Justice as Invisibility: Law, Terror, and Dehumanization

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Abstract:

This paper summarizes and extends an inquiry set out in a recent work, *The Harbinger Theory* (Diab 2015), by developing one of its arguments. The book traces the prevalence in North American security discourse since 2001 of a belief in the imminent possibility of further terror on the scale of 9/11 as a rationale for a range of extraordinary counter-terror measures. It also argues that post-9/11 perceptions of terrorism led to a demise in the cultural currency of liberal legality in favour of what the book terms authoritarian legality. The latter framework is marked by law and policy entailing an abandonment of absolute or non-derogable rights (against torture, cruelty), greater state secrecy and surveillance, judicial deference to the expansion of executive discretion, and a lack of accountability for serious violations of human rights. Part II of the paper posits that a further dimension of authoritarian legality, or an underlying principle supporting it, is a broader societal equation of justice with measures that render terrorism offenders invisible—including targeted killing, citizenship revocation, and life without parole—as a means of denying recognition of their humanity. This denial serves to avoid a conflict that would otherwise arise between a perceived need to suspend earlier limits on the state's use of force against the individual, in light of the vastly greater threat of terror, and a desire to adhere to legal principles premised on the recognition of individual dignity and equality. By contrast to earlier scholarship in which dehumanization results from racist, imperialist, or religious framings of the war on terror, a case is made here for it being linked primarily to beliefs about the magnitude of the threat of terror. The

paper posits the continuing currency of the harbinger theory and authoritarian legality as impediments to reform.

Introduction

The events of 9/11 recede from memory as time goes on, but they continue to shape law and policy throughout the west. Part of this legacy can be felt in the wake of recent events in Sydney, Ottawa, and Paris, as governments, quick to assert the need for new powers, have sought to link the events to large transnational entities, such as the Islamic State in Iraq and Syria or offshoots of al Qaida. The link, however tenuous, helps to situate current fears of terror within a larger imaginative framework of rhetoric and belief shaped after 9/11, in which terrorism had come to be seen as closer in nature to war than to crime, with a host of implications.

This article explores these and other continuing effects of ideas about terrorism shaped by 9/11, and their impact on current law and policy, by summarizing and extending an inquiry set out in a recent work entitled *The Harbinger Theory: How the Post-9/11 Emergency Became Permanent and the Case for Reform* (Diab 2015). The book's central claim is that 9/11 had two salient, long-term effects on approaches to security throughout the west, but primarily in Canada and the United States. The first pertains to beliefs about the nature of the threat that terrorism was capable of posing after 9/11. Many commentators have acknowledged the role of fear and threat inflation in the embrace of extraordinary measures. The book contends that much of the post-9/11 security apparatus was premised on a more specific proposition consistently asserted in political and cultural discourse. This was a belief that 9/11 marked the harbinger of a new order of terror, one in which further attacks could be expected at some point soon in a large urban centre on a similar or greater scale as 9/11, possibly involving weapons of mass destruction. Thus, rather than being perceived as anomalous and unlikely to be repeated, 9/11 had demonstrated that a small group of non-state actors, using relatively simple tools, could inflict casualties several orders of magnitude greater than in previous acts of terror, which had remained in the tens and low hundreds. With the prospect of terror now claiming thousands of lives, it became more legitimate

and plausible to consider the possibility of it claiming millions of lives. Within this new paradigm, liberal limits on the state's use of force against individual suspects or detainees were, in the eyes of many, no longer tenable.

The book also argues that evolving perceptions of terror as a threat tantamount to war have served as a basis for a shift in the cultural currency of liberal legality to what can be called authoritarian legality. Within this latter conceptual framework, courts, lawmakers, and voters have consistently supported law or policy entailing an abandonment of absolute or non-derogable rights (against torture, cruelty, indefinite detention); an expansion of secrecy and surveillance; greater deference to assertions of executive authority; and limited accountability for serious violations of human rights. Surveying a range of recent law and public opinion data, the book demonstrates the recurring role of the harbinger theory as a rationale for authoritarian legal measures, suggesting, therefore, that reform of the latter hinges at least in part on the prevalence of the former.

The summary of the book's argument in the first part of this article lends context for an examination of the enduring relevance of the harbinger theory to recent responses to terrorism. Part two of the paper expands upon the book's discussion of evolving conceptions of legality by exploring related shifts in ideas about justice. It argues that in a series of recent measures that include targeted killing, citizenship revocation, and life without parole, a sense or concept of justice can be discerned that is distinct from that current in liberal legality—one that serves as a kind of underlying principle for authoritarian law. An important feature of the earlier liberal legal order was a conception of the criminal suspect or offender as a deviant member of the community who is entitled to due process and the presumption of innocence, and retains a theoretical capacity for rehabilitation and reintegration. Various facets of modern criminal justice had thus come to reflect—however imperfectly in practice—ideas rooted in Enlightenment notions of the inherent dignity and equality of all persons, and an abhorrence of cruel or arbitrary treatment. By contrast, in an emerging framework of justice premised upon terrorism as a kind of super-crime or a form of war,

courts, governments, and sizeable portions of the Canadian and US electorate have come to affirm the use of measures designed to permanently remove, confine, or destroy the terrorism offender, and thus, in a manner of speaking, to render them invisible.

Drawing upon recent work by Thompson (2005; 2011) and Brighenti (2007) on the role of visibility in the discursive construction of marginalized groups and persons, I argue that what is at stake in these forms of banishment, confinement, or death is a denial of visibility as a means of denying the offender recognition of his or her humanity. This denial or concealment has become vital in light of the harbinger theory because of a symbolic or conceptual conflict it helps to avoid. Without such measures, and with the offender's humanity remaining visible to us in various ways, we would be caught between, on the one hand, a desire to uphold commitments to respecting individual dignity and equality, and, on the other, a felt need to operate beyond earlier limits on the state's use of force against the individual—in light of a belief in the vastly greater threat of terror. A paradigmatic case would be the figure of bin Laden himself, whom we have difficulty imagining as the subject of arrest and detention in the 2011 raid on his compound, followed by a long trial filled with procedural protections designed to respect his human rights—and possibly an acquittal. We more readily associate justice with his being killed in what is conceived as a kind of battlefield death, given his identity as the leader of an enemy force threatening the nation. In this emerging sense of justice as invisibility, concealing the offender's humanity makes it less difficult to violate earlier limits on the use of force, and the measures that accomplish this concealment are seen as just in light of the much greater magnitude of the outstanding threat.

Dehumanization is thus explored here in a way that is distinct from earlier research suggesting that terrorism suspects or offenders have been subjected to inhumane treatment largely as a function of racist or imperialist assumptions operative in majority cultures or the justice system (Razak 2008; Butler 2004), or a larger framing of the war on terror as a religious war involving good Christians against evil Muslims (Toulouse 2015). The argument here, by contrast, is that in various *formal* attempts to justify these dehumanizing

measures—policy statements, court decisions—the case tends to be made, directly or impliedly, in light of beliefs about the much greater threat that terrorism now poses. The article advances the broader claim that significant reform of these measures is not likely to occur so long as a belief that terrorism presents a threat tantamount to war maintains some degree of currency.

I. Context for the Emerging Politics of Exclusion

The Harbinger Theory

September 11 transformed perceptions of terrorism due in part to the magnitude of the event in relation to the history of terror. Before 9/11, by many accounts, the largest terror attack in modern history in terms of casualties was the bombing of Air India flight 182 from Vancouver to Bombay in 1985, which claimed 329 lives (Global Terrorism Database 2007, cited in Mueller and Stewart 2011). With few exceptions, major terror attacks of the late twentieth century entailed far fewer casualties. By contrast, the attacks of September 11 claimed 2,997 lives (Global Terrorism Database).

One response to the events of 9/11 might have been to conclude that they were extremely anomalous and that an attack on a similar scale in the near future was highly unlikely to occur. But the event had also altered perceptions of the harm that terrorists could now inflict. Partly on this basis, 9/11 was perceived in a range of political and cultural discourses not only as the beginning of a possible new wave of terror involving al Qaida on domestic soil, but also, and more significantly, as the harbinger of a new order of terror, with further attacks on a similar or greater scale likely to occur in the near future (Mueller 2002; Diab 2015).

The harbinger theory was central to security policy in both Canada and the US for at least the first decade after 9/11, and continues to resonate in policy statements and political discourse. The pattern of its use as a rationale for new law was set early in the Bush administration, as the President and other officials made frequent reference to the prospect of large-scale terror, possibly involving weapons of mass destruction (WMD), in defence of a host of

measures, including new terrorism offences in the *USA PATRIOT Act* and indefinite detention without charge at Guantanamo (see, for example, Bush's State of the Union address, November 2002; other examples are cited in Diab 2015). President Obama would take a similar approach, frequently invoking the prospect of terror involving WMD in defence of targeted killing and other extreme measures (White House 2010; White House 2011; Leon Panetta's remarks about a "cyber Pearl Harbour" cited in Bumiller and Shanker 2012).

Well into Obama's second term, he and other administration officials have continued to invoke the prospect of large-scale terror in defence of authoritarian legal measures. A notable recent example pertains to Edward Snowden's revelations in June of 2013 of secret mass surveillance on the part of the National Security Agency. Snowden had revealed details of the NSA's bulk collection of cellphone metadata of all Americans, along with the content of Internet communications involving large numbers of foreigners visiting the US websites of popular technology companies (Greenwald 2014). In a press release issued within days of the first revelations, James Clapper, Director of National Intelligence, claimed that the surveillance programs had helped to "impede the proliferation of weapons of mass destruction" (Clapper 2013: 3). In a speech of January 2014, President Obama expressed the intention to continue employing many of the surveillance programs at issue and justified this by making several references to the possibility of large-scale terror. These included the claim that "[t]he men and women at the NSA know if another 9/11 or massive cyberattack occurs, they will be asked by Congress and the media why they failed to connect the dots" (Obama 2014).

Canadian officials also invoked the harbinger theory at crucial moments after 9/11. Anne McLellan, Minister of Justice, speaking to Parliament in October of 2001 when the *Anti-terrorism Act* was being debated, sought to justify the need for law that extends the scope of state secrecy and added new terrorism offences to the *Criminal Code*. Terrorism, she asserted, had come to pose "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" (Canada 2001). Fellow cabinet minister Irwin Cotler was more explicit. Writing in November of 2001, he described 9/11 as a "juridical watershed." From this point forward, new law had to be passed "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" (Irwin Cotler 2001, as quoted in Diab 2015: 114). A number of later policy statements and reports from the Ministry of Public Safety and the Canadian Security Intelligence Service have invoked the prospect of large-scale terror, possibly involving WMD, as a rationale for security measures (see, for example, Canada 2012).

In support of such claims, many experts on WMD offered similar apocalyptic prognoses. Graham Allison (2005) warned that "a nuclear terrorist attack on America in the decade ahead is more likely than not" (15). Many experts agreed for reasons that included poor security around nuclear sites in the countries of the former Soviet Union, open access to the knowledge of how to build a bomb, and the fact that al Qaida and other groups were known to harbour nuclear ambitions (Barnaby 2004; Ferguson and Potter 2005; Bunn 2010). A similar claim had often been made in relation to bioterrorism. Many of the most lethal toxins known to science can be cultivated from natural sources and readily produced in large quantities using knowledge and techniques available on the Internet and elsewhere in the public domain (Kellman 2007; Davis 2004). Radiological terror had seemed even more likely, given the ready availability of unguarded, highly radioactive material in industrial and institutional sites such as hospitals, universities, and factories (Levi and Kelly 2002).[68]

[68] *The Harbinger Theory* (2015) demonstrates a tendency on the part of these authorities of asserting the likelihood of such events on the basis of their theoretical simplicity. The book also demonstrates a common failure among such authors to acknowledge a host of challenges that terrorists are likely to confront in practice. It then surveys a body of skeptical literature to outline these practical impediments and call into question the near-term probability of terror involving WMD.

For much of the post-9/11 period, public opinion data has suggested that large portions of the North American public have been supportive of authoritarian law and policy in this area. The data also point to a widely shared belief in the further prospect of large-scale terror as a possible basis for this support. For example, a 2006 Gallup poll asked Americans whether they believed it was "likely that terrorists will set off a bomb that contains nuclear or biological material in the US within the next five years?" Forty-seven percent of those surveyed believed that it was. A survey that same year of "100 of America's top foreign policy experts" by the journal *Foreign Policy* found that "more than 8 in 10 expect an attack on the scale of 9/11 within a decade" (July/Aug 2006). Data also suggests that the level of fear in large-scale terror had remained high until at least the early part of the present decade. In 2012, when asked "How likely is it that another 9/11 will take place in America in the next 10 years?" sixty-five percent of Americans surveyed believed that it was likely, with twenty-nine percent expressing a belief that it was "very likely" (Rasmussen 2012).

Data on Canadian opinion is less specific about the nature of our perception of terror, but it suggests that a fear of terror has remained current here in recent years. An Ipsos Reid survey of 2011 found that fifty-eight percent of Canadians affirmed "[they] are more concerned about a terrorist attack in Canada now than before 9/11" (Chung 2011: para. 1). A full seventy-seven percent of respondents disagreed that "Canada and the U.S. can relax security measures now that there hasn't been an attack in 10 years." A Pollera poll conducted for the CBC in February of 2015 found that "nearly half of Canadians say they feel less safe from terrorism than they did two years ago," and that "[t]wo-thirds [of those polled] say it is likely that an attack will occur in Canada within the next five years including 42 per cent who expect that it will result in mass death and destruction" (Hembrey 2015).

North Americans have also continued to be largely supportive of security measures adopted in response to 9/11. A Cable News Network (CNN) poll of 2013 asked whether respondents think "the Obama administration has gone too far, has been about right, or has not gone far enough in restricting people's civil liberties in order to

fight terrorism." Thirty-eight percent believed it had been "about right," while 17 percent believed it had "not gone far enough" (n.p.). A CNN poll in June of 2015 found that 61% of Americans supported the renewal of *PATRIOT Act* provisions authorizing bulk surveillance of telephone metadata, with 44% of those polled agreeing that the risk of terrorism would rise without such powers (Agiesta 2015).

Analogous data can be found in Canada. An Ipsos poll conducted in July of 2013, in the wake of NSA mass surveillance revelations by Edward Snowden, found that to prevent further attacks sixty-four percent of Canadians surveyed found it "acceptable in some circumstances" for "governments to monitor everyone's email and other online activities" (Ipsos 2013). Similarly, an Abucus Data poll that summer found that sixty-two percent of Canadians surveyed support an intrusion on personal privacy to enable the federal government to investigate possible terrorist threats (Abacus 2013; I return below to the effect of the recent attacks in Sydney, Ottawa, and Paris on fears and perceptions of terror).

The harbinger theory has also shaped representations of terrorism in many works of popular culture since 2001. Plots to carry out large-scale terror have been central to television series that include *24* (Cochran and Surnow 2001) and *Homeland* (Gansa and Gordon 2011), films such as *The Sum of All Fears* (Neufeld and Robinson 2002) and *Antibody* (Beach, Roth and McIntire 2002), and books such as Tom Clancy's (2004) *Splinter Cell*, Dan Brown's (2001) *Deception Point*, and James Patterson's (2004) *London Bridges* (Lustic 2006). Notably, each of the nine seasons of *24* (Cochran and Surnow 2001), except the first, which began airing in September of 2001, featured terror plots that involved WMD. And in each of these seasons, as in other shows, films, and books, the threat was seen to be effectively thwarted through the use of torture or cruel and inhumane treatment.

These pervasive depictions of terrorism in extreme and catastrophic terms have helped to ground an argument about the need to embrace a more preemptive approach to security. Prominent advocates of this view have included Harvard Law professor Alan Dershowitz, former

counsel in President Bush's Office of Legal Counsel, John Yoo, and Federal Court of Appeal judge Richard Posner. Each has argued that given the much greater threat that terrorism has come to pose, it can no longer be understood exclusively or primarily as a form of crime. With 9/11 as a precedent, and terror involving WMD as a theoretical possibility, individuals are now capable of posing a much greater threat to society than had once been assumed when modern principles of criminal law and human rights were crafted. Until recently, it might have been reasonable for liberal societies to insist that a criminal conviction rest on proof beyond a reasonable doubt, or to allow 10 guilty men or women to go free to avoid sending one innocent person to prison, on the assumption that the harm inflicted by a wrongful conviction on our collective dignity outweighed the likely harm of several wrongful acquittals on our collective security. But the calculus changes with the prospect of an act of nuclear or biological terror. In light of this new threat, it may be necessary to detain several innocent people without charge for a period, to survey a wide portion of the population, or even to carry out the targeted killing of terror suspects – rather than acquitting one nuclear or biological terrorist (Posner 2007; Yoo 2006; Dershowtiz 2006).

As 9/11 recedes from memory, the harbinger theory will likely become a less plausible rationale for security policy in North America. But at present, officials continue to frame the threat of terror in light of it. Most recently, in the wake of attacks in Paris, Ottawa, and Sydney, governments have done this by linking the threat of domestic terrorism to the Islamic State in Iraq and Syria (ISIS)—or a larger trans-national entity with militaristic aims and capabilities closer in nature to war than to crime. The day of the attack on Parliament in the fall of 2014, Canada's Prime Minister, Stephen Harper, asserted: "The international jihadist movement has declared war… and are already executing it on a massive scale on a whole range of countries with which they are in contact" (Chase and Hol 2015). He also indicated that "the very worst manifestation of this […] is the entire jihadist army that is now occupying large parts of Iraq and Syria." The government soon tabled bill C-51, which includes a new offence of glorifying or advocating terrorism and a new no-fly list. It also contains unprecedented powers for the Canadian Security Intelligence Service to take preventive measures

that may infringe Charter rights, and a vastly expanded scope for information gathering and sharing among government and foreign agencies (see further discussion of the bill below).

US officials have also attempted to conflate the possibility of mass terror on domestic soil with ISIS or other large groups, and done so at crucial moments in public debate about security. In the lead up to President Obama's decision to bomb ISIS targets in September of 2014, Director of Operations for the Joint Chiefs of Staff, William Mayville, told the media that the bombing was necessary to address the threat posed by the "Khorasan Group," consisting of militants in Syria working under the direction of al Qaida leader Ayman al-Zawahiri. Mayville asserted that the group was in the "final stages of plans to execute major attacks against Western targets and potentially the U.S. Homeland" (McCoy 2014). Other administration officials indicated the plot was said to involve Yemeni bomb-maker working with the Khorasan group on "new ways to slip explosives past airport security" so as to bomb multiple flights into the US (Dilanian and Sullivan 2014).

But despite the efforts to draw a strong *imaginary* link between domestic terror and ISIS or other large groups, recent acts of terror in North America suggest that a factual link is at best tenuous. All have involved lone wolves or small groups influenced indirectly, if at all, by foreign groups, or only tangentially connected (Preble and Mueller 2014). Observers of ISIS's development and likely direction in the near future have also questioned its interest in direct engagement with western powers, other than in self-defence (Rashid 2014; Ruthven 2015). However, the impetus on the part of western governments to draw a link between ISIS and the possibility of domestic terror would appear necessary because ISIS is now among the only globally recognized entities capable of serving as a plausible basis for the claim that jihadist terrorism continues to be potentially war-like in scale in terms of its possible threat to western states. In short, ISIS provides at least a plausible basis for a substitution in the place of al Qaida in the social or political imaginary of terrorism, and thus as a means for sustaining an older constellation of belief about terrorism as possibly tantamount to war.

Authoritarian Legality

As beliefs about terrorism have evolved after 9/11, so too have beliefs about law. But the evolution in assumptions about law had important roots in cultural shifts that pre-date 9/11. As Garland (2001), Simon (2007), Zedner (2009) and others have noted in the context of the US and the United Kingdom, the final decades of the twentieth century had witnessed an increasing social and political embrace of security, a pattern of governing through crime, or a trend toward various forms of preventive policing and control. Writing before 9/11 and surveying the various elements of this broader shift, Garland's catalogue included a decline of the rehabilitative ideal, an embrace of punitive sanctions and expressive justice, a shift in the focus of crime policy from offender to victim, and an emphasis on public protection over civil liberties (Garland 2001). This general shift away from a corrective, rehabilitative paradigm toward containment and control had placed pressure on liberal conceptions of legality. Yet before 9/11, it had not amounted to a fundamental subversion of that framework.

To be clear as to the contrast between the two legal paradigms, a liberal rule of law is marked above all by the desire to preserve a "minimal infringement of civil liberty" (Pue 2003: 270). This is accomplished by an insistence upon clear limits to executive authority and discretion. It also involves a desire to maintain accountability and transparency of government power through the oversight of ordinary courts. Secrecy is also tolerated only to a limited degree, and emergency powers are limited in duration (Pue 2003). In a broader sense, liberal legality reflects a deeper commitment to core liberal values of the equal worth and dignity of the individual, and his or her right to liberty, privacy, and security. These values serve in turn as a foundation for a collective interest in democratic and constitutional government as a means of preserving them.

Thus, at the heart of liberal legality is a commitment to absolute limits on the state's use of force against the individual, or what are termed "non-derogable rights" against torture, cruelty, or inhumane treatment (Waldron 2005; Luban 2005). In what may be the high watermark of liberal legality, the 1984 *UN Convention Against*

Torture, torture is expressly prohibited in any circumstances—without regard to the nature of the crisis at hand. Similar prohibitions extend under international humanitarian law to indefinite detention without charge, rendering people stateless, and extra-judicial killing in situations not involving imminent and lethal danger. All such limits are assumed to be valid regardless of the nature of the emergency, and apply, with minimal modification, to enemy combatants in times of war.

In the closing decades of the twentieth century, as liberal societies embraced more preventive forms of policing, liberal legality may have retained its currency due in part to the fact that much of the conduct at issue was still understood primarily as crime. After 9/11, terrorism, perceived in light of the harbinger theory, posed a challenge to this. It placed individuals or small terror groups in an ambiguous position in the social imagination of deviance somewhere on the spectrum between crime and war. Yet without being clearly one or the other, it was difficult to reconcile with liberal assumptions designed for either context, thus opening a space for innovation.

Authoritarian legality has emerged precisely within this space and warrants being theorized as a distinct—if not entirely new—form of legality to draw attention to the principled connection and continuity of the facets of which it is comprised. Its most salient feature is a break with absolute or non-derogable human rights. In the new dispensation, cruel and inhumane treatment, including "enhanced interrogation," indefinite detention without charge, and targeted killing all find a place within law as necessary and proportionate measures. Cruel acts are either held not to be torture under new legal definitions (the torture memos), or if torture, not actionable or criminal due to various protections of persons acting in good faith reliance on the validity of legal advice about the propriety of such actions (Cole 2009; *Detainee Treatment Act* 2005, section 1004(a)). Both Canada and the US have also legislated schemes allowing for indefinite detention of terror suspects without charge, and supreme courts have upheld their constitutionality in light of the extraordinary threat that terrorism is believed to pose (Roach 2011).

At perhaps the furthest extreme, the Bush and Obama administrations have claimed the authority to carry out targeted killing of terror suspects in situations not involving an immediately imminent threat—an aspect of current policy explored further below.

The authoritarian legal framework is also marked by a much greater deference on the part of the courts in response to these and other assertions of expanded executive power. Among the most notorious cases in Canada in this regard was the Supreme Court's decision in *Suresh* (2002) upholding the constitutionality of the government's discretion to deport a non-citizen despite a significant risk of torture in his or her home state. Also relevant, but more nuanced, were the Court's decisions in *Charkaoui* (2007) and *Harkat* (2014) which upheld the constitutionality of a scheme allowing for detention without charge on secret evidence pending a deportation that may never occur. It thus affirmed the legality in Canada, at least in theory, of indefinite detention without charge. In a host of analogous decisions, the US Supreme Court outlined the contours of the rights of Guantanamo detainees with a similar sense of deference to the executive. Finding that detainees do have standing under the US Constitution and a right of review of their detention, the Court also held that hearings could be conducted in special military tribunals, using secret evidence, and a lower threshold to justify detention (*Hamdi et al.* 2004; *Rasul* 2004; *Hamdan* 2006; and *Boumedienne* 2008).

A further feature of this emerging legal paradigm is a vast expansion of government secrecy and surveillance. Canada's *Anti-terrorism Act* (2001) allows for a much broader scope for "public interest privilege" in national security, and the recently passed bill C-51 contemplates an almost infinite possible range of covert interference in civilian life through the issuance secret warrants under which agents of the Canadian Security Intelligence Service may take measures that breach *any* Charter right.[69] Surveillance in the US was

[69] The bill contains only three explicit limits on the scope of conduct carried out under such warrants: causing death or bodily harm intentionally or by criminal negligence; willfully attempting to obstruct justice; and violating the "sexual integrity" of an individual (s. 12.2[1] of the *Anti-terrorism Act 2015*). The constitutional validity of the bill has yet to be tested, but even within the bounds of an authoritarian legal paradigm,

vastly expanded with provisions of the *PATRIOT Act* and the *Foreign Intelligence Surveillance Act (FISA) Amendment Act* of 2008, adding a variety of means by which the National Security Agency could conduct bulk surveillance of telephone metadata of US citizens. Provisions of the latter act also allowed for surveillance of the content of electronic communications of foreigners using sites and servers in the United States, thereby permitting incidental surveillance of the content of traffic from US citizens (section 702). Some of the provisions of the *PATRIOT Act* lapsed in 2015, heralding much self-congratulatory rhetoric from supporters of Edward Snowden. But many of these discussions tended to overlook the fact that bulk collection is still mandated to continue at the hands of third-party providers, with ready access on the part of the NSA through the use of secret warrants from the FISA Court (Liu 2015; Edgar 2015).

Finally, authoritarian legality signals a sharp retreat from liberal principles of accountability and transparency. Among the most egregious of cases were those of Syrian-Canadian Maher Arar and German-national Khalid el-Masri, who both suffered extraordinary rendition and torture at the hands of US officials. They and others have consistently failed in tort actions against the US government, as courts have demonstrated a willingness to apply the "states secrets" doctrine expansively so as to prevent cases from proceeding on their merits. Canada's monetary settlement with Arar marks an outlier in the wider narrative of reparations for torture, with a more representative indication of current thinking about accountability to be found in the blanket exclusion in section 9 of Canada's new *Security of Information Sharing Act* (2015, passed as part of bill C-51) of state liability for future tortious acts in the course of national security investigations.

with courts tending to be deferential to expanded executive authority, the bill appears vulnerable to challenge on a number of fronts (Roach and Forcese 2015).

Part II: Forms of Justice as Invisibility

If the harbinger theory has supported an authoritarian shift in North American law and politics, a corollary to this is that ideas about justice have also evolved from those that had purchase in a liberal legal paradigm. In that earlier paradigm, two central components in the approach to crime and punishment, current for much of the twentieth century, were a belief in the importance of treating persons accused of crimes fairly and humanely (affording due process), and the assumption that rehabilitation and reintegration were fundamental goals of sentencing (Garland 2001). Both ideas were grounded in liberal or Enlightenment values surrounding individual dignity and equality, and an abhorrence of cruelty and arbitrary treatment in the meting out of punishment. But they also reflected a liberal conception of *community* in which the violation of social or moral codes might strain but did not suffice to sever the link to the individual, even in the most serious of cases (Duff 2001; 2003).[70]

Several years after 9/11, as a number of terrorism cases had developed or concluded, governments and courts were faced with questions of how best to deal with the offenders or suspects—or what justice had called for in a period in which terrorism had come to be understood in the social imaginary as a kind of super-crime or a form of war. If authoritarian legality would emerge as an institutional response to a belief in the much greater threat of terror, a broader social effect of this belief has been the embrace of a sense of justice associated with a need to render the terrorism offender invisible—to banish, confine, or kill them—as a means of dehumanizing them. This emerging form of justice as invisibility resolves a conflict we would otherwise confront between concerns about security and an earlier sense of justice as due process, humane punishment, and rehabilitation. Given the vastly greater magnitude of the threat of terror, we are more inclined to agree that extraordinary measures are necessary, even though they may

[70] The death penalty marks an important exception. Among states that had retained it, certain crimes warranted an emphasis on denunciation and retribution. But capital punishment has always been a remnant of an older form of justice, difficult to reconcile with liberal conceptions of legality (Garland 2010). The same can be said of life without parole, discussed further below.

infringe the dignity and equality of individual suspects. The conflict presses upon us, however, only so long as such people remain visible to us—as accused persons in conventional trials, or offenders working toward parole. By resorting to measures that render the terrorism offender invisible, we avoid or repress this conflict by concealing the offender's humanity, and thus the need to pay heed to his or her dignity and equality. Crucial among these measures are targeted killing, citizenship revocation, and life without parole.

Drawing on the work of Thompson (2005; 2011) and Brighenti (2007), this form of justice can be understood in terms of a denial of recognition of one's humanity effected within what Brightenti calls the "field of visibility." For Thompson, important features of the modern liberal state—its public sphere, the ideals of accountability and transparency—are premised upon forms of social interaction made possible by print and other broadcast media. In distinction to earlier forms of interaction in which visibility was primarily a function of direct, unmediated contact between individuals, broadcast media gave rise to a "new visibility" in which sovereign powers and their publics came to be represented to one another, projected, and surveilled on a vastly greater scale. The transformation was also integral to the shaping of western legal systems. Much of the apparatus of due process, and of liberal legality in general, is marked by an emphasis on visibility: the trial in open court, full disclosure, facing one's accuser—all woven more firmly into the fabric of modern democracy through highly publicized trials that humanize the process of justice by rendering the accused directly visible. For Brighenti (2007), visibility humanizes its subjects by enabling a form of recognition. With Charles Taylor, she postulates recognition as "a basic category of human identity, whose origin can be traced back to the Judeo-Christian and the secular Enlightenment project of 'life in common'" (Brighenti 2007: 329). Just as minority groups struggle for recognition within the political "field of visibility," marginalized individuals—migrants, the poor, persons convicted of crimes—are dehumanized or "discursively constructed as the underclass" by social practices or conditions that deny them recognition and render them invisible (Brighenti 2007: 330).

In what follows, I argue that one of the primary effects of the embrace of the harbinger theory is the emergence of a widely shared idea of justice in which the terrorism offender becomes an absolute other—an enemy alien—through measures that render their humanity invisible. I will also argue that justice is a plausible term to invoke here—it is neither too vague a concept nor an overstatement—by virtue of the recurring justification that attends the use of these measures. In ways to be explored below, the measures are repeatedly affirmed as proportionate and necessary (or implied to be), coupled with a lack of regret or apology for departing from earlier forms of justice premised upon recognition of the offender's dignity and humanity. Finally, I seek to demonstrate how justifications of these measures are closely linked to a host of assumptions about terrorism as a threat tantamount to war. The intention here is to distinguish a recurring, *official* rationale for dehumanizing measures from arguments in earlier scholarship to the effect that such measures are conditioned by tacit or overt racist or religious framings of the terrorism offender as hostile, foreign, or evil other (Butler 2004; Razak 2008; Toulouse 2015).

Targeted Killing

In contrast to its earlier pedigree as a clandestine tool on the part of the CIA—with roots that extend to missions in Cuba, Vietnam, and Chile in the 1950s to 70s—targeted killing became a central and overt part of the war on terror beginning in roughly mid-2002 (Blum and Heyman 2010). This was partly a consequence of the much broader authority set out in the congressional Authorization to Use Military Force (AUMF), passed in the weeks following 9/11. Drone strikes were assumed to be authorized against persons who were alleged to be involved with al Qaida or its affiliates and posed an "imminent threat of violent attack" to the United States. Notably, "imminent" was not understood here to be synonymous with "immediate" see discussion of Department of Justice memos on point (Diab 2015: 65-68). Strikes began in Yemen and soon expanded to Afghanistan, Iraq, and Pakistan (Blum and Heyman 2010). President Obama would vastly expand the practice, authorizing hundreds of attacks annually, with strikes continuing at present (New American Foundation 2015a; 2015b).

Yet, despite the frequency of attacks and numbers killed since 2002, drone strikes have garnered broad public attention on only a few occasions over the course of this period. Chief among them was the death of Osama bin Laden in May of 2011. Bin Laden had been a fugitive of US justice since his indictment in 1998 for involvement in the US embassy bombings in Tanzania and Kenya that year. After 9/11, one reading of the AUMF would suggest that he had become a legitimate target of assassination rather than arrest. But circumstances surrounding his death, and the more recent targeting of US citizens (discussed below), highlight a deeper shift in ideas about law and justice used to rationalize targeted killing.

An important element of this difference is an intention to render the subject of these killings less visible, or to deny a recognition of their humanity through a denial of conventional due process. Bin Laden's killing offers a notable example. For a number of years prior to his death, his appearance in the media through audio and video recordings had been sporadic, and his location a mystery. Yet he remained a fixture in discussions of the war on terror worldwide, maintaining a measure of visibility and recognition. Had he been captured and brought back to the US for trial, he would likely have enjoyed a further period of visibility as the world's most notorious criminal accused, and possibly decades more attention following sentence or acquittal. In an important sense, his death served the function of avoiding all of this—making him, as it were, disappear. It also helped to cast him as "enemy combatant in chief" rather than a fugitive of conventional criminal justice. Both facts support the possibility that his death rather than his detention had been the goal of the raid on the compound from the outset.

Obama's presentation of the event, at a late-night press conference, further supports this view. It also framed the event not as a lost opportunity for a fulfillment of justice through due process but a consummation of justice. When the President first broke the news, he asserted that US forces had located bin Laden in the compound and killed him "after a firefight"—implying a show of deadly resistance to being taken into custody (Baker *et al.* 2011). However, administration officials soon offered differing accounts of the

capture, including one in which the firefight had taken place earlier in the raid, in an adjacent guesthouse, not involving bin Laden (Booth 2011). On this account, when he was killed, bin Laden was only "within reach of an assault rifle and pistol" (Booth 2011). Some have therefore concluded that US forces carried out the killing not in self-defence but intentionally, and thus in keeping with a larger pattern of targeted killing in the region (Dreazen *et al*. 2011). Nothing in the President's initial report contradicts this, and the inference is supported by a number of later investigations, including an extensive report by investigative journalist Seymour Hersh (2015).

Even if the killing is assumed to have been lawful under the AUMF, or carried out in self-defence on some broader interpretation of the doctrine, the presentation of the event and its reception stand in clear contrast to earlier assumptions about law and justice. Consider the contrast with an earlier period in the attempt to apprehend bin Laden under the direction of then-Attorney General Janet Reno. As Jane Mayer has noted (2008), in 1998, prior to bombings of the US embassies in Kenya and Tanzania, CIA officials had approached Reno with a plan to locate bin Laden in Afghanistan and transport him to Egypt for "rough" interrogation, which may well have been fatal. Reno is said to have balked at the proposal. Bin Laden was certainly thought to be dangerous and in urgent need of capture, given evidence of his involvement in the 1993 attack on the World Trade Centre and on US service men in Somalia in the mid-90s. But in Reno's view, any operation to capture and retrieve him could be authorized only if he were first indicted and the goal of the operation was to bring him to the US to stand trial.

In hindsight, it seems fair to infer that the prospect of bin Laden's death at the hands of Egyptian interrogators was anathema to Reno not because she thought he did not deserve to die, but because she still assumed the matter involved the subject of a criminal investigation—a human being. What she abhorred in the possibility of bin Laden's torture and death without due process was precisely the idea of making him *disappear* without any recognition of his humanity. A sense that he was owed due process and humane treatment is inextricably linked to such recognition.

By contrast, Obama's late-night announcement of the killing in 2011 contained no discussion of whether capture and prosecution were preferable, and no attempt to justify the lack of any form of due process. The President's description of the event as having followed a "fire-fight" suggested a rationale for the use of deadly force, but notably, Obama did not assert this. A justification for the killing was thus implied but not offered. One might infer from this deliberate vagueness that an overt justification was neither expected nor even appropriate. With a wider public assuming bin Laden's culpability to be indisputable, and al Qaida perceived as a threat tantamount to war, his killing appeared to be just on the general perception of it as a kind of battlefield death of a major general rather than the execution of a criminal without due process. Put otherwise, his being killed rather than captured both denied recognition of his humanity, and made it easier to accept his death as an appropriate measure precisely by rendering his humanity invisible.

A similar logic was invoked in the course of a second prominent killing that followed in September of 2011, with the assassination in Yemen of a New-Mexican born extremist, Anwar al-Awlaki—who had been a highly visible and vocal advocate of violent jihad through various internet videos and recordings, and was widely known to be targeted for over a year (Kasinof *et al*. 2011). In this case, the justification for the use of targeted killing as an appropriate measure was more overt. Confirming a report of the killing, and defending the need to carry out the strike, 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 Americans abroad" (Mazzetti *et al*. 2011). He also suggested that Awlaki had encouraged or inspired militants in several plots, including the attempt in December 2009 by Umar Farouk Abdulmutallab to explode a passenger jet destined for Detroit, using a bomb in his underwear. The strike also killed a second US citizen, Samir Khan, with whom Awlaki had been traveling. Khan was the editor of a radical online news organ, but had been not explicitly targeted. The strike thus had the effect of curtailing visible forms of extremism,

while also depriving each of the suspects of the recognition and respect entailed in due process and the presumption of innocence.

Notably absent from the administration's pronouncements in the wake of the event was any explanation as to the *immediate* need to kill Awlaki, or regret for Khan's death as collateral and unintended. The fact that they were plotting or encouraging terror and associated with the Yemini off-shoot of al Qaida were sufficient reasons to cast them as enemy combatants in a war-like threat to America. Like bin Laden, they were thus portrayed as combatants ambushed in the theatre of war rather than fugitive suspects killed in a violent confrontation with law enforcement.

In March of 2013, the Obama administration shed further light on the logic at play in targeted killing by asserting the power to authorize strikes against American citizens *in* the United States. The premise for such authority was that strikes in this case were simply an extension of the principle that to kill in self-defence when under attack by what amount to enemy combatants is entirely fair and just. Attorney General Eric Holder invoked this logic in a letter to Senator Rand Paul, who had asked whether "the President has the power to authorize lethal force, such as a drone strike, against a U.S. citizen on U.S. soil, and without trial" (Holder 2013). Holder replied, "it is possible, I suppose, to imagine an extraordinary circumstance in which it would be necessary and appropriate under the constitution and applicable laws of the United States for the President to authorise the military to use lethal force within the territory of the United States" against a US citizen. The President may have "no choice," Holder suggested, "in the circumstances of a catastrophic attack like the ones suffered on December 7, 1941, and September 11 2001." Although members of the Senate Judiciary Committee were critical of the scope of the authority Holder had asserted, a number of them "defended the notion that some use of military force on United States soil would be lawful" (Savage 2013).

Citizenship Revocation

Over the course of the past century, Canadian law has contained a series of grounds for which citizenship could be revoked, including acquisition of another citizenship, fraud on the part of a naturalized

citizen in the course of acquisition, or participation in the military of an enemy nation (Macklin 2014). By 1977, all grounds were removed except for fraud (Macklin 2014). In 2014, however, Canada followed recent developments in the United Kingdom by amending its law to allow for revocation on grounds of national security (Macklin 2014). Following a series of legislative and judicial developments over the course of the decade, Britain had amended its law in 2013 to allow the Home Secretary to revoke citizenship, even if it rendered an individual stateless, in cases where a person has "conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom" and where the Secretary of State has reasonable grounds to believe the individual can obtain citizenship elsewhere (Macklin 2014: 17). In addition to Canada following suit, the Netherlands, Austria, and Australia have begun to debate analogous reforms (Macklin 2014).

The bases on which Canada has structured citizenship revocation are worth noting briefly, to shed light on the idea of justice they imply. In addition to fraud, the *Strengthening Canadian Citizenship Act* (2014) created two broad grounds on which the Minister of Citizenship (or other cabinet member) may revoke citizenship. The first is for "convictions relating to national security," which include terrorism offences in the *Criminal Code*, treason, and spying. For terrorism offences, the conviction may occur outside of Canada for acts that would constitute an offence under Canadian law (Macklin 2014). A second ground is where the Minister has reasonable grounds to believe that a person has "served as a member of an armed force of a country or as a member of an organized or armed group and that country or group was engaged in an armed conflict with Canada" (section 10.1.(2)). As Macklin (2014) notes, the armed conflict ground closely resembles the elements of the *Criminal Code* offence of high treason, which involves engaging in war against Canada or assisting an enemy at war with Canada, or any forces against which Canada is engaged in hostilities (section 46[1] and

[3]). Revocation thus serves as an alternative to conviction and punishment for this form of treason.[71]

As Macklin also notes (2014), both new grounds for revocation are constrained by the prohibition under international law of rendering a person stateless. Yet such an outcome is still possible because the 2014 bill places an onus on the citizen to prove, on a balance of probabilities, that he or she is not a dual citizen (Macklin 2014). Where a person fails to discharge the onus, the Minister may revoke citizenship by establishing prior convictions or by referring the question of a person's involvement in a foreign army or armed group to a judge of the Federal Court. The judge's finding of such involvement results in revocation (Macklin 2014). Once citizenship is revoked, removal proceedings begin. This leads Macklin to comment that the two events flow "almost seamlessly," as "sequential stages of a single event" which is essentially "exile or banishment" (Macklin 2014: 28).

Macklin (2014) and Forcese (2014) have argued that revocation of citizenship, on the basis of conduct other than fraud, is based on a variation of contract theory. On this view, citizenship is seen as a privilege of membership in a community, because membership is understood as fundamentally contractual. Individuals contract with the sovereign for inclusion and protection in the body politic, and by engaging in treasonous conduct, they voluntarily sever. Macklin and others (2015) have also observed that revocation closely parallels the death penalty, effecting a form of political or civil death, or a stripping of legal recognition akin to the status accorded to slaves or felons in earlier ages (3). In recent years, revocation of UK citizenship, together with banishment, have literally served as a "prelude" to death, with two former UK citizens being executed in US drone strikes (Macklin 2015).

To draw on Macklin once more, the contrast with liberal forms of legality and criminology is stark:

[71] As of October 2015, the Canadian government has revoked citizenship under the new act in only a single case—that of Zakaria Amara, a Jordanian immigrant, who received a life sentence in 2010 for his role in the "Toronto 18" bomb-plot (discussed below). The government is seeking revocation in a number of other cases involving persons convicted of terrorism offences under Canada's *Criminal Code*.

> As with the death penalty, denationalisation extinguishes the prospect of rehabilitation or reintegration. The paradigmatic subject of citizenship revocation – the terrorist – is excluded from the ambit of human dignity that underwrites contemporary penal philosophy and affirms capacity for autonomy, rational self reflection and reform. He is, in that sense, not fully human and thus incapable of rehabilitation. Banishment operates as pure and permanent retribution. There is no re-entry into the political community, no life after political death. (Macklin 2015: 4)

I would add to Macklin's assessment here that revocation or banishment not only implies a perception that the terror suspect or offender lacks humanity, but also brings about their dehumanization. It is precisely *through* the act of banishing rather than prosecuting and punishing that such persons are rendered inhuman by a denial of recognition of their dignity and equality—becoming what Agamben (1998) terms *homo sacer* or "bare life."

The Conservative government has indicated that its aims for the 2014 amendments were to deter terrorism and protect national security (Alexander 2014, cited in Macklin 2014). In a practical sense, neither aim is plausible—suicide bombers are unlikely to be deterred by the threat of banishment, and once banished, they remain a security threat (Macklin 2014). Yet, invoking national security here is significant. On a symbolic level, the government is relying on a view of terrorism in general (not in specific cases) as something more than a threat to social order, or a crime, but a threat to national security, and thus, impliedly, a threat tantamount to war. Banishment may not make us safer, but it presents a *just* consequence by expressing a shared sense that we cannot afford to harbour such dangerous enemies within.

Terrorism Sentencing (Life Without Parole)

A final sense of justice as invisibility or disappearance is found in the sentencing of terrorism offenders in the period after 9/11. Across the common law world, sentences in cases involving serious or large-scale plots have tended to result in life without parole (in the

United States) or long periods of parole ineligibility.[72] In a number of commonwealth decisions, courts have arrived at this result in partial reliance upon the dicta of Chief Justice Lord Bingham in the 1997 English Court of Appeal decision in *R. v. Martin*. *Martin* involved an Irish Republican Army conspiracy to set off explosions at an electricity plant. Lord Bingham stated that "[i]n passing sentence for the most serious terrorist offences, the object of the court will be to punish, deter and incapacitate; rehabilitation is likely to play a minor (if any) part." The Chief Justice had thus minimized the role of rehabilitation not for *all* terrorism offences but only for "the most serious" of them. After 9/11, however, a number of courts would read the holding in *Martin* more expansively to apply to *all* terrorism offences, including cases involving peripheral offenders. Courts would seek to justify this logic by framing terrorism as a kind of super-crime or a form of war.

Leading UK decisions are exemplary in this respect. Relying partly on the dicta in *Martin*, but also on amendments to the UK's *Criminal Justice Act of 2003* mandating longer sentences for certain forms of murder or conspiracy, the English Court of Appeal in *Barot* (2007) imposed a life sentence with a 30 year non-parole period for one of the main conspirators in a plot to bomb a London office building. Yet Chief Justice Lord Phillips also cited the trial decision to note the appellant's intention to "slaughter hundreds, if not thousands, of wholly innocent men, women and children." He took the facts in this case to indicate "the search by the terrorists for a means of causing death on an even greater scale than results from the destruction of a passenger plane and the events of 9/11 show that this can be achieved." It was also, in his view, "not without significance that in *A v. Secretary of State for the Home Department* [2004] UKHL 56 […] the majority of the House of Lords accepted that the terrorist threat represented "a public emergency threatening the life of the nation." In *Ibrahim* (2008), Britain's most serious post-9/11 terror case, involving plotters in the failed bombing that

[72] At the furthest extreme, Dzhokhar Tsarnaev was sentenced to the death penalty for his role in the Boston bombing of 2013. However, death sentences in terrorism case have been relatively rare even in the United States, due in part to vagaries in the choice of federal and state law in the process of prosecution. On terrorism sentencing in the US generally, see Said (2014).

occurred two weeks after the attacks of July 7, 2005, the English Court of Appeal upheld sentences of life with non-parole periods of 40 years. Dismissing the appeals of two of the offenders who played a less central role in the plot, Justice Forbes held that given the common intent among the four appellants to commit "mass murder" it was "quite impossible… to discern distinctions of degree and involvement between different defendants."

In *R. v. Lodhi* (2007), Australia's leading terrorism case after 9/11, the offender had collected maps of the Australian electrical supply system and made efforts to obtain explosives. Yet he was stopped at a very early stage of the matter, compared to the more extensive steps taken by the parties in *Martin.* The New South Wales Court of Appeal upheld a 20-year sentence, with Justice Price citing *Martin*, but asserting more broadly that "[r]ehabilitation and personal circumstances should often be given very little weight in the case of an offender who is charged with a terrorism offence." In *R. v. Elomar* (2010), the conspirators amassed weapons and bomb-building materials, and contemplated various targets, without settling upon any in particular at the time the plot was foiled. There was also a reasonable doubt as to a deliberate intention to cause casualties. The Supreme Court of New South Wales would invoke *Martin* to justify sentences that ranged from 23 to 28 years, with non-parole periods of 17 to 21 years.

The Ontario Court of Appeal embraced a wider interpretation of *Martin* in a set of companion decisions involving offenders of varying culpability (*Khawaja*, *Khalid*, *Gaya* and *Amara* 2010), holding rehabilitation should play a minor role in all terrorism cases. The court raised the sentences of all offenders, in two cases to life, and extended the various non-parole periods at issue. Khawaja's sentence had "fail[ed] to reflect the enormity of his crimes and the horrific nature of the crime of terrorism itself. Terrorism, in our view, is in a special category of crime and must be treated as such." To support the distinctness argument, the court cited the trial decision of Justice Durno of one of the appellants, Amara, who was charged in a plot to bomb two Toronto office buildings. "What this case revealed was spine-chilling. I agree with [Crown counsel] that

the potential for loss of life existed on a scale never before seen in Canada. It was almost unthinkable without the suggestion that metal chips would be put in the bombs. Had the plan been implemented it would have changed the lives of many, if not all Canadians forever."

In an appeal to Canada's highest court in one of these cases, *Khawaja*, the Court disagreed with the proposition that "the import of rehabilitation as a mitigating circumstance is significantly reduced" in the case of terrorism offences in general. On behalf of the Court, Chief Justice McLachlin held instead that "the weight to be given to rehabilitation in a given case is best left to the reasoned discretion of trial judges on a case-by-case basis." She also suggested that if there had been evidence of rehabilitative prospects in Khawaja's particular case, the principle of rehabilitation might have played a greater role, despite the gravity of his conduct (directly assisting in a London bomb plot). Against the grain of the jurisprudence in this area, then, the Court refused to see terrorism as a distinct form of crime. It held to a liberal legal conception of the terrorism offender as capable at least in theory of rehabilitation and reintegration—even in the most serious cases.

However, *Khawaja* stands in contrast to a growing body of case law and legislation calling for longer sentences that equate a just and appropriate sentence for the terrorism offender with a lengthy period of separation and minimal concern for rehabilitation and reintegration. They serve as a further instance of justice being equated with treating terrorism offenders as inhuman others, who merit permanent removal or disappearance, in light of the gravity of the threat to which they are linked.

Conclusion: Impediments to Reform

In the first decade or so after 9/11, a perception of terrorism had gained currency in North American cultural and political discourse to the effect that 9/11 was not to be understood as an anomaly in the history of terrorism but the harbinger of the much greater scale of attacks that could be expected in the near future. The view of 9/11 as a harbinger served to support various authoritarian measures, including targeted killing, indefinite detention without charge, and mass surveillance—and shifting ideas about legality that made it

possible to ratify all of these practices as lawful. It is unclear to what extent the harbinger theory remains current in North American discourse and perceptions about terrorism. Yet governments continue to attempt to frame concerns about terror in terms that resonate with it—by pointing to large, transnational groups such as ISIS or al Qaida in the Arab Peninsula to suggest the continuing presence of entities capable of launching large-scale attacks on North American soil.

If, to some extent, the theory continues to underwrite authoritarian measures, it also poses an obstacle to reform. This article has attempted to illuminate how an emerging sense of justice traceable in late-stage terrorism cases contributes to this challenge. Through the practices of targeted killing, citizenship revocation, and terrorism sentencing, a clear shift can be seen in ideas of justice at play. Until relatively recently, we might have been inclined to see the terror suspect or offender as an extreme form of criminal, still owed due process and capable in theory of rehabilitation. But in light of a belief in the much greater threat of terror, it has become more difficult to imagine extending older, humane protections and limits on the use of force to terrorism offenders. Banishment, permanent confinement, and killing appear just and appropriate due in part to the need for greater security, but also by virtue of rendering the offender's humanity invisible.

References

Abacus Data. (2013). NSA and Snowden: Canadians, terrorism and online privacy. Retrieved from: http://abacusinsider.com/politics-public-affairs/nsa-snowden-canadians-terrorism-online-privacy/

Agamben, G. (1998). *Homo sacer: Sovereign power and bare life*. Stanford, CA: Stanford University Press.

Agiesta, J. (2015). Poll: 6 in 10 back renewal of NSA data collection. *cnn.com*

Alexander, C. (2014). Strengthening the value of Canadian Citizenship to the Canadian Club of Vancouver (Keynote Address delivered at the Canadian Club of Vancouver, 18 February).

Allison, G. (2005). *Nuclear terror: The ultimate preventable catastrophe*. New York: Henry Holt.

Baker, P., Cooper, H., & Mazzetti, M. (1 May 2011). Bin Laden is dead, Obama says. *New York Times*.

Barnaby, F. (2004). *How to build a nuclear bomb and other weapons of mass destruction*. London: Granta Books.

Beach, J., Roth, P. J. (Producers), & McIntire, C. (Director). (2002). *Antibody* [Motion picture]. US: United Film Organization (UFO).

Blum, G., & Heymann, P. (2010). Law and policy of targeted killing, *Harvard National Security Journal*, *1*, 145-170.

Booth, R. (4 May 2011). The killing of Osama bin Laden: How the White House changed its story. *The Guardian*.

Brighenti, A. (2007). Visibility: A category for the social sciences. *Current Sociology, 55*(3), 323-342.

Brown, D. (2001). *Deception point*. New York: Pocket Books.

Bumiller, E., & Shanker, T. (11 Oct 2012). Panetta warns of dire threat of cyberattack on US. *New York Times*.

Bunn, M. (2010). *Securing the bomb 2010: Securing all nuclear materials in four years*. Cambridge: Project on Managing the Atom, Belfer Center for Science and International Affairs, Harvard Kennedy School and Nuclear Threat Initiative.

Bush, G. W. (29 Jan 2002). State of the union address. *Washington Post*.

Butler, J. (2004). *Precarious life: The powers of mourning and violence*. London: Verso Press.

Cable News Network. (2013). CNN/ORC Poll: Terror, June 11–13. Retrieved from: http://www.pollingreport.com/terror.htm

Canada, Parliament. House of Commons. (2001). Evidence. *Standing Committee on Justice and Human Rights*. (Meeting No. 29, October 18) 37th Parliament, 1st session.

Canada. (2012). *Building resilience against terrorism: Canada's counter-terrorism strategy*. Ministry of Public Safety.

Chase, S., & Hol, D. (8 Jan 2015). New anti-terror laws coming as Jihadis "declare war," Harper says. *The Globe and Mail*.

Chung, A. (7 Sept 2011). Canadians fears of terror rose post 9/11. *Postmedia News*.

Clancy, T. (2004). *Splinter cell*. London: Penguin Group.

Clapper, J. (8 Jun 2013). Facts on the collection of intelligence pursuant to Section 702 of the Foreign Intelligence Surveillance Act. *Office of the Director of National Intelligence*.

Cochran, R., & Surnow, J. (Creators). (2001). *24* [Television series]. Los Angeles: 20th Century Fox.

Cole, D. (Ed.). (2009). *The torture memos: Rationalizing the unthinkable*. New York: The New Press.

Davis, J. (2004). A biological warfare wake-up call: Prevalent myths and likely scenarios. In J. A. Davis and B. R. Schneider (Eds.), *The Gathering Biological Warfare Storm* (pp. 289-307). Westport, CT: Praeger.

Dershowitz, A. (2006). *Preemption: A knife that cuts both ways*. New York: W.W. Norton.

Diab, R. (2015). *The harbinger theory: How the post-9/11 emergency became permanent and the case for reform*. New York: Oxford University Press.

Dilanian, K., & Sullivan, E. (13 Sept 2014). Syrian extremists may pose more direct threat to US than Islamic State. *Associated Press*.

Dreazen, Y., Madhani A., & Ambinder, M. (4 May 2011). The goal was never to capture bin Laden. *The Atlantic.*

Duff, A. (2001). *Punishment, communication, and community.* New York: Oxford University Press.

Duff, A. (2003). Penance, punishment, and the limits of community. *Punishment and Society, 5*(3), 295-312.

Edgar, T. (2015). Without the USA Freedom Act, NSA could resume bulk collection even if Patriot Act provisions expire. *Lawfare* [Blog].Retrieved from: https://www.lawfareblog.com/without-usa-freedom-act-nsa-could-resume-bulk-collection-even-if-patriot-act-provisions-expire

Ferguson, C., & Potter, W. (2005). *The four faces of nuclear terrorism*. London: Routledge.

Forcese, C. (2014). A tale of two citizenships: Citizenship revocation for traitors and terrorists. *Queen's Law Journal, 39*(2), 551-586.

Gansa, A., & Gordon, H. (Creators). (2011). *Homeland* [Television series]. New York: Showtime.

Garland, D. (2001). *The culture of control: Crime and social order in*

contemporary society. Chicago, IL: University of Chicago Press.
Garland, D. (2010). *Peculiar institution: America's death penalty in an age of abolition.* Cambridge: Harvard University Press.
Gallup. (2006). Terrorism in the United States. Retrieved from: http://www.gallup.com/poll/4909/Terrorism- United-States.aspx
Greenwald, G. (2014). *No place left to hide: Edward Snowden, the NSA, and the US surveillance state*. New York: Metropolitan Books.
Hembrey, J. (4 Mar 2015). Terrorism survey: 50% of Canadians feel less safe than 2 years ago. *CBC News*.
Hersh, S. (21 May 2015). The killing of Osama bin Laden. *London Review of Books*.
Holder, E. (2013). Letter of March 4 to Senator Rand Paul. Retrieved from: http://www.paul.senate.gov/files/documents/BrennanHolderResponse.pdf
Ipsos Inc. (2013). Canadians split on whether it's acceptable for governments to monitor email and online activities in some circumstances. Retrieved from: http://www.ipsos-na.com/news-polls/pressrelease.aspx?id=6233
Kasinof, L., Mazzetti, M., & Cowell, A. (30 Sept 2011). U.S.-born Qaida leader killed in Yemen. *New York Times*.
Kellman, B. (2007). *Bioviolence: Preventing biological terror and crime*. Cambridge: Cambridge University Press.
Levi, M., & Kelly, H. (2002). Weapons of mass disruption. *Scientific American, 287*, 76-81.
Liu, J. (2015). So what does the USA Freedom Act do anyway. *Lawfare* [Blog]. Retrieved from: https://www.lawfareblog.com/so-what-does-usa-freedom-act-do-anyway
Luban, D. (2005). Liberalism, torture, and the ticking bomb. *Virginia Law Review, 91*, 1425-1461.
Lustic, I. (2006). *Trapped in the war on terror*. Philadelphia, PA: University of Pennsylvania Press.
Macklin, A. (2014). Citizenship revocation, the privilege to have rights and the production of the alien. *Queen's Law Journal, 40*(1), 1-53.
Mayer, J. (2008). *The dark side: The inside story of how the war on terror turned into a war on American ideals*. New York: Doubleday.
Mazzetti, M., Schmitt. E., & Worth, R. (20 Sept 2011). Two-year manhunt led to killing of Awlaki in Yemen. *New York Times*.
McCoy, T. (23 Sept 2014). Targeted by U.S. airstrikes: The secretive al-Qaeda cell was plotting an "imminent attack." *Washington Post*.
Mueller, J. (2002). Harbinger or aberation? A 9/11 provocation. *The National Interest, Fall*, 45-50.
Mueller, J., & Stewart, M. (2011). *Terror, security and money: Balancing*

the risks, benefits, and costs of Homeland Security. London: Oxford University Press.
Neufeld, M. (Producer), Robinson, P. A. (Director). (2002). *The Sum of All Fears* [Motion picture]. US: Paramount Pictures.
New America Foundation, (2015a). Drone wars Pakistan: Analysis. *New America Foundation.* Retrieved from: http://securitydata.newamerica.net/drones/pakistan-analysis.html
New America Foundation, (2015b). Drone wars Yemen: Analysis. *New America Foundation.* Retrieved from: http://securitydata.newamerica.net/drones/yemen-analysis.html
Obama, B. (17 Feb 2014). Remarks by the President on review of signals intelligence. *Department of Justice*. Washington D.C.
Patterson, J. (2004). *London bridges*. New York: Grand Central Publishing.
Posner, R. (2007). *Countering terrorism: Blurred focus, halting steps*. Lanham,MD: Rowman and Littlefield.
Preble, C., & Mueller, J. (2014). Introduction. In C. A. Preble, & J. Mueller (Eds.), *A dangerous world? Threat perception and U.S. National Security.* Washington, DC: Cato Institute.
Pue, W. (2003). The war on terror: Constitutional governance in a state of permanent warfare. *Osgoode Hall Law Journal, 41*, 267-292.
Rashid, A. (2014). ISIS: What the US doesn't understand. *New York Review of Books* [Blog]. Retrieved from: http://www.nybooks.com/daily/2014/12/02/isis-what-us-doesnt-understand/
Rasmussen Reports. (2012). 65% see another 9/11 as possible in next 10 years. Retrieved from: http://www.rasmussenreports.com
Razack, S. (2008). *Casting out: Race and the eviction of Muslims from Western law and politics*. Toronto, ON: University of Toronto Press.
Roach, K. (2011). *The 9/11 effect: Comparative counter-terrorism*. Cambridge: Cambridge University Press.
Roach, K. & Forcese, C. (2015). Bill C-51: Collation of evidence on C-51 before Commons Committee. Retrieved from: http://www.antiterrorlaw.ca
Ruthven, M. (2015). Inside the Islamic State. *New York Review of Books* [Blog]. Retrieved from: http://www.nybooks.com/articles/2015/07/09/inside-islamic-state/
Said, W. (2014). Sentencing terrorist crimes. *Ohio State Law Journal, 75*(3), 477-528.
Savage, C. (6 Mar 2013). Senators press Holder on use of military force. *New York Times*.

Simon, J. (2007). *Governing through crime: How the war on crime transformed American democracy and created a culture of fear*. New York: Oxford University Press.
The White House. (2010). *The National Security Strategy of the United States of America.*
The White House. (2011). *National Strategy for Counterterrorism.*
Thompson, J. (2005). The new visibility. *Theory, Culture & Society, 22*(6), 31-51.
Thompson, J. B. (2011). Shifting boundaries of public and private life. *Theory, Culture, and Society*, *28*(4), 49-70.
Toulouse, M. (2015). Evil as a noun: Dichotomous avoidance of political analysis. In E. M. Iacobucci, & S. J. Toope (Eds.), *After the Paris attacks: Responses in Canada, Europe, and around the Globe*. Toronto, ON: Universty of Toronto Press.
Waldron, J. (2005). Torture and positive law: Jurisprudence for the White House. *Columbia Law Review, 105*, 1681-1750.
Yoo, J. (2006). *War by other means: An insider's account of the war on terror*. New York: Atlantic Monthly Press.
Zedner, L. (2009). *Security*. London: Routledge.

Canadian Case Law

Abdelrazik v. Canada, 2009 FC 580.
R. v. Amara, 2010 ONCA 858.
Canada (Citizenship and Immigration) v. Harkat, 2014 SCC 37.
Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9.
R. v. Gaya, 2010 ONCA 860.
R. v. Khalid, 2010 ONCA 861.
R. v. Khawaja, 2010 ONCA 862.
Suresh v. Canada, 2002 SCC 1.

U.S. Case Law

Hamdi et al. v. Rumsfeld, Secretary of Defence, et al, 542 U.S. 507 (2004).
Rasul v. Bush, 542 U.S. 466 (2004).
Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
Boumediene v. Bush, 476 F. 3d. 981 (2008).
Totten v. United States, 92 U.S. 105, at 107 (1876)

UK Case Law

A v. Secretary of State for the Home Department [2004] UKHL 56 *R. v. Martin*, [1999] 1 Cr App R (S) 477
R. v. Barot, [2007] EWCA Crim 1119
R. v. Ibrahim, [2008] EWCA Crim 880

European Case Law

El-Masri v. the former Yugoslav Republic of Macedonia, 39630/09, December 2012

Australian Case Law

Lodhi v. R, [2007] NSWCCA 360

R. v. Elomar, [2010] NSWSC 10

Canadian Statutes

Anti-terrorism Act, S.C. 2001, c. 41.

Anti-terrorism Act 2015, S.C. 2015, c. C-20

Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23.

Canada Evidence Act, R.S.C. 1985, c. C-5.

Criminal Code, R.S.C., 1985, c. C-46.

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

National Defence Act, R.S.C., 1985, c. N-5.

Strengthening Canadian Citizenship Act, S.C. 2014, c. 22.

U.S. Statutes

Authorization to Use Military Force, Public Law 107-40.

Detainee Treatment Act of 2005, H.R. 2863.

Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA Patriot Act), H.R. 3162.

Foreign Surveillance Intelligence Act, Public Law 95-511.

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