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Terrorism and Democratic Recession

Aziz Z. Huq†

This Essay examines the potential causal mechanisms that plausibly link the occurrence of terrorism within a polity to that polity's democratic decline. That causal pathway is often asserted in political rhetoric about terrorism. But such assertions do not rest on a robust body of theory or empirical knowledge. I hypothesize three pathways along which acts of terrorism might lead to a decline in democratic practices. These three pathways work through the use of emergency powers, the assemblage of a repressive state apparatus, and the emergence of a populist style of politics adverse to democratic contestation. I tentatively conclude that terrorism is most likely to undermine democracy through its accelerating effect on state development and its corrosive effect on democratic politics. Recognition of this possibility, I conclude, has implications for the doctrinal treatment of individual rights in the context of national security threats.

INTRODUCTION

The act of terrorism and the state of democracy are related in complex, dimly understood ways. Both claim lineage in Mediterranean antiquity.¹ Yet each became symptomatic of global political practice only in the twentieth century. Each is also the others' secret sharer. That is, each can be said to enable, plague, and even extinguish the other. One might think this rich, paradoxical symbiosis ripe for academic tillage. But the potential causal linkages between democracy and terrorism remain unevenly studied. We have sharply defined theory and solid empirical data about some. But, in other respects, we have only gauzy supposition unguided by a plausible theory of causation.

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¹ See Kurt A. Raaflaub, Josiah Ober, and Robert W. Wallace, *Origins of Democracy in Ancient Greece* 11–14 (California 2007) (describing the connection between modern and Athenian democracy); Gérard Chaliand and Arnaud Blin, *Zealots and Assassins*, in Gérard Chaliand and Arnaud Blin, eds, *The History of Terrorism: From Antiquity to ISIS* 55, 55–78 (California 2d ed 2016) (illustrating the line between al-Qaeda and the origins of organized terrorism in first-century Palestine).

My aim in this Essay is to isolate and then unpack a single underappreciated strand of that complex relationship between terrorism and democracy, specifically the *causal pathway that runs from terrorism to democratic decline*. Although a staple of democratic political rhetoric, this possibility remains poorly understood. Its contours are vague, its descriptive force uncertain. By distinguishing this question from contiguous but distinct puzzles about the health of democratic systems, my hope is to offer the beginnings of a theoretical framework to enable clearer thinking about the terrorism–democracy nexus.

In particular, this Essay sets out three potential mechanisms by which political violence might conduce to the democratic recession. To be clear up front, I cannot in the modest compass of this Essay offer conclusive empirical evidence for the operation of any one of these mechanisms. Instead, I hazard tentative estimates of their plausibility and force. Such estimates are open to testing—and hence refutation—in the future.

Whether or not such quantitative tests are feasible, the identification of plausible causal pathways from terrorism to democratic decline is, to my mind, an intrinsically important exercise. Not the least reason for this is practical. A democratic default seems undesirable and something that we should endeavor to evade. Another reason is doctrinal. Discussion of national security law in the American legal academy is dominated by concerns about individual rights on one side and systemic security risks on the other. It is commonly assumed that the welfarist cost of security risks materializing is larger than the cost to rights of effective prophylaxis.² In part, this estimation is motivated by an assumption that a terrorist attack will have (potentially) systemic effects, whereas counterterrorism efforts will not.³ But this framing of the debate can mislead seriously. As I aim to show here, there may well be systemic, even catastrophic, harms on both sides of the ledger, albeit ones sounding in different registers and working via

² See, for example, Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 26–28 (Oxford 2007) (arguing for a “security-liberty” “tradeoff thesis” that recognizes the need for government to restrict civil liberties if faced with severe enough security threats in order to obtain an optimal level of public welfare); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 Conn L Rev 1549, 1551 n 2 (2009) (recounting various scholars’ arguments in favor of strong executive powers in times of emergency).

³ Posner and Vermeule, *Terror in the Balance* at 54–55 (cited in note 2) (identifying political constraints that prevent an unbridled expansion of executive power during emergencies).

different pathways. Those who focus only on the systemic consequences of terrorism, and not the systemic consequences of state responses, are committing a serious fallacy of omission.

I. ENTANGLEMENTS OF TERRORISM AND DEMOCRACY: A TAXONOMY

We can usefully start with a rough and approximate typology of causal pathways between democracy and terrorism. By establishing the lay of the land, this tripartite taxonomy underscores the complexity of their relationship. It also renders the specific mechanism that engages my interest in sharper contrast.

To begin with, there is the possibility that terrorism can be deployed as a means to facilitate democratic creation. At the beginning of the twentieth century, the Russian underground organization *Narodnaya Volya* deployed terrorism as a pathway to more populist, more egalitarian political arrangements.⁴ Self-determination or some like ideal has similarly animated the Irish Republican Army (IRA),⁵ the Basque Euskadi Ta Askatasuna (ETA),⁶ and the Zionist groups Irgun and Lehi.⁷

This kind of a relationship between terrorism and democracy might also be discerned in violent efforts to restart a democracy that has either wholly failed or systematically let down a minority population. In India, for example, Ramachandra Guha glosses the extraordinary success of the Maoist Naxalite insurgency in recruiting among tribal “adivasi” communities by showing that “the state has treated its adivasi citizens with contempt and condescension.”⁸ According to Guha, the Naxalite rebellion began as a reaction to the failure of democratic norms.⁹ Alternatively, consider the abrupt caesura in Algerian democracy in January 1991, which catalyzed a dizzying and bloody spiral into terrorism and

⁴ Daniel Gaido and Constanza Bosch Alessio, *Vera Zasulich's Critique of Neopopulism: Party Organisation and Individual Terrorism in the Russian Revolutionary Movement (1878–1902)*, 23.4 *Historical Materialism* 93, 98 (2015).

⁵ Mark Hayes, *The Evolution of Republican Strategy and the 'Peace Process' in Ireland*, 39 *Race & Class* 21, 32 (Jan 1998).

⁶ Paddy Woodworth, *Why Do They Kill? The Basque Conflict in Spain*, 18 *World Pol J* 1, 7–8 (Spring 2001).

⁷ Steven Wagner, *Whispers from Below: Zionist Secret Diplomacy, Terrorism and British Security inside and out of Palestine, 1944–47*, 42 *J Imperial & Commonwealth Hist* 440, 443 (2014).

⁸ Ramachandra Guha, *Adivasis, Naxalites and Indian Democracy*, 42 *Econ & Polit Weekly* 3305, 3311 (2007).

⁹ *Id* at 3307–08.

ultimately civil war.¹⁰ In Algeria as well as India, terrorism has been deployed as a localized response to democratic failure. In this regard, it can be, although need not be, a tactic for redeeming democratic rule that has been abrogated or incompletely realized. (Whether it can work to this end is quite a different matter.) It should be no surprise that violence works as a substitute for democracy in this way. For it is a core function of democratic constitutionalism to act as a forum for channeling and taming social conflict.¹¹ The failure of democracy is therefore logically tied to the invocation of political violence.

The second connection between terrorism and democracy treats them not as substitutes but complements of a sort. Several quantitative studies demonstrate that democracies are more attractive targets for terrorism campaigns than autocratic regimes.¹² Moreover, even the limited introduction of democratic institutions to an autocratic regime, at least under certain circumstances, induces an uptick in terrorist violence. Specifically, in dictatorships that experience relatively low levels of terrorism, political violence tends to increase when a regime allows the formation of political parties but then denies them a legislative forum to air grievances.¹³ Democracy, in other words, can tend to breed terrorism as a response—at least under certain conditions.

What explains the effect, and whether it is correlational or causal too, remains opaque. So far, there has been no evidence found for the most intuitive explanations, such as the possibility that it is democracies' commitment to respecting civil and human rights that has a positive impact on terrorism rates.¹⁴ But the question is subject to ongoing and intensive investigation in the political science literature.¹⁵

By contrast, a third entanglement between democracy and terrorism has received scant scholarly attention. At the same

¹⁰ Hugh Roberts, *The Algerian State and the Challenge of Democracy*, 27 *Govt & Opposition* 433, 451–54 (1992).

¹¹ Tom Ginsburg and Aziz Z. Huq, *Assessing Constitutional Performance*, in Tom Ginsburg and Aziz Z. Huq, eds, *Assessing Constitutional Performance* 3, 18–20 (Cambridge 2016).

¹² See, for example, Erica Chenoweth, *Terrorism and Democracy*, 16 *Ann Rev Polit Sci* 355, 357–60 (2013).

¹³ Deniz Aksoy, David B. Carter, and Joseph Wright, *Terrorism in Dictatorships*, 74 *J Polit* 810, 818 (2012).

¹⁴ See Chenoweth, 16 *Ann Rev Polit Sci* at 360–70 (cited in note 12) (surveying various attempts to explain this phenomenon and identifying their shortcomings).

¹⁵ See *id.*

time, it occupies a recurrently prominent role in the political rhetoric of democratic responses to terrorism. It is also of immediate policy relevance, as much as either of the claims I have just outlined. It is the notion that terrorism can be democracy's antipode—the possibility that *terrorism is related as a causal matter to democratic recessions*.

This idea, or a close analog, resurfaces often in the rhetorical responses to acts of spectacular terrorism in Europe and America. When the British Parliament—perhaps the most venerable global symbol of democracy, and almost certainly the oldest—was the site of an attack by a lone terrorist in March 2017, British Prime Minister Theresa May vowed not to let terrorism “silence our democracy.”¹⁶ In a similar vein, the European Council's 2001 framework decision on fighting terrorism cautions that “terrorism constitutes a threat to democracy.”¹⁷ More recently, *The New York Times* editorial page in 2016 contended that the “greatest threat posed by terrorism [is] a descent into the lawless, hateful demagoguery of those who despise the West and its values” and urged its readers to “stay true to what democratic societies really stand for.”¹⁸

Notwithstanding the frequency of its public invocation, the idea that terrorism leads to democratic failure has received little close scholarly attention. Several related questions therefore remain opaque: Is the idea that terrorism will “succeed” when a democratic regime is ousted in favor of another less democratic dispensation? Or is the worry that terrorism will catalyze some set of internal institutional or political dynamics that sap or contradict necessary predicates of democracy? And if the latter, what might be the mechanisms? Which democracies are likely to be at the greatest risk? The idea that terrorism is a “threat” to democracy, in short, is powerful rhetoric but has yet to be specified with precision. This, then, is the task at hand.

¹⁶ Lizzie Dearden, *Theresa May Speech in Full: Prime Minister Says London Terror Attack Suspect ‘Tried to Silence Our Democracy’* (The Independent, Mar 23, 2017), archived at <http://perma.cc/HSR8-5CFA>. The attack, in fact, largely occurred on the adjacent Westminster Bridge.

¹⁷ Council Framework Decision of June 13, 2002 on Combating Terrorism, 45 J EU L164 3 (2002).

¹⁸ *Our Best Defense against Terrorists* (NY Times, July 15, 2016), online at http://www.nytimes.com/2016/07/16/opinion/our-best-defense-against-terrorists.html?_r=0 (visited Jan 3, 2018) (Perma archive unavailable).

II. GROUNDWORK: SOME DEFINITIONS AND A DISTINCTION

It is helpful to begin by clarifying three key terms—terrorism, democracy, and democratic decline. Each is highly contested, in part because each depends not just on empirical, but on normative criteria. Having articulated the definitions that I will use for the purpose of this Essay, a useful distinction emerges that informs the balance of the analysis.

The standard social science definition of terrorism, as developed and refined by Professor Alex Schmid, allows for both state and nonstate actors and hinges upon “fear-generating, coercive political violence . . . targeting mainly civilians and non-combatants, performed for its propagandistic and psychological effects on various audiences and conflict parties.”¹⁹ This definition captures the kind of political action I have in mind by using the term “terrorism.” But I focus here only on nonstate violence employed outside the context of an armed conflict, whether international or internal.²⁰ Instances wherein terrorism accelerates so as to become indistinguishable from civil war fall outside my purview here. Rather, paradigmatic cases of terrorism include al-Qaeda, ISIS, ETA, the IRA, the Italian Red Brigades, the Kurdistan Workers’ Party (PKK), and the Maoist Naxalites. All unfurl within a context of persisting democratic contestation.

One important distinction among these cases concerns the degree of public support for a given terrorist organization within a polity. Whereas groups like the PKK and Naxalites maintain substantial support among specific populations defined typically by ethnicity or class, other groups—most importantly, ISIS and al-Qaeda—lack any numerically substantial basis of support within democratic countries.²¹ The nature of the threat to democratic rule may well vary depending on the extent of potential and actual indigenous support.

¹⁹ Alex P. Schmid, *The Revised Academic Consensus Definition of Terrorism*, 6 *Persp Terrorism* 158, 158 (May 2012).

²⁰ For the threshold of “armed conflict,” see Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadic*, Case No IT-94-1-AR72, *36–37 at ¶¶ 67, 70 (Intl Crim Tribunal for the Former Yugoslavia Oct 2, 1995) (“[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State [with a scope that] extends beyond the exact time and place of hostilities.”).

²¹ See Jacob Poushter, *Support for al Qaeda Was Low before (and after) Osama Bin Laden’s Death* (Pew Research Center, May 2, 2014), archived at <http://perma.cc/M6CK-7RBB>;

Next, “democracy” remains as contentious a term as “terrorism.” I define “democracy” for present purposes in relatively parsimonious terms to include three necessary elements: (1) a democratic electoral system involving periodic free and fair elections in which a losing side cedes power; (2) liberal rights to speech and association related directly to political contestation; and (3) stable, predictable, and noncorrupt administrative agencies and courts capable of managing electoral competition without fear or coercion.²²

This definition captures the bare institutional necessities of democracy as a going concern. But it eschews controversial claims about the traits of individual citizens or governmental size predicates of democratic practice. It is hence meant to be as minimal as possible—albeit not excessively parsimonious—while retaining a measure of functional plausibility. So, I think that it is impossible to conceive of an effective democracy without the speech and associational rights typically exercised through political contestation. Perhaps more controversially, I also think it is impossible to imagine a democracy without some measure of bureaucratic apparatus with which to manage free and fair elections.²³ In contrast, I do think that democracy can exist with highly imperfect “horizontal” accountability—that is, a system in which “some properly authorized state institutions act to prevent, redress, or punish the presumably illegal actions (or inactions) of public officials.”²⁴ Indeed, I think we presently lack a comprehensive system of horizontal accountability in the United States today,²⁵ yet it is the consensus view among most scholars and observers that we still have a democracy of sorts.

Muslim Americans: No Signs of Growth in Alienation or Support for Extremism (Pew Research Center, Aug 30, 2011), archived at <http://perma.cc/NS4C-A2E8>.

²² See Aziz Huq and Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L Rev* *9 (forthcoming 2018), archived at <http://perma.cc/N67G-B5UK> (providing the same definition of democracy and calling it “constitutional liberal democracy”).

²³ See Guillermo O’Donnell, *Why the Rule of Law Matters*, 15 *J Democracy* 32, 37 (Oct 2004) (“[V]ertical electoral accountability . . . results from fair and institutionalized elections, through which citizens may change the party and officers in government.”).

²⁴ *Id.* (arguing that vertical accountability is required by definition in a democracy, but horizontal accountability can “vary across cases and time periods”).

²⁵ See Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 *Duke L J* 1, 71–74 (2015) (concluding that litigants levying ex ante facial challenges to laws face fewer transaction costs than do litigants seeking remedies or injunctions against individuals or institutions engaged in unconstitutional practices). See also generally Aziz Z. Huq and Genevieve Lakier, *Apparent Fault*, 131 *Harv L Rev* (forthcoming 2018), archived at <http://perma.cc/LR5X-3GER> (extending this analysis across constitutional and federal criminal law).

Finally, the idea of a democratic *decline* or *recession* rests on the assumption that a status quo ante of democracy (as defined above) exists and that it suffers a substantial degradation in quality along one or more of the three margins I have identified above. Importantly, a decline need not be a collapse. Democracy is a continuous, not a binary, variable. If a democratic drop-off is absolute, it is what Professor Tom Ginsburg and I have elsewhere labeled an “authoritarian reversion.”²⁶ If it is incremental, it is what I have labeled a “retrogression.”²⁷

Here, I am interested in both possibilities of complete reversion and also creeping retrogression. But there must be some threshold below which a quantum of backsliding does not merit consideration within the scope of my analysis. The United States, for example, has fluctuated in democratic quality over the past fifty years since the passage of the Voting Rights Act²⁸ and the formal enfranchisement of African Americans after decades of Jim Crow. Many of these changes are dismaying, although not large enough in magnitude or sufficiently geographically extensive to be examples of national retrogression. Rather, I assume that the last few decades represent a high water mark in democratic inclusion, and that retrogression occurs if there is a *marked and substantial* downward shift in democratic quality of a kind not seen in the past four or five decades.

Looking around the world, it is clear that democratic decline is a real concern. Whereas complete reversions are rare, substantial retrogressions are surprisingly common. Using POLITY data, Ginsburg and I have identified thirty-seven recent instances of retrogression across twenty-five countries, including democracies like the United States, Sri Lanka, India, Israel, and Ireland.²⁹ A 2011 study focused on a thirty-year window, and identified cases of democratic backsliding in fifty-three countries.³⁰ It is worth noting (although hardly conclusive) that several of the democracies in which backsliding is observed, including some of those listed above, simultaneously experienced significant terrorism

²⁶ Huq and Ginsburg, 65 UCLA L Rev at *5–6 (cited in note 22).

²⁷ Id.

²⁸ Pub L No 89-110, 79 Stat 437 (1965), codified as amended at 52 USC § 10101 et seq.

²⁹ Huq and Ginsburg, 65 UCLA L Rev at *38 (cited in note 22).

³⁰ Gero Erdmann, *Decline of Democracy: Loss of Quality, Hybridisation and Breakdown of Democracy*, in Gero Erdmann and Marianne Kneuer, eds, *Regression of Democracy?* 21, 26 (Comparative Governance and Politics 2011).

threats. This suggests, at minimum, the possibility of a relevant correlation.

With these definitions of democracy and democratic decline on the table, we can usefully distinguish the problem of democratic decline from another question that is commonly pursued in legal scholarship on terrorism. The central question in this scholarship is the relationship of security measures to individual interests, usually in the form of civil or human rights, rather than systemic qualities, such as democracy. These are distinct questions. Even if a democracy entails the availability of some rights, it is not reducible to the existence of such rights. Rights, meanwhile, can be obtained even absent democratic processes (and indeed, at times, are imperiled by the very exercise of democracy).

Existing debate on the relationship between terrorism and rights is arrayed between two poles. On one side of this debate are those who worry that responses to terrorism will often be excessive, imposing ultimately needless burdens on suspect populations.³¹ On the other side are scholars who claim that recalibrations of state power in response to terrorism threats tend to be welfare enhancing, so that there is little reason to install institutional checks, such as judicial or legislative oversight.³²

The resulting debate about the magnitude of and justification for liberty, dignity, and privacy deprivations resulting from counterterrorism measures is, in my view, largely distinct as a conceptual and empirical matter from the question of democracy's maintenance. Indeed, it is telling that scholars who argue for maximal state power, and hence are most willing to tolerate high rates of rights infringements, appear to assume the persistence of democratic accountability through terrorism campaigns in framing their argument for extensive state power.³³ They assume, that

³¹ See generally Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1789 to the War on Terrorism* (Norton 2004). See also Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 Yale L J 1011, 1031 (2003) (contending that the overreaction of democracies to terrorism may imperil democracy).

³² See Posner and Vermeule, *Terror in the Balance* at 53–57 (cited in note 2).

³³ This is evident in Professors Eric A. Posner and Adrian Vermeule's discussion of the panic and democratic failure mechanisms—both of which assume the persistence of democratic accountability. *Id.* at 73–77 (discussing insulation of lawmakers under the panic theory); *id.* at 87–90 (discussing democratic failure theory). Posner and Vermeule, however, make strong assumptions about (1) the rationality of the democratic public, (2) their willingness to engage in retrospective voting, (3) the availability of information necessary for the exercise of such voting, and (4) the absence of elite cuing effects or partisan polarization. Their scant regard for the observed operation of the political checks is

is, that democratic accountability is not corroded though the extensive violation of individual liberties—especially when predictably allocated to a minority group. While this argument is deeply flawed, it demonstrates a common belief in the possible coexistence of democracy along with widespread rights infringements.

A gap between threats to individual rights and impingements on democratic practice also becomes apparent when one examines discrete case studies and also when one looks at larger empirical trends. In the context of twentieth-century security crises in the United States, for example, fairly discretely defined ethnic or religious minorities have typically borne the burden of security-related rights deprivations.³⁴ But a democracy can exclude racial, religious, or ethnic minorities and remain, in substantial measure, a democracy (if a morally iniquitous one). State-coordinated campaigns of coercion and intimidation against Japanese Americans, Muslim Americans, or Eastern European migrants across the last century are not commonly viewed as *lapses* in democracy: instead, they illustrate how democracy in action can be prone to moral failure, written off as just another instance of necessarily dirty hands.³⁵ Some rights are certainly necessary to democracy (whether defined as such or not), and some of those rights may well be undermined by counterterrorism responses. But these examples suggest that the derogatory treatment of a minority population—however unwarranted and even reprehensible on its own terms—is not the same as a substantial rollback of democracy. It is only when the minority is sufficiently numerous that their disenfranchisement can be ranked as a blow to democracy *per se*.

in stark contrast to their purportedly hardheaded analysis of security risks. More forcefully put, by idealizing political checks and by casting legal checks in the worst light possible, Posner and Vermeule bias their analysis to an inevitable result. The internal incoherence of their argument substantially undermines its force.

³⁴ See, for example, Immigration Act of 1924, 43 Stat 153 (limiting the immigration of persons from Southern and Eastern Europe); *Korematsu v United States*, 323 US 214, 217–18 (1944) (finding constitutional the detention of persons of Japanese descent); *Ashcroft v Iqbal*, 556 US 662, 667–68 (2008) (describing the detention of several hundred Arab Muslims in the aftermath of 9/11).

³⁵ See Aziz Huq, *The Uses of Religious Identity, Practice, and Dogma in 'Soft' and 'Hard' Counterterrorism*, in Liora Lazarus and Benjamin Goold, eds, *Security and Human Rights* *5–10 (Hart forthcoming 2018) (on file with author) (considering how the modern counterterrorism apparatus tends to view Islam as a signal for risk, an object of reform, or an object of extirpation).

While quantitative studies suggest that a connection does obtain between democracy and human-rights compliance, they further hint that their relationship is not a linear one. Only when highly consolidated does democracy correlate with improved human rights.³⁶ When weak, in contrast, democracy has no impact on the level of rights violations.³⁷ Complicating matters further, even consolidated democracies can violate rights at high rates when faced with a terrorist threat.³⁸ Given the tendency of democratic publics to rally around leaders in times of crisis and the manner in which terrorism triggers broad mortality salience and authoritarian sentiments, it might well be expected that democracies would be no less likely than nondemocratic polities to engage in repressive measures.³⁹ Consistent with this intuition, greater levels of state violence are associated with swelling public support for repressive measures.⁴⁰

While distinct from the question I have framed here about democratic decline, this existing debate about rights and terrorism does implicate questions of democracy's quality in one respect. The scholars engaged in this demand are implicitly making claims about the way in which democratic publics are likely to respond to security threats: either by rationally demanding cost-justified security measures or by allowing invidious stereotypes and cognitive biases to influence their choices—and the way in which governmental actors will respond—by making decisions based on expertise or not. Their debate is, at some level, about the competing relevance of emotional and epistemic springs of decisions in democracies. But it is still one that simply assumes the continued operation of democracy.

In sum, the question whether terrorism leads to substantial damage to democracy is one that can be defined with a tolerable

³⁶ Bruce Bueno De Mesquita, et al, *Thinking inside the Box: A Closer Look at Democracy and Human Rights*, 49 *Intl Stud Q* 439, 450 (2005).

³⁷ Christian Davenport and David A. Armstrong II, *Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996*, 48 *Am J Polit Sci* 538, 542 (2004).

³⁸ Chenoweth, 16 *Ann Rev Polit Sci* at 362 (cited in note 12) (discussing how democracies grant the executive expanded powers after terrorist acts, with examples from Israel and the United Kingdom).

³⁹ Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 *Cal L Rev* 887, 935–43 (2012).

⁴⁰ Bart Schuurman, *Defeated by Popular Demand: Public Support and Counterterrorism in Three Western Democracies, 1963–1998*, 36 *Stud Conflict & Terrorism* 152, 163–65 (2013) (presenting the turn of public opinion against the Front de Libération du Québec as an example of this phenomenon).

degree of precision and distinguished from the currently dominant rights-related debate about emergency powers. Given the nontrivial risk of democratic decline that exists today,⁴¹ this raises the question whether a pathway can be traced from the occurrence of political violence to democratic decline.

III. MECHANISMS OF DEMOCRATIC DECLINE IN THE CONTEXT OF TERRORISM THREATS

The relationship between terrorism and democratic decline might be studied using either econometric methods or more granular case studies. A concern with the former might be that the number of available examples of democratic decline is relatively small, and the causes of such decline are almost certainly plural and complex. As a result, econometric techniques are not always well matched to available data. It may well be just as useful to develop illustrative case studies and local observations to offer a suite of potential mechanisms whereby terrorism might induce democratic recession. This is the approach I take.

This inductive approach has risks. Ascriptions of causality must be more tentative, and concerns about external validity loom large. Yet history is a storehouse of political tactics for contemporary actors. Even a single example of successful assault on democracy may prove influential because later decisionmakers consciously choose to imitate it. Case studies, in particular, of high-salience examples may therefore be surprisingly predictive, and perhaps even more trenchantly illuminating than the normal run of econometric tools.

I see three specific mechanisms whereby the use of terrorism as a tactic has an effect on the strength of democracy as a systemic quality of political arrangements. Each involves a slightly different species of institutional change, and each has a distinct and different pace and timeframe. The first concerns the rapid deployment of formal emergency powers. The second hinges on changes to the forms of institutionalized coercive authority adopted in response to perceived terrorist threats. The third, by contrast, courses through a public, political channel, and pertains to shifts in the rhetoric deployed in electoral campaigns, and subtle shifts in the strategies of legitimation employed by elected leaders. In the end, I am skeptical that the first, and in some ways most

⁴¹ See generally Huq and Ginsburg, 65 *UCLA L Rev* (cited in note 22).

obvious and salient to law professors, is in practice all that important. The other two mechanisms, however, seem to me important potential objects of future research.

A. Triggering Emergency Powers

In the first pathway, a terrorism event provides a trigger for the exercise of emergency powers that constrict or suppress political competition. In its simplest iteration, a terrorism event occurs and the government responds not only with detention and coercion of putatively suspect communities but also with a more general constriction on rights of speech and association necessary to democratic governance. This is a close cousin to the emergency powers/civil liberties question already explored in the legal scholarship.⁴² But it is distinct insofar as the cost of security measures is not tallied in terms of discrete infringements on individual rights, but rather in terms of systemic distortions in the functioning of the political system.

The highest-profile examples of this mechanism arise in early twentieth-century Germany and arguably also in contemporary Russia and Turkey. First, take the obvious example. On February 27, 1933, the German Reichstag building burned to “ruins,” allegedly at the hands of a young Dutch anarcho-syndicalist, Marinus van der Lubbe.⁴³ A “massive” round-up of alleged leftists started that day.⁴⁴ The next day, President Paul von Hindenburg signed a decree suspending “key” articles of the Weimar Constitution and starting “[t]he Nazi seizure of power . . . in earnest.”⁴⁵ The threat of leftist violence embodied in the Reichstag fire was significant, additionally, not only because it provided an occasion for Hindenburg’s decree but also because it deepened the “widespread” fear of “communist ‘terrorism.’”⁴⁶ This in turn led civil society groups and conservative politicians to lend broad support to the Nazi’s subsequent constrictions on democratic practice.⁴⁷

More recently, the historian Timothy Snyder has identified a parallel dynamic at work in the consolidation of political power within Vladimir Putin’s Russia and Recep Tayyip Erdoğan’s

⁴² See text accompanying notes 31–33.

⁴³ Richard J. Evans, *The Coming of the Third Reich* 328–29 (Penguin 2003).

⁴⁴ *Id.* at 331.

⁴⁵ *Id.* at 333.

⁴⁶ Robert O. Paxton, *The Anatomy of Fascism* 107 (Knopf 2004).

⁴⁷ *Id.*

Turkey.⁴⁸ In the Russian context, Snyder suggests that attacks on apartment buildings in 1999 provided a platform for Putin's Chechnya campaign, which in turn cemented his fragile popularity.⁴⁹ There are other examples: Another terrorist attack killed 40 only two days before the 2003 parliamentary elections.⁵⁰ And in the wake of the 2005 Beslan hostage crisis, in which 150 children died, Putin invoked the terrorist threat to propose "radical changes" in Russia's state structure that stripped all of its provinces of power while greatly strengthening the central institutions under Putin's direct control.⁵¹ In Turkey, the precipitating event that Snyder cites was not terrorism. Rather, the Erdoğan government responded to a violent coup attempt in July 2016 by purging or detaining 9,000 police officers, 21,000 private school teachers, over 10,000 soldiers, 2,745 judges, 1,500 university deans, and 21,700 Ministry of Education officials.⁵² In the wake of these purges, Erdoğan sought and won a referendum on constitutional amendments that increased dramatically his authority as president.⁵³

The German, Russian, and Turkish cases present plausible examples of democratic decline. But it is far from clear to me that terrorism (or, in Turkey, the threat of a military putsch) played a decisive role in their trajectories. In Turkey, for example, smaller purges of Erdoğan opponents had occurred before the 2016 coup attempt.⁵⁴ Had concerns about terrorism been causally related to Turkish democracy's decline, one might have expected this connection to be clearest in relation to Erdoğan's policy toward the

⁴⁸ Timothy Snyder, *The Reichstag Warning* (NY Rev Books, Feb 26, 2017), online at <http://www.nybooks.com/daily/2017/02/26/reichstag-fire-manipulating-terror-to-end-democracy/> (visited Jan 9, 2018) (Perma archive unavailable).

⁴⁹ Id.

⁵⁰ Sarah Oates, *Comparing the Politics of Fear: The Role of Terrorism News in Election Campaigns in Russia, the United States and Britain*, 20 Intl Rel 425, 429 (2006).

⁵¹ Kim Lane Scheppele, "We Forgot about the Ditches": *Russian Constitutional Impatience and the Challenge of Terrorism*, 53 Drake L Rev 963, 967, 1011–13 (2005).

⁵² Josh Keller, Iaryna Mykhyalyshyn, and Safak Timur, *The Scale of Turkey's Purge Is Nearly Unprecedented* (NY Times, Aug 2, 2016), online at http://www.nytimes.com/interactive/2016/08/02/world/europe/turkey-purge-erdogan-scale.html?_r=1 (visited Jan 3, 2018) (Perma archive unavailable).

⁵³ Patrick Kingsley, *Erdogan Claims Vast Powers in Turkey after Narrow Victory in Referendum* (NY Times, Apr 16, 2017), online at <http://www.nytimes.com/2017/04/16/world/europe/turkey-referendum-polls-erdogan.html> (visited Jan 3, 2018) (Perma archive unavailable).

⁵⁴ Jenny White, *Turkey at a Tipping Point*, 113 Current Hist 356, 357 (2014) (recounting Erdoğan's response to a "perceived coup attempt" featuring policies that curtailed civil liberties, enhanced government surveillance, and jailed journalists and protesters).

PKK. But this is not the case. Erdoğan's approach to the Kurdish question has included both periods of attempted rapprochement and periods of intensified conflict.⁵⁵ Hence, while a pathway away from democratic competition that relied on fears of Kurdish terrorism can be imagined—and indeed, these fears played a role in the 2017 constitutional referendum campaign⁵⁶—Erdoğan's consolidation of political power has largely been motivated and explained by other considerations.

In Russia, similarly, the public desire for a “strong” leader like Putin that fueled his initial election victories was only partially motivated by concerns about terrorism.⁵⁷ Liberal opposition parties declined in popularity during the early 2000s in large part because of their own strategic blunders.⁵⁸ Doubts have been also raised about whether pivotal terrorism events in Russia, such as the 1999 apartment bombings, were in fact the work of nonstate actors or instead manufactured by the FSB, Russia's principal security agency.⁵⁹

Similarly, even the example of the Reichstag fire proves ambiguous. Although historians continue to disagree on the question of its origins, there is an increasing body of evidence that rather than van de Lubbe, the Nazi Party itself was responsible for the fire.⁶⁰ Without attempting to resolve the question, it suffices here to say that the scale of the Nazi response to the Reichstag fire reflected not the precise contours of the threat to order that had in fact manifested, but rather an extant Nazi agenda to suppress political opposition of all stripes.

A regime committed to unraveling democracy can employ terrorism as an instrument in this campaign. But it does not need

⁵⁵ See F. Stephen Larrabee and Gonul Tol, *Turkey's Kurdish Challenge*, 53 *Survival* 143, 143–44, 146–47 (Aug–Sept 2011) (recalling the violent struggle between the Turkish government and the PKK that has claimed over forty thousand lives and documenting attempts by Erdoğan and the AKP to soften the conflict through diplomacy and social reform).

⁵⁶ Ercan Gurses and Orhan Coskun, *Erdogan Risks Losing Turkish Swing Voters with Harsh Referendum Rhetoric* (Reuters, Feb 16, 2017), archived at <http://perma.cc/5NSV-C7UN>.

⁵⁷ For a fair-minded account of Putin's initial electoral appeal, see Arkady Ostrovsky, *The Invention of Russia: The Rise of Putin and the Age of Fake News* 264–66 (Penguin 2017).

⁵⁸ Vladimir Ryzhkov, *The Liberal Debacle*, 15 *J Democracy* 52, 54–57 (July 2004) (Anastasiya Kuzmina, trans) (identifying the mistakes as a failure to divorce themselves from the instability of the 1990s and an inability to position themselves as agents of economic growth).

⁵⁹ See, for example, Scheppele, 53 *Drake L Rev* at 1008 n 218 (cited in note 51).

⁶⁰ See generally, for example, Benjamin Carter Hett, *Burning the Reichstag: An Investigation into the Third Reich's Enduring Mystery* (Oxford 2014).

an *actual* external threat to do so. Imagined or manufactured conspiracies may do just as well. Moreover, even when security concerns are invoked, in practice it is unclear whether they have any significant effect on the trajectory of system-level aspects of the polity. It may well be that a regime or a leader inclined to treat terrorism as a trigger for the effectual contraction of democratic contestation is weakly committed to political pluralism in the first instance. Such a leader might fall off the democracy wagon sooner or later even without a looming security concern. Hence, this first potential causeway between terrorism and democratic decline seems a relatively unpromising one.

B. Reconfiguring the State's Repressive Capabilities

The second pathway is subtler. It wants for spectacular examples like the Reichstag fire and its aftermath. It is the possibility that the prospect of terrorism leads governments to introduce system-level reforms to state structure that, in the medium and long term, make a move away from democracy easier to achieve. The relevant changes to state institutions that respond to terrorism might be technological in character. For example, they might involve the acquisition of new forms of surveillance or coercive authorities. But in my view, they are more likely to be institutional in nature. Indeed, institutional change might be significant even if the underlying authority being exercised remains roughly unchanged.

The basic intuition animating this mechanism is familiar from the context of military coups. A military apparatus that developed to meet a specific external threat may become a destabilizing element within a wider and more heterogeneous democratic context once the threat has abated. In Pakistan, for instance, the army's broad prestige and political dominance (even in times of putative civilian rule) flowed from the dominance of geostrategic issues—most importantly, the perceived military threat of India—at the time of the nation's birth.⁶¹ The external threat induced institutional choices that diminished the possibility of stable democratic rule. This is not, however, the only way a destabilizing military presence can coalesce. In Turkey, by contrast, an underground network called the Committee of Union and Progress formed the backbone of anti-Ottoman mobilization around the

⁶¹ Ayesha Jalal, *The Struggle for Pakistan: A Muslim Homeland and Global Politics* 3–6 (Belknap 2014).

turn of the twentieth century, and then, having successfully overthrown the Sultan, went on to form what has been called a “deep state” within the new Kemalist republic.⁶²

In the terrorism context, the Italian state’s response to the Red Brigade insurgency of the late 1970s represents a concrete example of hazardous reconfigurations of institutional arrangements. This entailed the creation of “a nationwide network of armed neo-Fascist groups,” which ultimately turned their purposes to “a fully fledged *coup d’état*” aimed at reestablishing “Mussolini-style government in a ‘born-again’ Salo Republic.”⁶³ Paradoxically, development of this parastatal apparatus flowed from state weakness—the postwar “structural ‘unpreparedness’ of the Italian police.”⁶⁴ It is a nice irony that an impulse to professionalize the security apparatus should so directly induce a grave risk of democratic backsliding.

The Italian example is clearly an extreme case. It may thus be helpful to set forth some (hypothetical) examples of more nuanced ways in which terrorism emergencies can lead to the reconfiguration of state power and present a risk to democratic stability.

Two more mundane and plausible dynamics can be imagined. First, a government might respond to a terrorism threat by changing the manner in which a certain surveillance authority is used such that its deployment no longer requires judicial authorizations and no longer creates a record of its retail justifications and the extent of the resulting intrusions on private communications and files. The new surveillance authority might be employed with ease to gather information on political adversaries, which can either be leaked to inflict political damage or withheld to blackmail specific individuals.

Second, one common response to a terrorism event is to create a mechanism for proscribing certain organizations, foreign or domestic, that are affiliated in some fashion with terrorist organizations.⁶⁵ Ex ante designation, with attendant fiscal and

⁶² Mehtap Söyler, *Informal Institutions, Forms of State and Democracy: The Turkish Deep State*, 20 *Democratization* 310, 315 (2013).

⁶³ Peter Chalk, *The Response to Terrorism as a Threat to Liberal Democracy*, 44 *Australian J Polit & Hist* 373, 379 (1998).

⁶⁴ Donatella Della Porta, *Institutional Responses to Terrorism: The Italian Case*, 4 *Terrorism & Polit Violence* 151, 160 (Winter 1992).

⁶⁵ See, for example, *Holder v Humanitarian Law Project*, 561 US 1, 18–25, 29–33 (2010) (upholding the government’s methods to thwart terrorist groups by prohibiting any provision of material support to them, even if the support was directed toward legitimate activities or related organizations).

criminal sanctions, might be a rough substitute for the ex post use of inchoate criminal offenses, such as conspiracy and material support, as a means to target group-based security threats. But ex ante measures of this sort necessarily depend on speculative rather than historical judgments. They are hence more likely to court error and even partisan misuse.

In both of these hypothetical examples, the basic surveillance or regulatory authority being deployed has not changed. What *has* shifted are the institutional circumstances in which that power is exercised. In both instances, backdrop institutional changes make the authority a more potent instrument of democratic erosion. Surveillance of journalists and regime critics has become easier in the first hypothetical. The risk of active suppression of oppositional domestic civil-society elements as affiliates or alter egos of designated groups has increased in the second hypothetical.⁶⁶ In both cases, the expected cost of coordinated public enforcement of constitutional norms has increased.⁶⁷

Both of these hypotheticals involve the elimination of ex ante safeguards on the improper use of a security power for antidemocratic ends. Alternative reforms might also raise parallel concerns. For example, a reform catalyzed by a terrorism event might reallocate a power from an institution relatively insulated from politics to one in the immediate control of elected officials. Or a reform might remove ex post forms of accountability. The latter ranges from disclosure requirements respecting the frequency and scope of erroneous or unjustified applications of a specific security power to individual remedies sounding either in terms of declaratory relief or money damages.

Once adopted by the state, moreover, any of these institutional recalibrations may be difficult to wind back. This is especially so when they redound to the benefit of factions either within or outside government. The latter can, and often do, use privileged access to information or political decisionmakers to resist

⁶⁶ For an examination of the suppression of civil society, see Huq and Ginsburg, 65 *UCLA L Rev* at *46–51 (cited in note 22).

⁶⁷ For discussion of the importance of coordinated public action to constitutional enforcement, see Sonia Mittal and Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century*, 29 *J L, Econ & Org* 278, 278–80 (2011).

even plainly warranted changes in institutional form.⁶⁸ The result is a sticky “path dependence” in that institutional form.⁶⁹

This path-dependent effect will be especially pronounced if the political system is characterized by plural veto-gates, and, as a result, tends toward policy sclerosis.⁷⁰ Under such conditions, exogenous shocks like terrorist attacks will generate important windows for policy and institutional change. Moreover, if the manner in which security-related powers are deployed changes largely in response to exogenous security shocks, it is also likely that the pattern of resulting changes will be asymmetrically tilted toward enabling change. Further, when policy change is hard to achieve via ordinary political channels, incumbent elected actors may find it more attractive to align themselves with, or to provoke the intervention of, nondemocratic security agencies.⁷¹

A potential objection to this second pathway from terrorism to democratic decline is once again the concern that institutional responses to terrorism events are epiphenomenal. The slide away from democracy, this counterargument would go, is caused by independent forces, and will not be either retarded or delayed much by exogenous shocks. Professors Jack Balkin and Sanford Levinson, for example, have described a “national surveillance state” in the United States, but caution against the view that the latter flows from specific terrorism events.⁷² Rather, they contend, “new technologies of surveillance, data storage, and computation that arrived on the scene in the latter part of the twentieth century” have motivated the development of their national surveillance state.⁷³ The marginal effect of specific political responses to terrorism, on their view, is minimal.

⁶⁸ Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 Harv L Rev 641, 651–52 (1996) (“Either information or public choice barriers could induce strong-form path dependence.”).

⁶⁹ Scott E. Page, *Path Dependence*, 1 Q J Polit Sci 87, 97 (2006) (defining “path dependence” as a “process” in which “the outcome in any period depends on history and can depend on their order”).

⁷⁰ Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 Cal L Rev 1401, 1422 (2016).

⁷¹ See, for example, C. Christine Fair, *Why the Pakistan Army Is Here to Stay: Prospects for Civilian Governance*, 87 Intl Aff 571, 576–77 (2011) (discussing how the instability of Pakistani politics incentivizes opposition parties to use army intervention to dissolve governments early and obtain victories in early elections).

⁷² See Jack M. Balkin and Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 Fordham L Rev 489, 522 (2006).

⁷³ *Id.*

Balkin and Levinson are right to stress secular trends, such as technological change. But I think it is a mistake to think that the specific configurations of new powers are unaffected by exogenous shocks or the institutional reorganizations they set in motion. That is, Balkin and Levinson are in my view too quick to draw an unhindered plumb line between technological change and institutional metamorphoses. Policy change is more complex a process, and more uncertain in result, than they let on. There are many instances, both large and small, in which the specific configuration of security-related powers is crucially determined by specific and contingent decisions taken under the aegis of emergency. History, unlike the executive power portrayed by Balkin and Levinson, knows no iron law of necessity.

It is, for example, well known that the September 2001 attacks catalyzed a suite of novel aggregate surveillance measures, most of which were subsequently integrated into domestic law despite initial controversy.⁷⁴ It seems plausible to think that the programs installed after 9/11, which became a baseline against which policy proposals were judged, shaped the form and extent of regulation of new surveillance powers. Of course, we cannot know what would have happened absent the 2001 attacks, but the causal arrow observed in practice is tolerably strong.

Consider a further example: Federal law enforcement agencies have strenuously argued in recent years for new and improved forms of access to encrypted communications and data-storage devices through the creation of “keys” to access such data upon issuance of a warrant.⁷⁵ Cryptographers in the academy and in industry have resisted this proposal on the grounds that any compromising of end-to-end encryption would impose greater social cost than the deterrence obtained by easier access to devices.⁷⁶ The law enforcement push failed, notwithstanding an attempt to

⁷⁴ See Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 Harv J L & Pub Pol 117, 125–28 (2015).

⁷⁵ See *The Encryption Tightrope: Balancing Americans’ Security and Privacy, Hearing before the Committee on the Judiciary*, 114th Cong, 2d Sess 15 (2016) (statement of FBI Director James B. Comey).

⁷⁶ Harold Abelson, et al, *Keys under Doormats: Mandating Insecurity by Requiring Government Access to All Data and Communications* *24–25 (Computer Science and Artificial Intelligence Laboratory Technical Report, July 7, 2015), archived at <http://perma.cc/56NE-7CKL>.

leverage a high-profile fracas over one of the San Bernardino terrorists' iPhones.⁷⁷ In the wake of that failed effort, a senior lawyer within the intelligence community cautioned his colleagues privately to await "the event of a terrorist attack or criminal event where strong encryption can be shown to have hindered law enforcement."⁷⁸ His comments suggest that actors within agencies are perfectly aware that exogenous security shocks provide political platforms for reengineering the scope of coercive authorities—as well as being well positioned to capitalize on those opportunities.

Another objection to this pathway from terrorism to democratic decline might focus on the relation between the misuse of new security powers and the quality of democracy. On this account, terrorism might influence the quality of official accountability for wrongdoing consistent with some notion of the rule of law, but it is irrelevant to the problem of "vertical" accountability.⁷⁹

But new technologies of coercion can and do dampen democratic participation in significant ways. China's experience with social media regulation is but the most familiar example.⁸⁰ A useful analogy comes from the municipal policing context. There, evidence suggests that negative contact with the police has a demoralizing and alienating effect, in particular on young African American men.⁸¹ This effect is reinforced by a number of ways in which aggressive street policing using stops undermines the trust in the state and community cohesion necessary for effectual political action.⁸² What I suggest here is simply that the same political suppression can occur, under the right institutional conditions, on a somewhat grander scale.

I have offered here examples from the US context of terrorism creating the conditions for political entrepreneurs to secure new

⁷⁷ Matt Zapotosky, *FBI Has Accessed San Bernardino Shooter's Phone without Apple's Help* (Wash Post, Mar 28, 2016), archived at <http://perma.cc/8SPS-276H> (noting that after a third party broke into the phone, the Department of Justice withdrew its suit against Apple).

⁷⁸ Ellen Nakashima and Andrea Peterson, *Obama Faces Growing Momentum to Support Widespread Encryption* (Wash Post, Sept 16, 2015), archived at <http://perma.cc/Q7KM-GZ4A>.

⁷⁹ O'Donnell, 15 *J Democracy* at 37 (cited in note 23) (defining "vertical electoral accountability" as submission to "fair and institutionalized elections," or to popular mobilization, not necessarily to the rule of law).

⁸⁰ See generally Gary King, et al, *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 *Am Polit Sci Rev* 326 (2013).

⁸¹ Amy E. Lerman and Vesla M. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control* 54–55, 150–51 (Chicago 2014).

⁸² Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 *Minn L Rev* 2397, 2437–38 (2017).

institutional configurations of security-related powers. In doing so, though, I do not want to suggest that these particular powers are now or have previously been employed in ways subversive to American democracy. Perhaps they are, although I cannot demonstrate this to be so here. My point is more modest: this sort of evolutionary process of institutional development, under the right circumstances, may well yield in the medium term a terrain of governing bodies primed for and conducive to substantial retrogression in democratic norms, if not outright collapse.

This dynamic occurs in a longer timeframe than the direct policy responses to a security emergency and is hence less visible to citizens and scholars. Its deleterious effect on democratic norms is incremental and probabilistic in character. Nevertheless, I do not think it is overly speculative to be concerned about the democratic costs of new security measures when viewed in the medium term.

C. Terrorism and Populism

The third, and perhaps most interesting, pathway between terrorism and democratic decline flows, paradoxically, through democratic politics itself rather than via an institutional design choice. The eruption of terrorism, on this account, conduces to a new style of populist politics in the medium term. In turn, politicians selected by dint of their populist appeals tend to be averse to the main tenets of democracy as I have defined it. Even if this relationship between terrorism and the adoption of antisystem policy positions is a contingent rather than a necessary one, it is a correlation that holds with some rigidity in the current geopolitical moment. It generates a medium-term dynamic that might run roughly concurrent to the process of institutional transformation just canvassed.

Populism has emerged as a potent political form in both Europe and North America in the last decade.⁸³ But it has a longer pedigree. It can be seen earlier in Latin America,⁸⁴ Asia,⁸⁵ and also in earlier twentieth-century Europe.⁸⁶ Populism is not a well-defined term. In

⁸³ John B. Judis, *The Populist Explosion: How the Great Recession Transformed American and European Politics* 12–13 (Columbia Global Reports 2016).

⁸⁴ See Carlos de la Torre, *Left-Wing Populism: Inclusion and Authoritarianism in Venezuela, Bolivia, and Ecuador*, 23 *Brown J World Aff* 61, 63–64 (2016).

⁸⁵ See generally, for example, Pasuk Phongpaichit and Chris Baker, *Thaksin's Populism*, 38 *J Contemp Asia* 62 (2008).

⁸⁶ See Judis, *The Populist Explosion* at 154–55 (cited in note 83).

a cogent recent effort at definitional clarity, Professor Jan-Werner Müller has argued that an axiomatic characteristic of populist politics is the belief in the existence of a “true” people genuinely and completely represented by a singular party or leader, and a corresponding rejection of competitive elections and the possibility of legitimate political opposition.⁸⁷

Agreeing with Müller, Professor Nadia Urbinati has argued that successful populism tends to “change, and even shatter constitutional democracy” through the “centralization of power, weakening of checks and balances, disregard of political opposition, and the transformation of election [into] a plebiscite of the leader.”⁸⁸ These definitions provide analytically crisp means of isolating distinct threats to democratic stability.⁸⁹

Populist regimes can be discerned today in Venezuela, Hungary, Russia, and Poland—all countries that have experienced recent substantial democratic retrogression under populist rule.⁹⁰ In France, the United Kingdom, and the United States, populist movements have either achieved significant policy or electoral triumphs in the past two years, without (for now) substantial backward movement in democratic quality.⁹¹

Populism has left- and right-wing variants; in Greece, for example, Syriza and Golden Dawn respectively occupy these positions.⁹² The connection between terrorism and democratic decline is most apparent with the latter organization. In Europe, increasing support for populism is associated with negative views of immigrants. Right-of-center populist parties like the Dansk Folkeparti, the Bündnis Zukunft Österreich (Alliance for the Future of Austria), and the Dutch Party for Freedom coalesce around restrictive immigration measures aimed at stanching

⁸⁷ Jan-Werner Müller, *What Is Populism?* 19–28 (Pennsylvania 2016).

⁸⁸ Nadia Urbinati, *The Populist Phenomenon*, 51.3 *Raisons Politiques* 137, 137 (2013).

⁸⁹ For a defense of this position, see Aziz Z. Huq, Book Review, *The People against the Constitution*, 116 *Mich L Rev* *13–14 (forthcoming 2018), archived at <http://perma.cc/3YWH-EMQ5>.

⁹⁰ See Pippa Norris, *It's Not Just Trump: Authoritarian Populism Is Rising across the West. Here's Why* (Wash Post, Mar 11, 2016), archived at <http://perma.cc/YNU8-6XAF> (detailing the state of populist politics in various countries in the West and throughout the world). See also, for example, Joanna Fomina and Jacek Kucharczyk, *Populism and Protest in Poland*, 27 *J Democracy* 58, 58–60 (Oct 2016) (documenting the rise to power of the populist Law and Justice Party in Poland).

⁹¹ Judis, *The Populist Explosion* at 12–17 (cited in note 83).

⁹² Dalibor Rohac, Book Review, *Clientelism and Economic Policy: Greece and the Crisis*, 37 *Cato J* 427, 429 (2017).

Muslim migration, partly in the name of ensuring security.⁹³ Such sentiments are strongly linked to perceptions of terrorism risk. The recognition and stoking of public fear of such violent disorder is a central element of the emotional appeal of right-of-center populism.⁹⁴

Hence, population-wide surveys in European countries find that perceptions of a security threat from Islamic terrorism predicted negative views toward Muslim migrants.⁹⁵ More specifically, quasi-experimental studies show that media exposure to high-profile terrorism events, even in nations that have not experienced that political violence directly, causes increased anti-immigrant sentiments.⁹⁶ This study found the effect to peak in geographic areas that have experienced recent spikes in unemployment.⁹⁷ Today, some of the highest levels of anti-immigrant sentiment are found in Eastern Europe, which has experienced spikes of support for populist candidates at the polls.⁹⁸

In this third causal pathway, terrorism is not a *direct* cause of democratic decline. Rather, terrorism events, whether local or global, serve as a backdrop that is especially conducive to the political rise of parties and leaders that do not accept basic tenets of democracy. This is, however, not to suggest that even if such leaders come to power, they will necessarily be successful in presiding over institutional changes that narrow democratic space. In the US context, for example, Professor Ginsburg and I have argued that the risk of democratic regression is a function not simply of constitutional design flaws (although there are plenty of those),

⁹³ Farid Hafez, *Shifting Borders: Islamophobia as Common Ground for Building Pan-European Right-Wing Unity*, 48 *Patterns of Prejudice* 479, 482–83, 485 (2014).

⁹⁴ *Id.* at 483–84.

⁹⁵ Richard Wike and Brian J. Grim, *Western Views toward Muslims: Evidence from a 2006 Cross-National Survey*, 22 *Intl J Pub Op Rsrch* 4, 19 (2010).

⁹⁶ Joscha Legewie, *Terrorist Events and Attitudes toward Immigrants: A Natural Experiment*, 118 *Am J Sociology* 1199, 1218–20 (2013).

⁹⁷ *Id.* at 1223–25.

⁹⁸ Zan Strabac and Ola Listhaug, *Anti-Muslim Prejudice in Europe: A Multilevel Analysis of Survey Data from 30 Countries*, 37 *Soc Sci Rsrch* 268, 278, 283 (2008). See also Krisztina Than and Gergely Szakacs, *Fidesz Wins Hungary Election with Strong Mandate* (Reuters, Apr 11, 2010), archived at <http://perma.cc/UM8K-GYPF>; Silke L. Schneider, *Anti-immigrant Attitudes in Europe: Outgroup Size and Perceived Ethnic Threat*, 24 *Eur Sociological Rev* 53, 67 (2008) (Table A1). In addition, data from the World Values Survey points toward the extremely high levels of anti-immigrant sentiment in Hungary. See World Values Survey, *Immigrant Policy: 2005–2009*, archived at <http://perma.cc/4TVL-NUA3> (including Hungary in list of countries for 2005–2009 data).

but also of the coalitional politics within which potentially demagogic leaders operate.⁹⁹ When the coalitional context is unfavorable, the risk of democratic decline is dampened.

In sum, the third pathway posits that populism presents a substantial risk of democratic retrogression—if not of wholesale reversion into autocracy. It further suggests that the specter of terrorism works as the fuel for populism’s ascent.

Again, it is worth considering counterarguments. The strongest hinges on the connection between terrorism and populism. Not all populists focus on terrorism threats. In the United States, for example, populisms both old and new are organized around economic grievances, as well as security fears.¹⁰⁰ Perhaps economic insecurity is sufficient to generate pressure for populist positions.

But the best studies available to date do not support the idea that economic forces alone can explain the present populist wave. Studying data on the shifting positions of political parties in European countries, for example, Professors Ronald Inglehart and Pippa Norris distinguish between economic insecurity and cultural backlash as possible theories of populism’s recent success. They suggest that the cultural backlash theory has more support than economic explanations for populism’s appeal.¹⁰¹ Inglehart and Norris treat security-related concerns as one of five potentially salient “cultural” factors and find that it is independently predictive of populist sentiment.¹⁰² Even if security-related concerns are not the *sole* cause of contemporary populism in the form that Müller and Urbinati have stipulated, therefore, it appears they are sufficiently common to be a major driver of the populist “explosion” currently underway.

CONCLUSION

Democratic decline happens in a small, albeit growing, number of cases. Discrete case studies of its microfoundations might yield insight into the trajectories of particular polities. But the

⁹⁹ Huq and Ginsburg, 65 *UCLA L Rev* at *73–75 (cited in note 22) (summarizing the warning signs of retrogression presented by the current ruling coalition in America).

¹⁰⁰ See Martin Eiermann, *How Trump Fits into the History of American Populism*, 33 *New Persp Q* 29, 32 (Spring 2016).

¹⁰¹ Ronald F. Inglehart and Pippa Norris, *Trump, Brexit, and Rise of Populism: Economic Have-Nots and Cultural Backlash* *1, 4–5 (Harvard Kennedy School Working Paper No 16-026, Aug 2016), archived at <http://perma.cc/3EZ4-729D>.

¹⁰² *Id* at *27–28, 45–46.

lack of cases to study means we are a long way from understanding the full panoply of its institutional, social, political, and economic causes. The task is particularly challenging because there is not simply one story of democratic decline, but many. The typologies offered here are just a first step toward better understanding some of those mechanisms.

This Essay identifies three potential ways in which terrorism might conduce to democratic recession. I do not believe that terrorism directly precipitates the lurch away from democracy via the first pathway. Instances in which terrorism leads directly to a democratic recession through the strait gate of an emergency declaration (as in Weimar) or radical structural change to the state (as in Putin's Russia) are rare and ambiguous.

Instead, the more interesting and more significant pathway to consider is an intertwined version of the second and third mechanisms that I have described: the incidence of terrorism could both instigate a process of institutional change that weakens restraints on coercive authorities that might be employed to unravel democratic practice and, at the same time, encourage the polity to shift toward a more populist stance, with less toleration for the necessary predicates of effectual democracy, such as competitive elections and the recognition of a loyal opposition. These institutional and political changes, respectively, furnish the means and the motivation to engage in democratic retrogression. When they occur simultaneously—and there is no reason to think that they always will—it is quite plausible to think that their costs include the medium-term emasculation of democracy's institutional and political foundations.

This possibility merits consideration not only for its implications for constitutional design writ large, but also because it might influence legal interpretation on the ground. I will close by developing one such implication.

It is a commonplace now that even rule-like constraints on governmental action can warp and buckle when national security is imperiled, say by a serious terrorism threat. One of the most sensitive and sophisticated versions of this intuition is offered by Professor Richard Fallon, who has suggested that “the obligation of fidelity to specific, constitutionally and statutorily established

legal norms” can give way if “consequence-based pulls of obligation to the overall legal order . . . achieve a supervening legal force.”¹⁰³

Fallon means to suggest that concerns about grave security harms can dissolve normal legal constraints. But the analysis I have offered cuts in the other direction. The systemic harm of terrorism is more symmetrical than commonly appreciated. It is not only the attacker but the defensive operation of counterterrorism that poses a risk of unraveling fundamental predicates of the legal order. In some respects, indeed, the latter danger may be greater because it wants for obvious indicia. If that is even possibly so, a threshold deontological approach to national security should be structured to reflect the symmetrical risks of catastrophic harm to the democratic, constitutional order. There are devils, in short, on every side.

¹⁰³ Richard H. Fallon Jr, *Interpreting Presidential Powers*, 63 Duke L J 347, 371 (2013).