The Harbinger Theory

HOW THE POST-9/11 EMERGENCY BECAME PERMANENT AND THE CASE FOR REFORM

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Contents

1

Introduction

SINCE THE TERRORIST attacks on the United States in September 2001, North American law has been transformed in ways previously unimaginable. Measures that had once seemed extraordinary or even unthinkable in sophisticated Western democracies have now become permanently ensconced in our legal systems. Laws now authorize, and courts have affirmed the constitutionality of, indefinite detention without charge on secret evidence, mass secret surveillance, and a vastly expanded scope for the assertion of state privilege. The U.S. Congress has acquiesced in the President's claim of authority to carry out targeted killing of American citizens. Perhaps more strikingly, from a pre-9/11 perspective, large portions of the U.S. and Canadian public support many of these measures.

What seems just as striking as the nature of the shift is the sense of its possible permanence. Acting on powers conferred by Congress days after 9/11, the President continues to hold 149 detainees at Guantanamo on secret evidence, with an intention to imprison 48 "high value" detainees indefinitely and without charge.[1] Revelations of mass secret surveillance of telephone and Internet communications of unsuspecting civilians on an unprecedented scale are met with assurances by security officials of the legality and propriety of the measures, and acquiescence by a larger public.[2] The President continues every month to authorize scores of drone strikes of persons he alone deems to pose an imminent danger to the United States, asserting the power to target U.S. citizens without charge or judicial oversight, and to do so,

[1] Charlie Savage, *The Future of Guantanamo*, N.Y. TIMES, Aug. 31, 2014, and *US Government Releases Names of Indefinite Guantanamo Detainees*, jurist.org, June 19, 2013.

[2] *See* discussion of sources in Chapter 3.

if necessary, on American soil.[3] Canada has seen a similar entrenchment of powers to detain indefinitely without charge, to assert greater state secrecy, and to conduct new forms of secret surveillance.[4] Attempts to hold officials in both nations accountable for involvement in torture, rendition, or other violations of core human rights continue to be hindered by assertions of state privilege, with no change likely in the foreseeable future.[5]

How did this transformation occur? Was it simply an extension of an increasing "culture of control" or a trend toward greater "securitization" in North America that began two or three decades before 9/11?[6] Or has the embrace of extraordinary measures since 2001 been marked by the prevalence of a new and unique form of reasoning about law and security? And how will it end?

This book seeks to shift perspective in debates about counterterrorism measures in the post-9/11 period by revisiting the conceptual framework by which many extraordinary measures were initially justified and have now come to be entrenched. The book argues that we cannot begin to undo the many facets of the permanent emergency until this framework is better understood and arguments for reform are crafted to address it more effectively.

The central contention of this book is that in the wake of 9/11, a range of extraordinary measures have come to be entrenched in North American law largely as a consequence of a wider cultural and political embrace of what can be called the harbinger theory.[7] At the core of the theory is the assumption that 9/11 was not a profoundly anomalous event in the history of terror but the harbinger of a new order of terror—giving rise to the belief that at some point in the near future, an attack might occur in a large North American city on a scale similar to or greater than 9/11. More specifically, the theory assumes the form of a belief that al Qaeda, or an affiliated or analogous group, may soon make use of a weapon of mass destruction (WMD), with cataclysmic or possibly "existential" consequences for the state, or that terrorists without WMDs may soon carry out an attack on the scale of 9/11 or greater. Either form of attack would entail thousands or more casualties rather than tens or hundreds, as in earlier events (the Air India bombing, Oklahoma City), lending the prospect of terrorism a qualitatively different character from crime. Further terror on this scale is assumed to be likely either because WMDs are—so is the common refrain—"only

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[3] Details of the President's practice of targeted killing are explored in Chapter 2.

[4] Chapter 2 provides a brief overview of the "security certificate" regime in Canada's Immigration and Refugee Protection Act, S.C. 2001, c. 27 and new powers of law enforcement, intelligence, and state secrecy in the Anti-terrorism Act, S.C. 2001, c. 41 and other legislation.

[5] *See* the discussion in Chapter 2 of El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007); Mohamed v. Jeppesen Dataplan, No. 08-15693 (9th Cir., Sept. 8, 2010); and Arar v. Ashcroft, No. 06-4216 (2d Cir., June 30, 2008).

[6] 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 & Liora Lazarus, eds., Security and Human Rights (Oxford: Hart Publishing, 2007); Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (Oxford: Oxford University Press, 2007).

[7] For the use of the term "harbinger," I acknowledge a debt to John Mueller who analyzed early perceptions of 9/11 in *Harbinger or Aberration? A 9/11 Provocation,* Nat'l Interest, Fall 2002, at 45.

becoming more accessible and diffuse" or because today's terrorists are more skilled and ambitious, and 9/11 itself has demonstrated how readily and *easily* non-state actors can carry out an attack on that order. What is therefore at stake in the possibility of another attack is much more than the safety of a small number of civilians, but a much greater and more catastrophic disruption of both society and the state. These beliefs commonly form the basis of a larger claim, made in several contexts, that given the magnitude of the outstanding threat, more invasive measures have become necessary for the foreseeable future.

A key context is government itself. In numerous pronouncements and policy statements since 2001, and often at crucial moments, such as legislative debates around the passage of controversial measures, members of the executive and prominent security officials in both nations have defended the necessity of authoritarian measures continuously and at times exclusively by invoking the prospect of terror involving WMD or another attack on the scale of 9/11. For example, in his "National Security Strategy" of 2010, President Barack Obama affirmed a set of initiatives that include targeted killing and indefinite detention without charge in light of the prefatory comment that "[t]he American people face no greater or more urgent danger than a terrorist attack with a nuclear weapon…"[8] His 2011 "National Strategy for Counterterrorism,"[9] published after Osama bin Laden's death, reiterated that the "danger of nuclear terrorism is the greatest threat to national security." Terror groups including al Qaida, we were told, "have engaged in efforts to develop and acquire weapons of mass destruction—and if successful, they are likely to use them."[10] In March 2013, in a widely reported exchange with Senator Rand Paul, Attorney General Eric Holder rendered the opinion that the President maintains the authority to carry out targeted killing of U.S. citizens without charge on U.S. soil and defended such power as "necessary and appropriate" in the event of "a catastrophic attack like the ones suffered on December 7, 1941, and September 11, 2001."[11] In a speech in January 2014 in response to the report of the President's Review Group on Intelligence and Communications Technologies and following the Edward Snowden revelations, President Obama defended the use of mass secret surveillance by making several references to the prospect of another 9/11 or an attack involving WMDs. He claimed, for example, that "emerging threats from terror groups and the proliferation of weapons of mass destruction place new, and in some ways, more complicated demands on our intelligence agencies"; and "[t]he men and women at the NSA know that if another 9/11 or massive cyberattack occurs, they will be asked by Congress and

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[8] *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, May 2010), at 23.

[9] *National Strategy for Counterterrorism* (Washington, D.C.: The White House, June 2011).

[10] Ibid. at 8.

[11] Holder set out this position in a letter in response to a query from Senator Paul Rand: http://www.paul.senate.gov/files/documents/BrennanHolderResponse.pdf. *See also* Charlie Savage, *Senators Press Holder on Use of Military Force on U.S. Soil*, N.Y. Times, Mar. 6, 2013.

the media why they failed to connect the dots . . . "[12] Similarly, in Canada, a host of policy statements and reports since 9/11, from the Ministry of Public Safety to the Canadian Security and Intelligence Service, have invoked the prospect of large-scale terror, and the possible use of WMDs.[13]

In addition to its role in political rhetoric, scholars and authorities in a number of fields have invoked the harbinger theory in work on terror threats of a specific nature (nuclear, biological, radiological), the history of terrorism, and other facets of security, including cyberterror.[14] A host of prominent public intellectuals and high-profile commentators, including Richard Posner, Alan Dershowitz, and John Yoo, have also sought to make the case for extreme measures on the basis of often vivid and stirring hypothetical scenarios consistent with the notion of 9/11 as a harbinger of the scale of future terror.[15]

The harbinger theory has thus been invoked with a prevalence and consistency in political and juridical defenses of extreme measures that places it at the center of political and public discourse on national security in North America. For this reason, it can be distinguished from other grounds of public support for extraordinary measures. Some have argued, for example, that to a significant extent popular support for the measures reflects a set of racist, imperialist, or jingoistic assumptions and beliefs about the nature

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[12] Barack Obama, *Remarks by the President on Review of Signals Intelligence*, (Washington D.C.: Dep't of Justice, Jan. 17, 2014): http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence. Further examples are explored in Chapter 3.

[13] Ministry of Public Safety, Canada, *Building Resilience Against Terrorism: Canada's Counter-terrorism Strategy* (Ottawa: Ministry of Public Safety, 2012); Canadian Security and Intelligence Service, *2008–2009 Public Report* (Ottawa: CSIS, 2008). References to mass terror are explored in Chapter 3.

[14] Walter Laqueur, The 9/11 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), Matthew 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): www.nti.org/e_research/Securing_The_Bomb_2010.pdf. On biological terror, see Barry Kellman, Bioviolence: Preventing Biological Terror and Crime (Cambridge: Cambridge University Press, 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 (Westport, CT: Praeger, 2004); and Frank Barnaby, How to Build a Nuclear Bomb and other Weapons of Mass Destruction (London: Granta Books, 2004). On cyberterror, see Sam Powers, *The Threat of Cyberterrorism to Critical Infrastructure*, E-International Relations, September 2013, *available at* http://www.e-ir.info/2013/09/02/the-threat-of-cyberterrorism-to-critical-infrastructure/; and Marie-Helen Maras, Computer Forensics: Cybercriminals, Laws, and Evidence (Sudbury, MA: Jones and Bartlett, 2012).

[15] 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).

of terrorism or national security.[16] Or, as noted above, support may be grounded in earlier cultural trends toward greater control, risk management, and security.[17] The intent here is not to deny the presence of other grounds for support, but, rather, to highlight the degree to which the measures have been defended in official pronouncements by a wide range of institutional actors in the post-9/11 period consistently and almost exclusively in terms of a single articulable theory. A variety of motivations may or may not inform the politics of security, but members of the executive and key security officials in both nations have rarely if ever sought to justify the measures in terms other than a variation on the harbinger theory.

The theory has also characterized the prevailing public imagination of the threat of terror and beliefs about appropriate responses to it. For much of the post-2001 period, the prospect of further terror on the scale of 9/11 has been continuously affirmed for a wider public in various works of popular culture—from countless films and books to TV series, including *24, Zero Dark Thirty*, and *Homeland*—which often depicted terror plots involving WMDs or contemplated the imminent possibility of attack resulting in thousands of casualties rather than tens or hundreds. Many of these works have also endorsed a more aggressive and preemptive approach to national security by depicting the use of torture, rendition, or targeted killing as necessary, effective, and proportionate responses to the threat of terror.

Public opinion surveys over the course of the post-9/11 period in Canada and the United States suggest that large portions of the North American public have adopted beliefs consistent with the harbinger theory and its corollary assumptions about security. More recent polls confirm the currency of these beliefs, indicating that a large portion of the U.S. public continues to fear the future possibility of an attack on the scale of 9/11 or greater.[18] Recent polls also suggest that sizeable numbers still support a range of authoritarian measures including targeted killing, indefinite detention without charge, and mass secret surveillance. Poll data in Canada are less clear on the extent to which Canadians fear large-scale terror, but confirm the currency of such fears along with significant support for more invasive measures. Opinion data thus support the role of the harbinger theory as a social and cultural foundation for extreme measures.

Earlier approaches to post-9/11 policies and practices have therefore erred in assuming a continuity with an older rise of securitization. These approaches overlook the important question of what the security landscape would have been like had 9/11 not occurred, and what particular forms of reasoning about security 9/11 had made possible. Put otherwise, if 9/11 had not occurred, an increase in forms of security may have been likely, but not the

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[16] *See,* e.g., 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 (London: Verso, 2004) and Frames of War: When Is Life Grievable? (London: Verso, 2010).

[17] *See* Garland, Simon, and Zedner, *supra* note 6.

[18] Examples are explored in Chapter 3.

extraordinary measures that have in fact come about. And while fear and overreaction to the spectacle of 9/11 explain much, they do not explain the primary mode of argument by which the executive, courts, and prominent voices in public debate have justified authoritarian measures, or the basis on which a wider public has come to accept them.

There is of course nothing new in the claim that North Americans have embraced more invasive measures on the basis of growing fears about terrorism. But by probing this claim in more depth, this book will demonstrate that support for the measures has rested on a more specific and recurring logic that played an indispensable role in shaping law and policy precisely as a result of the absence of any prominent public critique of it. Seeking to address this gap, the book will explore expert opinion and evidence to advance arguments that may be used in law and policy debates to call the harbinger theory into question.

But before expanding upon this, the book also advances a further primary claim. I will argue that the impact of the harbinger theory has gone beyond shaping security law and policy to affect a deeper transformation in cultural perceptions of law itself. Understanding this shift is essential to the project of reform in large part because authoritarian measures are not seen to be emergency measures, but part of the fabric of a new and evolving idea of law—one in which vastly expanded state secrecy, indefinite detention, mass surveillance, and extra-judicial killing are consistent with law. These practices have become consistent with law, and not merely temporary exceptions, on the basis that the much greater threat that terrorism poses is permanent. And this logic can be discerned on both sides of the border.

The salient feature of the Bush administration's legal response to 9/11, a feature retained under Obama, was to frame the event as an act of war, conferring upon the President warlike powers. The legal centerpiece of the war on terror in this regard is the "Authorization to Use Military Force" (AUMF), a joint resolution of Congress passed on September 14, 2001.[19] Containing no explicit time limit, the AUMF states that "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." Given its broad sweep, the AUMF has served as a continuous reference point for the President's legal authority to carry out a range of extraordinary measures, including indefinite detention without charge at Guantanamo, targeted killing, and certain forms of mass surveillance.

But, notably, the AUMF, and the larger framing of the threat of terror as tantamount to war, is premised on the harbinger theory and would be implausible without it. The preamble to the AUMF makes this explicit: "on September 11, 2001, acts of treacherous violence were committed against the United States…and such acts continue to pose an

[19] Authorization to Use Military Force, Pub. L. No. 107–40, 50 U.S.C. §1541 (2001).

unusual and extraordinary threat to the national security and foreign policy of the United States." To assert that al Qaida poses a continuing and extraordinary threat is to view 9/11 not as an anomalous and highly improbable event but as one that may be repeated at some point in the near future. It was also an open-ended threat, giving rise to a war of indefinite duration—or at least as long as the harbinger theory seemed plausible. When Congress reaffirmed the validity of the AUMF in 2012—effectively renewing it—it also reaffirmed its belief in the currency of the harbinger theory.[20]

For much of the post-9/11 period, as these legal developments have emerged, U.S. jurists, legal scholars, and rights advocates have been concerned primarily with debating the constitutionality of the war on terror or its consistency with the rule of law and the principles of human rights. Part of the problem is that the conduct of the war has not easily fit within the older paradigm of a liberal or humane law of war against a conventional territorial enemy. And yet core elements of the new preemptive regime have found a place in law, forcing an ever-expanding set of subtle but significant alterations, amendments, and qualifications to primary doctrines and principles of law. To take a notorious example, the Bush administration sought initially to deny detainees at Guantanamo the protections of the Geneva Conventions—including the duty to refrain from interrogation—preferring to subject these "enemy combatants" to coercive or "enhanced" interrogations. The Supreme Court then ruled otherwise in what appeared to be a victory for human rights; but it conceded that the President had the authority to detain terror suspects for the "duration of hostilities" in the war on terror, however long that might be.[21] It also allowed for a more restricted form of habeas corpus and the use of secret evidence in reviewing the detentions.[22] Later, the administration would insist on the legality of coercive interrogation bordering on torture, and the practice of "extraordinary rendition."[23] In response to revelations in 2005 of a secret National Security Agency mass surveillance program, Congress would amend the Foreign Intelligence Surveillance Act in 2008 to allow many of the same powers with limited judicial oversight or public accountability.[24] At a further extreme, the President claimed in 2013 the constitutional authority to carry out targeted killing of U.S. citizens either abroad or *in* the United States on the basis that although it may involve a deprivation of life without "judicial process," it does not deny a form of due process.[25] These various controversial measures may not easily fit into either conventional criminal law or law of war frameworks, but are now entrenched to a significant extent in law.

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[20] *See* discussion in Chapter 2 of the National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. (2011).

[21] Hamdi et al. v. Rumsfeld et al., 542 U.S. 507 (2004).

[22] Boumediene v. Bush, 476 F.3d. 981 (2008).

[23] *See* discussion of these measures in Chapter 2.

[24] Foreign Surveillance Intelligence Act, Pub. L. 95–511, 92 Stat. 1783 (1978); Foreign Surveillance Intelligence Act of 1978 Amendments Act of 2008, Pub. L. 110–261, 122 Stat. 2436 (2008).

[25] Charlie Savage, *Senators Press Holder on Use of Military Force on U.S. Soil*, N.Y. Times, Mar. 6, 2013.

Canada, by contrast, is not engaged in a war on terror, and in many respects its legal response to 9/11 has been more restrained than that of the United States. Canada's Anti-terrorism Act, passed in December of 2001, added new terror-related offenses to the Criminal Code, and powers for preventive detention and judicial interrogation.[26] But the new offenses did not contain mandatory minimum sentences, and the new detention and interrogation powers include significant procedural limits. And although the government preferred the use of immigration detention powers over criminal prosecution as a counterterrorism measure in the early years after 9/11, it soon shifted emphasis back to prosecutions, demonstrating a measured use of that tool as well. Moreover, while Canada's immigration law allows for a form of indefinite detention without charge on secret evidence, the "security certificate" regime is fundamentally different from detention at Guantanamo by virtue of the fact that its primary purpose is to facilitate a detainee's secure deportation rather than indefinite detention per se. Canada has also demonstrated a significant measure of accountability for rights violations by holding two high-profile inquiries into the involvement of state officials in the deportation and torture of one of its citizens, Maher Arar, and in the torture of three other Canadians in Syria and Egypt.[27] The government also compensated Arar with $10.5 million and made an official apology.

Yet, in many respects, Canada's response to 9/11 raises similar questions about the nature and limits of the concept of legality at work in much of its security law after 2001. Terrorism offenses may contain important limits on their scope, but changes to the law of evidence allow the government to prosecute these offences with greater secrecy, or to limit accountability for its complicity in torture or other rights violations through significantly expanded forms of public interest privilege.[28] Though much of the information the government sought to redact from final reports of the Arar and Iacobucci inquiries noted above was ordered to be released, much of the evidence in both cases and significant portions of the final reports were still concealed from the public. The Supreme Court of Canada has also held that in extraordinary circumstances, the government may deport an immigration detainee despite a clear risk of torture in their state of origin—*without violating* the protection of "life, liberty, and security of the person" in the Charter of Rights and Freedoms.[29] The Court has also affirmed the constitutional validity of immigration law allowing for a prolonged detention without charge on secret evidence, despite the fact that the cause of the delay is a difficulty in carrying out the deportation.[30] Relying on these powers, Canada held five non-citizens suspected of involvement in terrorism without charge for periods ranging from two to seven years.

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[26] Anti-terrorism Act, S.C. 2001, ch. 41; Criminal Code, R.S.C. ch. C-46, §§83.3(2), (6) and (7) and §83.28.

[27] The Arar and Iacobucci inquiries are discussed at greater length in Chapter 2.

[28] *See* discussion in Chapter 2 of litigation involving Abousfian Abdelrazik.

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

[30] Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9; Canada (Citizenship and Immigration) v. Harkat, 2014 SCC 37.

The prevailing response to these measures among law scholars in both Canada and the United States has been to frame them as facets of emergency government, or of moments of non- or extra-legality with debatable legitimacy.[31] A fascinating discussion centered upon the work of Italian philosopher Giorgio Agamben and the German legal theorist Carl Schmitt has sought to complicate the question of the legality of extreme measures by positing the indeterminate character of the state of emergency or exception on which they are premised. On this view, measures imposed pursuant to an exceptional instrument such as the AUMF are neither within nor beyond law, but blur the boundaries between law and sovereign power, or expose the irreducible indeterminacy of their borders.[32] This book argues, by contrast, that all such approaches that emphasize a non- or extra-legal aspect of the measures overlook one of the salient characteristics of a wide range of extraordinary counterterrorism law and policy after 9/11—from legislation authorizing targeted killing, to court decisions confirming the constitutionality of indefinite detention, to the torture memos: the prevalence of an insistence on legality.

By virtue of a common insistence on the part of government that various measures are legal, and a broad acceptance on the part of the public and the judiciary (with some qualifications), the measures can be understood collectively as marking a shift in the cultural currency of liberal legality to what can be called authoritarian legality—effecting a shift of a deeper, more pervasive character. This new concept of law can be understood in terms of its basic features, including a repudiation of absolute or "non-derogable" human rights (against torture or indefinite detention without charge); the expansion of seemingly unfettered state secrecy and surveillance; broad judicial deference to executive discretion; and a reluctance to remedy serious rights violations or to be held accountable for them.

In May 2013, President Obama gave a speech that signaled an intention to bring the war on terror to an end. But his vision for a postwar security policy offered evidence of how deeply rooted some of the hallmarks of authoritarian legality have become and how much longer they may remain. Obama said he would work with Congress to "refine and ultimately repeal" the AUMF, and the United States would eventually have to close Guantanamo. But it would continue to hold a number of high-value detainees without charge in supermax American prisons. The limits and rules around mass warrantless surveillance of phone and Internet data should be debated, and certain limits imposed, but the general practice would continue.[33] Targeted killing should be subject to greater accountability and perhaps some form of judicial oversight, but the power and practice

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[31] *See*, e.g., Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 Yale L. J. 1011 (2003) and Kent Roach, The 9/11 Effect: Comparative Counter-Terrorism (Cambridge: Cambridge University Press, 2011).

[32] Giorgio Agamben, State of Exception, Kevin Attell (trans.) (Chicago: University of Chicago Press, 2004); Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty, George Schwab (trans.), (Chicago: University of Chicago Press, 2005). Both works are discussed further in Chapter 2.

[33] Obama confirmed this intention in his speech of Jan. 17, 2014, *supra* note 12.

would persist. And there was no discussion of redress for victims of torture, rendition, or civilian casualties from drone strikes. Expanded state secrecy and limited oversight will therefore still function in ways that pose large obstacles to accountability.

Thus, without the harbinger theory and the war on terror as a justification, authoritarian measures become harder to rationalize—yet they remain entrenched, as Obama's vision demonstrates, on the assumption that they now form an essential part of a rational, contemporary legal order. In the wake of Obama's declaration of the imminent end of the war on terror, some have suggested that many of the measures (detention, surveillance) should also be brought to an end.[34] While the argument is plausible, meaningful reform seems unlikely until two things come to pass. First, the harbinger theory will need to be repudiated on a wider level, or rendered less plausible with time. The current administration has continued to invoke the harbinger theory as a defense of extraordinary measures. Other security officials and experts on the threat of terror in both Canada and the United States continue to do the same, and likely will for the foreseeable future. Second, the currency of an earlier liberal legality—a legal order that values non-derogable or core human rights, individual privacy, and limited government—must be restored.

This book will argue that the project of reform, the task of bringing an end to the permanent emergency, can be more effectively advanced if liberal jurists and rights activists were to focus not only on the validity of liberal ideals, but also on the invalidity of the harbinger theory and related arguments about security. For much of the period at issue, rather than seeking to challenge the harbinger theory, or the claim that terrorism had come to pose a much greater and imminent threat to national security, many if not most rights advocates, scholars, and jurists have been concerned primarily with questions of law and principle. In ways to be explored below, the prevailing approach to reform has not been to question common claims and assumptions about outstanding threats, but to show instead how new laws and policies are 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.

This is not say that rights advocates have never been skeptical or have not sought to cast doubt on inflated claims or fears about the threat of terror after 9/11. But reformers have tended to call the harbinger theory into question not by drawing on evidence of its implausibility but by suggesting that it reflects a form of psychological overreaction to the spectacle of 9/11.[35] Seldom have rights advocates or liberal jurists sought to critique the need for extraordinary measures by endeavoring to demonstrate in any detail why claims about the imminence of terror on the order of 9/11, or terror involving WMDs, are highly implausible.

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[34] See, e.g., David Cole, *The End of the War on Terror?*, N.Y. Review of Books, Nov. 7, 2013.

[35] David Cole & Jules Lobel, Less Safe, Less Free: Why America is Losing the War on Terror (New York: The New Press, 2007), Ch. 8; Cass Sunstein, Worst Case Scenarios (Cambridge: Harvard University Press, 2009), Ch. 1; Oren Gross & Fionnuala Ni Aolain, Law in Times of Crisis: Emergency Powers in Theory and Practice (Cambridge: Cambridge University Press, 2006), at 103–09.

By exploring the specific claims that make up the harbinger theory, this book aims to provide liberal jurists and rights advocates with a clearer understanding of a set of common assumptions about terror and security that they might seek to challenge more directly. Thus they may be in a better position to effect a deeper shift in public opinion about the necessity and proportionality of invasive measures. The book will also demonstrate patterns in the recurring use of the harbinger theory that help to explain its foothold in a larger public conversation. Chief among these is the self-evident character with which aspects of the theory are frequently presented; including, as noted above, the oft-repeated claim that WMD terror is more likely because the weapons are "only becoming more accessible and diffuse" or that a 9/11-scale attack is likelier by virtue of the greater skill and ambition of today's terrorists—claims that are seldom supported by evidence or expert knowledge. The analysis set out here will demonstrate that greater measures are supported not in response to a general tendency to threat inflation, or vague fears of future terror attacks on a significant scale, but a specific set of claims and assumptions about the form that future attacks will take, coupled with a rhetorical approach to framing the theory that resists or discourages skeptical responses.

Finally, the book highlights a body of critical material that reform advocates can draw upon to make a potentially stronger case for reform. Reformers have thus far largely overlooked the possible usefulness of a large body of evidence and opinion as to why the likelihood of a large-scale attack involving WMDs at the hands of a non-state actor is, as one commentator has suggested, "vanishingly small," 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. The book therefore proposes a different approach to advocating reform, one in which advocates are encouraged not simply to dismiss the harbinger theory as a form of psychological overreaction, or to demand evidence of its proof, but to actively refute the theory by demonstrating its implausibility.

Later portions of this book will model this form of argument by canvassing some of the ample evidence in support of the view that future attacks in North America are likely to be no more serious or frequent than earlier attacks (Oklahoma, Air India) that were effectively addressed through the criminal law and liberal legal principles. These arguments are important to make because authorities continue to rely on the harbinger theory in defense of extraordinary measures and assertions of the theory remain largely unanswered in public debate. This may be due in part to the fact that much of the skeptical opinion on certain forms of mass terror remains dispersed throughout the expert literature, waiting to be consolidated and made more accessible. At the least, by drawing upon this body of opinion, reformers could help a wider public call into question the seemingly self-evident nature of many of the claims and assertions made in support of the harbinger theory. A more informed public discussion about the nature of outstanding threats would be an important step in bringing an end to the seemingly endless post-9/11 emergency.

An Overview of the Book

The inquiry begins with a chapter that surveys extraordinary measures in U.S. and Canadian counterterrorism law after 9/11, advancing the argument that, together, the measures can be seen as part of a deeper normative shift from a liberal to an authoritarian form of legality. Drawing on the work of Joseph Raz, Lon Fuller, and Ronald Dworkin,[36] Chapter 2 first defines liberal legality and explores how liberal values can be distinguished from legality as such. It then defines 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 U.S. and Canadian law.

The third and fourth chapters explore beliefs and assumptions about the threat of terror and their role in the defense of extreme measures in law and policy. Chapter 3 focuses on the role of the harbinger theory in political discourse and public opinion, looking first at how members of government, security officials, and other policymakers have relied, and continue to rely, on claims about mass terror in defense of extreme measures. It draws on statements by members of the executive and submissions to congressional or parliamentary committees, as well as policy statements, such as the bi-annual U.S. *National Security Strategy*, and Canadian equivalents. The chapter then traces manifestations of the harbinger theory in popular media and 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 invasive counterterror measures.

Chapter 4 turns from the world of politics and public opinion to an examination of the harbinger theory in three fields of scholarship: expert opinion on the prospect of terror involving WMDs and cyberterror; the history of terrorism; and legal scholarship in support of authoritarian measures. The aim in exploring these fields in a single discussion is to show that experts on WMDs 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 WMDs and historians of terror advance a common set of arguments for the imminent prospect of nuclear, biological, or radiological terror that it may help to identify before giving an overview of later portions of the book.[37] Briefly,

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[36] Joseph Raz, The Authority of Law, 2d ed (Oxford: Oxford University Press, 2009); Lon Fuller, The Morality of Law (New Haven: Yale University Press, 1964); Ronald Dworkin, Taking Rights Seriously (Cambridge, MA: Harvard University Press, 1977).

[37] *See*, e.g., Laqueur, Bobbitt, Allison, Bunn, Ferguson and Potter, Kellman, Davis, and Barnaby, *supra* note 14.

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 what is often thought to be poorly guarded fissile material, or fully functional bombs. At some point soon, a terror group will either steal a bomb or obtain the material to build one. And since, in the view of some experts, the task of building a nuclear bomb is not thought to be onerous, stealing the necessary material overcomes the greatest hurdle. As for the task of building a bomb, plans 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 post-9/11 period given the fact that al Qaeda and other groups were known to be seeking weapons of this nature.

Experts offer a similar set of arguments 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. Others have made analogous arguments 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. The weapon would likely cause fewer deaths than a nuclear or biological attack, but could easily cause large-scale disruption—for example, 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 that one set of extraordinary measures or another has become necessary, including 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, each also enjoys a public profile that has helped contribute a measure of legitimacy to the case for extreme measures among a wider public.

Chapter 5 considers the work of liberal jurists and rights advocates in countering extraordinary measures. It begins by acknowledging that liberals have made a number of strong arguments in defense 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 making these and other powerful arguments, 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, the chapter briefly surveys different forms of rights advocacy, including reports by nongovernmental organizations (NGOs) such as the International Commission of

Jurists and the International Committee of the Red Cross, and work by David Cole and Jules Lobel, Mark Danner, Ronald Dworkin, Michael Ignatieff, and Bruce Ackerman.

The survey demonstrates that liberal advocates have tended to fall within two camps. One group tends to downplay or ignore claims about the growing threat that terrorism poses, 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. Both groups therefore demonstrate a tendency on the part of rights advocates in the post-9/11 period to avoid unsettling 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.

Chapter 6 proposes an alternative approach to advocating reform and comprises three parts. The first part challenges the strong form of the harbinger theory by canvassing skeptical opinion on the likelihood of terror involving WMDs. It does not, however, attempt to set out the case against WMD terror conclusively. It seeks instead to *model* the form of argument that advocates for reform might advance to call claims about WMD terror into question. 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.

But rather than saving this analysis for the final portion of the book, given its importance to the skeptical position taken throughout much of what follows, it may help to summarize the argument against WMD terror here briefly. The case for the imminence of nuclear terror often rests, as noted, 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,[38] Steven Younger,[39] and co-authors Christoph Wirz and Emmanuel Egger,[40] argue that in the various stages of acquiring or building, and then deploying a bomb, terrorists would face a host of significant challenges.[41] Together, they render the prospect of a nuclear attack far more complicated and improbable than is often assumed in both casual assertions and in the scholarship warning of the likelihood of WMD terror. First, 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 70-year history of the bomb, no nuclear power has ever shared the

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[38] Michael Levi, On Nuclear Terrorism (Cambridge, MA: Harvard University Press, 2007).

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

[40] Christoph Wirz & Emmanuel Egger, *Use of Nuclear and Radiological Weapons by Terrorists?*, Int' Rev. Red Cross 87: 859, 497 (2005).

[41] Other skeptical perspectives include the first report of the U.S. Congress' "Gilmore Commission" (Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction), *First Annual Report: Assessing the Threat*, Dec. 15, 1999 ["Gilmore Commission Report"], *available at*

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 in short order.

Yet, even if fissile material of a sufficient quantity could be obtained—a large 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.[42] 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.

A number of experts have also advanced a skeptical view of the likelihood of large-scale biological terror, including William Clark,[43] Milton Leitenberg,[44] and Andreas Wenger.[45] They concede that certain biotoxins 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 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 the United States and Russia.

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

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www.rand.org/nsrd/terrpanel; and some of the contributions to Paul Leventhal & 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?*

[42] Levi, On Nuclear Terrorism, *supra* note 38, at 36–42.

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

[44] Milton Leitenberg, *Evolution of the Current Threat*, in Andreas Wenger & Reto Wollenmann, eds., Bioterrorism: Confronting a Complex Threat (Boulder, CO: Lynne Rienner Publishers, 2007).

[45] *Securing Society Against the Risk of Bioterrorism*, in Wenger & Wollenmann, ibid. See also the contributions to the same collection by Peter Lavoy and Marie Isabell Chevrier.

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.[46] An extensive FBI investigation concluded in 2010 that the likely source of the sample in this case was a senior bioweapons researcher in the U.S. military.[47]

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 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.[48] 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.[49] 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 theory, 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 employ) a technologically

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[46] Leitenberg, *supra* note 44, at 65.

[47] U.S. Dep't of Justice, *Amerithrax Investigative Summary*. Feb. 19 2010, *available at*, http://www.justice.gov/opa/pr/justice-department-and-fbi-announce-formal-conclusion-investigation-2001-anthrax-attacks.

[48] Michael Levi & Henry Kelly, *Weapons of Mass Disruption*, Scientific American 77 (November 2002), 78; Peter Zimmerman & Cheryl Loeb, *Dirty Bombs: the Threat Revisited*, 1 Def. Horizons 5 (January 2004) 5; Christoph Wirz & Emmanuel Egger, *supra* note 40, at 505–06.

[49] Wirz & Egger, *supra* note 40, at 503.

informed skepticism about WMDs to challenge claims about the imminent threat they have often been said to pose. It also shows how a broader critical approach may be useful in debates about law and policy relating to what are believed to be new and unprecedented dangers brought about by the potential uses of new technologies.

The second part of Chapter 6 challenges a belief in the likelihood of large-scale terror not involving WMDs. It canvasses evidence to suggest that future acts of terror are likely to be no more frequent or greater in scale than events prior to 2001. This part draws primarily on the work of John Mueller and Mark Stewart, who have sought to assess the merits of U.S. security expenditures in light of the risk 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.[50]

Writing in 2011, Muller and Stewart noted that in the decade following 9/11, the core al Qaeda group had not carried out a single attack in Canada or the United States.[51] No al Qaeda cell has since been discovered in either country.[52] 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.[53] 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, U.S. 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.[54]

Mueller and Stewart have also argued that what remains of the group is likely "a few dozen individuals," joined by "perhaps a hundred fighters left over from al-Qaida's golden days in Afghanistan in the 1990s." They note that every terror attack linked to al Qaida since 2001 appears to have been carried out by a group only tenuously connected to the core group in the Afghanistan–Pakistan region. Much of the focus of concern about international terrorism has thus shifted to what are described as offshoots of al Qaida elsewhere in Asia and Africa. Yet, as Mueller and Stewart contend, attacks from Morocco to Bali to Jordan exhibit a similar tendency to involve groups whose primary grievance is with regional governments and events.[55]

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[50] John Mueller & Mark Stewart, Terror, Security, Money: Balancing the Risks, Benefits, and Costs of Homeland Security (Oxford: Oxford University Press, 2011); *Civil Liberties, Fear, and Terrorism*, Notre Dame J. Int'l & Comp. Law 2:2 (2012) 282; and *The Terrorism Delusion: America's Overwrought Response to September 11*, Int'l Security 37:1, 81 (2012).

[51] Ibid., *Civil Liberties, Fear, and Terrorism*, at 285.

[52] Ibid.; *see also* Brian Ross, *Secret FBI Report Questions Al Qaeda Capabilities*, ABC News Online, Mar. 9, 2005 (cited in Mueller and Stewart).

[53] Mueller & Stewart, *The Terrorism Delusion, supra* note 50, at 93.

[54] John Mueller, ed., Terrorism Since 9/11: the American Cases (Columbus, OH: Mershon Centre for International Security Studies, 2012): http://polisci.osu.edu/faculty/jmueller/since.html, at 19.

[55] Mueller & Stewart, Terror, Security and Money, *supra* note 50, at Kindle edition, location 617.

Mueller and Stewart also observe that what remains of international terrorism has dwindled to "thousands of sympathizers and would-be jihadists spread around the globe who mainly connect in Internet chat rooms, engage in radicalizing conversations, and variously dare each other to actually do something."[56] Future attacks in North America are therefore likely to involve, as Brian Jenkins has put it, "tiny conspiracies, lone gunman, one-off attacks rather than sustained terrorist campaigns."[57]

The Boston bombing in April of 2013 is consistent with this analysis. It caused an enormous amount of fear and terror. But notably, it was carried out by a group of individuals not affiliated with a larger international organization. It involved the use of conventional explosives, and caused three deaths and 230 injuries—certainly a significant number, but closer in magnitude to attacks prior to 9/11. The act was also not prevented through the use of post-9/11 extraordinary measures, including mass secret surveillance.

In recent years, a number of commentators have also posited the use of cyberterror as a new means by which mass casualties might be carried out. Defense Secretary Leon Panetta warned in 2012 of the prospect of a "Cyber Pearl Harbor" in which terrorists might soon use computers to "gain control of critical switches" to "derail passenger trains" or "contaminate the water supply in major cities."[58] In light of these fears, Panetta and others have called for increased—though not necessarily extraordinary—measures around sensitive networks. Yet as Chapter 5 notes, a number of experts have questioned whether cyberterror scenarios leading to mass casualties are remotely plausible, given a host of potential impediments. These include the complex and diverse body of knowledge and expertise needed to create certain effects in a given setting once one "gains control of critical switches," such as how to control a nuclear reactor, a water supply facility, or a train system; and the limited computer skills most terror suspects have displayed relative to what would be entailed in such elaborate scenarios.

The third part of the chapter argues that in the absence of the harbinger theory, and in light of evidence that future acts of terror in North America are likely to be no more serious or frequent than events prior to 9/11, the case for authoritarian measures becomes more difficult to sustain. Yet advocates for reform might still face an obstacle among a wider public in a further form of reasoning not grounded on the harbinger theory. Authoritarian measures might still be justified on the basis that terrorism represents a special threat to public order. It may do so, for some, on the basis that even where casualties or injuries in a given attack are relatively low compared to 9/11, they will still seem striking, horrible, or tragic in a way that no other criminal activity would. The special emotive charge of terrorism, on this view, justifies a perception of acts of terror—such

[56] Ibid., at location 698.

[57] Brian Jenkins, Would-be Warriors: Incidents of Jihadist Terrorist Radicalization in the United States Since September 11, 2001 (Santa Monica, CA: Rand, 2010), at 4 (cited by Mueller & Stewart, *supra* note 50, at location 768).

[58] Elisabeth Bumiller & Thom Shanker, *Panetta Warns of Dire Threat of Cyberattack on US*, N.Y. Times, Oct. 11, 2012.

as the Boston bombing or the bombing of a plane killing 200 to 300 passengers—as something greater than crime but less than war. On this reasoning, we might feel justified in having a lower tolerance for terrorism and curtailing certain liberties in an effort to address the special risk that we perceive it to pose.

The chapter offers two responses to this line of reasoning. One is to argue that we should resist lowering our tolerance of terrorism because the risk it presents is comparable to risks we readily accept in other facets of modern life. As Mueller and Stewart have suggested, a variety of assessments on hazardous risks indicates a consensus as to acceptable or manageable degrees of risk. Using these assessments, Mueller and Stewart have observed that the risk of terrorism is comparable to the threat posed by many other hazards of modern life—calling into question the basis for perceiving terrorism as a special form of risk.

The second argument against terrorism as a special risk—whatever its scale—is that terrorism is essentially criminal in nature and does not pose a much greater harm to the public than the threat posed by other forms of grave or egregious criminal conduct. This can be demonstrated by considering the impact that terrorism might have compared to a range of offenses such as serial murder, large-scale financial fraud, or cybercrime. As a consequence of both arguments, the chapter concludes that terrorism should be addressed as a form of crime rather than as war or a hybrid of the two. Conventional protections of the criminal law should apply in terrorism cases, and the focus of preventive efforts should shift to the regulation of sensitive sites and materials.[59]

The goal, then, for those who wish to see an end to the permanent emergency is to persuade a wider public that ample evidence supports the view that terrorism on the scale of 9/11, while still possible, is not inevitable, imminent, or likely to occur in the near future. Moreover, events on the scale of the Boston bombing or even another Air India ought to be understood primarily as a form of crime as opposed to war. To accomplish this goal, rights advocates might attempt to challenge common assumptions about current threats more directly. Thus far, much of the advocacy in favor of reforming security law has focused on larger liberal or constitutional principles and a call for clearer proof of the necessity and proportionality of invasive measures. By contrast, a more effective case might be made by attempting to demonstrate why the measures are *not* necessary.

The conclusion addresses three potential counter-arguments. One is that a mass terror attack may still be imminent, because it can be accomplished through simple technological methods (Molotov cocktails in the crowded subway, suicide bombers in a large, busy urban space). Or it might occur through several smaller attacks carried out simultaneously. The chapter concedes 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. But it argues that a technically informed skepticism is still

[59] I follow Kent Roach in this suggestion, September 11: Consequences for Canada (Montreal: McGill-Queens University Press, 2003).

also 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 in many of these scenarios would be limited. For this reason, 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, scholars in political theory, critical race theory, and postcolonialism, including Sherene Razack and Judith Butler, have pointed to larger social and historical forces.[60] 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 such as 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."[61] Lawmakers since at least the 1970s have engaged 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 as to the state's use of force.

These and other alternate explanations for the embrace of authoritarian measures after 9/11 offer important insights. They also point to large obstacles to reform. It is likely true, for example, that racist, 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 favored victims' rights over those of the accused. Thus, restoring fairness or due process for terror suspects in the current political climate is certainly a daunting challenge.

Yet it remains important to distinguish these various accounts of the larger shift toward more security from what might be called the official account. In ways to be explored throughout this book, the single recurring thread in the public and juridical defense of authoritarian measures—from the executive to lawmakers, judges, and security officials—is that the catastrophic nature of the threat that terrorism poses has made these measures 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

[60] *Supra* note 16.
[61] *Supra* note 6.

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. This book will contend that by addressing the harbinger theory more explicitly and directly, liberal advocates would offer a more persuasive case in defense of rights going forward.

Finally, the book offers a sketch of recommended reforms and suggestions for how the approach to advocacy set out here might be applied in practical situations. It calls 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. It recommends a stricter threshold for granting state privilege and greater limits to lawful surveillance. Finally, it calls for domestic law compensating victims of torture and other serious violations for state complicity in their injuries.

Advocates for reform can make the case against the harbinger theory in a number of places where key decisions are made about law and policy. One 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 is in constitutional litigation, when questions are raised about reaching a reasonable balance between rights to due process and public safety. A further place is in the work of NGOs, scholars, and activists, who might collectively make more frequent and effective use of expertise and evidence on current threats in the course of scholarship and public advocacy.

Both Canada and the United States 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 the ability to unsettle this line of reasoning, which presents an opportunity for rights advocates, and a measure of hope for those committed to the future of constitutionalism and human rights.