.

be equally plausible. We might just as well insist that our liberties should not change in the face of rising risk, only our tolerance for that risk. His point, however, is not that we should raise our tolerance for risk, since he has little to say about the nature of current risks. His point, rather, is that we should question our willingness to accept a change in our liberties for the sake of security.

He advances this case by interrogating the notion of balance on a series of other grounds. As he notes, the concept of rights has always been resistant to forms of consequentialism. That is to say, strictly utilitarian considerations generally do not form the basis for suspending rights. Yet we have always acknowledged the need to limit some rights in favour of protecting others. In Waldron's view, the question of how the idea of balancing rights maps onto the relationship of rights and security has given rise to a complex and contentious philosophical discussion. At issue here is whether security ought to be treated as one right to be balanced against another, or whether it is better understood as an interest or a good that we weigh against individual rights in a utilitarian sense. Without resolving this question, Waldron argues that when we speak of balancing rights and security, we tend to contemplate something closer in nature to the idea of balancing individual and communal rights.³¹ And upon closer analysis, the balance typically entails not a trade-off of one set of rights for another, but a loss of individual or minority rights for the security interest of the majority.

In the discourse of "shifting the balance", we also tend to ignore the consequence that by reducing liberty, we increase the powers of the state and the likelihood of the abuse of that power. Waldron's final argument targets consequentialists with a version of the necessity argument:

³¹ *Ibid.*, at 201.

Though talk of adjusting the balance sounds like hard-headed consequentialism, it often turns out that those who advocate it have no idea what difference it will actually make to the terrorist threat. Accordingly we must subject these balancing arguments to special scrutiny to see how far they are based on fair estimates of actual consequences and how far they are rooted in the felt need for reprisal, or the comforts of purely symbolic action.³²

Later, he adds that if, in exchange for a loss of liberty, “the desired reduction in risk is only probable not certain, then we must be as clear as we can about the extent of the probability.”³³

Waldron concedes the challenge of proving in advance whether the loss of a given liberty will enhance security. On this basis, he asserts that “what has to be inferred is that *we cannot know whether it is worth giving up this liberty*, and thus [that] we cannot legitimately talk with any confidence about an adjustment in the balance.”³⁴ In short, if we cannot be sure of a gain security for the liberties we forsake, we are not adjusting a balance so much as losing some of both. In Waldron’s view, the crux of public support for extreme measures is not a reasoned consequentialism but a psychological desire for symbolic action. “When they are attacked people lash out, or they want their government to lash out and inflict reprisals. To put it a little more kindly, people want to feel that something is being done.”³⁵

He concludes by asserting: “This article does not embrace any particular policy or proposal. It is intended mainly as a call for care and caution. We should be cautious about giving up our civil liberties.”³⁶ This is a subtle form of argument in favour of liberal legality. In effect, Waldron seeks to defend rights by inviting advocates of extreme

³² *Ibid*, at 195.

³³ *Ibid*, at 208.

³⁴ *Ibid*, at 209.

³⁵ *Ibid*, at 209.

³⁶ *Ibid*, at 210.

measures to prove that such measures are effective and necessary. In the absence of proof, the reader is encouraged to see how easily liberty is lost in return for a measure of security that is uncertain and impossible to quantify. This is indeed a powerful and important argument.

However, one consequence of focusing one's advocacy of civil liberties on an argument of this nature is that by leaving the question of outstanding threats aside, the argument also leaves untouched the possibility that the extraordinary measures at issue may indeed be both necessary and effective. For civil libertarians, not laboring under the fear of mass terror, the implied message of Waldron's argument is that the proof of such necessity or efficacy is wanting, and therefore the measures are unjust. But for those who do entertain such fears, the question of proof is more complicated — in ways explored above. In theory, then, Waldron's case for reform, like the ICJ's, rests not on a critique of the beliefs that give rise to a perceived need for new measures, but on the lack of proof of their effect.

Put otherwise, Waldron's argument concedes the possibility that, at the present time, in some cases it may be necessary and effective to forsake some form of liberty for a gain in security. And his analysis is certainly useful for helping us to think through this balancing exercise carefully. But in a larger sense, the analysis leaves intact a host of beliefs about the nature of current threats, and the assumption that those threats *may* warrant the use of more invasive measures.

5.2.2.2 Kent Roach

In 2006, Canadian law scholar Kent Roach presented a complementary analysis to Waldron's in an article titled "Must We Trade Rights for Security? The Choice Between

Smart, Harsh, or Proportionate Security Strategies in Canada and Britain”.³⁷ For both authors, the relationship between rights and security is more complex than is suggested by the language of trading off, or compatibility. Yet, both also recognize that in some cases a “tension” remains. Roach argues that in all cases, the tension is best addressed by applying the necessity and proportionality test. In taking this view, he too leaves intact a deeper set of beliefs about the need for a new approach to security.

He begins by showing how some of the most effective measures are ones that infringe rights to a minimal degree. He has in mind “mundane administrative regulation to help prevent terrorists from gaining access to substances and sites that can be used for terrorism”.³⁸ A “smart” security policy would recognize “the reality that it is impossible to prevent all acts of terrorism”. It would set aside coercive measures in favour of “emergency preparedness and hard reduction measures.”³⁹

In making this case, Roach invokes the prospect of nuclear terror and the use of other WMD.⁴⁰ He cites Graham Allison on the need for greater regulation of fissile material.⁴¹ Then, in passing, he characterizes the threat of nuclear terror as “thankfully low” – without providing any corroboration for this claim.⁴² He also makes no further attempt to question or challenge assumptions about the imminent nature of catastrophic threats. Instead, he concludes this portion of his argument by emphasizing the greater

³⁷ Kent Roach, “Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain” (2006) *Cardozo Law Review*, Vol. 27: 5, 2151

³⁸ *Ibid*, at 2153.

³⁹ *Ibid*, at 2154.

⁴⁰ *Ibid*, at 2159.

⁴¹ *Ibid*, citing Graham Allison, *Nuclear Terrorism: the Ultimate Preventable Catastrophe* (New York: Macmillan, 2005), at 3 and 203.

⁴² This is curious fact, given that Roach makes the comment in the same paragraph in which he cites Allison’s *Nuclear Terrorism*, *ibid* — a work best known for its strident warnings about the imminence of nuclear terror. On page 15, for example, Allison writes: “A nuclear terrorist attack on America in the decade ahead is more likely than not...” (for further references, see chapter 3 of this thesis).

effectiveness of measures contained in Canada's *Public Safety Act* over those in the *Anti-terrorism Act*.⁴³ While the former allows for the safeguarding of sensitive sites and temporary derogations of rights for emergency response, the latter entails a "permanent shift of the balance between rights and security", without any clear evidence of its effect on security.⁴⁴

Roach then expands on this point in the next section: many of the more invasive recent counter-terror measures have been ineffective. Waterboarding, indefinite detention, profiling, and overbroad definitions of terrorism that stifle free speech have done little, if anything, to make us safer. Nor has it made much sense to spend so much on the wars in Iraq and Afghanistan, and on "homeland security," while spending relatively little on disaster response. The critique in this part rests on the assertion that a "proper assessment of the proportionality of anti-terrorism measures requires calm assessment of the effectiveness of each measure."⁴⁵ This was often lacking because measures were formulated too quickly after 9/11, in Canada and the US, or after the July 2005 bombings in Britain. In those cases, law and policy makers generally failed to adhere to the notion that where there are "alternative means to prevent terrorism while infringing rights less, [questionable measures] should be rejected as disproportionate."⁴⁶

Yet Roach concedes that in certain "hard cases" rights and security remain in "tension". These cases include the use of sensitive information in trials against terror suspects; the treatment of noncitizens who face the risk of torture if deported; and preventive detention. In these cases, the tension should be resolved by "the rigorous,

⁴³ Roach, *supra*, note 37, at 2162.

⁴⁴ *Ibid*, at 2162.

⁴⁵ *Ibid*, at 2172.

⁴⁶ *Ibid*, at 2155.

rational, and logical application of proportionality principles.”⁴⁷ Thus, a more proportionate response to deporting a suspect to face the risk of torture is to impose conditions on their release, or charge him with an offence.⁴⁸

In some cases, however, the tension becomes acute. As the “frequency and lethality of terrorist attacks increases”, the imperative of preventing terror becomes greater, and with it the justification for more invasive measures.⁴⁹ It is key that for Roach the rising frequency and lethality of attacks remains a real possibility. It is also crucial that for both Roach and Waldron, there is no theoretical limit to the proportionality test – no rights that are not subject to this assessment. Echoing Waldron, Roach calls for a recognition that there are “no easy answers” to the problems raised by hard cases, and that courts and governments alike must approach each of them “on [their] facts in light of the question of what is the least restrictive and fairest deprivation of rights that is consistent with security interests”.⁵⁰ It remains unspoken but implied by both authors’ arguments that if the circumstances were sufficiently dire, serious violations of human rights might be deemed necessary and proportionate.

To be sure, neither author is arguing that where the threat is perceived to be great enough, *any* measures are justified. Rather, any measures *might* be. Both authors would support only those measures that are proportionate, effective, and lacking reasonable alternatives. (Torture or targeted killing would presumably be ruled out.) Both authors also affirm an unavoidable “tension” between rights and security, and the necessity in some cases of trading one off for the other.

⁴⁷ *Ibid*, at 2155.

⁴⁸ *Ibid*, at 2195.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*, at 2196.

In a larger sense, then, both Roach and Waldron focus not on assumptions about current threats and reasons for embracing extreme measures — but on how to assess the validity of those measures *on the assumption that outstanding threats are indeed grave*. As a result, they leave undisturbed a critical background assumption that helps to motivate the use of extreme measures. This does not render their analysis less valuable. Again, I seek to make a narrow point. On a more abstract level, both authors concede that current threats *might* warrant extraordinary measures. Yet, for those inclined to believe in the imminent possibility of mass terror, the case for reform might seem more persuasive by challenging that belief more directly, rather than pointing to the lack of proof of the proportionality of certain measures.

5.2.3 Examples from journalism or mainstream non-fiction

Another important part of the campaign for liberal reform involves books and essays meant for a wider public audience. These include works of non-fiction for the general reader, or articles in high-profile journalistic venues. In this section, I look at two prominent examples.

5.2.3.1 Cole and Lobel

The first is David Cole and Jules Lobel's *Less Safe, Less Free: Why America is Losing the War on Terror* (2007).⁵¹ Both Cole and Lobel are legal academics, but as the style and format of this book suggests, they aim to address a broader audience.⁵² The book also builds on Cole's national profile as a lawyer and public intellectual. Cole has acquired this

⁵¹ David Cole and Jules Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (New York: the New Press, 2007).

⁵² I credit Ben Goold with the observation that US legal academics often produce work that straddles the worlds of scholarship and non-fiction for the general reader. I note that in this case, *Less Safe* was published by a trade rather than university press, and was widely reviewed in electronic and print media venues.

profile by appearing in a number of leading US Supreme Court counter-terror cases, and writing frequently in venues that include the *New York Review of Books*, *The Nation*, and *The New York Times*. The book thus represents an important effort to advance a public case for a return to liberal legality.

Cole and Lobel advance their case at the outset by expressing concern with the Bush administration's embrace of a "preventive paradigm" for counter-terrorism. The paradigm is marked by the use of a series of "highly coercive tactics",⁵³ from arbitrary detention, torture and cruel treatment, to war. The administration has "treated the most fundamental commitments of the rule of law as if they were optional protocols to be jettisoned in the face of the threat of terrorism."⁵⁴ The measures violate the rule of law's requirement for "equality, transparency, fair procedures, individual culpability, clear rules ... and respect for basic human rights."⁵⁵ The measures instead impose "double standards on the most vulnerable, operate in secret, [deny] fair trials, [impose] guilt by association, [...and] assert unchecked unilateral power".⁵⁶

The great "irony", however, is that the measures are defended as necessary for the sake of our security, but have only made us "more vulnerable to attack."⁵⁷ They have "wasted" resources that might have been used more effectively, alienated allies, and "provided recruitment fodder for our enemies."⁵⁸ None of the interrogations appears to have produced any significant intelligence not already available.⁵⁹ And claims about the

⁵³ Cole and Lobel, *supra*, note 51, at 1.

⁵⁴ *Ibid*, at 2.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*, at 1.

⁵⁷ *Ibid*, at 2.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*, at 122-128.

handful of attacks that were thwarted on the basis of information from interrogation are cast seriously into doubt.⁶⁰ Instead of employing such conspicuous yet counter-productive measures, the administration should have devoted more of its resources to less visible but more effective measures. These include the safeguarding of sensitive material sites and bolstering regulation of related industries. They might also have done more about nuclear disarmament, at home and abroad.

In the process of making the case against the preventive paradigm, Cole and Lobel employ all four common arguments for liberal legality, noted above. They invoke the compatibility claim by asserting that a more effective counter-terror strategy would recognize the rule of law as “an asset, not an obstacle” to security.⁶¹ Their larger argument combines the balance, proportionality, and practicality arguments. Echoing Waldron and Roach, they contend that while it is “often wrong to sacrifice liberty, freedom, and rights in the search for security, [...] trade-offs are inevitable [and] in some circumstances sacrifices in liberty may be warranted if they can promise substantial improvements in security.” Yet, the choice to be made is “not simply between liberty and security, but between effective security measures and counterproductive ones. The administration’s coercive preventive model not only sacrifices liberty but compromises our security.”⁶²

Notably, Cole and Lobel are also alive to the role played by the fear of mass terror as a motivator for the use of extreme measures. “The preventive paradigm,” they note, “is premised on a claim that ordinary cost-benefit calculations are not appropriate when the potential risks are catastrophic.”⁶³ Indeed, often the most extreme measures — coercive

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, at 17.

⁶² *Ibid.*

⁶³ *Ibid.*, at 189.

interrogation, rendition — are “invariably defended with some version of the familiar ‘ticking time bomb’ hypothetical” in which the measures are necessary to thwart a mass-casualty attack.⁶⁴ The authors point out that the Bush administration’s Nation Security Strategies argue against limits on the state’s use of force based explicitly on the threat posed by “suicide terrorists and weapons of mass destruction”.⁶⁵ They also note similar logic at play in public discourse. *Washington Post* editorial writer Charles Krauthammer argued for the use of torture in a widely cited 2005 article in the *Weekly Standard*, on the basis of a nuclear ticking bomb scenario. A number of commentators have argued for preventive detention on the basis of “doomsday scenarios” including Paul Rosenzweig of the Heritage Foundation, Yale Law professor Bruce Ackerman, and Director of Homeland Security, Michael Chertoff.⁶⁶ The claim in each case is, as Cole and Lobel note, that “the increased threat posed by weapons of mass destruction warrants action on less clear evidence of a future attack.”⁶⁷

In response to this logic, Cole and Lobel seek to characterize the fear of mass terror as a form of “overreach”, or emotional over-reaction. Drawing upon social science research, they suggest that “emotional factors are likely to cause us to overestimate risks based on vivid, emotionally laden events, such as terrorist attacks, and to underestimate costs and risks that are abstract, statistical, and likely to arise in the long term.”⁶⁸ They devote a lengthy chapter of the book to the psychology of perception about risks relating to emotional images and events.⁶⁹ They make a clear case that both citizens and

⁶⁴ *Ibid*, at 4.

⁶⁵ *Ibid*, at 4.

⁶⁶ *Ibid*, at 189.

⁶⁷ *Ibid*, at 190.

⁶⁸ *Ibid*, at 191.

⁶⁹ *Ibid*, Chapter 8.

governments easily overstate risks, and acquiesce in coercive practices in response. These in turn lead to a “slippery slope” in which the practices become more widespread and coercive.

Yet the question of the likelihood of mass terror itself is not engaged in any depth. Cole and Lobel characterize it as a “low probability event”, but without *establishing* this. On the contrary, when they do confront the question directly, they remain agnostic in similar terms to the ICJ:

It may well be that the potentially catastrophic dangers posed by al-Qaeda and other terrorist groups shift the cost-benefit analysis. But the highly emotional climate created by the fear of terrorism also makes the likelihood of balancing error event greater than before.⁷⁰

The authors are not therefore seeking to defend rights on the basis of *evidence* of the low probability of the event — and thus the absence of a growing threat to security. They defend them by arguing that when “ad hoc balancing” is left to members of government, the legislature, or the executive, they are “likely to overestimate the benefits of preventive measures and to downplay or ignore altogether the long-term costs to both liberty and security.”⁷¹

Yet, not only do Cole and Lobel remain agnostic about the possibility of mass terror, but the “alternative preventive strategy” they propose largely *supports* the fear of it. Their chapter outlining “non-coercive” strategies proposes many of the same measures that Roach suggests: safeguarding sites containing material for WMD, better tools for detecting their transport across borders, on planes and at sea ports, and better emergency response provisions. The chapter commends the Bush administration for steps taken in this direction, but it also outlines a number of remaining security issues with nuclear and

⁷⁰ *Ibid.*, at 201.

⁷¹ *Ibid.*

radiological materials. In doing so, the authors highlight a number of significant risks and areas of vulnerability, presenting a picture that is reminiscent of the work of Graham Allison or Matthew Bunn. The sense is one of imminent danger posed by unguarded nuclear sites in Russia and Pakistan, or nuclear materials soon coming into the hands of terror groups through illicit networks such as those of AQ Khan. The message is that the current threat of terror involving WMD is plausible and profound.

The authors maintain, therefore, a curious position on mass terror. The probability has likely been overstated for psychological reasons. Yet when canvassing the question of nuclear and radiological threats, the sense of imminent danger returns. Psychology aside, Cole and Lobel's position on the *actual* probability of mass terror is unclear.

In summary, Cole and Lobel's work sets out a forceful argument against extreme measures. It offers a more comprehensive case for reform than those offered in other texts under review in this chapter. It does so by inviting readers to question certain measures as impractical, excessive, or unjustified. But it also goes a step further by identifying the fear of mass terror as an important factor in the embrace of those measures, and encourages readers to be critical of it. I am suggesting that they might have made an even more forceful case for reform if they had done more than characterize the fear of mass terror as an overreaction. They might have done this by offering evidence and argument to show why mass terror is neither imminent nor likely.

Even without this, however, it is important to recognize one relatively rare quality of Cole and Lobel's work among the literature on rights advocacy. By calling into question the assumptions and beliefs that motivate the support for extreme measures,

they invite readers to reflect critically on the larger claim that the magnitude of current threats warrants a more pervasive shift to a preemptive approach.

5.2.3.2 Mark Danner

Mark Danner is another prominent law scholar who has written frequently in defence of liberal legality for a wider public. My intent is only to describe the nature of a reform initiative he proposed over the course of two lengthy articles in the *New York Review of Books* in 2009.⁷² The initiative he presents is novel, but the rationale behind it is consistent with a primary reliance on the common arguments for liberal legality noted above.

In the first of the articles, Danner sought to share with a wider audience the findings of the International Committee of the Red Cross' "Report on the Treatment of Fourteen High Value Detainees in CIA Custody".⁷³ It recounts in vivid detail evidence about the use of coercive measures by the CIA and US military at Guantanamo and various black sites, and the frequency of their use. It notes the ICRC's position that the acts amounted torture or cruel and unusual treatment, and a violation of international law. Danner devotes much of his discussion in both articles to addressing the administration's role in orchestrating these events. He asserts that on the basis of the evidence in the report, and many other sources, "we know that the decision to [carry out

⁷² Mark Danner, "US Torture: Voices from the Black Sites" (9 April 2009) *The New York Review of Books*; and "The Red Cross Torture Report: What It Means" (30 April 2009) *The New York Review of Books* [hereafter "What It Means"].

⁷³ International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, ICRC 2009, online: < <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>>.

torture] was taken at the highest level of the American government and carried out with full knowledge and support of its most senior officials.”⁷⁴

In Danner’s view, such findings rationally compel certain responses. One would expect the US government to abandon its policies around “coercive interrogation,” which Obama did upon taking office. One would also expect an official repudiation of the legality and propriety of such practices, which is beginning to occur. One might also hope to see that those who ordered and carried out torture are held accountable, through some form of “societal sanction,” which has not occurred. But most crucially, Danner suggests that one would expect that

some judgment [would] be made, based on the most credible of information compiled and analyzed and weighed by the most credible of bodies, about what these policies actually accomplished: how they advanced the interests of the country, if indeed they did advance them, and how they hurt them.⁷⁵

Until this judgment is made, questions about torture will remain. What was gained from using it? And was it really effective? At the moment, these issues remain politicized.

President Obama has said that torture is neither legal nor effective. Former Vice President Cheney and other Bush administration officials deny this. They claim that waterboarding and other measures were effective in preventing further attacks. Upon review of secret evidence, Obama insists the “facts don’t bear [Cheney] out.” Cheney and others reply that the point cannot be settled without revealing information that must remain secret.

Danner cites numerous admissions by high-level officials and military personnel casting doubt on the quality of the intelligence gathered. Either way, in public discourse and opinion, the question remains caught in an impasse. So long as it does, Danner fears that torture or other coercive measures will be used more readily in the future.

⁷⁴ Danner, “What it Means”, *supra*, note 72.

⁷⁵ *Ibid.*

In Danner's view, the only way to move beyond this impasse is to settle the question of whether torture really worked by providing "authoritative and convincing information about how it was really used and what it really achieved."⁷⁶ Neither the various reports by liberally inclined NGOs, nor the press, are capable of producing the kind of "bipartisan, broadly credible, and politically decisive effort" that is required to "pronounce authoritatively" on the issue. In Danner's view, only the creation of a bipartisan commission on the order of the Watergate Select Committee or the 9/11 Commission could settle the question, definitively and credibly, of "whether or not torture made Americans safer."

Danner's proposal is forceful and timely. He points to a critical source of widespread misunderstanding about torture, and a potential source of support for its use in the future. But it is also worth noting that his proposal seeks to curb the future use of torture without challenging in any significant way the beliefs that made its recent use seem necessary. In other words, Danner seeks to discredit the use of torture in extreme circumstances, but not the notion that we *are* in an extreme situation. Indeed, the very urgency of his proposal arises at least in part from the sense that the US remains in a kind of exceptional state, or could return to one in short order.

This is not to overlook the importance of Danner's contribution. Although he focuses on torture, he also challenges the larger claim that current threats warrant the use of extreme measures – by showing that those measures may not actually render any practical benefit. My point is that while Danner's approach offers a persuasive case for reform, it might have been more persuasive still if he had probed the rationale for torture a stage further. Rather than ending at the point of debating the utility of torture and other

⁷⁶ *Ibid.*

measures, or asking what did we gain from torture, Danner might also have asked: why did we believe we *needed* to torture in the first place?

5.3 Liberal deference to claims about mass terror

While many liberals have played down or ignored the prospect of mass terror in their arguments for reform, some begin with it as a central assumption. Among this group, some have demonstrated a vivid sense of the threat at issue, but maintained a commitment to core human or constitutional rights. In other cases, the threat is cited as a need for occasional suspensions of core rights – but subject to the rule of law. In this part, I briefly note examples in both categories: Ronald Dworkin in the first, and Michael Ignatieff and Bruce Ackerman in the second.

I suggest that by paying heed to the catastrophic imagination, the authors here undermine their own case reform by legitimizing fears and beliefs about the prospect of mass terror. While the arguments in each case are persuasive, the collective effect of their deference to catastrophic fears is to bolster the validity of the perception that a significant threat remains, and a new, more radical approach to security is in order.

5.3.1 Dworkin's defence of liberal legality:

Dworkin is a leading liberal law scholar and public intellectual who has written extensively on counter-terror law in the *New York Review of Books*, national newspapers, and in works of mainstream non-fiction. Yet, in the course of setting out an eloquent and persuasive defence of civil liberties in the wake of 9/11, Dworkin concedes the apocalyptic dimension of outstanding threats to national security. The concession is initially quite nuanced. He is careful to remain agnostic about the probability or magnitude of another

attack. Yet he clearly acknowledges the possibility that it may be quite serious, and for this reason liberal jurists ought to attempt to defend rights in light of this new reality.

For example, in a contribution to the *New York Review of Books* entitled “The Threat to Patriotism” (2002), Dworkin surveys a number of extreme measures employed by the Bush administration in the fall of 2001. Arguing in a similar fashion to Waldron, Roach, and Cole and Lobel, Dworkin insists that while the threat may be great, the necessity for such measures ought to be justified individually. But the argument is framed within a larger concession to the immensity of the threat posed by mass terror. “Do we really face such extreme danger from terrorism that we must act unjustly?,” he asks. “That is a difficult question. We cannot yet accurately gauge the actual power of the linked groups of terrorist organizations and cells that apparently aim to kill as many Americans as possible.” He then asserts:

But al-Qaeda killed, by latest reckoning, approximately 3,000 people in minutes on September 11, which is a quarter of the number of murders in the entire country in 1999. If they or some other terrorist organization has or gains access to nuclear, chemical, or biological weapons and the means to use them, then the threat to us would be truly enormous. It would justify unusual and, in themselves, unfair measures if the government thought that these would substantially reduce the risk of catastrophe. Even then, however, it would be imperative to permit only the smallest curtailment of traditional rights that could reasonably be thought necessary, and to attempt to mitigate the unfairness of these measures so far as safety allows.

Dworkin concludes that the government has thus far failed on both counts, and urges reform on the proportionality and necessity test. He also appears to concede that a suspension of the rule of law may be justified in such extreme cases. The argument is thus not over whether a drastic set of measures ought to be employed, but whether their necessity can be justified.

Later, Dworkin will tend to insist more clearly on principle — on non-derogable rights as an absolute limit on how unfair or unjust the government can be.⁷⁷ But even then, he continues to pay heed to fears of mass terror. His next article in the *New York Review of Books* (November 2003) begins:

Two years after the September 11 catastrophe Americans remain in great danger. The danger is of two kinds, of which the first—further terrorist attacks—is obvious. Well-financed terrorists, who live and undergo training in various foreign countries, are determined to kill Americans and are willing to die in order to do so. If they gain access to nuclear weapons, they would be able to inflict even more terrible harm.⁷⁸

(The second danger is the one posed to civil liberties.) The remainder of this lengthy piece makes no further mention of the threat. The prospect of mass terror is asserted as “obvious” at the outset, and the assumption is never revisited. Further rights violations are canvassed. The Bush administration is advised to grant detainees the protection of either the laws of war or the criminal law. The entire discussion is carried out under the larger assumption that the threat posed is so great as to place it somewhere between a crime and a war. The problem calls for nothing short of a “new legal system for terror that can one day be encoded in some new set of international conventions.” The system would combine the constraints of the two older models, and reflect a liberal rule of law.

The larger point is that Dworkin concedes throughout these pieces that circumstances call for new measures, and a new approach. The debate is only about which new measures can be justified and how. As with Waldron, Roach, and others, the issue is how far the state can go in employing force in this model, and what tests, rules, and principles should apply. The question for Dworkin is not whether a new, more pre-emptive approach is in order, but what it should entail.

⁷⁷ Ronald Dworkin, “Terror and the Attack on Civil Liberties.” 2003 *New York Review of Books* 50, 17 (November).

⁷⁸ *Ibid.*

5.3.2 Authors in defence of liberal legality involving certain ‘lesser evils’

Although I look only at Ignatieff and Ackerman here, this category might also include authors such as Oran Gross, Mark Tushnet, and Eric Posner and Adrienne Vermuele.⁷⁹ I should note that authors in this category straddle a fine line between illiberal advocates of extreme measures and defenders of liberal legality. Like Posner, Dershowitz, and others, Ignatieff and Ackerman argue for the necessity of certain measures, while insisting on the need to subject them to the rule of law, and to judicial and public oversight. In distinction to Posner and Dershowitz, however, Ignatieff and Ackerman do not espouse the use of torture or cruel and unusual treatment, even if what they propose amount to this. The distinction I seek to draw among members of this group is indeed debatable. But I include the work of both Ignatieff and Ackerman because it *purports* to argue for reform in defence of liberal legality, and on the basis of a fear of catastrophic threats.

5.3.2.1 Michael Ignatieff:

Of all the writers in this category, Ignatieff offers perhaps the most vivid set of threat scenarios, and argues for the widest range of extraordinary measures. He set out his case in a widely-read 2004 article in the *New York Times Magazine*, “Lesser Evils”,⁸⁰ later expanded into a best-selling book.⁸¹ The article begins by posing the question of what it would mean for the US to lose the war on terror:

Consider the consequences of a second major attack on the mainland United States -- the detonation of a radiological or dirty bomb, perhaps, or a low-yield nuclear device or a chemical strike in a subway. Any of these events could cause

⁷⁹ See, e.g., Oren Gross, “The Prohibition on Torture and the Limits of the Law” in Samuel Levinson, ed., *Torture: a Collection* (Oxford University Press, 2004); Mark Tushnet, “Defending Korematsu?: Reflections on Civil Liberties in Wartime,” 2003 *Wisconsin Law Review* 273 (2003); and Eric Posner and Adrian Vermuele, *Terror in the Balance: Security, Liberty and the Courts* (Oxford: Oxford University Press, 2007)

⁸⁰ Micheal Ignatieff, “Lesser Evils” (2 May, 2004) *The New York Times Magazine*.

⁸¹ Micheal Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*. (Princeton: Princeton UP, 2004).

death, devastation and panic on a scale that would make 9/11 seem like a pale prelude. After such an attack, a pall of mourning, melancholy, anger and fear would hang over our public life for a generation.⁸²

The possibility rests on the assumption that such an attack is technologically well within the means of terrorists. Without supporting or expanding on the assertion, Ignatieff writes: “An attack of this sort is already in the realm of possibility. The recipes for making ultimate weapons are on the Internet, and the matériel required is available for the right price.”⁸³ The result would be the end of democracy:

A succession of large-scale attacks would pull at the already-fragile tissue of trust that binds us to our leadership and destroy the trust we have in one another. Once the zones of devastation were cordoned off and the bodies buried, we might find ourselves, in short order, living in a national-security state on continuous alert, with sealed borders, constant identity checks and permanent detention camps for dissidents and aliens. Our constitutional rights might disappear from our courts, while torture might reappear in our interrogation cells. The worst of it is that government would not have to impose tyranny on a cowed populace. We would demand it for our own protection.⁸⁴

For this reason, a series of measures are necessary; indeed “[t]o defeat evil, we may have to traffic in evils: indefinite detention of suspects, coercive interrogations, targeted assassinations, even pre-emptive war.”⁸⁵

But in each case, Ignatieff suggests that we remain committed to the rule of law, seeking to “strike a balance” between being tethered by law and dispensing with it altogether. Those in preventive detention ought to receive the right to counsel and a form of review before military tribunals. Torture ought to remain prohibited, but not lesser forms of coercive interrogation: including “forms of sleep deprivation that do not result in lasting harm to mental or physical health, together with disinformation and

⁸² Ignatieff, “Lesser Evils”, *supra*, note 80.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

disorientation (like keeping prisoners in hoods) that would produce stress.”⁸⁶ The president’s power to make war, or to carry out targeted killing ought to be subjected clear rules, including a requirement that force may be used only where “the danger that must be pre-empted is imminent”.⁸⁷

Clearly the necessity for the various measures hinges on Ignatieff’s assumptions about the imminence of mass terror, and the nature of the threat it poses. His blueprint for counter-terror policy is distinguished from authoritarian legalism only to the degree that it avoids an explicit embrace of torture, and seeks to subject executive power to judicial and congressional oversight.

The larger point, however, is that Ignatieff argues for limits on the state’s use of force while doing a great deal to bolster the kind of fear that is used to justify the state’s use of force. Against the grain, then, of the larger liberal position he purports to maintain, the implied thrust of his argument is quite clearly that current threats warrant more extreme, illiberal measures.

5.3.2.2 Bruce Ackerman

Bruce Ackerman, a professor at the Yale Law School, is a prominent figure in the US legal academy. In 2004, he published a controversial article entitled “The Emergency Constitution”,⁸⁸ later expanded into a widely-read book, the *Before the Next Attack: Preserving Civil Liberties in the Age of Terror* (2006).⁸⁹ The article began in this way:

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Bruce Ackerman, “The Emergency Constitution” 113 YALE L.J. 1029 (2004).

⁸⁹ Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in the Age of Terror* (New Haven: Yale University Press, 2006).

Terrorist attacks will be a recurring part of our future. The balance of technology has shifted, making it possible for a small band of zealots to wreak devastation where we least expect it—not on a plane next time, but with poison gas in the subway or a biotoxin in the water supply. The attack of September 11 is the prototype for many events that will litter the twenty-first century.

A few pages later, he asserts “It may only be a matter of time before a suitcase A-bomb obliterates a major American city”.⁹⁰

Ackerman argues that without a clearer, more effective emergency regime in place, civil liberties in the US and other western nations will suffer a permanent erosion as governments respond to each attack by instituting excessive but permanent measures that ought to be temporary.

He proposes that congress should pass legislation that would function as a kind of “emergency constitution.” It would authorize the use of a range of extraordinary measures that Ackerman only sketches in outline, including the power to arrest and detain without reasonable grounds and without charge. He contemplates a situation in which hundreds or even thousands may be detained on mere suspicion, but in which compensation would be provided for the many innocent people likely to be affected. Ackerman is, however, categorical in ruling out the use of torture or cruelty.

The scheme would serve several purposes. It would provide a genuine security function (preventing a follow up attack). And it would reassure the public of the continuing power and control of the government. In a larger sense, it would ensure that emergency powers remain subject to the rule of law and avoid becoming permanent.

To do this, the emergency constitution would be subject to what Ackerman calls the “super-majoritarian escalator”. An initial set of emergency powers would be limited to

⁹⁰ *Supra*, note 88, at 1036.

a week or two, and then require escalating majorities in congress or parliament to extend the emergency in two month intervals -- to the point where an eighty or ninety percent majority would be required to extend it. This would make a permanent emergency unlikely; compel prosecutors to justify ongoing detentions; and defray pressure on the judiciary in attempting to oversee executive power in a time of emergency.

Ackerman's argument emphasizes the need for "temporary reassurance" in the face of "episodic terror".⁹¹ His primary concern is with emergency or extreme measures becoming permanent. Yet, his argument for emergency law is premised on the *inevitability* of further mass terror on the scale of 9/11 or greater. As with Ignatieff, Ackerman makes a plausible case for liberal limits on executive action in extreme circumstances, but also impliedly bolsters a sense of permanent emergency that is ultimately not conducive to the cause of liberal reform.

5.4 Conclusion

Over the course of the past decade, North American scholars and jurists have set out a sophisticated and often persuasive set of arguments in defence of liberal legality in several venues. Through scholarship and wider public forums, they have sought to persuade citizens and lawmakers of the need for reform of excessive counter-terror practices, as a crucial commitment to maintaining a liberal democratic state.

Yet across the board, the case for liberal legality has also been marked by a general tendency to avoid challenging two key assumptions. One is a belief in the possible imminence of mass terror. The other is a belief that the nature and magnitude of the

⁹¹ *Ibid*, at 1045.

threat warrants a shift to a more preemptive approach, entailing the use of a new, more elaborate set of security measures.

The failure to challenge these assumptions has kept the focus of the debate about rights and security centered on the question of appropriate measures, and discussions of proportionality and efficacy. This chapter has sought to demonstrate the persuasive limitations of such an approach. It laid the groundwork for a larger claim that liberals might have made a more persuasive argument in favour of rights by challenging beliefs about mass terror more directly. In the next chapter, I offer a model of this argument and explore evidence in support of it.

6 An Alternative Model for Reform Advocacy

Earlier chapters have surveyed extreme measures, and the beliefs that made them seem necessary. The last chapter examined common arguments in favour of reform. This chapter sets out a blueprint for an alternative approach.

The approach is based on a direct challenge to two assumptions that form a central basis for authoritarian legality. The first holds that, since 9/11, the threat of terrorism has grown much more serious. Earlier chapters have shown that members of government, security experts and officials, scholars, and large portions of the North American public have shared a belief in the real prospect of a mass terror attack in the near future. This is often thought to involve WMD, but not always. In either case, the scale of the attack is often imagined to be on the order of 9/11 or greater, which is to say, one resulting in casualties in the thousands rather than hundreds, as in attacks before 2001.

The second assumption, also widely shared, is that the gravity of this threat warrants the embrace of a deeper shift to a preemptive approach in law and security. This involves the use of a series of what were once considered extraordinary measures (among others: targeted killing, indefinite detention without charge, and expanded state secrecy).

The goal of this chapter is to set out a model for an alternative approach to law reform advocacy. The model is meant to present a more persuasive and potentially more effective case against authoritarian legality by doing what earlier reform advocates have tended not to do – which is to challenge the two core assumptions noted above. By offering only a model, however, the case outlined here against those assumptions is not

meant to be conclusive or definitive. It contains only a sketch of the *kinds* of argument that might become more central in liberal reform advocacy.

More specifically, the chapter seeks to foreground the importance of employing a technologically or scientifically informed skepticism. While it sketches key arguments in this area by drawing on expert opinion and scholarship, a more definitive or authoritative case would involve a deeper engagement with this literature. My objective here is only to demonstrate how this body of knowledge might be used to craft a more persuasive and potentially more effective argumentative strategy for reform than some of the common approaches explored in chapter 4. The key difference between those approaches and the one outlined here is that this approach would offer a sound basis for assuming that the current threat of terrorism is not significantly different from earlier threats, and thus a radically different (and more illiberal) approach to security is not warranted. It would therefore target the deeper assumptions that motivate not only the use of specific measures but also the inclination to depart from liberal legality in a broader sense.

The first part of the chapter sets out the first part of the model by outlining a challenge to the first assumption. It focuses on the claim that terror involving WMD has become an imminent possibility, and explores in some detail the prospect of nuclear, biological, and radiological terror in particular. This part highlights: (a) the existence of a significant body of credible skeptical opinion on the likelihood or imminence of such an event; and (b) the common arguments made by members of these schools.

The second part of the chapter sets out the second part of the model. It outlines a challenge to the second core assumption of authoritarian legality: that due to the likelihood of pending, catastrophic threats, it is reasonable and necessary to embrace a preemptive paradigm involving more invasive measures. In response to this

consequentialist logic, I do not suggest that catastrophic threats do not justify invasive measures. I suggest, rather, that invasive measures are unjustified because catastrophic threats are unlikely. In other words, I seek to avoid the question of whether catastrophic threats, if plausible, *would* justify authoritarian measures. Instead, I propose that a more effective response to a prevailing consequentialism in security discourse is to argue that it is misplaced – that it rests on an implausible assessment of the nature of current threats. And, as I seek to show, without recourse to some form of consequentialism, authoritarian measures cannot be plausibly justified.

To advance these claims, I canvas argument and evidence to support the view that future acts of terror *not* involving WMD are, in all likelihood, to be of no greater frequency or magnitude than those witnessed in the Oklahoma City bombing in 1995, or in the Air India bombing in 1985. Although grave and tragic, both events involved hundreds rather than thousands of deaths. Both are also noted as instances in which terrorism on this lower scale was perceived at the time to be rare and anomalous, and not believed to pose a significant threat to national security. They also provide support for the view that acts of terror are not, as Kent Roach has put it, failures of the criminal law but of law enforcement.¹ I conclude by arguing that if we can assume that mass terror attacks – involving thousands of casualties through WMD use or otherwise – are highly unlikely, the argument for a deeper preemptive turn, and for extreme measures, becomes much harder to sustain.

To be clear, however, I am not suggesting that WMD do not pose the most serious conceivable threat to world peace and security – a threat made more vivid by recent events in Iran, Pakistan, and North Korea. Nor am I suggesting that acts of terror

¹ Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queens UP, 2003).

resulting in thousands of casualties are impossible, even in the near future. Rather, I argue that the *imminent* possibility of a mass terror attack (thousands of casualties, by non-state actors) is *highly unlikely*, and therefore the argument for preemptive *illiberal* measures is unreasonable. Preemptive measures are certainly appropriate. We ought to safeguard sensitive materials and sites, and to support nuclear disarmament and security (among other measures, explored in the next chapter). Put otherwise, the terrorism that we can expect to see in the foreseeable future does not warrant the use of extreme measures, because it is highly unlikely to be greater in scale than attacks witnessed before 9/11. Terrorism therefore presents a risk that is manageable and tolerable by employing measures consistent with liberal legality.

6.1 Challenging assumptions about the imminence of WMD terror

I focus primarily on nuclear and biological terror here, and to a lesser degree radiological terror (at the end of Part 1). The first two forms of terror are commonly invoked whenever claims are made about imminent WMD use. They are also the most extreme. I note, however, that for those seeking to formulate arguments against the imminence of other forms of mass terror, research could begin with several of the sources explored below.

6.1.1 Why nuclear terror is much less likely than many suggest

In Chapter 4, I canvassed the work of a school of experts who argue for the imminent prospect of nuclear terror. I made the point that in advancing their case, these authors have tended to ignore a long-standing tradition of credible, contrary opinion. I also noted that a belief in the rising likelihood of nuclear terror rests on four assumptions:

1. the prodigious supply of poorly guarded fissile material;
2. the availability of information about how to build a nuclear bomb;
3. the ease with which a bomb could be built, delivered, and reliably exploded
(especially a crude ‘gun-type’ bomb using highly enriched uranium [HEU]) ;
and
4. the fact that al Qaeda and other groups have been known to seek one.

In what follows, I draw briefly from a series of figures and reports to present a contrary perspective. Key figures in this alternative school include John Mueller, a political scientist and historian of the nuclear bomb;² Michael Levi, a recent Fellow for Science and Technology at the US Counsel for Foreign Relations;³ Steven Younger, a nuclear weapons designer for the US government;⁴ and Swiss nuclear scientists Christoph Wirz and Emmanuel Eggerts.⁵ Often cited documents among this group include the first volume of the US congressional “Gilmore Commission” (1999),⁶ and a 1987 collection of papers by nuclear scientists and other experts titled *Preventing Nuclear Terrorism*,⁷ which contains

² Mueller addresses the challenges confronting the would be nuclear terrorist in *Overblown: How Politicians and the Terrorism Industry Inflate National Security Threats, and Why We Believe Them* (New York: Free Press, 2006) and *Atomic Obsession: Nuclear Alarmism from Hiroshima to Al Qaeda* (London: Oxford UP, 2009), and further explores the probability and risk of nuclear terror in a book co-authored with Mark Stewart, *Terror, Security and Money: Balancing the Risks, Benefits, and Costs of Homeland Security* (London: Oxford UP, 2011).

³ See, e.g., Michael Levi, *On Nuclear Terrorism* (Cambridge: Harvard UP, 2007).

⁴ See, e.g., Steven Younger, *Endangered Species: How We Can Avoid Mass Destruction and Build a Lasting Peace* (New York: Harper Perennial, 2008).

⁵ See, e.g., Christoph Wirz and Emmanuel Egger, “Use of Nuclear and Radiological Weapons by Terrorists?” (2005) Vol. 87: 859 *International Review of the Red Cross* 497.

⁶ Gilmore Commission (Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction), “First Annual Report: Assessing the Threat”, 15 December 1999. Online: <www.rand.org/nsrd/terrpanel>.

⁷ Paul Leventhal and Yonah Alexander, eds., *Preventing Nuclear Terrorism: the Report and Papers of the International Task Force on Prevention of Nuclear Terrorism* (New York: Lexington Books, 1987).

one of the most exhaustive pre-9/11 studies on the obstacles facing a non-state actor in building a nuclear bomb.⁸

Perhaps the single overriding observation among members of the skeptical school is that although the prospect of nuclear terror seems simple and plausible in theory, it entails so many significant obstacles that in practice it is extremely unlikely to occur in the foreseeable future. Levi and Mueller, for example, have catalogued up to 20 separate stages involved in the process, and have suggested separate odds for overcoming potential obstacles at each stage.⁹ As Mueller notes, many nuclear terror alarmists acknowledge the obstacles but note that in theory each is “not impossible” to surmount. In response, he suggests that “while it may be ‘not impossible’ to surmount each individual step, the likelihood that a group could surmount a series of them quickly becomes vanishingly small.”¹⁰

A further common observation among this group relates to a point on which authors on both sides of the debate agree. The production of either HEU or weapons-grade plutonium is essentially beyond the capacity of a non-state actor.¹¹ (Either is essential for a bomb.) Thus, both sides agree that if a terror group is to obtain a nuclear bomb, it must either obtain the bomb itself or fissile material from another source.

⁸ J. Carson Mark, Theodore Taylor, Eugene Eyster, William Maraman, and Jacob Wechsler, “Can Terrorists Build Nuclear Weapons?”, in *Preventing Nuclear Terrorism*, *ibid*.

⁹ See Levi, *supra*, note 3, Chapter 3, and Mueller, “The Atomic Terrorist: Assessing the Likelihood” (International Commission on Nuclear Non-Proliferation and Disarmament, 2009) at 13.

¹⁰ Mueller, *ibid*, at 12. See also Levi, *supra*, note 3 at 7; Younger, *supra*, note 4, at 87, and the Gilmore Commission, *supra*, note 6, at 21 and 29.

¹¹ See the discussion of Allison, Bunn, and Ferguson and Potter in Chapter 4.

6.1.2 Why the supply of fissile material poses less of a risk than alleged

Writing in 1998, Stanley Jacobs cast doubt on the danger posed by terrorists stealing an intact nuclear weapon. “A diverted device”, he writes, “could be used directly only if the terrorists had access to the appropriate resources for arming and firing or otherwise delivering the device.”¹² This usually involves a “coded sequence of events, possibly involving two or more trained persons”. Some weapons require certain conditions — a certain number of rotations of given parts, correct temperatures, locations, and other such variables. A common feature from the 1960s onward is the use of “permissive action links”, or protective systems, which require coded signals for detonation. As Graham Allison and others have noted, the obstacles posed by these codes and systems can be overcome (bribing officials at the source, etc.). Yet, this gives rise to further risks, including detection and betrayal.¹³ Terrorists might also seek to remove the fissile material within these devices. For Jacobs, “this seems only marginally credible”, given the challenges entailed in building a nuclear bomb, which is “highly sophisticated in terms of construction geometries” — a point explored further below.

The first report of the US congressional “Gilmore Commission” in 1999 addressed concerns with respect to Russian stockpiles, which at the time were thought to be the most likely source of stolen weapons or material. The Commission found that “Russian strategic and tactical weapons are perhaps more secure than had been initially feared.”¹⁴ Despite the fact that protocols around the transfer and maintenance of Russian weapons

¹² Jacobs, Stanley S. “The nuclear threat as a terrorist option” (1998) *Terrorism and Political Violence*, 10: 4, 149, at 151.

¹³ See also Mueller, an earlier version of “The Atomic Terrorist: Assessing the likelihood” (2008) at 7; online: <<http://polisci.osu.edu/faculty/jmueller/APSACHGO.PDF>>; and William Langewiesche, *The Atomic Bazaar: The Rise of the Nuclear Poor*. (New York: Farrar Straus and Giroux, 2007), at 33-48, cited in Mueller.

¹⁴ *Supra*, note 6, at 29. The Commission also cites Karl-Heinz Kamp, “Nuclear Terrorism is Not the Core Problem,” *Survival*, Vol. 40, No. 4 (Winter 1998–1999), at 170.

had raised concerns, the authors cited the same obstacles noted by Jacobs and others as to the use of stolen weapons — locks, coded systems, and other protective mechanisms.¹⁵ The Commission also sought to qualify concerns about the status of some 250 tons of HEU and 50 tons of weapons-grade plutonium known to be in Russia's possession. The black market for such materials was “less worrying” given the fact that “[b]etween 1992 and 1996, more than 1,000 claims were made involving the illicit sale and smuggling of nuclear material; however, only six instances were substantiated, and none of those involved the quantities needed to construct an effective ‘homemade’ device that could cause mass casualties—thereby suggesting that the black market, if it exists at all, is limited in size and grossly exaggerated in impact.”¹⁶

More recent assessments corroborate these findings. They also address concerns about Pakistan, and the fear that a sizable black market might exist, given the discovery of the A.Q. Khan network in 2003.

With respect to Russia, Muller, Langewiesche, Younger, and others have questioned the continuing threat posed by its stockpiles of older or smaller weapons. Mueller cites frequent and adamant denials on the part of Russian military officials as to the possibility that terror groups may have obtained some of the known KGB “suitcase nukes”, which have fewer security mechanisms. Citing a 2002 study by the Centre for Nonproliferation Studies, Mueller asserts that it is “unlikely that any of these devices have actually been lost and that, regardless, their effectiveness would be very low or even non-existent because they require continual maintenance.”¹⁷ Most of the smaller bombs,

¹⁵ The Commission relies for this point on Peter de Leon et al., *The Threat of Nuclear Terrorism: A Reexamination*, N-2706 (Santa Monica, Calif.: RAND, January 1988).

¹⁶ *Supra*, note 6, at 30.

¹⁷ Mueller 2008, *supra*, note 13, at 6. Mueller also cites Langewiesche, *supra*, note 13, at 19; Center for Nonproliferation Studies, “Suitcase Nukes: A Reassessment” (Monterey, CA: Monterey Institute of

which are more likely to be stolen, use plutonium, which emits enough radiation to be easily detected “by passive sensors at ports and other points of transmission.”¹⁸ Moreover, as Mueller points out, the issue of bribery is more complex upon closer examination.¹⁹ In both Russia and Pakistan, potential officials risking the prospect of taking a bribe in these cases would face certain death if caught. Mueller speculates that the sums required to secure cooperation of even a small group of people would likely be quite large. And as noted, with more people involved, the probability of detection or disruption rises.

Younger concedes the potential for theft or illicit transfer of weapons or materials in nuclear states, but suggests that “regardless of what is reported in the news, all nuclear nations take the security of their weapons very seriously.”²⁰ One example he provides is the Russian nuclear weapons laboratory at Arzamas. It is protected by “a tripled array of fences nearly 20 feet tall that are regularly patrolled by guards and dogs and monitored by radar and other sensors.”²¹ Bribery is a possibility, but “there would still be the problem of getting the weapon out of the country, a complex operation requiring planning and a knowledge of who needs to be bribed and when.”²² Even if a weapon were obtained, the locks would require special know-how, information, or equipment and “*very few people have access to that*”.²³

International Studies, 22 September 2002, at 4 and 12; and Jeffrey Smith and David Hoffman, “No Support Found for Report of Lost Russian Suitcase-Sized Nuclear Weapons” (5 September 1997) *Washington Post* A19.

¹⁸ Mueller 2008, *supra*, note 13, at 6. See also, Richard Rhodes, *Twilight of the Bombs: Recent Challenges, New Dangers, and the Prospects for a World Without Nuclear Weapons* (New York: Vintage Books, 2010). Rhodes also notes, at 288, that Plutonium is “far more susceptible to predetonation during assembly” than HEU.

¹⁹ Mueller 2008, *supra*, note 13, at 12.

²⁰ Younger, *supra*, note 4, at 93.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

Swedish nuclear physicists Christian Wirz and Emmanuel Egger concur. Existing nuclear states keep material and weaponry “well protected and guarded”, such that “a theft would involve many risks and great efforts in terms of personnel, finances and organization.”²⁴ In the case of stolen weapons, they note a series of protective mechanisms cited by others, but one notable addition. Both Russian and US nuclear weapons possess systems that will “destroy critical components or render them useless if someone handles the weapon improperly or tries to open it.” Reiterating points made earlier, they add that “if the nuclear weapon is not completely destroyed when it is opened, and the fissile material can be removed, the quantity will not be sufficient for a primitive design; to obtain enough, several weapons would have to be stolen.”²⁵

As for other weapons or material in either Pakistan or Russia, Mueller and others have suggested that each nation has “an intense interest in controlling any weapons on its territory since is likely to be a prime target of any illicit use by terrorist groups”.²⁶ Russia has Chechen rebels to contend with. Pakistan’s government has any number of extremist groups to guard against. In 2008, summing up the recent history of lost material, Mueller writes: “in the last ten years or so, there have been 10 known thefts of highly enriched uranium – in total less than 16 pounds or so, far less than required for an atomic explosion.”²⁷ Dafna Linzer adds to this: “the thieves – none of whom was connected to al Qaeda – had no buyers lined up, and nearly all were caught while trying to peddle their

²⁴ Wirz and Egger, *supra*, note 5, at 502.

²⁵ *Ibid.*

²⁶ Mueller 2008, *supra*, note 13, at 6. See also Gavin Cameron, “Weapons of Mass Destruction Terrorism Research: Past and Future” in Andre Silke, ed., *Terrorism: Trends, Achievements and Failures* (London: Frank Cass, 2004) at 8, and Langeweische, *supra*, note 13, at 19 (both cited in Mueller).

²⁷ Mueller 2008, *supra*, note 13, at 8. Mueller concedes that there may have been unreported thefts.

acquisitions”.²⁸ Langewiesche notes that if terrorists were to succeed in obtaining fissile material in Pakistan, Russia, or elsewhere in Asia, they would face the challenge of transporting it over hundreds if not thousands of miles of hostile terrain, and likely while being pursued by security officials.²⁹

In separate works, John Mueller and William Langewiesche have argued against the likelihood that Pakistan, North Korea, or any future nuclear power, would provide them to terrorists. It would be too risky for that nation to be discovered as the source of the bomb, given that an extreme reaction by the US or Israel would be all but certain.³⁰ Mueller suggests that “there is a very considerable danger the bomb and its donor would be discovered even before delivery or that it would be exploded in a manner and on a target the donor would not approve (including on the donor itself).”³¹ Mueller also points to the fact that despite the fifty-year history of nuclear weapons, “no state has ever given another state – even a close ally, much less a terrorist group – a nuclear weapon (or chemical, biological, or radiological one either, for that matter) that the recipient could use independently.”³²

A further source of concern among nuclear alarmists relates to the uncovering in 2002 of the underground trade in nuclear materials involving the Pakistani nuclear scientist A.Q. Kahn. As noted in Chapter 4, many commentators cite the Kahn case as confirmation of the danger that a market may exist. On this view, Kahn was only the tip of the iceberg. Mueller and Langewiesche draw the opposite conclusion. In their view, the

²⁸ Dafna Linzer, “Nuclear Capabilities May Elude Terrorists, Experts Say” (29 December 2004) *Washington Post* A1 (cited in Mueller).

²⁹ Langewiesche, *supra*, note 13, at 48-50, (cited in Mueller).

³⁰ Mueller 2008, *supra*, note 13, at 5; Langewiesche, *supra*, note 13, at 20 (cited in Mueller).

³¹ *Ibid.*

³² *Ibid.*

discovery of the Kahn network was evidence of the ease of detection rather than the potential size of the market. As Mueller argues, the network was “rather easily penetrated by intelligence agencies (the CIA, it is very likely, had agents within the network), and the operation was abruptly closed down when it seemed to be the right time.”³³

In summary, if a bomb were stolen, the protective system would pose a further obstacle. Transportation, betrayal, and discovery would pose further potential obstacles. The quality and amount of material obtained would be a further issue. Yet if terrorists succeeded in overcoming each of these obstacles, they would encounter still more at the next stage.

6.1.3 Why building a nuclear bomb is much harder than it seems

From at least the 1960s onward, a literature has emerged around the question of what challenges are entailed in building a reliably functional nuclear or atomic weapon. Among the most frequently cited narratives in this literature is one that relates to a project known as the “Nth Country Experiment”.³⁴ At the time the project was conducted by the US military in 1964, the world’s only nuclear powers were Russia, Britain, and the United States. The US wanted to know how easily, if at all, another nation seeking to build a nuclear bomb could do so, working without the classified information in possession of the nuclear powers. It commissioned two recent PhD graduates in physics, and provided them with a laboratory and time to work. Three years later, the two young scientists impressed their military sponsors by producing a blueprint for a bomb that was more powerful and sophisticated than the one they were asked to create. The question seemed to be settled: it could be done quite readily, with a very small team, and no classified

³³ *Ibid*, at 5, see also Langewiesche, *supra*, note 13, at 169-72 (cited in Mueller).

³⁴ Dan Stober, “No Experience Necessary,” *The Bulletin of the Atomic Scientists*, May-June 2003.

information. For this reason, the story is frequently cited by figures in the “imminent danger” school as proof of the simplicity of the task.³⁵ Yet, each time it is cited by members of this group, a critical fact is either ignored or mentioned only in passing. *The bomb was never built.*

The Nth Country Experiment goes to the heart of a critical issue in the debate. In theory, say the alarmists, it is easy to build a bomb, given the relative simplicity of the physics at issue. In practice, say the skeptics, it is not.³⁶ The skeptics’ arguments for why bomb building is harder in practice than it sounds are key. They offer some of the most persuasive reasons to believe that nuclear terror is a highly unlikely event. The challenges occur at several stages, including:

- i. the acquisition of an adequate amount of appropriate fissile material from one or more sources;
- ii. building the device;
- iii. testing it without being detected [a useful though not essential step];
- iv. transporting it undetected;
- v. reliably exploding the device; and

³⁵ See, e.g., Graham Allison, *Nuclear Terrorism: the Ultimate Preventable Catastrophe* (New York: Henry Holt, 2004) at 94: “...In the end, they produced a document with such precise details on how to build the bomb, and what materials would be required, that Seldon remarked that it ‘could have been made by Joe’s Machine Shop downtown.’”

Ferguson and Potter, in *The Four Faces of Nuclear Terrorism* (New York: Routledge, 2005) at 137, begin a paragraph addressing the experiment by asking: “Could a reasonably technically competent small terrorist group design *and build* an implosion device?” (emphasis added). The paragraph describes how the two novices at the Livermore Laboratory triumphantly succeeded in producing a design for a more powerful bomb than the one requested, but it makes no mention of the fact that the bomb was never built.

See also, Matthew Bunn and Anthony Wier, “Terrorist Nuclear Weapon Construction: How Difficult?” (2006) *The ANNALS of the American Academy of Political and Social Science* 607: 133, at 145: “They quickly decided that designing a workable gun-type bomb would be too easy to show off their technical skills in a way that would improve their subsequent job prospects; instead, they successfully designed a workable implosion bomb...” What the authors mean here by “successfully designed” is not explored.

³⁶ See, e.g., Levi’s analysis of the Nth Country Experiment in Chapter 3 of *On Nuclear Terrorism*, *supra*, note 3.

- vi. effecting an explosion of the intended magnitude.

In canvassing these points, one might recall (from Chapter 4) the strongest argument set forth by the alarmist school. This is the claim that, at the very least, with a sufficient sample of fissile material, a non-state actor could easily build at least a crude “gun-type” nuclear weapon that would be somewhat reliable. This would only have to involve creating a device that would slam together two pieces of HEU.

To lend a sense of the force of this argument, Richard Rhodes invokes the authority of nuclear physicist and Nobel laureate Luis Alvarez, who was involved in creating the first atomic bomb. Alvarez suggested to Rhodes that “[y]ou can make a fairly high-level nuclear explosion just by dropping one piece [of HEU] onto another *by hand*.”³⁷ Why, then, would it be hard to build a crude, gun-type nuclear weapon?

In short, it would not be hard in the sense of theoretically difficult. It would be hard in the practical sense – at least if you wanted to be reasonably sure it would work. (I will return momentarily to the question of whether one might wish to settle for a bomb that was unpredictable and to simply save the testing for its actual use in Manhattan or London.) It is harder to build a bomb than Alvarez’ comment would suggest because in order to cause a significant explosion – one or more kilotons – it would be necessary to use two samples of HEU of a sufficient size, purity or quality, *and* an appropriate shape. And although experts debate the necessary size of a sample to cause an explosion in the kilotons, many agree that the tasks of acquiring material of the right kind and shape

³⁷ Richard Rhodes, *supra*, note 18, at 289. See also, Louis Alvarez, *Adventures of a Physicist* (New York: Basic Books, 1988), at 125: “with modern weapons-grade uranium, the background neutron rate is so low that terrorists, if they have such material, would have a good chance of setting off a high-yield explosion simply by dropping one half of the material onto the other half.” (Cited in Levi, *supra*, note 3.)

would present a host of challenges that have proved daunting or insurmountable to many states, and would be especially difficult for a small group of non-state actors.

On the basis of these facts, a number of experts contend that a wide gap exists between the theory or physics of a nuclear bomb and its accomplishment in practice – regardless of the bomb’s design. The simple explosion that Alvarez contemplates would require sufficient amounts of HEU, in a certain shape and consistency; and it may also involve a weapon carefully calibrated to perform as intended. The calibration of such a weapon would require significant expertise with metals and substances, crafting and machining; time and material to work with; and possibly the opportunity to test some if not all of the components. The work would be dangerous, difficult to conceal, and time consuming — all raising the risk of failure or discovery.³⁸ To explore these issues, I deal first with the prospect of building a weapon, then consider the possibility of setting off a bomb without first testing it.

Writing in 1998, Stanley Jacobs asserted that “[w]hile the design of a workable device may be *approximated* based on readily accessible, unclassified information, the conversion of that information into a functioning device is a task of a far different magnitude.”³⁹ The reason for this relates to the scale of the undertaking: “Although a functional nuclear weapon requires only a small amount of plutonium..., obtaining the requisite amount of weapons-grade material, assembling the technical personnel to create the device, equipping a laboratory-ship to build the device, obtaining all the other materials needed, funding the operation and keeping the entire enterprise secret appear to

³⁸ Jacobs, *supra*, note 12, at 152-3.

³⁹ *Ibid.*, at 152.

be a series of steps that have effectively prevented any successful attempt.”⁴⁰ Despite claims by experts and physicists to the effect that “a small group of dedicated individuals with appropriate backgrounds in physics and nuclear chemistry, resources, security, etc., could fabricate a nuclear device, it has not been accomplished in over half a century.”⁴¹ Iraq failed to accomplish the goal “after spending more than 20 years and over a billion dollars”.⁴²

An important source of corroboration for this view is a commonly cited study published in 1987 by a team of US nuclear weapons experts, commissioned by the International Task Force on the Prevention of Nuclear Terrorism.⁴³ The authors sought to assess what would be involved in creating either a crude gun-type device or a more sophisticated design. They found that while a crude gun-type weapon could conceivably be manufactured by a non-state actor, “substantially more than a critical mass of uranium is needed, and plutonium cannot be used” (given issues with “predetonation” unique to plutonium).⁴⁴ Other types of design would require either greater amounts of fissile material or material of a higher quality.⁴⁵ Speaking generally, they assert: “The amounts of fissile material necessary would tend to be large – certainly several, and possibly ten times,

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ J. Carson Mark, Theodore Taylor, Eugene Eyster, William Maraman, and Jacob Wechsler, “Can Terrorists Build Nuclear Weapons?”, in *Preventing Nuclear Terrorism*, *supra*, note 7.

⁴⁴ *Ibid.*, at 55. At 62, the authors explain why predetonation complicates or precludes the use of plutonium in a gun-type design.

⁴⁵ *Ibid.*, at 56

the so-called formula quantities.”⁴⁶ The weight of any complete device would also likely be large, “probably more than a ton.”⁴⁷ They also found that:

[s]chematic drawings of fission explosive devices of the earliest types [i.e., including the gun-type] showing in a qualitative way the principles used in achieving the first fission explosions are widely available. However, the detailed design drawings and specifications that are essential before it is possible to plan the fabrication of actual parts are not available. The preparation of these drawings requires a large number of man-hours and the direct participation of individuals thoroughly informed in several quite distinct areas: the physical, chemical, and metallurgical properties of the various materials to be used, as well as the characteristics affecting their fabrication[...].⁴⁸

On this basis, the authors conclude that at an absolute minimum the team involved “could scarcely be fewer than three or four and might well have to be more”.⁴⁹ The preparation involved would be “a number of weeks (or, more probably, months)”.⁵⁰

In the event that a theft of material would be detected, the authors note that time would become critical: “In addition to all the usual intelligence methods, the most sensitive technical detection equipment available would be at [the searcher’s] disposal. As long as thirty-five years ago, airborne radiation detectors proved effective in prospecting for uranium ore. Great improvements in such equipment have been realized since.”⁵¹ There are also “a number of obvious potential hazards” to confront in the process of building, including “the possibility of inadvertently inducing a critical configuration of the fissile material at some stage in the procedure,” and being exposed to high levels of toxicity and radiation.⁵² Finally, the device itself would function unpredictably:

⁴⁶ *Ibid*, at 60: ‘Formula quantities’ refers to regulated amounts of material that may be safely stored or transported in and among US military nuclear installations. The authors cite as an example 5kg of U-235 (HEU) or 2kg of plutonium.

⁴⁷ *Ibid*, at 60.

⁴⁸ *Ibid*, at 58.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*, at 59.

⁵¹ *Ibid*, at 60.

⁵² *Ibid*, at 62-3.

“Terrorists would not be in a position to know even the nominal yield of their device with any precision.”⁵³

Writing more recently, Levi, Younger, and Wirz and Eggers present a similar set of challenges with even the most basic, gun-type design. Levi sets out several. Noting that a crude gun-type weapon could be fashioned by modifying a purchased artillery piece, he explains that a group would have to test it “at least once using natural or depleted uranium, introducing at least a small probability of detection”.⁵⁴ The impact of such testing and the preparation facility involved could attract attention. Without the requisite knowledge of how to use such an artillery piece, further tests would be necessary. A terror group would also face additional challenges around the precise design and function of the initiator mechanism in the gun (which would set off the nuclear chain reaction). Without this, they would have to create an effectively functioning uranium “bullet and target” mechanism.⁵⁵ Levi sets out a number of potential pitfalls at this particular stage, involving a detailed discussion of the physics of nuclear fission (more on this below).⁵⁶ Without building this correctly and precisely, the device could cause the material to pre-detonate or to yield a much smaller explosion.⁵⁷

All of these scenarios contemplate a set of tests before use. But an important issue to address before proceeding is whether a group of terrorists might simply forego the testing stage and attempt to carry out the attack itself – taking their chances as they treat Manhattan or London as their testing ground. They would thus circumvent at least some

⁵³ *Ibid*, at 63.

⁵⁴ Levi, *supra*, note 3, at 38-9.

⁵⁵ *Ibid*, at 43.

⁵⁶ See discussion from 43 to 46, *ibid*.

⁵⁷ *Ibid*, at 43.

of the hurdles mentioned above – but how likely are they to succeed in setting off a nuclear explosion? The answer depends in large part on the validity of Louis Alvarez’s claim that merely slamming two pieces of HEU together would suffice to create high-powered nuclear explosion. Michael Levi offers a critical reading of this assertion. The reading depends, however, on an understanding of the process of nuclear fission itself. When examined in closer detail, this process makes clear that the likelihood and size of an explosion is closely dependent on the quality, size and shape of the material. Alvarez’ theory of a simple explosion is premised on having not only two pieces of a certain size but also an optimum quality and shape.

The reason for this relates the physics of nuclear fission. As Levi explains earlier in his text, a nuclear explosion is a consequence of the process of nuclear fission. Fission occurs on an atomic level. It begins when a sub-atomic particle known as a “neutron” strikes the nucleus of another atom – for example, a uranium atom – causing that atom to split and release both energy and more neutrons. The release of energy and neutrons can cause other atoms to split, leading to a further release of energy and more neutrons, and further atom splitting. Eventually, this chain reaction within a mass of uranium will cause it to explode due to the release of greater amounts of energy. The force of the resulting explosion will depend on how many atomic splits, or “fissions”, have occurred by that point in time.

It is important to note, however, that not every neutron that strikes an atom will cause the atom to split. Also, where fission does occur, the nature of the fissile material will affect the likelihood of a chain reaction occurring or continuing. Certain forms of uranium, for example, are more conducive to the formation of a chain reaction than others. As Levi notes, neutrons striking a piece of Uranium 238 are less likely to result in

either fission or a chain reaction than those hitting a piece of Uranium 235, given greater the likelihood that escaping neutrons in an atomic split of Uranium 238 will be “captured” or will “disappear and be unable to cause additional fissions.”⁵⁸ The uranium samples used in a nuclear weapon will therefore usually contain a blend of both Uranium 235 and 238, but will consist of at least 90 percent Uranium 235 (*i.e.*, ‘weapons-grade’ uranium).

In addition to the quality or make-up of a given mass, two other vital factors for the fission process are the size and shape of the sample. In a sample that is too small, the neutrons would escape “through the surface of the uranium.”⁵⁹ In a sample that is too large, the neutrons may never escape, which would allow the energy created by early reactions to dissipate, and for the chain reaction to die out. As Levi explains, “[a]t some size and shape in between, the material is barely able to sustain a chain reaction – just enough neutrons leak to balance their production through fission. That configuration is referred to as a critical mass.”⁶⁰ A sample might therefore lack the right balance of size and shape, rendering it either “sub-critical” or “super-critical.” A critical or super-critical mass is required to trigger and sustain the fission process for some period. But, in short order, the chain reaction will cause the uranium mass to expand and either become sub-critical or explode – in each case, bringing the chain reaction to an end.

Levi further explains that the size of the resulting explosion will depend on how many fissions occur before the sample explodes, and that this number depends on how soon the chain reaction begins. When two critical or sub-critical masses are slammed together, they become super-critical – due, that is, to a greater density of atoms and neutrons. If the chain reaction starts early, it will cause the mass to expand earlier in time.

⁵⁸ Levi, *supra*, note 3, at 36.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, at 37.

However, even a small amount of expansion will cause the material to become sub-critical quickly, leading to fewer fissions and either a smaller explosion, or no explosion at all. Yet, if the reaction starts a sufficient period after two the masses are brought together into a super-critical mass, the material will have time to become *denser* than in the earlier case. A greater density of neutrons and atoms will allow for more fission – for two reasons. More density leads to a higher rate of collisions between atoms and neutrons; and, given the greater density of material, it will take longer for the material to expand to become sub-critical once again. More fission makes a more forceful explosion more likely.

These details are important because although a chain reaction can be triggered by any neutron striking a uranium atom, the likelihood of setting off a chain reaction early turns on how many neutrons are emitted by either of two masses when striking one another. The more neutrons that are emitted by either piece, the more likely it is that the chain reaction will be triggered early, when the material is less critical (or dense) – yielding a smaller explosion. Conversely, the less neutrons emitted and the faster two pieces come together, the more dense the material will be, and the more fission that may occur. Thus, the size, shape, and quality of the material – and how they come together – are key factors in assessing the resulting yield.⁶¹

To return, then, to Levi's critique of Alvarez, Levi begins by noting that Alvarez's claim is often cited in scenarios of terrorists breaking into a nuclear installation and setting off an explosion on site, without resort to a gun-type apparatus. In one variation, Matthew Wald asserts that "a 100-pound mass [of weapons-grade] uranium dropped on

⁶¹ *Ibid.*

a second 100-pound mass, from a height of about 6 feet, could produce a blast of 5 to 10 kilotons”.⁶² Levi suggests:

These assertions are correct, but they can easily be misinterpreted. Making a nuclear weapon is harder than they suggest.

How can they be misinterpreted? The experts making these claims assume the two pieces of uranium are in ideal shapes for creating an explosion. Take the last example, where the final mass of uranium is about one hundred kilograms (or about two hundred pounds). This weight would provide about two critical masses for a spherical piece of uranium, which leads to a blast of five to ten kilotons, as claimed. Yet for other shapes, one hundred kilograms of material may not even form a critical mass, in which case no explosion will occur; alternatively, the two shapes may form more than a critical mass but not the two critical masses that would lead to a five- to ten-kiloton explosion. Depending on the shapes and sizes of nuclear material a terrorist group acquires, then, the group may have to reshape the material, or, in some cases, decide between reshaping the material and accepting a reduced yield.⁶³

Put otherwise, *unless* a terror group obtains material of the right kind, shape, and size, it will *have* to reshape the material or accept a lower yield. Merely obtaining a sample or two of HEU will not likely place a terror group in the position to create the simple explosion that Alvarez contemplates. At least, not without overcoming further obstacles.

As Levi points out, reshaping material would entail “more challenges and create new vulnerabilities.”⁶⁴ He doubts whether “standard machine shop tools are adequate for manipulating uranium.”⁶⁵ Moreover, “having equipment and tools with sufficient capabilities is different from having individuals skilled enough to use them successfully.”⁶⁶ This introduces further opportunities for failure. Chief among them is the high probability of accidents occurring while working with the material itself: “Uranium metal

⁶² Matthew Wald, “Suicidal Nuclear Threat Is Seen at Weapons Plants,” (23 January 2003) *New York Times*, cited in Levi, *supra*, note 3, at 39-40.

⁶³ Levi, *supra*, note 3, at 39-40.

⁶⁴ *Ibid.*, at 40.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

is vulnerable to spontaneous ignition when finely divided, creating the risk of fire during processing, and of ensuing detection.”⁶⁷

As an example of the degree of challenge involved in shaping material, Levi cites a report of the Iraq Survey Group (investigating in 2003), which found “no evidence that Iraq had acquired or developed the technology of dealing with casting and machining issues of highly enriched uranium.”⁶⁸ The report also noted various difficulties Iraqi scientists encountered in using casting furnaces to melt uranium, for the purpose of pouring it into molds. While the Iraqis were able to create spherical and cylindrical pieces for an implosion device, the pieces were “of relatively poor quality as pertaining to void and impurity incursions.”⁶⁹ Terrorists seeking to build a gun-type device would encounter different problems, yet in Levi’s view, the “impurity problem the ISG refers to could still be significant.” If a terrorist group encountered the same issue, “it might only obtain a yield of roughly ten tons, still devastating but a thousand times smaller than a typical crude nuclear weapon.”⁷⁰

Younger’s analysis is consistent with Levi’s. Drawing on his work as a nuclear bomb-builder for the US government, he emphasizes the importance of three specific hurdles. Although one can obtain a general idea of how to build a bomb from public sources, he asserts, “none of these sources has enough detail to enable the confident assembly of a real nuclear explosive.”⁷¹ It would take more than having the right tools, it would also require a “working knowledge of how the parts fit together, what tolerances

⁶⁷ *Ibid.*

⁶⁸ Cited at 42 in Levi, *ibid.*

⁶⁹ Citing the report, *ibid.*

⁷⁰ *Ibid.*, at 42.

⁷¹ *Ibid.*, at 88.

are permitted or required, the compatibility of materials [...], and many other details.”⁷²

Uranium is also “exceptionally difficult to machine.”⁷³ Plutonium, “one of the most complex metals ever discovered,” is an extremely sensitive material. Tolerances create further issues:

‘Just put a slug of uranium into a gun barrel and shoot it into another slug of uranium’ is one description of how easy it is to make a nuclear explosive. However, if the gap between the barrel and the slug is too tight, then the slug may stick as it is accelerated down the barrel. If the gap is too big, then other, more complex, issues may arise. All of these problems can be solved by experimentation, but this experimentation requires a level of technical resources that, until recently, few countries had. How do you measure the progress of an explosive detonation without destroying the equipment doing the measurements? How do you perform precision measurements on something that only lasts a fraction of a millionth of a second?⁷⁴

For these reasons, Younger is also skeptical of the likelihood that terrorists could create a small, easily transportable nuclear device. Even if the designs for “suitcase bombs” are readily available, in his view only the US and Russia have the engineering capability and material “to turn the blueprints into hardware.”⁷⁵

Swiss nuclear scientists Wirz and Eggers writing in 2010 provide further corroboration for these arguments.⁷⁶ Mueller cites several others who draw similar conclusions.⁷⁷ Thus, a sizeable body of experts agree that what can be accomplished in theory becomes much less probable when attempted in practice.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*, at 89.

⁷⁵ *Ibid.*, at 91.

⁷⁶ Wirz and Eggers, *supra*, note 5.

⁷⁷ See Mueller’s most recent and extended discussion of the challenges faced by the would-be nuclear terrorist in Chapter 12 of *Atomic Obsession*, *supra*, note 2.

6.1.4 On recent terrorist efforts to obtain a nuclear weapon

In 2002, the Gilmore Commission issued a fourth report that addressed the available evidence surrounding al Qaida's efforts to obtain a nuclear weapon.⁷⁸ It cited numerous statements by Bush administration officials to the effect that the group was actively seeking to acquire nuclear and other weapons of mass destruction. Yet, upon examining the evidence in some detail, authors of the report concluded that very limited steps had been taken beyond that point – beyond verbal expressions of interest and a collection of disparate notes and articles.⁷⁹

Over the course of the decade, further inquiries have been made into al Qaeda's interest in and attempts to acquire WMD.⁸⁰ John Mueller has attempted periodic overviews of this evidence, and he maintains a similarly skeptical position. In 2009, he argued that apart from occasional expressions of interest by senior al Qaida figures, the evidence points to only two serious attempts to pursue an interest in nuclear terror.⁸¹ The first relates to a claim made by a defector from al Qaida in 1996, Jamal al-Fadl. Fadl is alleged to have told the CIA of an attempt he made in 1993 to obtain uranium on behalf of bin Laden from Sudan, and of the uranium turning out to be counterfeit.⁸² Mueller questions the veracity of the incident partly on the basis of Fadl's credibility. The second involves conversations that bin Laden and other members of al Qaida had with two Pakistani nuclear scientists in August of 2001. Pakistani intelligence officers have

⁷⁸ Gilmore Commission, "Fourth Annual Report to the President and the Congress of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction" (15 December 2002).

⁷⁹ *Ibid*, at 20.

⁸⁰ For a comprehensive summary, see Rolf Mowatt-Larssen, "Al Qaeda Weapons of Mass Destruction Threat: Hype or Reality?" (Cambridge: Belfer Centre for Science and International Affairs, Harvard, 2010).

⁸¹ Mueller, "The Atomic Terrorist" (2009), *supra*, note 9, at 16.

⁸² *Ibid*, at 16.

described these as “academic” in nature.⁸³ Others, including Graham Allison, claim that the scientists provided bin Laden with “blueprints” for a bomb; Mueller asserts they were little more than “a hand-drawn rough bomb design”.⁸⁴ The scientists would also have been of limited use to the group, in Mueller’s view, given that their specialty was not bomb design but the production of fissile material — a task that is well beyond a non-state actor, as many have noted.⁸⁵ Mueller also cites al Qaida documents seized by the US government in Afghanistan in 2001, which reveal that the group’s budget for work on WMD acquisition was only some two to four thousand dollars.⁸⁶

Mueller had occasion to revisit the issue in 2011, in the wake of bin Laden’s killing and the seizure of computers at his compound. They contained extensive notes and information on the group’s activities over the course of the decade. Muller writes:

A multi-agency task force has completed its assessment, and according to first reports, it has found that al Qaeda members have primarily been engaged in dodging drone strikes and complaining about how cash-strapped they are. [...] The full story is not out yet, but it seems breathtakingly unlikely that the miserable little group has had the time or inclination, let alone the money, to set up and staff a uranium-seizing operation, as well as a fancy, super-high-tech facility to fabricate a bomb.⁸⁷

This speaks only to the group’s interest in nuclear terror. In the next section, I briefly address al Qaida’s efforts to obtain biological weapons.

In any case, whether or not al Qaida’s efforts were cause for concern, they may not have been alone in seeking to deploy a nuclear weapon. Other groups may have been

⁸³ *Ibid.*

⁸⁴ Mueller, *ibid.*, cites Allison’s *Nuclear Terrorism*, *supra*, note 35, at 24 on this point. For the point that what was shown was only a rough sketch, he cites on George Tenet (with Bill Harlow), *At the Center of the Storm: the CIA During America’s Time of Crisis* (New York: Harper Collins, 2007), at 268.

⁸⁵ Mueller, “The Atomic Terrorist” (2009), *supra*, note 9, at 16.

⁸⁶ John Mueller, “The Truth About al Qaeda: Bin Laden’s Files Revealed the Terrorists in Dramatic Decline” (2 August 2011) *Foreign Affairs*.

⁸⁷ *Ibid.*

interested, and others might be in the future. Reports also still surface from time to time of stolen quantities of HEU, giving rise to serious concerns.⁸⁸

In response, the argument of this chapter is to counsel caution and skepticism. Where a non-state actor obtains HEU, this is cause for concern. But it does not mean that nuclear terror is likely or imminent. Many obstacles remain.

This is because – to summarize – in addition to the task of acquiring fissile material, the task of building, transporting, and deploying a nuclear bomb are much more complex and challenging than is often assumed. Future developments and events may change this analysis. But in this case, rights advocates will be in a position to evaluate them with a spirit of scientifically informed skepticism, and to set out a more cautious, sober assessment.

6.1.5 Why terrorism involving a biological weapon is harder than it seems

Chapter 4 surveyed common arguments in support of the view that a major bio-terror attack could likely occur in the near future. They include the claims that:

1. certain biological substances are among the most lethal potential weapons in existence;
2. many can be manufactured with limited knowledge or equipment, and with natural or readily obtainable material; and
3. such weapons can be easily dispersed to cause mass casualties.

⁸⁸ See, e.g., Peter Goodspeed, “Ongoing Nuclear Threat Looms Over Seoul Summit” (24 March 2012) *The National Post*, citing the June 2011 arrest of a group in Moldavia for smuggling 4.4 grams of weapons-grade uranium, as part of a sale that may have involved up to nine kilograms.

A number of experts have cast these arguments into doubt. What follows is a brief overview of skeptical perspectives on bio-terror.

William Clark, an emeritus professor of immunology at the University of California, lends a general sense of these perspectives in his 2008 book *Bracing for Armageddon*:

Those who think deeply about America's response to bioterrorism should be very clear about one thing. It is almost inconceivable that any terrorist organization we know of in the world today, foreign or domestic, could on their own develop, from scratch, a bioweapon capable of causing mass casualties on American soil. It just isn't going to happen. The isolation and purification of the requisite pathogens from nature, although theoretically possible is far beyond the ability of all but a handful of advanced scientific laboratories in the world. So is the development of a mass-scale delivery system for most pathogens.⁸⁹

Clark contemplates challenges at both the production and dissemination stage. A more detailed exploration of these challenges is set out in the 1999 Gilmore Commission report, noted above, and in Clark's assessment of the bioterror episode involving the Japanese Aum cult in the mid 1990s.

The Gilmore Commission's first report assessed the prospect of bioterror in addition to nuclear terror. It noted that would be bio-terrorists would face significant obstacles at several stages. A group might acquire lethal substances from four sources: a germ bank, a research laboratory or hospital, a natural source, or a rogue state.⁹⁰ But a "principal obstacle" is to produce "a genuinely lethal strain of the agent in sufficient quantities to cause mass casualties".⁹¹ (The Aum group, for example, failed to do precisely this, despite explicitly attempting it, with both considerable expertise and facilities.) One

⁸⁹ William Clark, *Bracing for Armageddon: the Science and Politics of Bioterrorism in America* (Oxford: Oxford UP, 2008) at 170-171.

⁹⁰ At 162, *ibid*, Clark notes that in the US, as a result of the 2002 *Bioterrorism Act*, it has become "much, much harder" to obtain pathogens from a lab, bank or hospital. The Act regulates the transfer and production of listed pathogens through an elaborate licensing and reporting scheme, with strict penalties.

⁹¹ Gilmore Commission, *supra*, note 6, at 22.

way the obstacle might be overcome is to produce a strain of a poisonous substance – e.g., anthrax spores – from natural sources and to cultivate it into large quantities. While conceivable, the Commission asserts that the task is “difficult in practice and doubtless well beyond the capabilities of most terrorist groups.”⁹² The reasons for this relate to the challenges of working with such substances.

Once a lethal strain is obtained, one key challenge is to make it stable. The Commission cites Russian bio-weapon scientist Ken Alibek on this point: “the most virulent culture in a test tube is useless as an offence weapon unless it has been put through a process that gives it stability and predictability. The manufacturing technique is, in a sense, the real weapon, and it is harder to develop than individual agents.”⁹³ Producing airborne viral agents becomes an even greater challenge, the Commission notes, given that they are “extraordinarily difficult to work with”.⁹⁴ The production, packaging and storing of viruses entails a further set of opportunities for failure, and risk to those involved.⁹⁵ Some agents, such as botulinum toxins, become unstable once purified, requiring further testing and special knowledge of how to maintain toxicity for storage and dissemination.⁹⁶ US military researchers have also found that maintaining a high enough level of purity to use toxic agents as a weapon reduces 70-80 percent of the sample supply.⁹⁷

⁹² *Ibid.*

⁹³ *Ibid.*, at 22-3.

⁹⁴ *Ibid.*, at 23.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

Other potential obstacles the Commission canvasses relate to acquiring necessary “training, advanced techniques, and specialized equipment.”⁹⁸ While some of the testing could be conducted in small laboratories, larger tests “will likely invite the attention of law enforcement or intelligence agencies.”⁹⁹ Testing is of course not strictly necessary, but if a group were to continuously try to carry out a bio-attack until it worked – testing in the field – they would likely face a growing risk of detection.

In addition to issues about equipment and testing, the Commission concedes the existence of debate on the question of how much expertise is necessary to develop certain lethal substances. Yet it also notes that most experts agree that at a minimum, a team would require the involvement of a microbiologist, a pathologist, and an aerosol physicist and meteorologist (if airborne dissemination were the chosen route).¹⁰⁰ Assembling such a team, in the Commission’s view, poses the greatest hurdle. The fear and paranoia that would surround their work would only add to the difficulties.

The final stage, dissemination, presents a further set of obstacles. If a group’s aim were to inflict tens or hundreds of thousands of casualties, it would have to create an “aerosol cloud” as a vehicle. This can be created from a liquid or powder form, but both are difficult to produce and control. Samples of the virus must be dried, which in the process “tends to kill inordinate amounts of the organisms.”¹⁰¹ Portions also cling to surfaces, making it hard to handle and increase the chance of infection.¹⁰² In a “slurry” liquid form, the substance must be kept refrigerated, causing it to settle at the bottom of

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, at 24

¹⁰² *Ibid.*

its container and to clog the dissemination device. (The Commission notes that this is precisely what occurred when the Aum attempted to spray anthrax from the roof of a Tokyo building.¹⁰³) The disseminating particles must also be the proper size — between 1 and 5 microns. But building a tool to disseminate particles of this size would pose “a major technical hurdle for any prospective biological terrorist.”¹⁰⁴

Even if all of these hurdles were overcome, one further opportunity for failure remains: “As bioagents are aerosolized and become airborne, they decay rapidly. It is estimated that 90 percent of the microorganisms in a slurry are likely to die during the process of aerosolization.”¹⁰⁵ Temperature changes, humidity, wind, smog, and other environmental factors will further impede the effect.

William Clark’s assessment of the Japanese Aum Shinrikyo group lends a further sense of the magnitude of these challenges. The Aum had carried out seven attacks, four with anthrax and three with botulinum toxin.¹⁰⁶ The group’s overt aim was to inflict as many casualties as possible. Had it succeeded, Clark believes the casualties would have been in the thousands or tens of thousands. Yet, its failure was instructive in many respects.

The Aum were lead by Seiichi Endo, who possessed a doctorate in molecular biology. The team had other trained experts, and access to labs and equipment. Yet, as Clark suggests, the group’s critical shortcoming was its failure to gather the necessary expertise. As he notes, “none were experienced in microbiology or other biological sciences directly impinging on bioweapons development. None had the biotechnology

¹⁰³ *Ibid.*, at 25.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ Clark, *Bracing for Armageddon*, *supra*, note 81, at 164.

background for large-scale pathogen production. None had the engineering skills to produce an efficient weapons delivery system.”¹⁰⁷

The group began by producing botulinum from natural sources. But there are, as Clark explains, various strains of botulinum toxin in nature, and only a few of them are harmful to humans. Greater expertise would have been critical at an early stage in selection and production.¹⁰⁸ The team also faced challenges in purifying and producing a high enough quantity of the organism. It encountered further trouble stabilizing the quantity in storage, and settling upon effective methods of delivery.

Clark believes that Endo probably obtained anthrax samples by stealing them from a local university. But he failed to produce further quantities of it, given a lack of expertise and knowledge.¹⁰⁹ “This usually come from years of experience, judging when cultures must be subdivided and recognizing from the appearance of the cells themselves what more may be needed”.¹¹⁰ Even more expertise is required to “encourage a high degree of spore formation without killing off huge amounts of bacteria.”¹¹¹ The drying, storing, and dissemination of anthrax spores presented further issues. The method Endo chose — spraying a liquid slurry from the top of an eight-story building — was “almost certainly doomed to failure”.¹¹² This was due in part to the poor quality of what was disseminated. Samples collected from the incident were later analyzed in a US university. They were found to contain “a low level of anthrax spores” and a specific strain “used to vaccinate farm animals against anthrax. It is essentially completely harmless in

¹⁰⁷ At 169.

¹⁰⁸ At 165.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, at 167.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, at 168.

humans.”¹¹³ Even if Endo had worked with a lethal strain, the group had also failed to engage experts in weather conditions and aerosolized dissemination. Without this, Clark believes “the amount of damage done to humans even in the immediate vicinity of the building would have been minimal at best.”¹¹⁴

Other experts have corroborated the skeptical position set out by Clark and the Gilmore Commission.¹¹⁵ I conclude this part by drawing on one final authority, Milton Leitenberg, a senior research scholar at the Centre for International Security Studies at the University of Maryland.¹¹⁶ For Leitenberg, bioterror on a significant scale is highly improbable, and claims about al Qaida’s interest it have been grossly inflated.

Writing in 2007, Leitenberg relates the findings of a survey he conducted of a series of databases that have tracked “bioweapons-related events” throughout the twentieth century, including hoaxes, expressions of interest, and actual attempts to procure, produce or use a biological agent.¹¹⁷ He notes that:

events that were actual examples of use were overwhelmingly chemical, and even these involved the use of easily available off-the-shelf, nonsynthesized industrial products. Many of these events were instances of individual murder and not attempts to cause mass casualties. [...T]here are only a few recorded instances in the years from 1900 to 2000 of the preparation of biological pathogens in a private laboratory by a nonstate actor.¹¹⁸

The three most serious events on record involve the Rajneesh cult in Oregon in 1984; the Japanese Aum Shinrikyo group in 1995; and use of anthrax in the US congressional

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ See, for example, Andreas Wenger and Reto Wollenmann, eds., *Bioterrorism: Confronting a Complex Threat* (Boulder, Lynne Rienner Publishers: 2007), and in particular, the contributions by Milton Leitenberg, Peter Lavoy, Marie Isabell Chevrier, and Andreas Wenger.

¹¹⁶ *Ibid.*, at 39-76.

¹¹⁷ Milton Leitenberg, “Evolution of the Current Threat,” *ibid.*, at 49.

¹¹⁸ *Ibid.*

incident in the fall of 2001. The question raised in each of these cases is whether the group could produce a biotoxin and how much damage it could accomplish.

The Rajneesh group is notable for having successfully cultured a biological agent – a form of salmonella that members dispersed by hand in salad bars of restaurants throughout a small Oregon city. Over 700 people suffered from food poisoning, but there were no casualties.¹¹⁹ Although Leitenberg does not explore this case in much detail, Clark makes two notable points about the event. One is that the group obtained the original salmonella cultures from an industrial supplier in Seattle more easily than would be the case today, given the passage of stricter regulation around the storage, sale, and transfer of dangerous pathogens.¹²⁰ He notes that “[f]ailure to account fully for every organism under a laboratory’s control could result in suspension of that laboratory’s license. While a determined individual might still find a way to get at a lab’s stock of Select List pathogens, it is much, much harder today than it was in 1984, or even 2001.”¹²¹ Another critical point is that the group was able to order the sample and cultivate it without detection due in part to the fact that the cultivation of salmonella, “an ordinary bacterium”, is technically and practically simple; and also due to the fact that the Rajneesh compound contained “a clinic, pharmacy, and a state-licensed medical laboratory,”¹²² along with a trained nurse. Moreover, the group in this case began with an original sample of the bio-agent, and it was not a lethal agent.

¹¹⁹ Clark, *supra*, note 89, at 89.

¹²⁰ *Ibid*, at 162; Clark cites the *Public Health Security and Bioterrorism Preparedness and Response Act of 2002* (the ‘*Bioterrorism Act*’), 107th Congress, H.R. 3448 ENR.

¹²¹ Clark, *ibid*, at 162.

¹²² *Ibid*, at 163.

Leitenberg notes that the Japanese Aum Shinrikyo group had “unsuccessfully attempted to procure, produce, and disperse anthrax and botulinum toxin.”¹²³ It obtained only a strain of anthrax that was “nonpathogenic under any conditions” – and the group was also “unsuccessful in working with even that properly.”¹²⁴

This leaves the US congressional anthrax episode of 2001. Leitenberg describes this as the single most significant bio-weapon event on record, given the quality and nature of the weapon at issue. The question for him and other bio-weapon experts is what it portends about bioterror in a larger sense. In this case, samples of less than a gram of a deadly strain of anthrax were found in letters sent to US Senators Tom Daschle and Patrick Leahy, killing five people and injuring several more. Given the high purity of the samples, Leitenberg conjectures that the pathogen might have been derived from a US military source, or expertise arising from it.¹²⁵ His view corroborates with Clark’s analysis.

Clark explains that the samples used in the 2001 attack were “if not of the very highest level of purity and potency, certainly good enough to cause very serious problems.”¹²⁶ They were not the work of “an amateur microbiologist or a survival chemist”; but rather, were “likely made in a government or possibly university research facility highly specialized in producing anthrax spores.”¹²⁷ In addition to the purity of the samples, the group or individual responsible used a highly efficient distribution method – *i.e.*, placing less than a gram of the sample in various letters. This helped evade detection

¹²³ Leitenberg, *supra*, note 115, at 49.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, at 66.

¹²⁶ Clark, *Bracing for Armageddon*, *supra*, note 89, at 170.

¹²⁷ *Ibid.*

yet could still result in the death of “dozens of people under the right conditions, and maybe more.”¹²⁸ Clark concludes:

In the end, the most unsettling aspect of Amerithrax is that it was not likely carried out by a foreign terrorist. At present, all evidence suggests that it was most likely an American scientist, who was either working or had worked in an American laboratory – possibly even a government laboratory – who carried out these attacks. The failure of the FBI to identify the individual involved suggests this was a highly sophisticated person who knew exactly what it would take to cover his or her tracks.¹²⁹

Both Clark and Leitenberg are cautious about the event’s larger significance.¹³⁰ Their assessments also predate the findings of an extensive FBI investigation that concluded in 2010. It found that the likely source of the sample in this case was a senior bio-weapons researcher in the US military by the name of Bruce Edwards Ivans.¹³¹ This finding has been debated by later inquiries, but considerable evidence still suggests that the ultimate source of the sample was a US military research facility.¹³²

Setting this issue aside, as Leitenberg points out, the Amerithrax episode is an outlier. “Without this event, and except for the Rajneesh salmonella incident,” he writes, “there would still be no evidence of the capability of a nonstate actor to produce a biological agent. There has also been no evidence uncovered to date of state assistance to a nonstate actor to produce biological agents.”¹³³

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ Clark, *ibid.*, at 170-171.

¹³¹ United States Department of Justice, “Amerithrax Investigative Summary,” (19 February 2010) <http://www.justice.gov/amerithrax/docs/amx-investigative-summary.pdf>.

¹³² See, e.g., the National Research Council, “Review of the Scientific Approaches Used During the FBI’s Investigation of the 2001 Anthrax Letters,” (Board on Life Sciences; Committee on Science, Technology, and Law; 2011) <http://dels.nas.edu/resources/static-assets/materials-based-on-reports/reports-in-brief/Anthrax-Report-Brief-Final.pdf>.

United States Department of Justice, “Amerithrax Investigative Summary,” (19 February 2010) <http://www.justice.gov/amerithrax/docs/amx-investigative-summary.pdf>.

¹³³ Leitenberg, *supra*, note 115, at 65.

Leitenberg concludes his survey of bioweapon events over the course of the century by stating:

Scenarios of national bioweapons exercises that place various bioweapons agents in advanced states of preparation into the hands of terrorist groups simply disregard the knowledge and experience that such groups would need to have in order to work with pathogens. [...] If and when a nonstate terrorist group does successfully reach the stage of working with pathogens, there is every reason to believe that such action will involve classical agents, without any molecular genetic modifications.¹³⁴

He conjectures that common misperceptions about bioterrorism result from the fact that “since the mid-1990s, the risk and imminence of the use of biological agents by nonstate actors and terrorist organizations – or bioterrorism – have been systematically and deliberately exaggerated.”¹³⁵ The culprits, in his view, are a “small group of vociferous proponents of ‘the bioterrorism threat’ [who have] obtained allies at the most senior levels of the executive branch and in Congress.”¹³⁶ While the proponents of the bioterror threat seek to encourage greater security around biomaterials, he suggests that state resources would be better used to prepare for more likely scenarios, such as a flu pandemic or other natural viruses.

One further notable aspect of Leitenberg’s analysis is his treatment of al Qaeda’s efforts to obtain biological weapons, and the threat posed by the group’s interest in bioterror.¹³⁷ The evidence suggests that two significant attempts were made. The first came to light in December of 2001, through a cache of papers discovered in an al Qaeda training camp near Kandahar. It contained copies of journal articles on bioweaponry, and a set of letters and notes authored by a Pakistani microbiologist in the mid-90s to Ayman al-Zawahiri (formerly bin Laden’s closest associate, and purported leader of al Qaeda at

¹³⁴ *Ibid*, at 66.

¹³⁵ *Ibid*, at 67.

¹³⁶ *Ibid*, at 67.

¹³⁷ *Ibid*, at 54-58.

present). The letters document a failed attempt to obtain samples of anthrax and other pathogens from the UK's Society for Applied Microbiology.

The second attempt involved the efforts of a Malaysian man, Yazid Sufaat. Working at a laboratory near Kandahar, Sufaat is alleged to have attempted to create anthrax for al Qaeda, in the period preceding his arrest in Malaysia in December 2001.¹³⁸ His expertise was limited, however, given that he possessed only a Bachelor of Science degree and had been a lab tech for a brief period in the Malaysian military. He might have worked periodically with one other Indonesian member of al Qaeda, but otherwise appears to have worked alone. He failed to procure an effective strain of anthrax.

Leitenberg explains that aside from these two episodes, the only other evidence of al Qaeda's efforts to obtain biological or chemical weapons were in fragmentary notes from a disk believed to belong to al-Zawahiri, covering a period in the late 90s. They indicate an interest acquiring nerve gas, and in finding people to assist with this, but suggest that no further steps were taken.¹³⁹

6.1.6 Skeptical perspectives on radiological and chemical terror

The argument against the likelihood or imminence of mass terror must also address the possible use of radiological and chemical weapons. For reasons to be explored, both weapons are more easily deployed than nuclear or biological weapons, but are much less

¹³⁸ For details of this episode, Leitenberg draws on *The 9/11 Commission Report* (the National Commission on Terrorist Attacks upon the United States; New York: Norton, 2004).

¹³⁹ Leitenberg, *supra*, note 115, at 60. In August of 2011, the New York Times reported that an al Qaeda-linked group in Yemen was found, by US officials, to be seeking to develop ricin "to be packed around small explosives for attacks against the United States." The report describes the group's efforts to create ricin from large quantities of castor beans. It also notes that "Senior American officials say there is no indication that a ricin attack is imminent, and some experts say the Qaeda affiliate is still struggling with how to deploy ricin as an effective weapon." It then proceeds to detail some of the many obstacles to deploying the poison on a large scale in various environments. See Eric Schmitt and Thom Shanker, "Qaeda Trying to Harness Toxin, Ricin, for Bombs, U.S. Says" (12 August 2011) *The New York Times*.

lethal in comparison. Also, on closer examination, the likelihood of causing “mass disruption” through the use of radiological weapons is much lower than many would suggest.

Recent work by John Mueller and Mark Stewart forms a basis for assessing the threat posed by chemical and radiological weapons.¹⁴⁰ In their view, both are often mistakenly conceived as “weapons of mass destruction,” and commonly assumed to pose a comparable danger to a nuclear weapon. But although these weapons can “cause problems, kill people and inflict damage, they can scarcely do so on a large scale.”¹⁴¹ Chemical weapons in particular “may have the potential, under the appropriate circumstances, for panicking people; killing masses of them in open areas, however, is beyond their modest capabilities.”¹⁴² An attack involving nerve, mustard, or sarin gas would require massive quantities (*i.e.*, tons rather than gallons) to pose a danger that extended beyond a square kilometer or a small urban space. Weather conditions would also easily diminish the effect.¹⁴³

Radiological weapons do, however, represent a special case. While they may be less likely to cause mass casualties (for reasons to be explored), they have the power to cause a great deal of fear, panic, and long-term disruption to land-use, with very serious economic consequences. They are also much less complicated to build and deploy than a nuclear weapon. Yet, a closer examination of the science involved suggests that there are *varying degrees* of probability involved in accomplishing varying degrees of destruction.

¹⁴⁰ *Terror, security and money*, *supra*, note 2.

¹⁴¹ *Ibid*, location 1,301, Kindle edition.

¹⁴² *Ibid*, location 1,312, Kindle.

¹⁴³ Mueller and Stewart cite biologist Mathew Meselson and the first Gilmore Commission report on this point. See Mathew Meselson, “The Myth of Chemical Superweapons,” *Bulletin of the Atomic Scientists*, April 1991: 13, and the Gilmore Commission, *supra*, note 6, at 28.

Thus, although a terror group can cause a great deal of disruption with a radiological weapon more readily than it can with a nuclear or biological weapon, it is still very challenging to do – and it becomes more challenging still, and thus less likely, to impose greater degrees of disruption.

Wirz and Egger define a radiological weapon as “any device that is designed to spread radioactive material into the environment, either to kill, or to deny the use of an area.”¹⁴⁴ Experts assume that terrorists would most likely attempt a radiological attack through the use of a “dirty bomb”, or a “crude device comprising conventional explosives such as TNT or a fuel oil/fertilizer mix laced with highly radioactive materials.”¹⁴⁵ The heat from the explosion would cause the radioactive materials to vaporize or aerosolize, and to spread easily and quickly over a potentially large space. Other methods of attack include dissemination through an “enclosed radiation source” left hidden somewhere in a large public building, or aerosolized or put into powdered form and placed within an air or water source.¹⁴⁶

Experts agree that apart from casualties caused by the explosive device, all but the largest radiological weapons would be unlikely to cause mass casualties. Mueller and Stewart go as far as to assert that radiological weapons “are incapable of inflicting much immediate damage at all.”¹⁴⁷ This is because the material cannot be dispersed in a way that forces victims to imbibe a lethal dose before leaving an affected area. It is therefore likely

¹⁴⁴ Wirz and Egger, *supra*, note 5, at 502.

¹⁴⁵ Michael Levi and Henry Kelly, “Weapons of Mass Disruption” (November 2002) *Scientific American* 77, at 78; see also Peter Zimmerman and Cheryl Loeb, “Dirty Bombs: the Threat Revisited” (January 2004) *Defense Horizons* 1, at 5.

¹⁴⁶ Wirz and Egger, *supra*, note 5, at 504.

¹⁴⁷ *Terror, security and money, supra*, note 2, at location 1,329, Kindle edition.

that “few, if any, in the target area would be killed directly, become ill, or even have a measurably increased risk of cancer.”¹⁴⁸

Wirz and Eggers suggest that where an explosive device is used in a radiological attack, the extent of the damage, and the size of the affected area, would depend on a number of variables, including “the means used to disperse the radioactive material, the quantity of radioactive material, the weather conditions and much more.”¹⁴⁹ The level of contamination “decreases with distance from ground zero [and also] decreases with time. [In addition,] weather conditions continuously remove radioactivity from the contaminated area, and [...] there is also the natural decay of the radionuclides.”¹⁵⁰

Speculating on the possible effects of a moderate to small sized dirty bomb Wirz and Egger write:

Mathematical models have shown that in the event of a dirty bomb attack we could expect a maximum dose rate of about 10 mSv/h at the explosion site.¹⁵¹ This value depends, of course, on the hypothetical parameters, such as activity, meteorological conditions and the amount of explosives. A person would have to spend one hundred hours in this course area to have a 5% likelihood of developing symptoms of acute radiation sickness. The radioactivity emitted by a radiological weapon is therefore unlikely to present a serious or acute health hazard.¹⁵²

Unfortunately, Wirz and Eggers do not cite the models they refer to, or specify the quantity of radioactive material involved in these calculations. Other experts suggest that the potential damage could be considerable if the bomb were large enough.

¹⁴⁸ *Ibid.* See also Wirz and Egger, *supra*, note 5, at 504; and Zimmerman and Loeb at 10.

¹⁴⁹ Wirz and Egger, *supra*, note 5, at 505-6.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.* Radiation dosages are measured in “sieverts” (“Sv”), after the Swedish physicist Rolf Sievert. “10 mSv/h” denotes a quantity of 10 milli-sieverts (“mSv”) per hour. To put this into context, a brain CT scan would yield 0.8 to 5 mSv, a chest CT scan 6 to 18 mSv. A fatal dose would involve between 4500-6000 mSv. See Van Unnik, J.G.; Broerse, J.J.; Geleijns, J.; Jansen, J.T.; Zoetelief, J.; Zweers, D., “Survey of CT Techniques and Absorbed Dose in Various Dutch Hospitals”, (1997) *The British journal of radiology* 70 (832), at 367–71.

¹⁵² *Ibid.*

Levi and Kelly have considered the possible damage of an explosive device containing 3,500 curies of cesium 137 – a very large sample, but one involving an amount that known to be “orphaned” in the former Soviet Union.¹⁵³ A bomb of this size could contaminate some 800 square kilometers:

The disaster would not be of Chernobyl’s magnitude; it would release less radiation overall, and none in the form of potent short-lived isotopes such as iodine 131. But its strategic placement would wreak havoc. Over an area of about 20 city blocks, there would be a one-in-10 increased risk of death from cancer for residents living in the area (without decontamination) for 30 years, a 50 percent increase over the background rate. A broader area of 15 square kilometers—varying from four to 20 square kilometers, depending on the weather—would be contaminated above the relocation threshold recommended by the International Commission on Radiological Protection and accepted by the NRC. If these standards were relaxed and the relocation threshold were the same as that used around Chernobyl, the area affected would still be roughly 100 city blocks. The property value of this area is estimated in the hundreds of billions of dollars.¹⁵⁴

Yet, this is an extreme scenario.¹⁵⁵ Is it any more or less likely than scenarios involving smaller amounts of material or a smaller explosive charge? The answer turns on a series of variables. In addition to the device used, weather, access to materials, and so forth, a key issue is how easy it is to *build* a radiological device.

Mueller and Stewart contend that radiological weapons are “easier to assemble than a nuclear weapon”, but that the “construction and deployment of one is difficult and requires considerable skill.”¹⁵⁶ Experts often point out the ready availability of radioactive materials – either among supplies or equipment stored in hospitals, universities, and industrial sites – and the difficulty of securing them. But as Wirz and Egger point out,

¹⁵³ Levi and Kelly, *supra*, note 145, at 80.

¹⁵⁴ *Ibid.*

¹⁵⁵ Zimmerman and Loeb, *supra*, note 145, at 10, offer similar speculation at the higher end: “It is unlikely that anything but a super-RDD will kill more than a few hundred Americans, but the task of cleaning up to currently acceptable levels of residual radiation will be enormous. There is not yet any technical solution other than razing structures and carting them away.”

¹⁵⁶ *Ibid.* Mueller and Stewart cite Levi and Kelly’s “Weapons of Mass Disruption,” *supra*, note 145.

“not all of these sources would be suitable for use in an RDD [radioactive dispersion device]. Most are far too weak to cause extensive damage. Furthermore, many radioactive sources are in metallic form and would not be dispersed very effectively by high explosives.”¹⁵⁷ Samples can certainly be obtained more readily than HEU or other fissile materials for a nuclear bomb, but for Wirz and Egger, building a radiological weapon “requires advanced know-how and planning, a very targeted approach and considerable expenditure.”¹⁵⁸ Levi and Kelly support this cautionary view:

Although they are relatively simple in principle, constructing and deploying one of these mechanisms is difficult to do. It is more complicated than wrapping stolen materials around a stick of dynamite. Such a clumsy weapon might only scatter large chunks of material, limiting the area affected and making cleanup easy. An effective dirty bomb is, however, much easier to assemble than a nuclear weapon, although it would still require considerable skill.¹⁵⁹

Once again, this does not mean that radiological terror is not likely. It suggests, rather, that it may be more complicated and thus *less likely* the further up the scale of complexity and destructive capacity one seeks to go. In short, scenarios that envision large swaths of New York or London rendered uninhabitable by a radiological weapon are possible, but much less plausible or likely than a smaller scale attack that renders a few square kilometers unusable.

It may be worth mentioning briefly that experts also agree that a number of “low cost, practical steps” can be taken to considerably reduce the threat posed by radiological terror, and to “minimize the effects if an attack should occur.”¹⁶⁰ These include stricter regulation and licensing of the trade and possession of such material, and tighter security standards for storage. Governments might also mandate that inspections be carried out

¹⁵⁷ Wirz and Egger, *supra*, note 5, at 503.

¹⁵⁸ *Ibid.*, at 503-4.

¹⁵⁹ Levi and Kelly, *supra*, note 145, at 78.

¹⁶⁰ *Ibid.*, at 81. See also the recommendations of Zimmerman and Loeb, *supra*, note 145.

with increased frequency and thoroughness; and that more investments be made in detection mechanisms for tracing stolen material.¹⁶¹ Levi and Kelly also propose “an extensive array of radiation-detection systems at key points such as airports, harbours, rail stations, tunnels, highways and borders.” By 2002, the US had begun to undertake initiatives of this kind in Boston, New York and Washington. Finally, they suggest, “routine checks of scrap-metal yards and landfill sites would also protect against illegal or accidental disposal of dangerous materials.”¹⁶² In short, the danger posed by radiological weapons may be managed by a more aggressive campaign to secure the possession, movement, and disposal of radioactive materials.

6.1.7 Conclusion to first half of chapter

I conclude this part of this chapter with the assumption that mass terror involving nuclear and biological weapons is extremely unlikely in the foreseeable future. While terror involving either weapon may be relatively simple in theory, their use would be fraught with a host of daunting challenges in practice. For this reason, they form no reasonable part of any pending or imminent threat to national security. I also assume that although chemical and radiological terror forms of terror are more likely to occur, catastrophic forms of attack involving either weapon are much less likely than is often suggested. These claims were advanced as an example of the kind of argument liberal jurists might make in mounting a direct challenge to common threat assessments about the likelihood of mass terror.¹⁶³

¹⁶¹ *Ibid.*, at 81.

¹⁶² *Ibid.*

¹⁶³ This is in distinction to argument made by Cass Sunstein, Cole and Lobel, others who rely on claims about psychological tendencies to inflate future probabilities based on threats that appear more vivid or plausible. See the discussion of Cole and Lobel’s *Less Safe, Less Free: Why America Is Losing the War on*

6.2 Why Current Threats Do Not Warrant a “Preemptive Turn”

The remainder of this chapter sets out the second part of an alternative blueprint for advocating reform. I will argue that in the absence of a threat of mass terror, or terror on a certain scale, the argument for a preemptive turn is implausible. Authoritarian legal measures are not reasonably justified. They should be repealed or abandoned as disproportionate and unnecessary.

The argument unfolds in three stages. I briefly identify strong and weak forms of the argument for a preemptive turn. I show that neither form of argument is plausible if one can assume the improbability of a future attack on the scale of 9/11 or greater. I then canvas evidence to support this claim. Future acts of terror, I will argue, are highly unlikely to exceed the scale of earlier attacks such as Oklahoma City or the Air India bombings (hundreds rather than thousands of casualties). Finally, I cite both the Oklahoma and Air India bombings to illustrate the point that terror on this lesser scale does not pose a significant threat to national security, and can be and has been properly dealt with by the criminal law.

6.2.1. Strong and weak forms of the argument for a preemptive turn

In Chapters 3 and 4, I canvassed beliefs about security and terror from politicians, scholars, and members of the public. I sought to establish that a certain assumption had gained currency after 9/11: namely, that the threat posed by terrorism had now become grave enough to warrant the use of extraordinary measures — or a larger shift toward a more preemptive approach in law and security. At this stage, however, it is important to distinguish two forms of this belief.

Terror (New York: the New Press, 2004), in Chapter 5, above. See also Cass Sunstein, *Worst Case Scenarios* (Cambridge: Harvard UP, 2009).

The stronger form holds that for various reasons, terror involving WMD has become an imminent possibility, which renders extreme measures necessary and reasonable. The weaker form holds that WMD may not be likely or imminent, but that terrorism after 9/11 has indeed become more of a threat, so much so that extraordinary, preemptive measures are necessary. Both forms of argument necessarily imply that terrorism in the near future poses a *significantly greater threat than that posed by earlier, large-scale acts of terror*. Greater in this case means either larger in scale or more frequent or both.

Evidence of the stronger form of the argument was canvassed in earlier chapters. For members of both the Bush and Obama administrations, and other security officials, al Qaida's potential use of WMD terror has played a key role in the claim that the threat this group poses is tantamount to war. Given the gravity of the threat, a series of preemptive measures is justified (targeted killing, indefinite detention without charge, among others). Similarly, for figures such as Richard Posner, John Yoo, Alan Dershowitz, and others,¹⁶⁴ the gravity of current threats warrants the use of torture, or at least cruel and unusual treatment, as part of a larger preemptive turn premised upon the need to avert catastrophe. In Canada, the strong argument for preemption can be traced in the rhetoric of Justice Minister Irwin Cotler, in submissions to parliamentarians during debates and reviews of the *Anti-terrorism Act*, and in surveys of parliamentarians and civil servants on security issues. It is also discernable in surveys of public opinion in both nations. As noted earlier, surveys over the course of the decade have established a correlation of belief in the pending threat of WMD terror and support for extreme measures.

¹⁶⁴ Other figures in this group would include Oran Gross, Mark Tushnet, Eric Posner, Adrienne Vermuele, and Michael Ignatieff. See discussion in Chapter 5, above.

Throughout this thesis, I have focused primarily on the stronger form of the argument. I have offered few examples of the weaker. This is due in part to the fact that examples of the weaker form are rarely expressed overtly. And this in turn may be due to the fact that people who express the weaker form of the argument have a vague idea about the nature of pending threats.

One notable example is the explanation offered by Canada's Minister of Justice, Anne McLellan, upon first reading of the *Anti-terrorism Act* in the House of Commons, in October 2001. In calling for more preemptive measures, she spoke of the world having "changed dramatically" on 9/11. She used the phrases "mass terror" and "mass destruction", and referred to the recent anthrax scare in the US. Yet she did not rest her argument for preemption on an explicit claim about WMD. Rather, she repeatedly characterized the pending threat in terms that suggested a possible repeat of 9/11:

The insidious nature of terrorism has dictated the need for new measures. These measures must have a preventative focus, because punishing terrorist crimes after they occur is not enough. Ladies and gentlemen, the way I very simply explain this is, if we don't stop the terrorists getting on the plane, it's too late.¹⁶⁵

And later on the same occasion: "We must be able to disable organizations before they are able to put hijackers on planes..." She envisioned, therefore, a form of terror not necessarily involving WMD, but still involving "mass destruction," possibly on the scale of 9/11.

McLellan's conception of the threat highlights an important point about the argument for preemption. It does not always rely on claims about the use of WMD. In other words, one might doubt the imminent use of WMD but still believe that current threats warrant a broader shift to a preemptive approach. And for those advocating

¹⁶⁵ Canada. Parliament. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*. (Meeting No. 29, October 18, 2001) 37th Parliament, 1st Session.

reform, the weaker argument for preemption is important to address because it is likely to be widely held. This is suggested by the public opinion polls cited earlier that note strong support in both the US and Canada for certain extraordinary measures, yet varying degrees of belief in the nature of current threats. To be sure, these findings can be explained by other assumptions and beliefs. (For example, one might support the torture of terror suspects out of an animus for them, or a belief that this would help to avert a future attack however serious it might be. This point is explored in the next chapter.) It should suffice at this point to note that whatever these supporting beliefs tend to be, the survey findings are also consistent with the logic that McLellan exemplifies. And it is in terms of this logic that McLellan and others have sought to justify the measures, publically and politically.

If one were to assume, then, that extreme measures were not warranted in the past, the belief that more extreme, preemptive measures are necessary today is likely to be justified – at least publically – by recourse to the claim that current threats are *significantly greater* than earlier threats. That is to say, both the stronger and weaker forms of the argument for preemption explored here imply a reliance on the belief that current threats are *qualitatively different* from earlier events. The difference is one that raises terrorism from a criminological problem to an issue of national security.

However, if one assumes, for the sake of argument, that the pending threat of terror is *not significantly greater* than it was before 2001, then both the strong and weak form of the argument for preemption are difficult to sustain. Put otherwise, if one can assume, again for the sake argument, that future attacks will only be on *the same scale and frequency* of those encountered in the past (*e.g.*, Oklahoma, Air India), then it becomes implausible to suggest that terrorism (a) poses a threat of a magnitude tantamount to a

war; (b) that it poses a significant threat to national security; or (c) that it justifies as *proportionate* the embrace of a range of preemptive, illiberal measures. All of this can be inferred from historical experiences of terror.

For example, throughout 20th century US history, a series of domestic acts of terror involving environmental, religious, and political groups have occurred — with varying degrees of seriousness. Yet even the most serious pre-9/11 incident was treated as a crime and seen as an anomalous event, portending no further *imminent* danger to the state. This was the Oklahoma City bombing of 1995, which caused 168 deaths and 680 injuries.¹⁶⁶ It also destroyed or damaged some 324 buildings and caused several hundred million dollars in damages. The event gave rise to various preemptive measures around federal buildings and embassies, and other changes in security protocol — but not a preemptive turn on the scale at issue after 2001. A similar point can be made about Canada's most serious historical encounter with terrorism. The Air India bombing of 1985 resulted in 331 casualties. But it was investigated and understood as a form of mass *murder*, not a threat to national security. It has also come to be seen as an anomalous event of a sort that is not *likely* to occur with any frequency.

Of course, one might object that invoking past events in this way is potentially misleading. In one sense, they demonstrate that acts of terror involving hundreds rather than thousands of casualties did not come to be viewed as acts of war or existential threats to national security. But after the trauma of 9/11, a wider public may be less inclined to agree — if they were to occur again or could be expected to occur soon. It may be that for at least a period after 2001, and possibly still, the memory of 9/11 has rendered North

¹⁶⁶ Eve Hinman and David J. Hammond, *Lessons from the Oklahoma City Bombing: Defensive Design Techniques* (American Society of Civil Engineers, 1997), at 1.

Americans less tolerant of the risk of *any* future terror attacks, whatever their likely magnitude or frequency.

Thus, an important counter-argument to address at this stage is that even if acts of terror are not likely to be greater or more frequent than they were before 2001, invasive measures might still be warranted as both a more effective tool of prevention and prosecution. In other words, it may be that for many people, extreme measures can be justified on the basis of a lower tolerance of the risk posed by terror, *even if the risk is no greater than it was before*. This may simply be one part of the indelible effect of 9/11 on North American attitudes about crime and security.¹⁶⁷

I concede the force of this argument. If we can assume that North Americans do in fact have a lower tolerance for the risk of terrorism in the wake of 9/11 (or at least a greater fear of it, as suggested by the surveys cited in Chapter 3), this certainly presents an important obstacle to arguments in favour of reform of illiberal security measures. I canvas in more detail this and other obstacles to reform in the Conclusion to this thesis.

However, a crucial aspect of the discourse in support of extreme measures, canvassed in Chapters 3 and 4, is that discussions of risk tolerance play no part in it. Nor does the argument for illiberal measures often rest on a claim that terror poses essentially the *same* threat as before 9/11. Rather, in many if not most cases of public advocacy for extreme measures, the argument assumes a familiar form: *i.e.*, because the threat of terror is much greater, and imminent, we need to resort to extreme measures. I am suggesting that for rights advocates to make a stronger case for reform, it is necessary to target *this* argument in particular – regardless of whether risk tolerance for terrorism may have

¹⁶⁷ I explore this point further in the Conclusion of this thesis, in relation to the work of David Garland, Jonathan Simon, and others.

diminished, or whether a case for illiberal measures can be made without recourse to a belief in growing threats. As I have laboured to demonstrate, the claim most often made in defence of illiberal measures is not only consequentialist in nature, but is also one that employs a very specific logic: *i.e.*, terror involving WMD or mass casualties makes illiberal preemption necessary.

To conclude this stage of the argument: if one can assume, as a fact, that future acts of terror will be infrequent and will involve tens or even hundreds of deaths, then the argument for a wholesale embrace of preemptive, illiberal measures becomes more difficult to sustain. Not impossible, but more difficult. This is because the argument for such measures is consistently made in reliance on a belief that current threats have come to pose a qualitatively greater risk to the public and the state than earlier ones. I turn now to the question: how can we be sure that future acts of terror *will* occur less frequently and be smaller in scale than 9/11?

6.2.2 Evidence about current and future threats

The short answer is that we cannot be sure. But the available evidence strongly suggests a very low probability that future acts of terror will be on a greater scale than pre-9/11 events, or that they will be more frequent. On this view, the events of 9/11 itself were profoundly anomalous rather than a harbinger of a growing threat.

Before moving on to the evidence in support of this view, one point about it should be noted. Scholars who take a skeptical view of the “growing threat” theory tend to rely on two kinds of argument. One is to suggest that fears of growing threats are rooted in human psychology. For example, in *Worst Case Scenarios* (2007), Cass Sunstein characterizes the pervasive tendency toward threat inflation in the US as a consequence of

“cognitive availability, probability neglect, and outrage.”¹⁶⁸ He explains that “[b]ecause the attacks of 9/11 are cognitively available and highly salient, many people believe that a future attack is likely. This idea in turn triggers strong emotions, causing many Americans to neglect the question of probability altogether as they focus on the nature of terrible outcomes. Public fear is heightened by outrage directed toward an identifiable perpetrator, Osama Bin Laden, and his allies.”¹⁶⁹ This line of argument calls our perceptions into question in important ways. Yet it does not address the core issue of whether the threat *is* greater. A second general approach tries to do precisely this. By focusing on evidence about terrorism itself, it offers a more direct or explicit case for why current threats are likely much less grave than many assume. As noted in Chapter 5, liberal jurists have tended to rely more on the first approach than the second. Yet, keeping with the spirit of part 1 of this chapter, I will attempt to demonstrate why *both* approaches are indispensable to building a more persuasive case for reform.

In a recent work, *Terror, Security, and Money* (2011), John Mueller and Mark Stewart undertake an extensive assessment of evidence relating to the current threat of terrorism in the US. Their goal is twofold. One is to offer the kind of risk assessment undertaken in the insurance industry. That is to say, they seek to quantify the probability of attacks both large and small, and the impact they would have in terms of lives and damage to property.¹⁷⁰ Second, they set out a cost-benefit analysis of the money spent and measures employed by the US Homeland Security, other departments — and by other nations including Canada, the UK, and Australia — in relation to the risks at issue.¹⁷¹ In

¹⁶⁸ Sunstein, *supra*, note 163, at 26.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Terror, security and money*, *supra*, note 2, at location 478, Kindle edition.

¹⁷¹ *Ibid.* The authors define risk as the sum of “the probability of a successful attack” multiplied by “losses sustained in the successful attack.” Kindle edition, location 482.

the US, the annual amount spent on homeland security since 9/11 would, in their view, be justified only if an attack that might have caused \$100 billion dollars in damage would have occurred roughly twice a year without the measures in place, or if a ten-kiloton nuclear attack were 17 percent likely to occur every year, or 85 percent likely over ten years. On the lower end, they suggest that in order to justify current expenditures, it would be necessary to thwart 1667 attacks on the scale of the attempted Time Square bombing of 2010, which would cause tens or hundreds of deaths, and damage in the hundreds of millions of dollars. Yet a closer look at the evidence suggests that the risk of further terror attacks has diminished — in terms of both frequency and potential magnitude.¹⁷² They are now in line with other mortality risks that we accept in other contexts, such as travel by car or plane.

To substantiate this, they begin by assessing the continuing threat posed by the “transnational terrorist adversary”. Drawing on studies of political Islam after 2001, they highlight a growing resistance to and unpopularity of al Qaeda and other radical groups in much of the Islamic world.¹⁷³ As they assert, “Islamists who are still willing to apply violence constitute a tiny minority”.¹⁷⁴ States in the region have demonstrated a willingness to cooperate with western nations in monitoring and investigating suspected terror groups.¹⁷⁵ Mueller and Stewart also assert that despite insufficient credit on this point, nations such as Sudan, Syria, Libya and Iran have made “diligent and aggressive” efforts against al Qaeda and its affiliates, given the threat they pose to those regimes. As a

¹⁷² *Ibid*, at location 1035.

¹⁷³ *Ibid*, at location 584. Mueller and Stewart draw here Fawaz Gerges, *The Rise and Fall of Al-Qaeda* (New York: Oxford UP, 2011) and Peter Bergen and Paul Cruickshank, “The Unraveling: The Jihadist Revolt against bin Laden” (11 June 2008) *New Republic*.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid*, at location 599.

result of this, and the US's own involvement in the region, large numbers of suspects have been arrested, detained, killed or otherwise deterred.¹⁷⁶

Evidence also suggests that much of the African and Asian terrorism and insurgency covered in the media and associated with al Qaida is in fact local in nature. Attacks from Morocco to Bali to Indonesia exhibit a similar tendency to involve local groups whose primary grievance is with regional governments and events.¹⁷⁷ Detention centres in Afghanistan are a reflection of this, containing very few foreigners, and most of them from Pakistan. In 2010, CIA Director Leon Panetta stated a belief that there may be only 60 to 100 members of al Qaida remaining in Afghanistan.¹⁷⁸ Yet, as Mueller and Stewart note, the group has been alienated by the Taliban, by every government in Africa and Asia, and probably has very limited funds. Citing an assessment by Mark Sageman, a former US intelligence agent in Afghanistan, Mueller and Stewart argue that what remains of al Qaida is likely “a few dozen individuals”, joined by “perhaps a hundred fighters left over from al-Qaeda’s golden days in Afghanistan in the 1990s.”¹⁷⁹ They may continue to hold training camps, but these are likely, in their view, to be “quite minor affairs.”¹⁸⁰ As the authors note, every terror attack linked to al Qaeda since 2001 appears to have been carried out by a group only tenuously related to the core group in the Afghanistan-Pakistan region.¹⁸¹

Beyond al Qaida, Mueller and Stewart argue that what remains of international terrorism has dwindled to “thousands of sympathizers and would-be jihadists spread

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*, at location 617.

¹⁷⁸ *Ibid.*, at location 650.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

around the globe who mainly connect in Internet chat rooms, engage in radicalizing conversations, and variously dare each other to actually do something.”¹⁸² Mueller and Stewart add that “the notion that they present an existential threat to just about anybody seems at least as fanciful as some of their schemes.” One fact in support of this is that in the entire decade after 9/11, not a single al Qaeda “sleeper cell” has been found in the United States.¹⁸³ Another fact is that Muslim communities in the US and other nations have effectively served as “an extensive antiterrorism surveillance force.”¹⁸⁴ A third fact relates to the nature of the handful of terror plots that have been thwarted in this period.

A closer look at two of these recent plots lends support for view that future attacks are likely to involve, as Brian Jenkins has put it, “tiny conspiracies, lone gunman, one-off attacks rather than sustained terrorist campaigns.”¹⁸⁵ Future attacks will probably continue to be carried out by less sophisticated, well-funded, or ambitious individuals or small groups. CIA Director Leon Panetta lent official recognition of this view when he asserted recently that the “lone wolf” terrorist has become America’s “main threat.”¹⁸⁶ But, as Mueller and Stewart argue, if recent cases can be taken as an indication, the gravity of the threat posed is relatively low. One plot involved a plan to place grenades in garbage cans at a shopping mall in Rockford, Illinois. FBI agents foiled it in its early stages by providing fake grenades and a fake gun to the suspect – in exchange for used stereo speakers. He could not afford the \$100 agents had requested.

¹⁸² *Ibid*, at location 698.

¹⁸³ *Ibid*, at location 702.

¹⁸⁴ *Ibid*, at location 763.

¹⁸⁵ Brian Jenkins, *Would-be Warriors: Incidents of Jihadist Terrorist Radicalization in the United States Since September 11, 2001* (Santa Monica, Rand: 2010), at 4; cited by Mueller and Stewart at location 768.

¹⁸⁶ *Terror, security and money*, *supra*, note 2, at location 763, Kindle edition.

The 2009 plot involving Najibullah Zazi is also instructive. The *New York Times* cited an Obama administration official to the effect that this was the “most serious” plot in the US since 9/11; that it marked an attempt by al Qaida to “carry out another mass-casualty attack in the United States”; and confirmed that the group continued to pose an “existential” threat.¹⁸⁷ As Mueller and Stewart explain, Zazi was a high school dropout, working in a donut shop in Manhattan. Having decided to set off a bomb in New York, he traveled to Pakistan and received training on bomb building from members of al Qaida. He then spent a year in New York trying to build the bomb. He was naïve enough to use stolen credit cards to buy material, setting off various security and surveillance traps that assisted authorities in foiling the plot. Notably, however, he never succeeded in building the bomb, despite several “frantic” attempts to communicate (on a tapped line) with sources in Pakistan.¹⁸⁸

After exploring the recent fortunes of al Qaeda and its offshoots, Mueller and Stewart then draw on various statistical data about the chances of being killed in a transnational terror attack. They assert that “the total number of people killed in the years after 9/11 by Muslim extremists outside of war zones comes to some 200 to 300 per year.”¹⁸⁹ This includes high profile attacks in Bali (2002); Saudi Arabia, Morocco and Turkey (2003); the Philippines, Madrid, and Egypt (2004); and in London (2005).¹⁹⁰ Another set of data is provided by the Global Terrorism Database, compiled by the US National Consortium for the Study of Terrorism and Responses to Terrorism. It has tracked some 80,000 terrorist incidents worldwide from 1970 to 2007. The vast majority

¹⁸⁷ David Johnston and Scott Shane, “Terror Case is Called One of the Most Serious in Years” (25 September 2009), cited by Mueller and Stewart at location at 785.

¹⁸⁸ *Terror, security and money, supra*, note 2, at location 785, Kindle edition.

¹⁸⁹ *Ibid.*, at location 850.

¹⁹⁰ *Ibid.*

of the 3,292 US fatalities relate either to the 9/11 attack or the Oklahoma City bombing. A third set of indicia involves a table Mueller and Stewart have constructed that lists nine plots that US authorities claim to have foiled from 2001-2007. (They include the “shoe bomber” plot of December 2001, a plot in May of 2003 to bomb the Brooklyn Bridge, and one in June of 2007 to explode fuel lines at JFK airport.) Mueller and Stewart estimate that each of the plots would have resulted in between 100 to 200 lives lost, with the exception of the JFK plot, which might have lead to as many as 500 deaths. The point, therefore, is that the magnitude of 9/11, in terms of casualties, was extremely anomalous in the context of both American and worldwide terror.

Mueller and Stewart conclude, in a larger sense, that acts of terror will continue. But in terms of probability, frequency, and magnitude, the danger they present is low enough to constitute an acceptable risk — or a comparable risk to those we tolerate in other facets of life. One can therefore infer from their work, and the evidence they gather, a strong likelihood that future acts of terror will be infrequent and on a comparable scale to attacks preceding 9/11.

6.2.3 Security without the fear of imminent mass terror

If we can assume, then, that 9/11 was a profound anomaly, and that future attacks will be less serious or frequent, then extreme measures become harder to justify. This is because without relying on some version of the “greater threat” theory, the claim that terror poses a threat to national security becomes less plausible. On this view, it is best approached as a criminological problem. Preemptive measures should play a large role in this, but they need not violate core human rights.

To bolster these arguments, liberal jurists might make use, once again, of the examples of Air India and Oklahoma City. Both events still offer a number of valuable lessons, even if our risk tolerance for terror has been lowered by 9/11, or if that event would lend a different sense to these events, if they occurred today.

Both events mark tragic failures on the part of law enforcement. But the failure to prevent them does not change the limited nature of the threat they posed – and were seen to pose – to the legal, social, or political fabric of either nation. They were properly perceived as isolated events, involving small groups; and in the wake of each event, the immediate threat had subsided. The groups were investigated and prosecuted for criminal offences, rather than being dealt with as enemy combatants who warranted the use of military force. In the case of the Oklahoma City bombing, the investigation and prosecution was swift and more or less conclusive (ending with convictions of the principal conspirators, including Timothy McVey and Terry Nichols). The investigation and prosecution of Air India suspects was a much lengthier affair, fraught with challenges. But the shortcomings of the process have not served as a basis for arguing that risks remain to be addressed which pose a significant or existential threat to national security.

The events were also exemplary in a further sense. They each served as a catalyst for incremental changes to law and security, rather than a wholesale shift to a more invasive, preemptive approach. Arguably, this incremental approach was a more appropriate and proportionate response. This can be inferred from the long-term societal response to the events. They have each come to be seen as anomalous, unlikely to recur, and essentially criminal in nature – best responded to through incremental improvements to security.

In other words, there has been a public expectation that by applying lessons learned from these events – as well as other, more recent attacks, including 9/11 – the risk of future attacks of the same nature can be lowered. And many of the lessons to be gleaned from these events entail measures that are not invasive or in gross violation of human rights.

The recent Air India Inquiry, for example, has recommended various steps to make Canadian air travel safer.¹⁹¹ Changes to security around federal buildings and other measures following the Oklahoma bombing have been noted above. And following 9/11, a series of less invasive changes to security practices have tabled or implemented, including some recommended by the 9/11 Commission. These include better information sharing among the FBI, the CIA, and other agencies; measures to make airplane hijackings less likely, such as locking cockpit doors or using “sky marshals”; and, greater regulation of the storage, transfer, or sale of sensitive materials.¹⁹² These changes do not make us absolutely safe, but contribute in countless ways to making a repeat of 9/11 or an attack on that scale much less likely.

Thus, in contrast to Air India and Oklahoma City, September 11 has been the catalyst for both incremental security changes and a broader shift toward a post-liberal preemptive paradigm. This is understandably due in part to the unprecedented scale of the attack, but also in part to the psychology of threat perception and the politics of security (in ways explored earlier). Central to both is a belief that 9/11 marked the beginning of a larger ongoing threat to national security.

¹⁹¹ “Report of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182” (Ottawa, 2010), online: <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/default.htm>.

¹⁹² See the extensive series of recommendations in Chapters 12 and 13 of the *9/11 Commission Report*, *supra*, note 138.

The goal, then, of restoring the currency of liberal legality will depend on persuading a wider public that the belief in a larger, ongoing threat should be questioned – and showing *how it can be*. Invasive security measures are not necessary, proportionate or reasonable because the present risk posed by terrorism is not tantamount to an existential threat to national security. This is because future acts are not likely to be *significantly* greater than those before 9/11, for a host of reasons that include technological difficulty, the evolving geo-politics of Islamic radicalism and terror, and the demise of al Qaeda or analogous groups.

6.3 Conclusion

This chapter set out to provide a blueprint for an alternative approach to advocating reform of illiberal counter-terror practices. It was premised on a direct challenge to two assumptions. One is that terrorism after 9/11 has become much more serious, possibly involving the imminent use of WMD. The other is that due to the gravity of this threat, a new, more preemptive approach to law and security is in order.

The objective of part one was to demonstrate that both nuclear and biological terror are highly unlikely at the hands of a non-state actor, given the multitude of obstacles to overcome. This part also set out to show how a similar argument can be made against the likelihood or potential for serious damage caused by chemical and radiological terror.

The second half of the chapter argued that the case for a deeper preemptive turn in the law cannot be plausibly sustained without relying on a belief in the growing seriousness of the threat of terror. It canvassed evidence to support the view that future acts of terror would very likely be no greater than earlier acts, in terms of both frequency and magnitude. It concluded by suggesting that liberal jurists might make a stronger case

for reform by drawing on lessons of earlier terror incidents of a lesser nature than 9/11. In those cases, terror was best approached as a crime rather than a military threat, and best responded to through incremental changes consistent with core human rights.

7 Conclusion

This thesis has sought to make three general contributions to the literature and debate on counter-terror law in North America. The first relates to the concept of legality. Chapter 2 argued that a large measure of political and juridical acceptance of controversial measures brought about after 9/11 can be understood to represent a shift in the cultural currency of liberal legality to authoritarian legality. The remainder of this thesis has been concerned with the question of how this new form of legality arose and became entrenched, and the problem of liberal reform. I have suggested that for much of the post-9/11 period, the argument in favour of extraordinary measures has been largely premised on a belief in the imminence of mass terror. I then highlighted the general tendency in liberal scholarship and advocacy to avoid challenging or unsettling this belief. I argued that if this had been done, the case for extreme measures might have been more effectively resisted – and might still. Chapter 6 sought to model the kinds of arguments that might be used for this purpose.

A number of issues raised by my inquiry remain to be addressed. Is it correct to assume that during the decade after 9/11, a fear mass terror was indeed a primary or determining factor in the embrace of extraordinary measures?¹ And, if the fear of mass terror did play a key role in the period, and mass terror itself is unlikely, what reforms to counter-terror law should be made on this basis? Finally, how might jurists, lawmakers and activists make use of the form of argument modeled in this text in future moments of perceived crisis?

¹ In canvassing this question, I draw on the indispensable feedback I received at presentations to the faculties of law at the University of British Columbia, the University of Victoria, and Thompson Rivers University in February 2012.

7.1 Issues and Concerns

7.1.1 Can mass terror not be caused by simple methods?

Chapter 6 offered an overview of skeptical opinion on the likelihood of three forms of terror occurring in North America any time soon:

- a. large-scale nuclear or biological terror;
- b. less complicated forms of radiological attack that might cause significant disruption; and
- c. conventional bombings or hijackings leading to large numbers of casualties (1000s rather than 10s or 100s).

The chapter argued that attacks of the first form are highly improbable given the number and complexity of the obstacles that a non-state actor would confront. Radiological terror is more likely, but would entail fewer casualties. It could cause large-scale damage, but to do so, the attack would have to involve more material, more sophisticated equipment, favourable weather conditions, and significant expertise. It would thus involve a large enough set of variables to render the worse case scenario (a good portion of Manhattan uninhabitable for decades) much more unlikely in practice than it might seem in theory. Finally, the chapter surveyed evidence to demonstrate that all of the conventional bomb plots that were foiled in Canada and the US in the post-911 period would likely have been, at most, on the order of the Oklahoma City bombing or less (10s or low 100s rather than 1000s of casualties).

Yet, this analysis still leaves two important concerns outstanding:

(i) There may be less sophisticated ways of causing mass casualties or mass disruption.

A large-scale attack might be accomplished in one of two ways. One would involve the use of extremely simple methods – for example, a number of Molotov cocktails set off in a large subway station at rush hour, or a suicide bomber with a conventional bomb entering a crowded shopping mall cafeteria. Casualties in either case could conceivably run into the thousands. A second possibility would involve two or more such attacks carried out simultaneously, causing additional casualties, along with widespread panic and disruption. Entire cities might be voluntarily deserted, with catastrophic effects for the nation as a whole.

In short, a counter-argument to the model set out in chapter 6 is that neither mass terror nor mass disruption depends on the use of sophisticated materials, equipment, or methods. As 9/11 itself proved, an enormous amount of damage can be caused with just a set of box-cutters and a dozen or so willing individuals. Given this fact, one might wonder how we can be certain that future attacks are likely to remain on the smaller scale encountered in pre-9/11 attacks – especially given the grander ambitions of contemporary terror groups? What is the point of advocating a form of critique that focuses primarily on technologically challenging forms of mass terror?

The response to be inferred from the model set out in Chapter 6 is threefold.

First, the form of critique set out here need not be restricted to technologically advanced forms of mass terror. Indeed, the thrust of the critique is not technological but *critical*. The primary aim is to encourage a broader critical spirit when confronted with claims about pending threats – of whatever kind. The critique neither begins nor ends with an assertion that all forms of mass terror are equally unlikely or altogether impossible. It loses none of its force by conceding that some forms of terror are more likely than others, and that anything is possible. Yet it cannot anticipate every

hypothetical. Instead, it seeks to encourage a skeptical approach to all hypotheticals, and perhaps especially *the simpler ones*.

Indeed, for any given scenario that purports to establish the possibility of inflicting catastrophic damage (human or otherwise) from seemingly simple technical scenarios, the larger lesson from the literature explored in chapter 6 is that a skeptical second look will almost always result in a more modest assessment of the *actual* damage *likely* to be accomplished in practice. Put otherwise, the approach here takes, as its point of departure, the common sense view that if it were so easy to carry out many of these seemingly more dangerous yet simple scenarios, why are they not happening more often?

To be clear, then, it is not possible to anticipate the myriad hypotheticals that might make terror on the scale of 9/11 seem just as plausible today as it was surprising to us then. The goal here, however, is not to refute every such possibility, but to gain a *critical perspective* on them. I seek to emphasize the point that in most cases, regardless of how simple a scenario seems, the apparent danger it poses may begin to diminish upon a closer examination of the science and technology involved.

Thus, having raised the possibility of a relatively simple form of mass attack (Molotoff cocktails in the subway, or multiple and simultaneous low level attacks in crowded spaces), it may be worthwhile to take a final opportunity to exemplify the critical approach I advocate. Would it be *easy* for a lone terrorist or a group of them to cause large-scale casualties (*i.e.*, several hundred or thousands) by deploying a simple or moderate-size bomb in a busy urban space? Set aside for the moment the fact that *it has never occurred anywhere in the world*, despite a history of some 80,000 terrorist incidents

globally from 1970 to 2007.² In theory, it certainly sounds plausible that by tossing two or three Molotov cocktails into a busy New York or Toronto subway station at rush hour, over a thousand people might die. The point, however, is not whether it is possible, but whether it is *likely*. On this view, we can readily see that while there would certainly be tens or even hundreds of casualties, it is impossible to be reasonably certain that an attack of this kind would *likely* result in something greater. This is because a host of contingencies would come into play; for example, the size of the explosion, the architecture of the station, the scale and duration of any resulting fire, the number of exits, the quality of the emergency response, and so forth.

Perhaps a more effective way to respond to this hypothetical is to consider the real world case of the London bombings of both July 7th, 2005 and the failed attempt to carry out additional bombings on the 21st. These were attempts to do precisely what the earlier hypothetical contemplates: to cause mass casualties and disruption using conventional explosives, in multiple attacks. Three key lessons can be gleaned. First, although four explosions were set off in busy urban spaces (three packed subway cars and a double-decker bus on a downtown street at rush hour), the number of casualties (56 people including the four bombers) was serious though moderate in relation to the scale of 9/11.³ Second, although this was a multiple attack, which did cause a great deal of panic and disruption, it did not amount to a lasting, significant, or “existential” threat to the British state or English society. It certainly instilled a great deal of fear and terror. But, as with the

² See Mueller and Stewart’s use of the Global Terrorism Database, maintained by the US National Consortium for the Study of Terrorism and Responses to Terrorism, in *Terror Security and Money: Balancing the Risks, Benefits and Costs of Homeland Security* (Oxford: Oxford UP, 2011), at Kindle location 877. The database records statistics relating to some 80,000 terror incidents around the world between 1970 and 2007. In terms of casualties the four most serious attacks in this period were 9/11 (2,975, excluding relief workers); Air India (329); the Lockerbie bombing in 1988 (270); and Oklahoma City (165).

³ UK House of Commons, “Report of the Official Account of the Bombings in London on 7th July 2005” (HK 1087; The Stationary Office, 2006).

Oklahoma City and Air India bombings, the events were soon seen as anomalous and isolated. They were followed by a number of Parliamentary inquiries and administrative assessments of investigative techniques, emergency response measures, and other preventive tools.⁴ Several reforms have been proposed with a view to improving security and diminishing the odds of another event of this scale, or an attack on a larger scale in the near future.⁵

A third point to draw is that the failed bombings of July 21, 2005, were an important illustration of how even plots involving simple methods can easily unravel in practice. The goal, once again, was to set off a series of explosions almost simultaneously – three on subway trains and a fourth on a bus. But in each case, only the detonator caps fired.⁶ Some have speculated that this was due to the low quality of the hydrogen peroxide used in the bombs.⁷ A fifth bomber claims to have had a change of heart, aborting mission moments before he was about to enter the subway.⁸ A massive manhunt followed, resulting in the apprehension, within eight days, of all four main suspects, in addition to a number of others involved.⁹

One can speculate about how much more destructive or disruptive this attack might have been had it succeeded. Two rounds of large, coordinated attacks, so close in

⁴ See, e.g., “Report of the Official Account of the Bombings”; Intelligence and Security Committee, UK Parliament, “Report into the London Terrorist Attacks on 7 July 2005” (CM 6785; The Stationary Office, 2006); H.M. Coroner (UK), “Coroner’s Inquests into the London Bombings of 7 July 2005” (Office of H.M. Coroner, May 2011); Department for Communities and Local Government, “Improving Opportunity, Strengthening Society: One Year On – A progress report on the Government’s Strategy for race equality and community cohesion” (DCLG Publications: West Yorkshire, 2006).

⁵ See the recommendations in the final chapters of both the Intelligence and Security Committee report, *ibid*, and the report of the Coroner’s Inquests, *ibid*, at 17-61.

⁶ A single death was caused by an asthma attack triggered by smoke from one of the explosions.

⁷ US Department of Homeland Security, “Mass Transit System Threat Assessment” (DHS, Transportation Security Administration Office of Intelligence, February 2008), at 5.

⁸ Duncan Gardham, “July 21 ‘Fifth Bomber’ Jailed For 33 Years” (20 November 2007) *The Telegraph*.

⁹ “Police Hold Four 21 July Suspects” (30 July 2005) *BBC News*.

time, certainly would have been unprecedented in the Anglo-American world, and the fear and terror to follow would have been considerable. Understandably, even the failed attacks of the 21st continue to haunt our imagination. And the fact that they failed does not prove that they were unlikely to begin with. Yet, their failure does demonstrate that even a technically simple form of attack is subject to a host of contingencies, which affect the likelihood of carrying out the attack as planned.

The London bombings can therefore be read in one of two ways: as an example of how technically easy it was to have caused a great deal of damage, and possibly a lot more; or as proof of how even a relatively simple plan can be foiled by one of many possible practical impediments one might encounter. Regardless of which reading one prefers, one fact remains. Bombings of this kind, and the history of terrorism generally, suggest that the goal of inflicting *casualties* on the order of 9/11, or greater, is much more challenging and much less likely than many hypothetical scenarios would suggest. This is confirmed by the examples of the Madrid bombings of 2004 and the Mumbai attacks of 2008. In March of 2004, Islamic militants inspired by al Qaeda set off 10 bombs on four trains in metropolitan Madrid, killing 191 people.¹⁰ The Mumbai attacks involved 11 coordinated shootings and bombings by Pakistani militants that left 174 people dead.¹¹ These events lend a sense of how truly anomalous 9/11 was in terms of casualties.

However, these events give rise to a second concern:

(ii) *Even if casualties in post 9/11 attacks have been much lower, injuries have not.*

¹⁰ Paul Hamilos, "The Worst Islamic Attack in European History" (31 October 2007) *The Guardian*.

¹¹ Another recent example of a multiple simultaneous attack resulting in far fewer casualties than 9/11 are the Mumbai attacks of 2008. These involved 11 coordinated shootings and bombings that left 174 people dead. Delnaaz Irani, "Surviving Mumbai Gunman Convicted Over Attacks" (3 May 2010) *BBC News*. The Madrid train bombing

Casualties in three of the most notorious major attacks in the post-9/11 period may only have been in the 10s or 100s, but the injuries were much greater: roughly 300 in Mumbai, 700 in London, and 1,800 in Madrid. Taking these facts into account suggests that, in a global context, attacks on the scale of 9/11 over the course of the decade that followed were not quite so improbable. It suggests instead that if terrorists could inflict close to two thousand injuries so soon after 9/11, using entirely conventional means, the danger of mass terror remains plausible to this day – and without reliance on complex technology or practical means. Other foiled bomb plots in this period involving the “Toronto 18”, New York’s Times Square, and airports in Los Angeles in New York, among other places, add further support for this.¹²

Put in another way, the argument against the imminence of mass terror in this text has been premised in large part on a distinction between the likelihood of causing mass *casualties* and mass *injuries*. But clearly, mass terror involves both. Even if only 54 people died in the London bombing, or 191 in Madrid, there were still an enormously large number of people injured – rendering the social impact of the events quite comparable in nature to what Americans experienced on 9/11. On this view, mass terror has not seemed anomalous over the past decade, nor tied in any overt way to sophisticated weaponry.

How, then, could advocates of liberal reform have plausibly argued, earlier in the decade, for reform of extraordinary measures on the basis that mass terror – on this broader definition – was implausible? Indeed, it was occurring every two to three years, until 2008. And how can they still make this argument if it remains entirely plausible that homegrown terrorists in Canada or the US could inflict over a thousand injuries in a

¹² See the discussion of these plots in chapter 6.

conventional bombing at any point in the near future? In short, what makes an event of this nature *unlikely*?

This is indeed a powerful argument – one that rights advocates need to confront if they seek to offer a critical view of the “growing threat” theory. I would propose a threefold response.

First, a relatively low casualty but high-injury attack in North America in the near future remains entirely plausible in the hypothetical. But once again, the question is whether in practical terms, an attack of this nature is *likely* at some point soon in a given place. Within the decade following 9/11, there was certainly a pattern of terror in a global context, which included major plots in Canada and the US. But this does not equate to a high likelihood that the individual plots would succeed – on the scale intended. On the contrary, the high ratio of successful plots to foiled plots suggests otherwise. For the reasons canvassed above – in chapter 6 and in the discussion of the foiled London bombing of July 21/05 – conspiracies to carry out large-scale attacks will always be subject to a host of contingencies that cast their probability into doubt.

A second point is that for various reasons – cultural, political, and economic – terror plots are more or less likely to succeed in different places and times. For example, suicide attacks have become less likely in Israel in the wake of the Second Intifada (roughly 2005) following a series of measures by the state of Israel. A similar argument might be made about how expenditures and measures involving the RCMP and CSIS helped to foil the Toronto 18 plot, or render it less likely to succeed. It would also seem likely that at least some of the success that US investigators have enjoyed in foiling recent plots at early stages has been the result of greater expenditures, measures, and powers brought about after 9/11. In other words, large-scale terror attacks are not uniformly

probable in every context. The failure to carry out another attack in North America in the past decade is due to several factors (canvassed in part 2 of chapter 6), but also at least in part to the increasing effectiveness of domestic counter-terror efforts.

A third point is a qualification to this last point. Counter-terror efforts might have become more effective with time, but this does not mean that all expanded powers for countering terrorism are necessary, effective, or justified. In chapters 2 to 4, I canvassed some of the debates surrounding claims about the role that information obtained from torture has played in helping to foil later US terror plots. Much has been written that casts the efficacy of extreme measures into doubt.¹³ I set this question aside for the moment to note that the investigations of all the recent US and Canadian plots canvassed in Chapter 6 are understood to have relied on conventional methods, such as warranted surveillance, informers, and non-coerced interrogations. One can therefore argue that improved counter-terror efforts have contributed in some measure to lowering the probability of large-scale terror – without having to endorse extreme measures.

In summary, multiple attacks on a lower scale, or attacks involving simple methods, may certainly cause a great deal of fear, disruption, and damage. Yet, for reasons canvassed above, large-scale attacks remain highly improbable – and not because extraordinary measures have made us safer.

7.1.2 Other causes for the embrace of authoritarian legality

In Chapters 2 to 4, I sought to show that a fear of mass terror played a key role in legal and political justifications for extraordinary measures. I have inferred from this that reforms are more likely to be made if a wider public, together with lawmakers and jurists,

¹³ See, e.g., David Cole and Jules Lobel's *Less Safe, Less Free: Why America is Losing the War on Terror* (New York: the New Press, 2007).

can be persuaded that current threats are not qualitatively different from those we faced before 9/11. Yet this proposition was not established in the earlier chapters. It can be challenged by a number of alternative accounts.

In what follows, I briefly explore two, and then attempt to defend the centrality of the catastrophic imagination as a primary basis for authoritarian legality.

7.1.2.1 Racism, xenophobia, or fear of a foreign other?

Sherene Razack, among others, has suggested that something more than a calculus of potential risks posed by terrorists is at play in public support for authoritarian measures in North America.¹⁴ I draw on her work briefly here as an example of a broader critical approach that seeks to situate the politics of counter-terrorism within a larger set of sociological or cultural trends.¹⁵ In Razack's view,

Three allegorical figures have come to dominate the social landscape of the 'war on terror' and its ideological underpinning of a clash of civilizations: the dangerous Muslim man, the imperiled Muslim woman, and the civilized European. [...] These figures animate a [contemporary] story about a family of white nations, a civilization, obliged to use force and terror to defend itself against a menacing cultural Other. The story is not just a story, of course, but is the narrative scaffold for the making of an empire dominated by the United States and the white nations who are its allies. Supplying the governing logic of several laws and legal processes, both in North America and in Europe, the story underwrites the expulsion of Muslims from political community, a casting out that takes the form of stigmatization, surveillance, incarceration, abandonment, torture, and bombs.¹⁶

For Razack, wide public support for authoritarian measures in western nations after 9/11 forms part of an earlier history of Anglo-American or European racism and imperialism.

¹⁴ Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008).

¹⁵ Other lines of inquiry to consider here include Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Stanford: Stanford UP, 1998); Edward Said, *Orientalism* (Vintage: New York, 1979) and *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World* (Vintage: New York, 1997); and Judith Butler, *Precarious Life: Powers of Mourning and Life* (Verso: London, 2004) and *Frames of War: When is Life Grievable?* (Verso: London, 2010).

¹⁶ *Casting out*, *supra*, note 14, at 5.

This can be gleaned from the fact that contemporary support for extreme measures coincides with a rise of anti-Muslim sentiment that engages an older set of “orientalist” stereotypes of violent and radicalized Muslim or Arab men.¹⁷ On this reading, neither the support for the measures, nor the public’s indifference to the state’s failure to take accountability for serious violations of human rights, should come as a surprise. This is because the measures at issue are not primarily motivated by fears of a catastrophic attack. For the most part, they are impelled by an evolving set of beliefs about the nation-state itself – one in which “a national community [is] organized increasingly as a fortress, with rigid boundaries and borders that mark who belongs and who does not.”¹⁸ These beliefs both draw upon and maintain “old notions of the nation as a racial kin group”, and are a symptom of the larger-scale persistence of a “racially ordered world.”¹⁹

Support for authoritarian measures is not therefore grounded on assumptions about the magnitude of the threat, but on a “denial of a common bond of humanity” among racial groups. It also involves a “logic of exception” and the use of camps and other spaces in which “rightless peoples” are being separated and abandoned.²⁰ An argument for reform that targets beliefs about the nature of outstanding threats would be misguided. It would fail to see the indifference or support for extraordinary measures as a reflection of a deeper set of racist attitudes and beliefs.

A still further challenge to my argument is posed by a version of the same criticism, without attributing an underlying racial motive. The wider public, on this view, is

¹⁷ *Ibid.*, at 6.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

indifferent to the measures because they affect so few people.²¹ The measures were therefore entrenched not because of public support for the “growing threat” theory, but because of public indifference to the government’s actions. And given the majority’s indifference to the cause of a tiny minority of people affected, it is not likely to mobilize in support of change – whatever arguments are offered in favour of it.

Before responding to these points, I will consider one further set of alternative accounts.

7.1.2.2 Counter-terror law as part of an older “culture of control”

Chapter 2 referred briefly to the work of contemporary criminologists David Garland, Lucia Zedner, and Jonathan Simon. Each has identified trends in law, politics, and culture that pre-date 9/11 and serve as important antecedents to authoritarian legality. Support for extraordinary measures is seen here as involving much more than a set of beliefs about the potential threat posed by terrorism. The beliefs are a contemporary form of a much older and deeper cultural phenomenon – which cannot be easily addressed by dealing with only one of its more recent manifestations.

The reader may recall that, for Garland, the fear of violent crime has served as a “prominent cultural theme” since roughly the 1970s.²² It gave rise to “a settled assumption on the part of a large majority of the public in the US and the UK that crime rates are getting worse, whatever the actual patterns, and that there is little public confidence in the ability of the criminal justice system to do anything about this.”²³ Law and policy have moved further away from a sympathetic view of “the delinquent as a

²¹ I credit Professor Robin Elliot for raising this point.

²² David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001), at 10.

²³ *Ibid.*

disadvantaged, deserving, subject of need”, and replaced this with “stereotypical depictions of unruly youth, dangerous predators, and incorrigible career criminals.”²⁴ This has enabled a deeper shift toward a more controlling, punitive, authoritarian style of law and government on a range of matters pertaining to crime and security. Garland described this shift in a passage written just before 9/11. It shows how the groundwork for a transition from a liberal to an authoritarian form of legality was already firmly in place:

There [has been] a relaxation of concerns about the civil liberties of suspects, and the rights of prisoners, and a new emphasis upon effective enforcement and control. The call for protection *from* the state has been increasingly displaced by the demand for protection *by* the state. Procedural safeguards (such as the exclusionary rule in the USA and the defendant’s right of silence in the UK) have been part-repealed, surveillance cameras have come to be a routine presence on city streets, and decisions about bail, parole or release from custody now come under intense scrutiny. In these matters the public appears to be (or is represented as being) decidedly risk-averse, and intensely focused upon the risk of depredation by unrestrained criminals. The risk of unrestrained state authorities, of arbitrary power and the violation of civil liberties seem no longer to figure so prominently in public concern.²⁵

Thus, the cultural logic for a wider public acceptance of extreme measures was embedded well before 2001, and a key part of this was a growing risk-aversion to violent crime. In light of this diminished tolerance for violence, it would seem futile for rights advocates to quibble about the likelihood of mass terror if significant future acts of terror cannot be ruled out altogether. This inference is bolstered by the fact that increasingly, over the past three decades, North Americans have tended to value their security, however vaguely understood, over their liberty *regardless of evidence that violent crime has diminished*.

Jonathan Simon and Lucia Zedner provide further corroboration of the depth and intractability of these trends. For Simon, a major obstacle to reform of authoritarian measures is the degree to which a punitive, risk averse, victim-centered thinking has

²⁴ *Ibid.*

²⁵ *Ibid.*, at 12.

transformed both local and national politics in the US, along with prevailing styles of lawmaking. From the Johnson administration onward, Simon argues that to be elected, presidential and gubernatorial candidates have had to demonstrate a solidarity with victims, a punitive spirit, or an effectiveness in an earlier role as either a prosecutor or a legislator of pro-prosecutorial law.²⁶ A punitive, authoritarian style of lawmaking has become prevalent, marked by a sense of the crime victim as the “dominant model of the citizen”.²⁷ For Simon, the goal of catering to the victim’s interests has become central not only to criminal law and policy, but also to the very “mission of representative government” itself. For this reason, the style of lawmaking in the “war on terror” was to a large extent less a response to claims about growing threats and more a continuation of the approach taken in the “war on crime.”

British criminologist Lucia Zedner offers further insight into these trends. For Zedner, recent counter-terror measures are part of a larger and earlier shift toward a pre-emptive or what she calls a “pre-crime” society.²⁸ Rather than having to wait for serious threats to materialize, law enforcement agencies are now permitted to employ a wider range of precautionary measures. These include “anti-social behavior orders”, “travel restriction orders”, and “control orders” against terror suspects (pursuant to the *Prevention of Terrorism Act* 2005). Less emphasis is placed on the goals of “social prevention” or the task of “identifying the fundamental causes of social disorder and sexual and political violence.”²⁹ These are displaced by “a move towards secondary

²⁶ Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford UP, 2007), location 629, Kindle edition.

²⁷ *Ibid.*, at location 175.

²⁸ Lucia Zedner, “Seeking Security by Eroding Rights: The Side-stepping of Due Process”, in Benjamin J. Goold and Liora Lazarus, eds., *Security and Human Rights* (Oxford: Hart Publishing, 2007).

²⁹ *Ibid.*

prevention [or] a focus on forestalling the risk posed by known or suspected offenders”.³⁰ For Zedner, then, pre-emptive control measures in criminal law, and the logic to support them, are not a consequence of 9/11. Both are best understood as facets of a deeper embrace of a precautionary, risk-averse approach that stems from a larger set of fears than terror alone.

In summary, the view from contemporary criminology suggests that even if large-scale terror attacks can be shown to be improbable, a good portion of the public would still support a compromise of civil liberties because the risk of at least some form of terrorism remains. The fact is that for much of the public in developed western nations, security has become a major preoccupation.³¹ The fear that drives the desire for greater security, harsher penalties, fewer liberties may be inchoate, irrational, and mostly imagined. But rights activists cannot easily counter it. The project of reform is therefore much more complex and daunting than the model in Chapter 6 would suggest.

7.1.3 Two responses:

7.1.3.1 First response: conceding obstacles

The arguments canvassed in the previous section are complementary. They expose further layers of the cultural logic in support of authoritarian legality. These in turn serve as major obstacles to reform that liberal advocates will need to overcome. But the prospect of overcoming them should not be the only measure of the merits of any given approach to reform. Some arguments for reform might be more persuasive than others, despite the

³⁰ *Ibid.*

³¹ Ulrich Beck, *Risk Society: Towards a New Modernity* (London: Sage Publications, 1992).

fact that certain obstacles render the prospect of meaningful reform in the short term unlikely.

One response to these arguments, then, is to simply concede them. A widespread animus for a foreign other, or an increasing “culture of control” may indeed be obstacles to reform of counter-terror law and practice. In this case, the model set out in chapter 6 should be qualified in the following way: While it may offer the basis for a more persuasive case for reform than some earlier approaches, it may be no more effective in advancing the cause of reform – at least in the short term.

7.1.3.2. Second response: official reasons matter

Yet, one reason to be optimistic about the utility of the model set out in chapter 6 is that it aims to address the *explicit* and official justification consistently given for extreme measures. Put otherwise, although the assumptions and beliefs explored above form an essential part of the cultural context for recent measures, none of them appear explicitly in public policy discussions around national security. As canvased in chapters 2 to 4, the single recurring claim among politicians, jurists, and security experts is that illiberal measures are necessary due to a change in the nature of the threat that terror poses. And the claim is specific: threats of unprecedented gravity oblige us to revisit older ideas about absolute or non-derogable rights, due process, and accountability, to allow for greater discretion, force, and secrecy.

Therefore, while racism or xenophobia, or facets of a prevailing “culture of control” may inform authoritarian measures to some degree, the logic by which they have been *officially* defended has been consistent with what I have called the catastrophic imagination. And it remains so over a decade later. Thus, whatever other grounds there may be in support of extreme measures, the official version serves as a crucial set of beliefs

to challenge. And to the extent that there is a *public* (non-academic) debate about the measures going forward, it will not likely be focused on larger abstract trends, such as a “culture of control,” or an “orientalist” tendency in relations with Arab or Muslim populations. The argument in support of extreme measures has instead been – and will likely continue to be – *practical, empirical, quantitative* and *qualitative*. It stands to reason that an effective way to respond to such claims is to address them directly.

7.2 Recommendations that flow from this research

7.2.1 Reform of counter-terror measures

What changes to counter-terror law should be made on the basis of the finding in chapter 6 that future acts of terror in North America are likely to be no greater in scale or frequency than those before 9/11?

As a general proposition, any measures that mark a clear departure from liberal legality should be reassessed. If a case cannot be made for them without recourse to claims about the imminent possibility of mass terror, they should be rescinded or abandoned. What follows is not an exhaustive or detailed account, but an overview of some of the more salient measures that might be reformed and how.

Suggested changes would include:

7.2.1.1 Reinstating absolute or non-derogable human rights

The use of targeted killing, or drone strikes, should be exceptional rather than routine. It should be permitted only in strict conditions of necessity and proportionality, and be subject to the oversight of an independent and impartial tribunal. The criteria for inclusion on a list of targets should be made public, and the decision to carry out a killing

should be reviewed independently *before* it takes place – unless strict criteria of temporal imminence are satisfied. The test upon review for authorization to carry out a killing should function in a manner similar to the test for a search warrant.³² A tribunal should decide whether the evidence provides reasonable and probable grounds to believe that a target is directly involved in a specific plot or a criminal act which poses an imminent danger to human life – defined as “substantially likely to occur in the near future,” rather than “possibly occurring at some point in the near future”. A second part of the test should ask whether the suspect can be otherwise apprehended without undue risk to the lives or safety or others. This review may take place in secrecy, but not necessarily. Justified exceptions to the need to seek prior authorization should be similar to those allowing for the use of deadly force in conventional policing. Officers may use such force in the course of their duty where suspects pose an *immediate* risk of death or serious bodily harm to the officers or to those around them, and the killing is necessary in self-defence or the defence of others.

Other extreme practices should also be prohibited, including torture, rendition, and coercive interrogation, or the use of information obtained in the course of them. Also, the *Suresh* exception should be overturned. (This allows courts in extraordinary cases to

³² In a response to Attorney General Eric Holder’s March 2012 speech on targeting killing at Georgetown Law, David Cole points out that US citizen Anwar Al-Awlaki had been on a “kill list” for almost two years prior to his assassination. Cole writes: “surely the minimal burden of making one’s case to an independent judge in camera would be worth the time and effort required. Notice and an opportunity to be heard may not be realistic, but Holder did not explain why it would be impossible for the executive to make its case to an independent judge, much as it does for “foreign intelligence” searches and wiretaps under the Foreign Intelligence Surveillance Act. We have long recognized that those charged with law enforcement or security are at risk of overestimating their own certainty, and have therefore required that the government obtain a warrant from an independent judge before conducting a search, unless there is not time to do so. If we require such process even for the search of a backpack, shouldn’t we demand at least as much before the President orders the non-battlefield killing of a human being?” David Cole, “An Executive Power to Kill?” (6 March 2012) *New York Review of Books* (NYR Blog), online: <<http://www.nybooks.com/blogs/nyrblog/2012/mar/06/targeted-killings-holder-speech/>>

defer to the Minister's discretion to deport a person despite the risk of torture upon return to their country of origin.)

The practice of indefinite detention without charge on secret evidence should cease – in all its forms. This could be done by imposing a strict limit on the length of administrative detention in whatever form it assumes – for example, the detention of foreign terror suspects under the *National Defence Authorization Act of 2012*, or under Canada's security certificate regime in the *Immigration and Refugee Protection Act*.³³ After a substantial but limited period of time – six months to a year – a detainee should either be charged with a criminal offence or released.

If charged criminally, the accused ought to receive *full disclosure* of all relevant evidence in the case against him. If the court grants the state's request to maintain secrecy over certain evidence, and fair trial rights are substantially impaired as a result, a judicial stay should be mandatory. (This is in contrast to the current provision in the *Canada Evidence Act*, which gives judges the *discretion* to grant a stay where fair trial rights are violated.³⁴) The Supreme Court of Canada's decision in *Charkaoui*, recognizing the concept of a "substantial substitute" for disclosure (special advocates) in security certificate cases, should be overturned. In a liberal conception of legality, there can be no "substantial substitute" for disclosure, because there can be no substitute for knowing the *specifics* of the case to meet.³⁵ (Put another way, one cannot know "the case to meet" without "knowing the specifics" since the two cannot be distinguished.) Similar changes should be made to afford full disclosure to detainees seeking *habeas corpus* in US military detention cases, or to accused persons in trials held by US military tribunals.

³³ See the discussion of each of these acts in Chapter 2.

³⁴ Section 38.14 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5.

³⁵ This point is explored in more detail below.

At this point in time, there can be no plausible “security” justification for refusing full disclosure of evidence in cases where the state seeks a life sentence or the death penalty on the basis of evidence gathered over a decade ago. For more recent cases, where a plausible claim about privilege may be made, the state ought to strike a balance between disclosure and prosecution. That is to say, it should seek to prosecute terror suspects – or persons it deems dangerous – using whatever evidence it can afford to disclose for whatever conviction that may support. What ought to be abandoned is the view – expressed by President Obama in April of 2009 with respect some 50 Guantanamo detainees and still current – that certain persons are too dangerous to release but not indictable or triable, due to concerns about tainted evidence, a lack of evidence, or a reluctance to disclose. If there is evidence to believe a person to be dangerous, that person should be tried for an offence such as conspiracy or attempt, and otherwise released.

7.2.1.2 Raising thresholds for granting privilege and lawful surveillance

The reader will recall from chapter 2 that the *Anti-terrorism Act* of 2001 amended the *Canada Evidence Act* to allow the government to assert privilege over “potentially injurious information” or “sensitive information.” It also allows the executive to second guess or trump the court’s decision by issuing a certificate that prevents disclosure in cases where this was ordered. New categories of privilege, along with the power to issue a certificate, should be abolished.

The use of privilege in litigation might also be reformed, in both Canada and the US, by the exercise of less deference on the part of the courts. In the various tort actions for state complicity in torture currently under way, US and Canadian courts should fashion a higher standard for applying the state secrets or privilege doctrines. This would serve to counteract the present tendency, on the part of both governments, to invoke

privilege primarily as a shield from accountability and transparency in cases involving state complicity in serious rights violations.

Chapter 2 surveyed changes to US surveillance law after 9/11. These included the Attorney General's order permitting secret wiretapping of solicitor and client relations, and the expansion of the authority to issue warrants under both the *Wiretap Act of 1968* (for warrants in ordinary criminal cases) and the *Foreign Investigations Surveillance Act of 1978*. The changes allow for secret surveillance on lower thresholds, over a wider range of territory, and over any medium. When surveying these measures, I made the point that many of them individually are not inconsistent with liberal legal principles, but together, they contribute to a broader shift toward an authoritarian legal framework. The question of how to reform these measures to bring them into closer conformity with liberal legality is beyond the scope of this discussion. Suffice it to say that certain features of these new laws are justified and consistent with liberal legality. These would include the grant of warrants to carry out surveillance over a wider area, involving various new media, or pertaining to persons whose identity is unknown. But liberal legal principles would support a return to higher and clearer standards for deciding when to grant a warrant, what its purpose or object should be, and how long it should last. In short, tests for granting warrants should function in closer conformity with the standards that apply in conventional criminal search warrants (usually: "reasonable and probable grounds to believe that a crime has been committed or will be"), which are meant to safeguard liberal expectations of privacy and dignity.

7.2.1.3 Codifying rules for compensation

This point is closely related to the suggestion above that courts should exercise less deference in granting privilege in tort actions involving victims of torture or cruel and

inhumane treatment. Greater judicial oversight of privilege is not enough. Just as both Canada and the US have passed legislation in recent years in support of victims of terror,³⁶ so too should both governments pass law that addresses the position of innocent victims of counter-terror measures. The US has enacted legislation providing a basis for torture victims to sue *foreign* individuals or governments in tort.³⁷ But both governments should assist victims of torture or cruel treatment by passing law that does two things: enable litigants to hold domestic officials (or the state itself) liable in tort, and provide a basis for finding in favour of plaintiffs in cases where state secrecy would otherwise serve to prevent redress or accountability.

Jasminka Kalajdzic has proposed that section 38.14 of the *Canada Evidence Act* be amended to extend to civil trials a parallel form of relief allowed for in criminal cases (*i.e.*, an acquittal where a fair trial is impaired by secrecy).³⁸ More specifically, the section might be “extended to empower civil trial judges to find in favour of a plaintiff where the claim of national security privilege frustrates the litigation.”³⁹ Kalajdzic also notes that a similar provision was contemplated in a bill before the US congress in 2009, which did not pass but might still be tabled.⁴⁰ In light of a finding of privilege in favour of the state, the *State Secret Protection Act* would have allowed a court to find in favour of a party on a

³⁶ See bill c-10, 41st Parliament, 1st session: the *Safe Streets and Communities Act*, which contains provisions to enact the *Justice for Victims of Terrorism Act*. See also *USA PATRIOT Act*, Title VI: *Providing for Victims of Terrorism*, 115 Stat. 272 (2001).

³⁷ See the *Torture Victim Protection Act* (102nd Congress) H.R. 2092.

³⁸ Jasminka Kalajdzic, “Access to Justice for the Wrongfully Accused in National Security Investigations” (2009) 27 Windsor Y.B. Access Just. 171, at 204.

³⁹ *Ibid.*

⁴⁰ *State Secret Protection Act of 2009*, H.R. 984 (111th); cited in Kalajdzic at 204.

factual or legal issue, exclude evidence, dismiss a claim or counter-claim, or make any “appropriate orders in the interest of justice”.⁴¹

7.2.2 Which measures should be kept?

The model set out in chapter 6 also supports keeping in place a number of less invasive but effective *preventive* measures. These include laws and regulations meant to safeguard sensitive sites and materials, and their transport and trade.⁴² Greater surveillance, tracking, and restrictions on access and use of nuclear, biological, or radiological materials and sites can be easily justified, given the danger at issue. It is precisely through the effective regulation of these materials that the danger they pose can be managed and significantly reduced.

The same argument extends to the practice of information sharing among government agencies and with other nations – a practice that has increased considerably since 2001. While there is certainly a risk of sharing faulty information, or enabling access to personal information too widely and too readily, those risks can be addressed through practical improvements and safeguards.

In short, the model set out in chapter 6 supports the reform of pre-emptive measures that amount to gross violations of liberal legal principles. It does not, however, preclude all pre-emptive measures *per se*. A pre-emptive approach is necessary and prudent. But I join many other rights advocates in suggesting that this does not have to mean that core human rights or liberal legal principles should be dispensed with.

⁴¹ *Ibid*, section 7(d).

⁴² The *Public Safety Act* (2002) made a number of amendments to various acts for this purpose including the *Explosives Act*, R.S.C., 1985, c. E-17; the *Hazardous Products Act*, R.S.C., 1985, c. H-3; the *Radiation Emitting Devices Act*, R.S.C., 1985, c. R-1; and to the *Biological and Toxin Weapons Convention Implementation Act*, S.C., c. 15, s. 106.

7.3 How this research might be applied by lawmakers, jurists, and rights advocates

This thesis has focused in large part on the case for and against extreme measures. Yet the entire debate has unfolded against the backdrop of a much larger and older set of problems. These include the questions of how to better conduct threat assessments, and make law and policy, in times of perceived crisis or “moral panic.”⁴³ Pointing to these larger problems lends a sense for the possible future relevance of my research, or its relevance to topics other than counter-terrorism and national security. In this final section, I suggest three ways in which the approach to rights advocacy presented in this text might be used to promote a more careful, considered approach to lawmaking in moments of perceived crisis.

7.3.1 Intervening at the legislative and policy-making stages

Over the course of chapters 3 and 4, I sought to make clear that in the period after 9/11, lawmakers and security officials often invoked the growing threat of terror, or the use of WMD, when making the case for extreme measures. But in the course of my research, I came across few if any clear examples of occasions in which a claim as to the catastrophic nature of pending threats was followed by a call for contrary opinion. Thus, throughout the better part of the past decade, politicians, officials, and experts in the security field had frequently made statements in parliamentary or congressional hearings and debates, and in speeches or media appearances, in which the public was asked to accept at face value the validity of claims about the catastrophic nature of pending threats. In much of this discourse, often no effort was made to seek a balance of opinion, and for

⁴³ Stanley Cohen, *Folk Devils and Moral Panics*. (St Albans: Paladin, 1972); Stuart Hall, *Policing the Crisis: Mugging, the State and Law and Order* (London: Macmillan Press, 1978).

the most part, neither the media nor the academic or expert community helped to raise a public expectation that there was a balance to be sought. The most vocal experts on current threats – Harvard’s Matthew Bunn, Graham Allison, and others – tended only to bolster the validity of a belief in the undeniable likelihood of a possible mass terror attack. There was, in short, no discernable public trace of a contrary assessment – especially in the places where it mattered most: the discourse of the legislature and the executive.

This points to the most conspicuous and potentially critical space for more effective advocacy in defence of rights when law is being made in times of crisis. Rights advocates might be more effective in these moments by using a form of argument that they have not consistently employed in these spaces. That is to say, when speaking in legislative hearings, debates, or in the media, rights advocates have often tended to focus – at least in the field of counter-terrorism – primarily on ways in which the proposed measures will violate constitutional rights and principles, and why this ought to be avoided.⁴⁴ Yet they might make an even stronger case in these moments by explaining, if possible, that extreme measures are unnecessary because the threats that are said to justify them have been overstated and are unlikely. In the post 9/11 period, liberal jurists and activists generally fell short of this approach by limiting their practical critique of extreme measures to the *investigative* or *preemptive* merits of “coercive interrogation”, indefinite detention, and other measures. Advocates generally argued that such measures are less effective than many assume. But, as the survey in chapter 5 has sought to demonstrate, the argument was rarely tied to a critique of the nature of the threat itself. Extending the argument in this way might render the case against a proposed set of invasive measures

⁴⁴ See, e.g., the British Columbia Civil Liberties Association’s submissions to Parliament at the time the *Anti-terrorism Act* was tabled in the fall of 2001: “Anti-Terrorism Act: written submissions to House of Commons Standing Committee on Justice and Human Rights on Bill C-36”, online: <www.bccla.org/othercontent/01antiterrorismsub.pdf>. See also Ateghah Khaki, “The Patriot Act, 10 Years Later” (24 October 2011) *The American Civil Liberties Union*.

more forceful by provoking members of the public to question the need for the measures at a more fundamental level.

One important caveat to this suggestion is that it is best suited to cases where the threats that serve to justify invasive measures are indeed overstated or unlikely. Threat inflation is certainly not unique to the discourse around terrorism. But that discourse may be unique in terms of both the scale of the threats invoked in defence of invasive measures, and the extent of those measures. By contrast to this, many of the threats invoked in the near future as a rationale for employing invasive measures may well be less striking, or less likely to engage the public imagination with the same force.

One example of this is the threat to public safety that serves as a basis for “lawful access” provisions in the realm of cyber security. Governments are now beginning to insist that much greater surveillance of online activity and identity is necessary on the basis of the threat posed by pedophiles, members of organized crime, and terrorists who seek to exploit online anonymity to shield their activity.⁴⁵ The fear invoked here is less one of a pending catastrophe of existential import for the state and more a kind of growing menace of concerning though moderate proportions. (The Canadian government has not, to this point, explicitly tied the threat of *mass* terror to its arguments for lawful access provisions.)

My research may have less direct relevance to cases of this kind – *i.e.*, where laws are proposed in response to less extreme threats. Yet, it may still serve as a useful example of an approach to rights advocacy that seeks to engage a spirit of technologically informed skepticism. This will be useful to the defence of rights wherever claims are being made

⁴⁵ See, for example, Public Safety Canada’s press release rationalizing the tabling of bill c-30, 41st Parliament, 1st session: “Harper Government Introduces *Protecting Children from Internet Predators Act*” Public Safety Canada, online: <www.publicsafety.gc.ca/media/nr/2012/nr20120214-eng.aspx?rss=true>.

about new threats that technology makes possible, and new measures that are purported to be necessary in response.

7.3.2 Interventions in constitutional litigation:

A largely unspoken but central assumption that runs through all major post-9/11 decisions of the Supreme Courts of Canada and the United States that touch on counter-terrorism is that the threat of terror has become so grave that a much greater degree of deference to the executive on national security matters is now warranted. The assumption takes a different form in the US and Canadian cases, but in each context, it remains unquestioned. Calling the belief in a “grave threat” into question, or making it a more central issue in future litigation, is one way that right activists might undermine the court’s rationale for assuming an excessively deferential posture to the executive in times of perceived crisis.

As a qualification to this suggestion, I note that in US counter-terror litigation, judicial deference may be much more difficult to oppose – and not only for sociological, historical or political reasons, but for a more explicit legal reason. As the reader will recall from chapter 2, in cases dealing with the rights of Guantanamo detainees, and US citizens held as enemy combatants, the US Supreme Court’s approach was largely framed by reference to the 2001 passage of the “Authorization to Use Military Force.”⁴⁶ The AUMF serves as a legal basis for approaching the issues before the court in terms of the law of war. Thus, the assessment of the constitutionality of habeas corpus claims by Guantanamo detainees, or the validity of the military tribunals scheme under which they are to be tried, has all proceeded upon the assumption that the nation is at war. This

⁴⁶ See discussion in Chapter 2 of *Hamdi et al. v. Rumsfeld, Secretary of Defence, et al*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); and *Boumediene v. Bush* 476 F. 3d. 981 (2008).

assumption rests, in turn, on ideas about the scale and gravity of the threat that al Qaeda poses – a point explored in chapter 2, with reference to the text of the AUMF itself. With the passage of the *Defence Authorization Act of 2012*, the AUMF has been effectively renewed.⁴⁷ Future litigation dealing with counter-terror measures will therefore proceed upon the assumption that the US is still at war, and that war-like measures are justified against non-state actors and individuals. Litigants challenging the validity of these measures are thus effectively precluded, for at least the short-term, from arguing that the US is no longer at war, or that the president lacks the authority to employ extreme measures. A key issue for constitutional litigants in the short term is whether they can distinguish, in the eyes of the court, the threat that individual detainees are said to pose from the larger, but increasingly more amorphous threat posed by groups such as al Qaeda and its affiliates.

In Canada, where there is no equivalent to the AUMF, the Supreme Court has been less overt about its assumptions in relation to the threat posed by terror, or the extent to which these assumptions warrant greater deference to the executive.⁴⁸ Yet in *Charkaoui*, this logic comes close to the surface. A brief return to this case will lend a sense of how deeper assumptions about threats help to shape outcomes, and how the assumptions might be targeted to resist those outcomes.

The reader will recall that in *Charkaoui*, the Court finds that the security certificate scheme violates the *Charter's* guarantee of the right to liberty and security of the person, because the scheme allows for indefinite detention (pending deportation) on secret

⁴⁷ See discussion in Chapter 2.

⁴⁸ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248; and *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350.

evidence. The lack of full disclosure violates the right to a fair procedure, which is an essential part of the constitution's protection of liberty and due process. The question at this point was whether the violation could be justified as a "reasonable limit" on the rights in question. McLachlin C.J. suggested that while violations of the rights to liberty and security of the person – rights widely understood to be the most fundamental of all *Charter* rights – "are difficult to justify ... [n]evertheless, the task may not be impossible, particular in extraordinary circumstances where concerns are grave and the challenges are complex."⁴⁹ The court then applied the *Oakes* test to assess whether the violation could be justified. It found that it could not be justified because, in the court's view, there was another way of structuring the certificate regime to allow for a less serious violation of the right to disclosure (*i.e.*, the use of "special advocates"). Upon the court's recommendation, Parliament has amended the scheme to allow for the use of special advocates, and thus what was otherwise a serious violation of the most serious of *Charter* rights is now good law.

The point, however, is that the central question in this case was effectively decided by the larger terms in which the court chose to frame the case. The central question was whether there could be a "substantial substitute" for disclosure in a process that leads to one's indefinite detention without charge. The Court's answer in the affirmative (special advocates who see the secret evidence but conceal it from the detainee) follows somewhat predictably from the assertion that a violation of the right to liberty and security of the person can be justified in "extraordinary circumstances where concerns are grave and the challenges are complex". After framing the inquiry in these terms, the question is no longer whether there *can be* a substitute for disclosure in a system that remains faithful to

⁴⁹ *Charkooui, ibid*, at paragraph 66.

liberal legal principles. The question, rather, is how to fashion this substitute, on the assumption that a departure from liberal principles is necessary. Indeed, it is precisely because concerns here are “grave” and circumstances “extraordinary” that a “substantial substitute” *must* be found. Assuming the need for a substitute, the court does not find one, it settles for one.

Another approach to this case, and to future litigation in this field, would be to challenge the state’s (or, in this case, the court’s) framing of the case by asking: are the present circumstances truly extraordinary and grave? And can a link be drawn between these larger “extraordinary circumstances” and the threat posed by the detainees before the court? Or would it not make more sense to suggest that if there is evidence to support the view that detainees pose a substantial danger to public safety, they should be charged with an offence or released (if they cannot be deported within a reasonable period)?

The point, in other words, is to reject the claim commonly made after 9/11 that there are grounds for indefinite detention where information or intelligence raises concerns about a person that may not support a criminal conviction (on proof beyond a reasonable doubt). This was another key assumption that followed from the Court’s framing of the issues in *Charkaoui*. The decision is premised on an acceptance of the claim that, given the extraordinary circumstances, intelligence that falls short of evidence for a criminal conviction can, in some cases, make it necessary to hold a person indefinitely, pending deportation. Yet, there is a viable alternative. Its plausibility rests, however, on one’s belief in the existence or absence of “extraordinary circumstances.”

The criminal law allows for temporary detention (pre-trial) where the court is satisfied, on a balance of probabilities, that a person is *substantially likely* to reoffend or

otherwise interfere with the administration of justice.⁵⁰ A similarly more stringent test could be fashioned for prolonged administrative detention in the immigration context. Instead of asking whether detainees pose a “danger to the security of Canada” – a rather vague test for issuing security certificates⁵¹ – the question for the court in cases where detainees have been held for longer than a period of months should be whether they pose a significant threat to public safety.

In short, those involved in constitutional litigation might more effectively resist the judicial tendency to be deferential to government in times of perceived crisis by foregrounding the question of pending threats.

7.3.3 Rights advocacy among NGOs, scholars, and activists.

In Chapter 5, I sought to identify three common approaches to rights advocacy among NGOs, activists, scholars, and jurists. In many cases, advocates would emphasize the currency and compatibility of the older rights framework with the current threat environment, and urge governments and lawmakers not to depart from it (the “Ottawa Principles”, the 2009 ICJ Commission Report). Another approach is to catalogue the abuses in comprehensive, investigation-based reports (Human Rights Watch, Amnesty International, the International Committee of the Red Cross), which are meant to demonstrate the excessive, disproportionate, and unjust quality of many of the measures. Lastly, advocates have often argued that many of the more serious measures were ineffective tools of counter-terrorism and thus unnecessary.

⁵⁰ This is the ‘secondary ground’ for detention at a bail hearing under section 515(10)(b) of the *Criminal Code of Canada* (R.S.C., 1985, c. C-46).

⁵¹ Section 34 of *IRPA*, which works together with section 77 (providing for the issuing of certificates on grounds of ‘inadmissibility’). See the discussion of the scheme in Chapter 2.

What advocates have argued much less often is that the threats that form a basis for the measures are overstated or unlikely. In future efforts by these groups, the persuasive force of rights advocacy would be improved by a more explicit challenge to some of the more ambitious claims made about pending threats to national security. Advocates need not make an extensive or decisive case against the prospect of mass terror. Simply *engaging* the question – what is the true extent of the possibility of mass terror? – would change the tenor of the debate around extreme measures considerably.

Rights advocates might begin to do this by becoming more conversant with the critical literature around threat assessments. If legal scholars, jurists, and spokespersons for rights organizations were to invoke some of these critical perspectives in the course of their work, a larger public might soon come to appreciate at least the debatable or unsettled quality of many the claims around WMD use and mass terror. In short, it would contribute to a more informed public and scholarly discussion of the nature of outstanding threats and proportionate responses.

7.4 Conclusion:

A key argument throughout the modern history of authoritarian government is that today's emergency is different and that extraordinary measures are justified. With the death of bin Laden and al Qaeda in evident decline, the sense of emergency is receding, or becoming more difficult to sustain. Yet states continue to rely on a pending sense of menace to justify the emergency apparatus. The task for rights advocates moving forward is to expose this gap in rhetoric and reality, and to make the case for a return to a more robust form of the rule of law.

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