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The Demise of Rights as Trumps

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I. INTRODUCTION

The damage done to human rights in the period since 2001 as a consequence of various measures in the 'war on terror' is well known. What is perhaps new in recent years is an emerging sense of the extent of the damage, an awareness that a corner has been turned and that human rights may be entering a long-term eclipse, even where rights are at the centre of a nation's political self-conception. To identify this sense is not to deny the important work of courts and legislatures in resisting these trends. The point is to make sense of the fact that much of the apparatus of the war on terror remains intact, with no sign of change on the horizon. Scores of detainees at Guantanamo approach two decades in custody without charge.[1] The United States continues its targeted killing programme free of judicial due process;[2] terrorist suspects are still frequently subjected to rendition;[3] and extensive technologies of state surveillance are pervasive across the globe.[4] Citizens in modern democracies are, to a large degree, acquiescent.

The sense that we may be entering a longer-term decline in the currency of rights is further shaped by responses to more recent terror unfolding across the West. In the wake of what were by any measure small-scale events (3 soldiers killed), Canada passed a law in 2015 allowing courts to issue warrants to

[1] 'The Guantánamo Docket', *New York Times* (updated 2 May 2018), https://www.nytimes.com/interactive/projects/guantanamo.

[2] M Hussain, 'US Has Only Acknowledged a Fifth of Its Lethal Strikes, New Study Finds', *The Intercept* (13 June 2017): '[T]he drone program is intensifying. Since President Donald Trump took office earlier this year, the rate of drone strikes per month has increased by almost four times Obama's average.' See also Human Rights Watch, 'United States' in *World Report 2017* (New York, Human Rights Watch, 2017). For more on targeted killing, see also the chapter in this volume by Shiri Krebs.

[3] International Commission of Jurists, *Transnational Injustices: National Security Transfers and International Law* (Geneva, International Commission of Jurists, 2017).

[4] See contributions to the special issue of *Surveillance and Society* entitled 'Surveillance and the Global Turn to Authoritarianism' edited by David Murakami Wood, (2017) 15(3/4) *Surveillance and Society*.

intelligence agents to carry out not only searches and arrests but acts that would violate *any* of the rights guaranteed under the nation's constitutional bill of rights.[5] After two larger-scale attacks in 2015, France remained in a state of emergency until the fall of 2017, when it passed legislation making many of the emergency powers permanent.[6] And further attacks in Berlin, Barcelona, and London have only added to a climate of fear in which governments in Britain, Australia, and other nations have embraced deportation to torture, citizenship-revocation for terrorist suspects, and other infringements.[7]

In light of both this second wave of terrorism and the responses to it, earlier debates about rights and security in the years after 2001 have now taken on a different valence. Much of the scholarship of the post-9/11 period – including many contributions to the first edition of this volume – was premised on the view that rights and security were not incompatible.[8] A hope widely shared in these early debates was that much of the overstated fear would eventually subside, and rights would make something of a comeback.[9] Many commentators were therefore sceptical that terrorism posed a greater threat to national security after 2001.[10] But some prominent voices – Bruce Ackerman, Michael Ignatieff, Ronald Dworkin, eg – took seriously the claim that 9/11 had somehow changed the equation or at least called for a fundamental reassessment.[11]

[5] The Anti-terrorism Act 2015, SC 2015, c 20, affecting the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c II [hereafter, 'Canadian Charter']. For an extensive overview and critique of the bill, see C Forcese and K Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto, Irwin Law, 2015).

[6] Library of Congress, 'France: State of Emergency Officially Ends as New Security Measures Come into Force', *Global Legal Monitor* (29 November 2017), http://www.loc.gov/law/foreign-news/article/france-state-of-emergency-officially-ends-as-new-security-measures-come-into-force/. The article notes the bill's powers for establishing 'protection perimeters' around vulnerable sites (concerts, sporting events) at which searches may be conducted and entry denied; powers to close places of worship where violence or terror are promoted; and powers for the monitoring of suspects without charge. Law No 2017-1510 of 30 October 2017 Reinforcing Domestic Security and the Fight Against Terrorism. For discussion on the state of emergency in France, see the chapter in this volume by Marc-Antoine Granger.

[7] BBC, 'Theresa May: Tories to Consider Leaving European Convention on Human Rights', *BBC News* (9 March 2013), citing May: 'When Strasbourg constantly moves the goalposts and prevents the deportation of dangerous men like Abu Qatada, we have to ask ourselves, to what end are we signatories to the convention?'; and S Medhora, 'Law to Strip Dual Nationals of Australian Citizenship Set to Pass Parliament', *Guardian* (10 November 2015). For discussion on the curtailment of citizenship rights as a response to terrorism, see the chapter in this volume by Lucia Zedner.

[8] L Lazarus and BJ Goold, 'Security and Human Rights: The Search for a Language of Reconciliation' in BJ Goold and L Lazarus (eds), *Security and Human Rights* (Oxford, Hart Publishing, 2007) 2.

[9] See, eg, D Cole and J Lobel, *Less Safe, Less Free: Why America is Losing the War on Terror* (New York, New Press, 2007); and International Commission of Jurists, *Addressing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (Geneva, International Commission of Jurists, 2009).

[10] See both sources cited ibid for examples of scepticism to this effect.

[11] B Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven, Yale University Press, 2006); M Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, Princeton University Press, 2004); and R Dworkin, 'The Threat to Patriotism',

At the heart of the debate about rights and security, then, was a question about the nature of the threat of terrorism and its implications. In what follows, I show how and why this issue continues to be central to the debate and to the diminished currency of rights.

More specifically, I advance the claim that to better understand why security has continued to prevail over rights in much of present political discourse, we need to return to a recent high-watermark of rights consciousness and revisit some of its axiomatic assumptions. In ways to be explored, beliefs about terrorism have continued to evolve in recent years, but they still complicate assumptions that were fundamental to the defence of rights in the mid- to late twentieth century.

I refer, in this regard, to the period from roughly the mid-1950s to the 1970s, primarily in the United States but also in eastern Europe and many parts of the world in the process of decolonising, when civil and human rights had come to the fore of political thinking, with rights emerging as a 'last utopia'.[12] It was in this very different context that Dworkin first advanced his theory of 'rights as trumps'[13] – a theory that crystallised much of the discourse around rights in the period. A key aspect about rights for Dworkin was the contrast they entailed to utilitarian or communitarian approaches to politics. To 'take rights seriously', Dworkin began to argue around 1970, did not involve balancing them with collective interests; it involved giving them priority. This followed from the value we place on the Kantian sense of the inherent dignity and equality of each individual and the view that to protect these interests, we had to be prepared – in at least some cases – to place rights before and above the majority's interests.[14]

Dworkin happened to articulate this theory at roughly the point in time when concerns about security were becoming prominent in Anglo-American politics.[15] Across much of the United States and Britain, anxiety was rising

New York Review of Books (28 February 2002) 44; R Dworkin, 'Terror and the Attack on Civil Liberties', *New York Review of Books* (6 November 2003) 37; and R Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton, Princeton University Press, 2006) ch 2.

[12] S Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Harvard University Press, 2012).

[13] R Dworkin, *Taking Rights Seriously* (Cambridge, Harvard University Press, 1977). The chapter in which Dworkin set out the theory first appeared as the essay R Dworkin, 'A Special Supplement: Taking Rights Seriously', *New York Review of Books* (17 December 1970).

[14] Dworkin, *Taking Rights Seriously* (ibid) 198. See also Dworkin's later essays (cited above n 11). Dworkin was neither new nor unique in making this claim; congenial formulations of rights were at least implied in L Fuller, *The Morality of Law* (New Haven, Yale University Press, 1963). Rights as trumps also resonated with the importance of equality in the work of John Rawls in the period. See, eg, J Rawls, 'The Sense of Justice' (1963) 72 *Philosophical Review* 281. But Dworkin's foregrounding and articulation of the contrast between the instrumental thinking implied in utilitarian conceptions of liberalism and rights as political trumps were unique and influential.

[15] D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago, University of Chicago Press, 2001); L Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Goold and Lazarus (eds) (above n 8); and J Simon, *Governing*

along with crime rates and racial and class tensions.[16] Electoral politics became increasingly focused on security and punishment.[17] Yet despite this, Dworkin's theory of rights still held a measure of currency as a normative account, resonating with much of the jurisprudence of the period – notably, the first decade or so of Canada's Supreme Court under the new Charter of Rights and Freedoms and many decisions of the European Court of Human Rights.[18]

The events of 9/11, however, would come to pose a much greater challenge. From the outset, ideas about rights were in tension with evolving beliefs about the nature of terrorism and the degree of harm it was capable of posing. In earlier work, I have explored these beliefs in terms of what can be called the harbinger theory.[19] This was a view, discernible in a wide range of political discourse and popular culture, that 9/11 marked the emergence of terrorism on a new scale. Rather than being an anomaly in the history of terrorism (which earlier had involved casualties in the tens or low hundreds), 9/11 was seen as a harbinger of further attacks likely resulting in a similar or greater degree of carnage as that of 9/11, possibly involving weapons of mass destruction.

For at least a decade after 9/11, when the harbinger theory was most pervasive, terrorism became a kind of privileged exception to rights as trumps, or at least the focal point of tension. Dworkin grappled with it repeatedly. Our perceptions of terrorism have since continued to evolve. But we persist in seeing terrorism as a significant and possibly unique threat, and this belief still poses complications for the theory of rights as trumps. Exploring why this is so lends insight into the challenge we face in reconciling ideas about right and security, and in reviving the currency of rights in the present.

II. THE LAST UTOPIA, OR RIGHTS AS TRUMPS IN CONTEXT

Before turning to the theory of rights as trumps, it may be helpful to briefly address the context in which Dworkin initially formulated it. I do so not to suggest that it remains a product of its time or that it reflects a set of values we no longer recognise. Rather, the context here is vital to understanding the power and force with which concepts at the heart of the theory resonated in the period – namely, dignity and equality – and thus the nature of their displacement in the present. The point of this brief excursion will be to demonstrate

Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (Oxford, Oxford University Press, 2007).

[16] Garland (ibid) Introduction.

[17] Garland (above n 15). See also Simon (above n 15) ch 2.

[18] *R v Oakes* [1986] 1 SCR 103; *Hunter v Southam Inc* [1984] 2 SCR 145; *Reference Re BC Motor Vehicle Act* [1985] 2 SCR 486; *Ireland v United Kingdom* (5310/71) [1978] ECHR 1; and *Dudgeon v United Kingdom* (7525/76) [1981] ECHR 5.

[19] R Diab, *The Harbinger Theory: How the Post-9/11 Emergency Became Permanent and the Case for Reform* (New York, Oxford University Press, 2015).

the link between the central concepts in Dworkin's theory and a specific historical and political juncture. This in turn will be relevant to the discussion in the second half of this chapter regarding the challenge of restoring the currency of rights as trumps in the current climate.

Looking back at Dworkin's first extended formulation of the theory in 1970, we risk overlooking the fact that he was writing at the culmination of a global rights revolution that had been unfolding from roughly the 1950s onward.[20] The story of how human rights emerged as a prominent theme nationally and globally in this period has lately become a matter of some contention, yet certain broad features seem beyond debate.[21] In the two decades following the UN's Universal Declaration of Human Rights (1948),[22] the language of the Declaration became a significant political motif in a range of contexts, including the civil rights movement in America and decolonisation movements across Africa and Asia.[23] As Samuel Moyn has noted, while the emphasis in human rights discourse in the early years after the Declaration was primarily on the liberation of peoples, or with group rather than individual rights, over the course of the 1960s, human rights assumed a different character.[24] They became a focal point, or as Moyn has put it, a 'last utopia', after the demise or discrediting of so many of the century's large-scale political programmes, from communism and fascism to post-colonialism.[25] Forsaking the often violent search for perfect social ordering in favour of the valorisation of humanity itself, the central theme of much of this discourse was the inherent dignity and worth of the individual, or an underlying universal humanity, which came to be widely embraced in the period as a transcendent political value in its own right.[26] We glean some indication of this by noting Amnesty International's receipt of the Nobel Prize in 1977; President Carter's frequent invocations of human rights in his foreign policy statements, along with those of other world leaders; and the embrace of human rights by Charter 77 and a host of other Eastern European dissident groups presaging the end of the Soviet order.[27]

An essential element of this constellation of events but of more immediate relevance to Dworkin was the jurisprudential revolution unfolding in the United States Supreme Court of the 1950s and 1960s. As the focus of constitutional litigation shifted from issues of state and federal power to questions of individual liberty,[28] the Warren Court decided a series of now canonical cases that effected

[20] A Iriye, P Goedde, and W Hitchcock (eds), *The Human Rights Revolution: An International History* (Oxford, Oxford University Press, 2012).

[21] Moyn, *The Last Utopia* (above n 12) taking issue with L Hunt, *Inventing Human Rights* (New York, Norton, 2007) and launching a wider debate. See also Iriye et al (ibid).

[22] UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948), 217 A (III).

[23] S Moyn, *Human Rights and the Uses of History* (London, Verso, 2014) 80.

[24] Ibid.

[25] Ibid, 83.

[26] Ibid, 81.

[27] Ibid.

[28] M Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, Free Press, 1991) 4.

a sea-change in social relations and often employed a form of reasoning overtly germane to rights as trumps. Among the most important of these cases were those dealing with segregation (*Brown v Board of Education* in 1954), free speech (*New York Times v Sullivan* in 1964), and the right to privacy (*Griswold v Connecticut* in 1965; *Katz v United States* in 1967; and *Roe v Wade* in 1973).[29] No less crucial were those cases effecting a shift of emphasis in US criminal law from a 'crime control' model valorising victims' rights, factual findings of guilt, and police powers to one favouring due process and findings of legal rather than factual guilt (*Mapp* in 1961; *Gideon* in 1963; and *Miranda* in 1966).[30]

A central motif in these cases, either explicitly or implicitly, was dignity. In *Brown v Board of Education*, school segregation was contrary to the constitutional protection of equality because it engendered among blacks 'a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone'.[31] In *Miranda*, Chief Justice Warren sought to anchor the rationale for protecting the accused against coerced confessions by highlighting the often 'menacing police interrogation procedures' in which they were obtained and their effect on suspects presumed innocent.[32] As Justice Warren wrote,

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. […] To be sure, this is not physical intimidation, but it is equally destructive of human dignity.[33]

Approaching Dworkin's theory in this wider context suggests that his motivation in advancing it was at least in part to address concerns (or dispel confusion) as to why courts had gone to such lengths to protect rights to a point that appeared detrimental to collective interests, or to certain perceptions of it. On Dworkin's view, the Supreme Court's work could best be understood as an effort not to expand liberty so much as to advance a broader humanist project through the protection of individual dignity and equality. His reading aimed to frame the Court's work in the period as part of a wider and insurgent progressive movement. The Court portrayed here was not only more favourably constituted, from a liberal perspective, than the divided bench of the period after 2001; it was also less preoccupied than later courts would be with external threats, collective security, and justified limits on rights.

[29] *Brown v Board of Education of Topeka, Kansas*, 347 US 483 (1954); *New York Times Co v Sullivan*, 376 US 254 (1964); *Griswold v Connecticut*, 381 US 479 (1965); *Katz v United States*, 389 US 347 (1967); and *Roe v Wade*, 410 US 113 (1973).

[30] H Packer, *The Limits of the Criminal Sanction* (Stanford, Stanford University Press, 1968); *Mapp v Ohio*, 367 US 643 (1961); *Gideon v Wainwright*, 372 US 335 (1963); and *Miranda v Arizona*, 384 US 436 (1966).

[31] *Brown v Board of Education of Topeka, KS* (above n 29) 494.

[32] *Miranda v Arizona* (above n 30) 457.

[33] Ibid.

III. DWORKIN'S THEORY OF THE RIGHTS REVOLUTION

Dworkin's argument for rights as trumps was first elaborated in an essay published in the *New York Review of Books* in 1970[34] and later included as a chapter in his seminal 1978 book *Taking Rights Seriously*.[35] The book situated Dworkin's theory of rights within a broader challenge to dominant ideas in jurisprudence at that time, namely positivism and utilitarianism. The former entails a denial of the validity of rights or law not codified or inscribed in positive law, while the latter view assesses a law's validity primarily in terms of whether it serves the general welfare. In contrast, Dworkin began to stake a position for what might be described as the most prominent form of natural law theory in the closing decades of the twentieth century, one that distinguishes between law and morality, with law's validity and authority deriving from its consistency with underlying moral principles. He thus described the US Constitution as containing legal rights that protect conceptually prior political rights (eg, free speech in the First Amendment protecting a political freedom to open debate). A key question for Dworkin here and in later work is how governments and courts should define the legal rights of citizens to best protect their underlying moral rights.

In clear-cut cases, the task is easy – we ought to be free to express unpopular opinions. But what about advocating violence to secure racial equality? What happens when rights impose serious burdens on the majority's interests? We tend, in Dworkin's view, to take one of two approaches, the first of which is often invoked in law and politics and is superficially appealing but fatally flawed.[36] This involves striking a balance between individual and collective interests, trying to avoid infringing a right unduly by defining its limits too narrowly, or inflating a right excessively by defining its limits too broadly.[37] On the balance model, incursions in either direction are equally bad – either for or against the majority. But for Dworkin, the assumption of equivalence is 'false' and prevents us from understanding what it means to take rights seriously – and the balance metaphor is the root of the problem.[38]

Dworkin instead favoured a second model: the idea of rights as a political trump card; and his argument made clear that this idea has deep roots in our legal imagination. In many cases where governments or courts seek to protect an important right, they do so not by striking a balance but by imposing a

[34] Dworkin, 'A Special Supplement' (above n 13).

[35] Dworkin, *Taking Rights Seriously* (above n 13) ch 7 (citations to the essay in what follows are to its reprint in this edition).

[36] Ibid, 197–98.

[37] The balance model is not to be confused with proportionality theory. See J Weinrib, 'When Trumps Clash: Dworkin and the Doctrine of Proportionality' (2017) 30 *Ratio Juris* 341, arguing that despite Dworkin's criticisms of proportionality theory, his theory of rights as trumps is a notable instance of it.

[38] Dworkin, *Taking Rights Seriously* (above n 13) 198.

significant cost to the collective interest, drawing an imbalance in favour of the individual. Our reasoning in these instances is grounded in our commitment to 'the vague but powerful idea of human dignity'.[39] Identifying this idea with Kant, Dworkin asserted that it is premised on the view that 'there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.'[40] Violating a core right is a 'serious matter' because it entails 'treating a man as less than a man, or as less worthy of concern than other men'. We recognise and protect rights as an expression of our conviction that unequal or undignified treatment does 'a grave injustice', one for which we deem it worthwhile to pay an 'incremental cost in social policy or efficiency' to avoid.[41]

If the point of protecting rights is to protect underlying values of dignity and equality, it is more serious to violate an important right than it is to inflate it.[42] We may need to strike a balance when competing rights come into conflict, but not when asking whether the law should recognise a dignity-related right or when defining its limits against the collective.[43] As Dworkin noted, in the one area where 'the stakes for the individual are the highest', the criminal law, 'We say that it is better that a great many guilty men go free than that one innocent man be punished, and that homily rests on the choice of the second model for government.'[44]

If rights sometimes function as trumps, as they appear to in criminal law, when can they be justifiably infringed? In Dworkin's view, in only three instances. The first is where the government shows that values protected by the right (ultimately, dignity and equality) are not at stake in a given case, or only 'in some attenuated form'.[45] Second, the government may show that if a right is defined in a certain way, it will entail a conflict with an equally important right. And third, the government may show that defining a right would entail a 'cost to society [that] would not be simply incremental, but would be of a degree far beyond the cost paid to grant the original right involved, a degree great enough to justify whatever assault on dignity or equality might be involved'.[46]

The second and third of these limits are clearly relevant to contemporary debates about security and are often central points of contention in ways to be explored later in this chapter. First, let us consider the unspoken assumptions that render the theory of rights as trumps plausible within these limits. We can discern these assumptions in Dworkin's own application of the theory to

[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ibid, 200.
[45] Ibid.
[46] Ibid.

particular examples. These assumptions are key to what makes the theory less plausible in the present.

A crucial example he considered concerns free speech. Amidst the unrest that surrounded the 1968 Democratic Convention in Chicago, Abbie Hoffman, Jerry Rubin, and other protesters were charged and convicted of crossing state lines with the intent of inciting a riot.[47] Dworkin queried the constitutionality of the provisions and took this as a paradigm case of the challenge of defining the limits of free speech as a political and moral right. He conceded that, if challenged, on the logic of balancing collective and individual interests, the law might plausibly have been defended. But on the trump model, a law criminalising 'emotional speeches which argue that violence is justified in order to secure political equality' is invalid because it fails to fall within any of his three justified limits to core rights.[48] Protecting free speech, even provocative speech, clearly engages dignity and equal respect. He then considered the other two justified limits together – the competing right of other individuals to be safe from personal attacks in the course of a riot, or the 'grave threat to society' itself to which a riot would give rise through looting, vandalism, and general lawlessness.[49] The law fails both of these tests for the crucial reason that the state was not in a position to know 'with any confidence how much and what sort of violence the anti-riot law might be expected to prevent'.[50] It was not clear whether the protesters' expressions were necessary or sufficient conditions for the unrest that followed or whether police actions were a significant contributing cause. Curtailing speech in order to prevent the possibility of a riot entailed 'speculation' in 'conditions of high uncertainty' when the very 'institution of rights, taken seriously, limits [the state's] freedom to experiment under such conditions'.[51] The infringement of free speech here would lead to a 'certain and profound insult' to dignity while yielding only a 'speculative benefit'; but 'if rights mean anything, then the Government cannot simply assume answers that justify its conduct.'[52]

What, then, of the competing rights of others to be free from the violence to which a riot – however speculative – might give rise? Should this potential harm not be considered despite the uncertainty surrounding cause and effect? As Dworkin put it:

> Shall we say that some rights to protection are so important that the Government is justified in doing all it can to maintain them? Shall we therefore say that the Government may abridge the rights of others to act when their acts might simply increase the risk by however slight or speculative a margin, that some person's right to life or property will be violated?[53]

[47] Ibid, 197. The convictions were overturned on appeal on procedural grounds: *United States of America v David Dellinger*, et al, 472 F.2d 340 (1972).
[48] Dworkin, *Taking Rights Seriously* (above n 13) 197.
[49] Ibid, 202.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Ibid, 203.

This, for Dworkin, encapsulated the thrust of the opposition to much of the due process jurisprudence of the 1960s; but it was wrong-headed because significant infringements to dignity or equality cannot be justified on the basis that 'other men's risk of loss may be marginally reduced'.[54]

It is on this point that Dworkin drew a crucial contrast:

> When lawyers say that rights may be limited to protect other rights, or to prevent catastrophe, they have in mind cases in which cause and effect are relatively clear, like the familiar example of a man falsely crying 'Fire!' in a crowded theatre.[55]

The theatre case is one in which there is a 'clear and substantial risk that [a person's] speech will do great damage to the person or property of others and no other means of preventing this are at hand'.[56]

On closer inspection, the riot and theatre cases reveal core unspoken assumptions underlying Dworkin's theory. The anti-riot law is an unjustified limit on free speech because it involves a clear and substantial infringement of dignity without it being clear how much harm it avoids. By contrast, the prohibition on yelling 'fire' in a theatre entails a slight infringement of dignity and almost certainly avoids a significant degree of harm. The theory of rights as trumps therefore works best where a proposed limit:

a. is intended to prevent something amounting to a clear and substantial risk to the collective;
b. bears a direct or close causal link to preventing or significantly minimising the risk; and
c. does not entail a radical infringement of a core right.

It bears emphasising that the theory of rights as trumps is plausible in this text in large measure because Dworkin's paradigm case of a right trumping a freedom in the area of public safety entails a close connection between infringement and harm avoided, and the infringement is minor. The theory is further supported by the fact that his two main examples of unjustified limits – the anti-riot law and the idea that we generally prefer several acquittals of guilty persons to a single wrongful conviction – are cases in which protecting the right at issue entails a risk, but one that is vague and speculative – one that we have difficulty *imagining*.

Conditions that arose after 2001 – giving rise to the harbinger theory but also to fears of lesser forms of terror – have complicated this picture fundamentally. The prospect of mass terrorism presents Dworkin with an example that blurs the distinction between riot and theatre, giving rise to plausible arguments about a threat of enormous gravity, a causal connection between infringement and security that may not be direct but is more than speculative, and the need to

[54] Ibid.
[55] Ibid, 204.
[56] Ibid.

violate rights to a significant degree in light of a belief in the catastrophic cost of doing otherwise.

IV. FROM CARTER TO BUSH

It is important to distinguish why conditions after 2001 presented Dworkin's theory with a challenge it had not faced before. As noted earlier, just as Dworkin was articulating the larger philosophical rationale informing the rights revolution approaching its peak in the 1970s, signs of a profound shift away from the discourse of rights and toward a culture of security and control began to gain pace throughout the Anglo-American world. As many scholars have made clear, the late 1960s to roughly the early 1980s may in some quarters have been a triumphal period for rights, but they were also a time of rising crime rates, growing racial tensions in decaying urban centres, and election cycles increasingly marked by the rhetoric of law and order.[57] As David Garland and others have argued, much of the law and policy of the United States and Britain during this time moved further away from a sympathetic view of the accused to a framing of crime as a problem involving 'unruly youth, dangerous predators, and incorrigible career criminals'.[58] Separating and 'warehousing' poor, racialised, and dangerous populations made up much of the criminal law mandate in the period.[59] Looking at the United States in particular, Jonathan Simon has suggested that by the early 1980s, the crime victim had become the 'dominant model of the citizen',[60] with victims' interests central not only to the criminal law but to the very 'mission of representative government'. What, then, remained of the currency of rights as trumps?

In other quarters, a fair amount remained. The 1980s were still a period in which important milestones in the development of human rights were claimed, including and perhaps most notably the UN Convention Against Torture.[61] Adopted in 1984 and ratified by some 160 countries, Article 2 of the Convention notoriously held the right against torture to be absolute or non-derogable – asserting that 'No exceptional circumstances whatsoever, whether a state of war or a threat of war … or any other public emergency, may be invoked as a justification of torture'. That the United States ratified the Convention with significant qualifications should not detract from the basic symbolic import of the document as a collective affirmation of a belief that in principle

[57] See, eg, Simon (above n 15).

[58] Garland (above n 15) 10. See also Simon (above n 15); and Zedner (above n 15).

[59] L Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham, Duke University Press, 2007); M Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York, New Press, 2010).

[60] Simon (above n 15) Kindle edition, location 629.

[61] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984), UN Treaty Series, vol 1465, 85.

at least some individual rights ought to function as absolute trumps.[62] Despite the practical shortcomings of the Convention as a tool of torture prevention, it is clearly a formulation of rights sympathetic to Dworkin's theory. Further examples consistent with rights as trumps can also be found in the list of non-derogable rights under Article 15 of the European Convention on Human Rights (1950)[63] and the Canadian Supreme Court's application of its new Charter of Rights and Freedoms from 1982.[64] In an early and crucial Charter decision, known as the '*Motor Vehicle* reference,'[65] the Court held that violations of the core right to 'life, liberty, and security of the person' would 'rarely' if ever be justified for reasons of mere 'administrative expediency' and should be permitted only 'in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like'.[66]

But if Dworkin's theory maintained a certain currency in Anglo-American jurisprudence as a normative or aspirational principle, this is not to say that in practical terms human and political rights maintained the broad cultural prominence they had gained by the mid-1970s. On the contrary, the retrenchment was clear. Garland, writing in the months prior to September 11, captured the thrust of the demise in the status of rights by noting:

> The call for protection *from* the state has been increasingly displaced by the demand for protection *by* the state. Procedural safeguards (such as the exclusionary rule in the USA and the defendant's right of silence in the UK) have been part-repealed, surveillance cameras have come to be a routine presence on city streets, and decisions about bail, parole or release from custody now come under intense scrutiny.[67]

Yet as lamentable as this 'displacement' of rights was by 2001, this passage is notable for a certain absence – the absence of the extraordinary. The measures that Garland catalogued are relatively moderate: more scrutiny of procedural

[62] The Reagan administration was reluctant to recognise the 'competence' of the UN Committee Against Torture to assess reports of torture involving US interests: Ronald Reagan, 'Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment' (20 May 1988), available at G Peters and JT Woolley, *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=35858.

[63] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos 11 and 14 (4 November 1950), ETS 5. Article 15 precludes derogation in any circumstances from Articles 2 (the right not to be deprived of life, except pursuant to a lawful sentence or pursuant to a lawful act of war), 3 (torture), 4(1) (slavery), and 7 (arbitrary punishment).

[64] *Canadian Charter* (above n 5).

[65] *Re BC Motor Vehicle Act* [1985] 2 SCR 486.

[66] Ibid, para 85.

[67] Garland (above n 15) 12. But see also L Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in L Lazarus and JV Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford, Oxford University Press, 2012), suggesting that the trends Garland has described here capture only part of the currency of rights in the period. Lazarus has noted that the call for protection from the state was reflected in an emerging jurisprudence of protective duties, or a discourse of positive rights (to life, liberty, security), that compel the state to prevent and criminalise harmful acts.

protections, more frequent use of custody and surveillance. But there was still a commitment – at least in theory – to *basic* due process protections. Certain lines had not been crossed. Torture, indefinite detention without charge, and targeted killing of one's own citizens would all have seemed excessive if not unthinkable, even for the most cautious advocates of security. In this sense, the change in the landscape that September 11 ushered in did not merely mark a movement toward further securitisation – more of what we saw from the 1970s onward – but rather a dramatic shift in kind. Suddenly, the unspeakable was openly debated. And while we may look back on debates about torture or other radical measures in the early years after 9/11 with growing scepticism or even disbelief, we cannot deny the significance of the fact that we *had* such debates. What, then, was it about the events of 9/11 and the reaction they provoked that brought this about?

V. THE HARBINGER THEORY

The events of 9/11 provoked rights advocates and security theorists alike to re-evaluate assumptions about the danger that individuals are capable of posing to public safety and, consequently, about the extent to which governments should prioritise rights. This re-evaluation was reflected in a set of new assumptions that can be called the harbinger theory, a claim that became pervasive in a wide range of political and cultural discourse in roughly the first decade after 2001. This is the 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 (WMD). Rather than being perceived as anomalous and unlikely to be repeated, 9/11 was believed to presage a qualitative shift in the nature of terrorism: later events would likely entail carnage on a much greater scale than attacks preceding 9/11 precisely on the basis that those events had demonstrated what a small group of non-state actors using relatively crude tools could accomplish: casualties several orders of magnitude greater than earlier acts of terrorism, which had remained in the tens and low hundreds. (The largest terrorist attack in the world prior to 9/11 was the Air India bombing of 1985, which claimed 331 lives.[68]) In the wake of an act of terrorism involving a small group of men causing close to 3,000 deaths, it became more plausible to contemplate the prospect of attacks involving several thousand casualties or possibly even millions. Within this new paradigm, the notion that certain rights

[68] Global Terrorism Database, maintained by the US National Consortium for the Study of Terrorism and Responses to Terrorism, cited in J Mueller and M Stewart, *Terror, Security, Money: Balancing the Risks, Benefits, and Costs of Homeland Security* (Oxford, Oxford University Press, 2011) Kindle location 844.

should be non-derogable or protected in some absolute way – to function as ultimate trumps against collective interests – became problematic and, for some, altogether implausible.[69]

It is beyond the scope of this chapter to examine in detail the various ways in which the harbinger theory became a central part of security policy in North America in the post-9/11 period; I refer the reader to an earlier work on point and offer instead a brief sketch.[70] The theory can be traced to the earliest days after 9/11 and the Bush administration, as the President and other officials frequently invoked the prospect of large-scale terrorist attacks, possibly involving WMD; these invocations were often in defence of the USA PATRIOT Act (2001), the Guantanamo Bay detention camp, and the National Security Agency (NSA) surveillance programme (which was secret prior to 2005).[71] The theory also gained broad cultural resonance in various works of popular culture, often featuring an impending nuclear or mass terrorist attack narrowly averted through the use of torture or other acts of cruelty. The trope could be found in television series such as *24* and *Homeland*, and in countless books and films of the early years after 9/11.[72]

The harbinger theory also gained credence through the work of authorities in the fields of nuclear, biological, and radiological weaponry. Graham Allison, Director of Harvard's Belfer Center for Science and International Affairs, asserted in 2004, without qualification, that a 'nuclear terrorist attack on America in the decade ahead is more likely than not'[73] – forgetting that in 1995 he had claimed that an act of nuclear terrorism against the US would occur 'before the decade is out.'[74] Many nuclear experts agreed with such dire warnings, citing

[69] See, eg, Ignatieff (above n 11); and Ackerman (above n 11). Works that were at a further extreme, contrary to prevailing scholarly opinion about rights and security in the period but still influential, include: A Dershowitz, *Preemption: A Knife That Cuts Both Ways* (New York, Norton, 2006); R Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford, Oxford University Press, 2006); and J Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York, Atlantic Monthly Press, 2006). See the discussion in chs 4 and 5 of Diab (above n 19) on the role that fears of terror involving WMD played in defences of extraordinary measures in the work of each of the authors cited here.

[70] Diab (above n 19) chs 3 and 4.

[71] See, eg, The White House, 'Text of President Bush's 2002 State of the Union Address', *Washington Post* (29 January 2002); The White House, 'The National Security Strategy of the United States of America' (17 September 2002), https://www.state.gov/documents/organization/63562.pdf; the White House, 'We Strive To Be A Compassionate, Decent, Hopeful, Society' (text of the President's 2006 State of the Union Address), *New York Times* (31 January 2006); the White House, 'The National Security Strategy of the United States of America' (March 2006), https://www.state.gov/documents/organization/64884.pdf. For further examples, see Diab (above n 19) ch 3.

[72] A list and discussion of these can be found in Diab (above n 19) 112–13. See also I Lustick, *Trapped in the War on Terror* (Philadelphia, University of Pennsylvania Press, 2006) 25; and K Dodds, 'Screening Terror: Hollywood, the United States and the Construction of Danger' (2008) 1(2) *Critical Studies on Terrorism* 227.

[73] G Allison, *Nuclear Terror: The Ultimate Preventable Catastrophe* (New York, Henry Holt, 2005) 15.

[74] G Allison, 'Must We Wait for the Nuclear Morning After?' *Washington Post* (30 April 1995).

as reasons the poor security around nuclear installations in the countries of the former Soviet Union, open access to bomb-building methods, and the fact that al Qaida and other groups were known to harbour nuclear ambitions.[75] A similar claim was often made in relation to bioterrorism. Numerous authorities noted that some of the most lethal toxins known to science can be cultivated from natural sources and readily produced in large quantities using knowledge and techniques readily accessible on the internet.[76] Radiological terrorism seemed even more likely, given the ready availability of highly radioactive material in unguarded industrial and institutional sites such as hospitals, universities, and factories.[77]

The harbinger theory also played a role in the rhetoric of the Obama administration, in defence of targeted killing and other extreme measures.[78] A notable example arose with Edward Snowden's revelations in June of 2013 of the NSA's secret bulk collection of phone metadata of all Americans, along with the content of internet communications of large numbers of foreigners visiting US websites.[79] In a press release issued within days of the first revelations, James Clapper, Director of National Intelligence, claimed that the surveillance programmes had helped to 'impede the proliferation of weapons of mass destruction'.[80] In a speech of January 2014, the President justified the continued use of mass surveillance by making several references to the prospect of large-scale terror, including 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'.[81]

[75] C Ferguson and W Potter, *The Four Faces of Nuclear Terrorism* (London, Routledge, 2005); M Bunn, 'Securing the Bomb 2010: Securing All Nuclear Materials in Four Years', Project on Managing the Atom, Belfer Center for Science and International Affairs, Harvard Kennedy School and Nuclear Threat Initiative (April 2010).

[76] On biological terror, see B Kellman, *Bioviolence: Preventing Biological Terror and Crime* (Cambridge, Cambridge University Press, 2007); J Davis, 'A Biological Warfare Wake-Up Call: Prevalent Myths and Likely Scenarios' in J Davis and B Schneider (eds), *The Gathering Biological Warfare Storm* (Westport, Praeger, 2004); and F Barnaby, *How to Build a Nuclear Bomb and Other Weapons of Mass Destruction* (London, Granta Books, 2004).

[77] M Levi and H Kelly, 'Weapons of Mass Disruption', *Scientific American* (November 2002) 77. See also Diab (above n 19), exploring a tendency on the part of authorities on terror involving WMD to infer 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 surveys a body of skeptical literature to outline these practical impediments and call into question the near-term probability of terror involving WMD.

[78] See, eg, the White House, 'National Security Strategy' (May 2010), http://nssarchive.us/NSSR/2010.pdf; the White House, 'National Strategy for Counterterrorism' (June 2011), https://obamawhitehouse.archives.gov/sites/default/files/counterterrorism_strategy.pdf.

[79] G Greenwald, *No Place Left to Hide: Edward Snowden, the NSA, and the US Surveillance State* (New York, Metropolitan Books, 2014) 92–118.

[80] J Clapper, 'Facts on the Collection of Intelligence Pursuant to Section 702 of the Foreign Intelligence Surveillance Act', Office of the Director of National Intelligence, Washington, DC (8 June 2013) 3.

[81] B Obama, 'Remarks by the President on Review of Signals Intelligence', Department of Justice (17 January 2014).

To be clear, while the harbinger theory played an important role in debates about terror and security in roughly the first decade after 9/11, perceptions of terrorism have continued to evolve. Nonetheless, terrorism continues to be associated with large-scale casualties. More recent attacks in Europe – 130 killed in Paris in 2015, 84 in Nice in 2016, 23 in Manchester in 2017 – garnered wide media coverage and engaged broader national and international interest.[82] This suggests an ongoing tendency to view terrorism as a kind of super-crime or a special kind of threat. Rights advocates, including Dworkin, have sought to contest this view, and the reason flows directly from terrorism's problematic implications for rights.

VI. REASSESSING RIGHTS AS TRUMPS AFTER 9/11

Soon after 2001, as Dworkin began to weigh in on debates about rights, he was seized by the harbinger theory and the prospect of mass terror and grappled with them repeatedly. That rights as trumps would need to be qualified or revised precisely in light of this new catastrophic imagination was clear from the dramatic way he opened one of his first essays on national security in the period:

> Two years after the September 11 catastrophe Americans remain in great danger … Well-financed terrorists, who live and undergo training in various foreign countries, are determined to kill Americans and are willing to die in order to do so. If they gain access to nuclear weapons, they would be able to inflict even more terrible harm.[83]

The prevailing assumption driving the adoption of the various extraordinary measures – mass preventive detention of Arabs and Muslims, 'contempt for the Geneva Conventions,' etc – was that in light of the possibly unprecedented gravity of the threat to security, we could no longer offer the same protections to suspected terrorists as those we offer to persons accused of lesser crimes:

> [I]t may be right, in more normal times, to allow a hundred guilty defendants to go free rather than convict one innocent one, but we must reconsider that arithmetic when one of the guilty may blow up the rest of Manhattan.[84]

Consistent with the third of Dworkin's justified limits on rights in 1970, the cost of protecting rights in this context was not simply incrementally different but qualitatively different or altogether prohibitive.

But if this was the rationale for embracing extraordinary measures, Dworkin argued, we should have been clear about it. We should have avoided falling in to the trap of assuming the nature of terrorism calls for a different balancing

[82] See en.wikipedia.org: 'November 2015 Paris Attacks'; '2016 Nice Attack'; 'Manchester Arena Bombing', as well as a host of contemporary articles and news stories from major national and international news outlets.

[83] Dworkin, 'Terror and the Attack on Civil Liberties' (above n 11) 37.

[84] Dworkin, 'The Threat to Patriotism' (above n 11) 47, paraphrasing Laurence Tribe.

between rights and security. This only encouraged the error of thinking the 'requirements of fairness are fully satisfied' when we apply 'laxer standards of criminal justice' in dealing with terrorist suspects despite the greater risk of wrongful convictions.[85] Once again, for Dworkin the balance metaphor was 'deeply misleading' because it suggested 'a false description of the decision the nation must make'.[86] The leadership, or electorate as a whole, was not being asked to decide how much security or freedom 'we' want but rather how much freedom to accord to a small few. The question for Dworkin once again was 'not where our interest lies on balance, but what justice requires'.[87]

Instead, Dworkin sought to salvage the theory of rights as trumps from the threat of obsolescence in light of fears of mass terrorism by showing that, with certain qualifications, it could be reconciled with them. On this view, we should speak more plainly and admit that 'laxer standards would be unfair' but agree that 'we must nevertheless adopt them to protect ourselves from disaster'.[88] In this case, however, rather than feeling justified in lowering our standards, we should be more 'discriminating' and 'insist that government show that unfair treatment is necessary, not for some widely defined category of persons, but, so far as this is practicable, for individual suspects or detainees, one by one'.[89] Rights may thus be justifiably infringed in this case, and to a radical degree perhaps, but something of the logic of rights as trumps should be preserved: a sense that any serious violation of dignity and equality is profoundly undesirable wherever it occurs and for whatever reason.

The more crucial question for Dworkin, however, was whether the United States did in fact 'face such extreme danger from terrorism that we must act unjustly'.[90] This appeared to him at the time 'a difficult question' given that it was impossible to 'accurately gauge the actual power' of the various groups believed to harbour the desire to carry out further attacks.[91] Dworkin then made the following crucial concession:

> al-Qaeda killed, by latest reckoning, approximately 3,000 people in minutes on September 11, which is a quarter of the number of murders in the entire country in 1999. If they or some other terrorist organization has or gains access to nuclear, chemical, or biological weapons and the means to use them, then the threat to us would be truly enormous. It would justify unusual and, in themselves, unfair measures if the government thought that these would substantially reduce the risk of catastrophe.[92]

[85] Ibid.
[86] Ibid, 48.
[87] Ibid.
[88] Ibid, 47.
[89] Ibid.
[90] Ibid, 49.
[91] Regarding the issue of secrecy in the context of evaluating security claims, see the chapter in this volume by Liora Lazarus.
[92] Dworkin, 'The Threat to Patriotism' (above n 11) 49.

Yet even so, Dworkin concluded that 'it would be imperative to permit only the smallest curtailment of traditional rights that could reasonably be thought necessary', and in various ways, the new policies 'fail that test'.[93]

This passage gives us the crux of the conundrum that rights as trumps has faced after 9/11 and the impasse at which the larger debate about rights and security has been stalled for over a decade. As Dworkin readily conceded, when one version of the harbinger theory or another is granted, security must trump rights. But what prevented Dworkin from a full or unqualified surrender to this logic was the question of the *likelihood* of mass terrorism on that scale. Were we in such a situation? Not being in a position to say either way, he was unable to do more than emphasise that short of proof of the imminence of mass terrorism, the earlier rationale for upholding rights – for insisting on the smallest necessary curtailments – remains valid. With the passage of time, however, Dworkin became more confident in his assessment of the threat of terrorism and offered a new defence for rights as trumps.

VII. SECURITY AS TRUMP?

Dworkin's last extended treatment of rights as trumps was set out in a chapter titled 'Terrorism and Human Rights' in his 2006 book *Is Democracy Possible Here?*[94] Once again, his analysis was framed from the outset in terms of the harbinger theory, suggesting that he continued to see the possibility of mass terrorism as the crucial test of his conception of rights. The chapter opened with another bracing set of images:

> Thousands of fanatics around the world would be glad to die if they could kill Westerners – particularly Americans. They created an unbelievable catastrophe in September 2001, and they may already have weapons of apocalyptic murder that could dwarf the horror of that destruction.[95]

Dworkin then considered a host of Bush administration measures in a discussion similar to those found in the essays of 1970 and 2003. Bush supporters invoked the need for a rebalancing of freedom and security, but a proper assessment of rights – in this case human rights – called for a greater emphasis on Kantian notions of dignity and equality for reasons similar to those canvased earlier. Drawing upon this reasoning, some measures were clearly unjustified, including coercive interrogation amounting to torture, which had recently come to light.[96] But other infringements, such as indefinite detention without charge and the use of military tribunals involving secret evidence, presented a greater challenge.

[93] Ibid.
[94] Dworkin, *Is Democracy Possible Here?* (above n 11) ch 2.
[95] Ibid, 24.
[96] Ibid, 40.

One common view held that while some detainees may be innocent, others may be quite dangerous, and in the current climate, a system guaranteeing a fairer trial would be too risky, given that 'such trials sometimes allow dangerous people to go free.'[97] But for Dworkin, applying different standards for terrorist suspects (eg, through military tribunals) showed that 'we do not regard [the latter] as fully human.'[98] Just as we reject the prospect of mistakenly incarcerating 'ordinary citizens' who are accused of more ordinary crimes because 'we think people have a right not to be injured in that very serious way' for some 'marginal' improvement in our safety, so too should we reject imposing lesser standards against certain foreigners for marginal improvement in national security.[99] Or at least, this was the analogy that Dworkin sought to draw. The crucial question was whether the menace of domestic crime and the threat of terrorism on a large scale were analogous in 2006 – a question that remains relevant still.

Dworkin's chapter culminates in an assessment of precisely this point. Dworkin's response – and thus his final defence of rights as trumps – involved an effort to make the gap appear smaller between the risk posed by conventional crime and that posed by mass terrorism. With the events of 9/11 receding into the past, Dworkin sought to shrink the gap by emphasising the abstract character of many of our more extreme fears – suggesting they were now to be relegated to the realm of the hypothetical. In a passage worth examining closely, he wrote:

> [E]ven human rights are not absolute.… [I]n a sufficiently grave emergency, a government is justified in violating even the most basic and fundamental human rights after these have been precisely stated. There is a stock example whose familiarity may have deadened its force. Suppose we have a captured terrorist who we know has planted a nuclear bomb timed to explode in two hours somewhere in Manhattan. It would be absurd, people say, not to torture him if we thought torture would force him to tell us where the bomb is in time to diffuse it. Let us now accept, if only for the sake of this discussion, that it is morally permissible to violate human rights in a sufficiently grave emergency like this one. Then our question becomes: how grave must the emergency be?[100]

Thus, the force of the concern about mass terrorism lies not in questions around its likelihood or practical import but in its effect as a theoretical abstraction. But, as Dworkin argued, as soon as we begin to interrogate the theory with practical considerations, it loses force. Unless we have clear proof that we find ourselves in a similarly extreme situation, we have no reason to conclude that serious violations are justified:

> We must take care not to define 'emergency' as simply 'great danger' or to suppose that any act that improves our own security, no matter how marginally, is for that

[97] Ibid.
[98] Ibid, 45.
[99] Ibid.
[100] Ibid, 49–50.

> reason justified. We must hold to a very different virtue: the old-fashioned virtue of courage.… We show courage in our domestic criminal law and practice: we increase the statistical risk that each of us will suffer from violent crime when we forbid preventive detention and insist on fair trials for everyone accused of crime. We must show parallel courage when the danger comes from abroad because our dignity is at stake in the same way.[101]

Put otherwise, short of clear proof that the threat we face in relation to terrorism is qualitatively greater than that posed by domestic crime – both in terms of the likelihood of a large-scale attack occurring and the extent of the damage if one is attempted – serious rights violations are unjust. Fears of mass terrorism are, for the most part, too speculative to serve as the basis for law or policy for similar reasons that applied in the case of the anti-riot laws in 1968:

> Now notice the crucial dimensions of the stock example about the ticking nuclear bomb hidden in Manhattan. The danger is both horrific and certain; we know that our victim is responsible for that danger, and we assume that if we torture him and he yields, we can remove the danger. None of that is true about our policy of imprisonment without charge or trial in Guantanamo and our other bases around the world. We are in danger of another devastating attack, to be sure. But there is no reason yet to think that the danger approaches certainty or that our violations of human rights are well calculated to end or even significantly to reduce that danger.[102]

The key, then, to Dworkin's treatment of the harbinger theory (or the prospect of large-scale terrorism) is knowledge. Without certainty or a reasonable sense of the risk at issue, we cannot and should not draw a *qualitative* distinction between the threat posed by mass terrorism and conventional crime. Rights should therefore still serve as trumps.

On one reading, Dworkin was persuasive. He plausibly defended the currency of rights as trumps with the qualification that at a certain hypothetical extreme, torture or other extraordinary measures *might* be justified. But in this case, as Dworkin implied by offering a similar analysis to the one in the anti-riot law case, the prospect of mass terrorism does not present us with anything new. It is simply a more striking version of Dworkin's third justified limit on rights, a case where a core right may be curtailed to avoid an unusually grave danger to society.

But on another reading, the harbinger theory or even fears of lesser forms of terrorism – attacks where scores of people are killed but fewer than, say, a hundred, as has become increasingly common throughout Europe – pose a greater challenge. On this reading, we note that a consistent feature of Dworkin's defence of rights as trumps over the years is that it is premised on the notion that all threats conform to one of only two possible models. A threat may be like a speech that gives rise to a riot, and in this case, since we do not know the likelihood of a riot occurring or the harm it may entail, no significant curtailment

[101] Ibid, 50.
[102] Ibid.

of rights (speech) is justified. Or a threat is like the act of falsely yelling 'fire!' in a crowded theatre, which will almost certainly give rise to a stampede, which in turn will certainly cause serious injury to several people – and therefore a minimal impairment of rights (a prohibition on that speech) is clearly justified. Dworkin's defence of rights as trumps after 2001 is premised upon the assumption that our fear of mass terrorism and our approach to terrorist suspects are variations on the riot case. We do not know whether any detention, interrogation, or surveillance we carry out will prevent an act of terrorism because we cannot know how likely it is that terrorist suspects will attempt acts of large-scale terrorism or what harm they will in fact cause if they attempt it.

But reading Dworkin against the grain, we can readily see that the mass terrorism example does not map onto the riot case so neatly. In fact, it straddles both the riot and the theatre examples, blurring the distinction between them and undermining Dworkin's narrow set of instances in which rights can be violated. Like the riot example, in which the harm that might flow from an incendiary speech is difficult to predict, we often cannot quantify the probability that a terrorist suspect will act and thus what harm he or she might cause. But unlike the riot case, in which the consequences of a speech are uncertain, when a terrorist succeeds in setting off a bomb or carrying out some other large-scale attack, serious harm is very likely. And while the harm that would follow from yelling 'fire!' in a crowded theatre or from setting off a bomb in a crowded theatre is likely to be serious in either case, the measures that may be necessary to prevent these acts are not the same: they are far less invasive in the one case (a prohibition on yelling 'fire!') than in the other (detention, surveillance, etc).

To make clear how and why this reading poses a significant challenge to the theory of rights as trumps, it may help to step back from a close analysis of Dworkin's examples and from his narrow set of justified limits, to offer some broader observations about the perception of rights in the present climate.

One might approach current debates about security with a healthy dose of scepticism about claims made in relation to the threat of terrorism. But certain facts cannot be ignored. While the harbinger theory may have proven to be illusory in the sense that an attack on the scale of 9/11 (some three thousand lives) now seems to us more an anomaly than a harbinger, what can still be described as mass or large-scale terrorist attacks (roughly ten to one hundred lives) have been occurring in the past few years with distressing frequency across the Europe and the United States. This fact alone lends a certain plausibility to official claims that significant incursions on rights are necessary – emergency rule in France, for example – on the basis that in at least some cases, persons of interest to authorities present a more than hypothetical prospect of mass carnage. While we can certainly agree with Dworkin that taking rights seriously calls for a clearer causal connection between the threats that are said to justify serious limits on rights on the one hand and the harm we may prevent in the course of dealing with a given suspect on the other hand, when the potential threat is as serious as a mass casualty attack, reasonable people may take a different view.

They might plausibly assert that they are justified in accepting that a reasonable possibility of averting a large-scale attack is a sufficient basis to warrant limits on rights, even significant limits, in at least some cases. We may certainly disagree with this and implore our adversaries to muster greater 'courage' as Dworkin suggested, but we cannot dismiss the logic in question as altogether implausible or misguided.

To be clear, the argument in this chapter is not that mass terrorism invalidates the theory of rights as trumps. The argument is that fears of mass terrorism fundamentally affect its *currency*. The prospect of mass terrorism has come to complicate the theoretical simplicity of Dworkin's ideal of rights as trumps, and this, together with other geopolitical realities, hinders the ideal from resonating in our time as it did in the 1970s.[103] The claims that it makes on voters, let alone on politicians, must vie daily with images of carnage that unsettle older cultural or political assumptions about when and where terrorism occurs. It has become so common and proximate a possibility to Western populations that it recalls the scene in Terry Gilliam's 1985 film *Brazil* in which a bomb explodes in the middle of a department store and the customers, so inured to such violence, dust themselves off and carry on shopping in seeming indifference. While we have not yet and may never reach that point emotionally, we do not seem far off in terms of the sheer frequency and unpredictability of events. Acts of terrorism still have the power to dominate our news cycle and shape our politics, hence the dissonance many feel when invited to think of rights as trumps. The impasse at which we find ourselves in broader debates about human rights and security is thus at root an effect of our inability to reconcile the theory with this new reality.

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[103] This is not to say that the theory of rights as trumps has not maintained a significant measure of currency, at least impliedly, in important legal and political contexts in the post-9/11 period, including among jurists, law scholars, and right advocates. Notable examples include D Luban, 'Liberalism, Torture, and the Ticking Bomb' (2005) 91 *Virginia Law Review* 1425; and J Mayerfeld, 'In Defence of the Absolute Prohibition of Torture' (2008) 22(2) *Public Affairs Quarterly* 109. See also *Saadi v Italy*, App No 37201/06, European Court of Human Rights (28 February 2008), affirming the absolute prohibition on torture in the context of deportation giving rise to the risk of torture; and *Bundesverfassungsgericht* [BVerfG] (15 February 2006), 1 BvR 357/05, a decision of the German Federal Constitutional Court finding unconstitutional the prospect of the military shooting down a plane hijacked by terrorists and destined for a particular target.

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