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Terrorism and Democratic Recession

Aziz Z. Huq

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Abstract

This short essay examples the potential causal mechanisms that might link terrorism to 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 ways in which acts of terrorism might lead to a decline in democratic practices. These three pathways work through the use of emergency powers, the creation of a repressive state apparatus, and the conjuring 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 teeth of 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. Yet each became symptomatic of global political practice only in the twentieth century. Each is also the others' secret sharer. Each is 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.

My aim in this essay is to isolate and then unpack a single underappreciated strand of the 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, my hope is to offer the beginnings of a theoretical framework to enable clearer thinking. 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 an intrinsically important exercise. Not the least reason for this is practical. A democratic default seems undesirable, and something 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. In part, this estimation is motivated by an assumption that a terrorist attack will have (potentially) systemic effects, whereas counterterrorism efforts will not. This framing of the debate is, however, misleading. 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 different pathways.

I. Entanglements of Terrorism and Democracy: A Taxonomy

It's useful to 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 of enabling 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. Self-determination or some like ideal has likewise animated the Irish Republican Army (IRA), the Basque Euskadi Ta Askatasuna (ETA), and the Zionist groups Irgun and Lehi.

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."¹ According to Guha, the Naxalite rebellion is a reaction to the failure of democratic norms. Alternatively, consider the abrupt caesura in Algerian democracy in January 1991, which catalyzed a dizzying and bloody spiral into terrorism and ultimately civil war.² In Algeria as well as India, terrorism is deployed as a 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. 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 constraining forum for social

¹ Ramachandra Guha, *Adivasis, Naxalites and Indian Democracy*, *Econ & Pol Weekly*, Aug 11, 2007, at

² Hugh Roberts, *The Algerian State and the Challenge of Democracy*, 27 *Gov't & Opposition* 433 (1992).

conflict.³ 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.⁴ Moreover, even the limited introduction of democratic institutions to an autocratic regime, at least under certain circumstances, induces an uptick in terrorist violence: 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.⁵ Democracy, in other words, tends to breed terrorism as a response. 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 has a positive impact on terrorism rates.⁶ But the question is subject to intensive investigation in the political science literature.

A third entanglement between democracy and terrorism by contrast has received scant scholarly attention. Yet 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 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 ... democracy.”⁷ In a similar vein, the European Council's 2001 framework decision on fighting terrorism cautions that “terrorism constitutes a threat to democracy.”⁸ More recently, the *New York Times* editorial page 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.”⁹

Notwithstanding the frequency of its public invocation, the idea that terrorism leads to democratic failure has received little close scholarly attention. Several related

³ Tom Ginsburg & Aziz Huq, *Introduction*, in *Assessing Constitutional Performance* 14-23 (Tom Ginsburg & Aziz Z. Huq, eds 2016).

⁴ Erica Chenoweth, *Terrorism and Democracy*, 16 *Ann Rev Pol Sci* 355, 356 (2013).

⁵ Deniz Aksoy et al., *Terrorism in Dictatorship*, 74 *J Pol* 810, 811 (2010).

⁶ Chenoweth at 366.

⁷ BBC News, *Speech of Hon. Theresa May to Parliament*, March 23, 2017, <http://www.bbc.com/news/av/uk-politics-39366151>. The attack in fact largely occurred on the adjacent Westminster Bridge.

⁸ Official J of Eur Communities, L164, at <http://eur-lex.europa.eu/JOYear.do?year=2002>.

⁹ Editorial, *Our Best Defense Against Terrorists*, *NY Times*, July 16, 2016.

questions therefore remain opaque: Is the idea that terrorism will succeed in the sense of ousting a democratic regime 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, and 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.

II. Some Definitions and Distinctions

A. Three Definitions

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.

The standard social-science definition of terrorism, as developed and refined by Alex Schmid, allows for both state and non-state 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.”¹⁰ This definition captures the kind of political action I have in mind by using the term “terrorism.” But I focus here only on non-state violence employed outside the context of an armed conflict, whether international or internal.¹¹ 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 Kurdish 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 the terrorist within a polity. Whereas groups such as the PKK and Naxalites maintain substantial support among certain populations, typically defined by ethnicity or class, other groups—most importantly, ISIS and al Qaeda—lack any numerically substantial basis of support within democratic countries. The nature of the threat to democratic rule may well vary depending on the extent of potential and actual indigenous support.

Next, “democracy” remains as contentious a term as “terrorism.” I define “democracy” here in relatively parsimonious terms as including 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 non-corrupt administrative agencies

¹⁰ Alex Schmid, *The Revised Academic Consensus Definition of Terrorism*, 6 *Perspectives on Terrorism* 158, 158 (2012).

¹¹ For the threshold of “armed conflict,” see *Prosecutor v. Tadic*, Case No IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ¶¶ 67, 70 (ICTY Oct 2, 1995).

and courts capable of managing electoral competition without fear or coercion.¹²

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 functionally 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.¹³ In contrast, I do think that democracy can exist with highly imperfect “horizontal” accountability—i.e., a system in which “some properly authorized state institutions act to prevent, redress, or punish the presumably illegal actions (or inactions) of public officials.”¹⁴ Indeed, we lack a comprehensive system of horizontal accountability in the United States today,¹⁵ yet it is the consensus view that we still have a democracy.

Finally, the idea of a democratic *decline* or *recessional* 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 I have elsewhere called an autocratic reversion. If it is incremental, it is what I have labeled a retrogression.¹⁶

Here, I am interested in both possibilities of complete reversion and also creeping retrogression. But there must be some threshold floor 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 Act and the formal enfranchisement of African-Americans after decades of Jim Crow. Many of these changes are dismaying, but not large enough to be examples of retrogression. Rather, I assume that the last few decades have marked a high water mark in democratic participation, 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, Tom Ginsburg and I identified 37 recent instances of retrogression across 25 countries, including democracies such as the United States, Sri

¹² Tom Ginsburg and Aziz Huq, *How to Lose a Constitutional Democracy*, 65 UCLA L Rev – (forthcoming 2018).

¹³ Guillermo O’Donnell, *Why the Rule of Law Matters*, 15 J Dem 32, 37 (2004) (“[V]ertical electoral accountability . . . results from fair and institutionalized elections, through which citizens may change the party and officials in government”).

¹⁴ *Id.*

¹⁵ Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*. 65 Duke LJ 1 (2015).

¹⁶ Ginsburg and Huq.

Lanka, India, Israel, and Ireland.¹⁷ A 2011 study focused on a thirty-year window, and identified 53 cases of democratic backsliding.¹⁸ 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 threats. This suggests, at minimum, the possibility of a relevant correlation.

B. A Distinction

With these definitions of democracy and democratic decline on the table, we can usefully separate the problem of democratic decline from another question 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.

This existing debate 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.¹⁹ On the scholars who claim that recalibrations of state power in response to terrorism threats tend to be welfare enhancing, and that there is little reason to install institutional checks such as judicial or legislative oversight.²⁰

But questions about the magnitude of and justification for liberty, dignity, and privacy deprivations resulting from counterterrorism measures are usually distinct from questions about democracy's maintenance. Indeed, it is telling scholars who argue for maximal state power, and hence are most willing to tolerate rights infringements, appear to assume the persistence of democratic accountability in framing their argument for extensive state power.²¹

This gap between threats to individual rights and impingements on democratic practice emerges 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. 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

¹⁷ Id at -- (table 2).

¹⁸ Gero Erdmann, *Decline of Democracy: Loss of Quality, Hybridisation and Breakdown of Democracy*, in *DECLINE OF DEMOCRACY* 26 (Gerd Erdmann & Marianne Kneuer, eds. 2011).

¹⁹ Geoffrey Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1789 to the War on Terror* (Norton 2004); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 Yale LJ 1011, 1031 (2003).

²⁰ Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford 2007).

²¹ This is evident in Posner and Vermeule's discussion of the panic and democratic failure mechanisms—both of which assume the persistence of democratic accountability. Id at 59-129.

how democracy in action can be prone to moral failure.²² Some rights are certainly necessary to democratic (whether defined as such or not), and some of those rights may well be undermined by counter-terrorism 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 where the minority is sufficiently numerous that their disenfranchisement can be ranked as a blow to democracy per se.

Similarly, quantitative studies suggest that a connection does obtain between democracy and human rights compliance, but that their relationship is not a linear one. Only when highly consolidated does democracy correlate with improved human rights.²³ When weak, in contrast, democracy has no impact on the level of rights violations.²⁴ Complicating matters further, even consolidated democracies can violate rights at high rates when faced with a terrorism threat.²⁵ 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.²⁶ Consistent with this intuition, greater levels of state violence are associated with swelling public support for repressive measures.²⁷

While distinct from the question I have framed here about democratic decline, this existing debate 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 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 degree of precision, and distinguished from the currently dominant rights-related debate about emergency powers. Given the nontrivial risk of democratic decline, 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

²² Aziz Huq, *The Uses of Religious Identity, Practice, and Dogma in 'Soft' and 'Hard' Counterterrorism*, in *Security and Human Rights* (Liora Lazarus and Benjamin Gould eds, forthcoming 2017).

²³ Bruce de Bueno Mesquita et al, *Thinking Inside the Box: A Closer Look at Democracy and Human Rights*, 49 *Intl Stud Q* 439, 450 (2005).

²⁴ Christian Davenport and David Armstrong, *Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996*, 48 *Am J Pol Sci* 538, 539 (2004).

²⁵ Chenoweth, at 362.

²⁶ Aziz Huq, *Structural Constitutionalism as Counter-Terrorism*, 100 *Cal L Rev* 887, 929-42 (2012).

²⁷ Bart Schuurman, *Defeated by Popular Demand: Public Support and Counterterrorism in Three Western Democracies, 1962-1998*, 26 *Stud Conflict & Terrorism* 152, 153 (2013).

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 because 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 well suited to the available data at least at the moment. Instead, a better first step might be to draw on 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 decision-makers consciously choose to imitate it. Case-studies, in particular, of high salience examples may therefore be surprising predictive use, and perhaps even more trenchant in their insight 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. I am skeptical that the first, and in some ways most obvious, is in practice 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 terrorist 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.²⁸ 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. Take the obvious example first. On February 27, 1933, the German Reichstag building burned to “ruins,” alleged at the hands of a young Dutch anarcho-syndicalist Marinus van de Lubbe.²⁹ A “massive” round-up of alleged leftists started that day. The next day, President Paul von Hindenburg signed a decree suspending “key” articles of the Weimar Constitution and starting “the Nazi seizure of power ... in earnest.”³⁰ The threat of leftist violence embodied in the Reichstag fire was significant, additionally, not because it provided an occasion for Hindenburg’s decree, but also because it deepened the “widespread” fear of

²⁸ See *supra* text accompanying notes 19 to 21.

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

³⁰ *Id.* at 333.

“communist ‘terrorism.’”³¹ This in turn led civil society groups and conservative politician to lend broad support to the Nazi’s subsequent constrictions on democratic practice.³²

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 Erdogan’s Turkey.³³ 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.³⁴ There are other examples: Another terrorist attack killed 40 only two days before the 2003 parliamentary elections.³⁵ 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.³⁶ In Turkey, the precipitating event that Snyder cites was not terrorism. Rather, the Erdogan government responded to a violent attempted coup attempt in July 2016 by purging or detaining 9,000 police officers, 21,000 private school teachers, 10,000 soldiers, 2,745 judges, 1,700 university deans, and 21,700 Ministry of Education officials.³⁷ In the wake of these purges, Erdogan sought and won a referendum on constitutional amendments that increased dramatically his authority as president.

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 this trajectory. In Turkey, smaller purges of Erdogan opponents had occurred before the 2016 coup attempt.³⁸ Had concerns about terrorism been causally related to Turkish democracy’s decline, one might have expected this connection to be clearest in relation to Erdogan’s policy toward the PKK. But this is not the case. Erdogan’s approach to the Kurdish question has included both periods of attempted rapprochement and periods of intensified conflict.³⁹ 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 campaign—Erdogan’s consolidation of political power has largely been motivated and explained by other considerations.

³¹ Robert O. Paxton, *The Anatomy of Fascism* 107 (Vintage 2004).

³² *Id.*

³³ Timothy Snyder, *The Reichstag Warning*, NY Rev Books, Feb 26, 2017, <http://www.nybooks.com/daily/2017/02/26/reichstag-fire-manipulating-terror-to-end-democracy/>.

³⁴ *Id.*

³⁵ 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).

³⁶ Kim Lane Scheppelle, *We Forgot about the Ditches: Russian Constitutional Impatience and the Challenge of Terrorism*, 53 *Drake L Rev* 1112-13 (2005).

³⁷ Josh Keller et al., *The Scale of Turkey’s Purge is Nearly Unprecedented*, NY Times, Aug. 2, 2016, http://www.nytimes.com/interactive/2016/08/02/world/europe/turkey-purge-erdogan-scale.html?_r=0.

³⁸ Jenny White, *Turkey at the Tipping Point*, 113 *Current Hist* 356, 357 (2014).

³⁹ F. Stephen Larabee and Gounul Tul, *Turkey’s Kurdish Challenge*, 33 *Survival* 143, 144 (2011).

In Russia, similarly, public desire for a “strong” leader such as Putin that fueled his initial election victories was only partially motivated by concerns about terrorism.⁴⁰ Liberal opposition parties declined in popularity in the early 2000s in large part because of their own strategic mistakes.⁴¹ Doubts have been also raised about whether pivotal terrorist events in Russia such as the 1999 apartment bombings, were in fact the work of non-state actors, or instead manufactured by the FSB, Russia’s principal security agency.⁴²

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.⁴³

A regime committed to unraveling democracy can employ terrorism as an instrument in this campaign. But it does not need an *actual* external threat to do. 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 such as the Reichstag fire and its aftermath. It is the idea 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 context of military coups. A military apparatus might develop to meet a specific external threat, but then, once that threat has abated, prove a destabilizing agent within a democratic context. 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

⁴⁰ Olsen at 430.

⁴¹ Vladimir Ryzhkov, *The Liberal Debacle*, 15 J Dem 52, 55 (2004).

⁴² Scheppele, at 1008.

⁴³ Benjamin Carter Hett, *Burning the Reichstag: An Investigation Into the Third Reich's Enduring Mystery* (Oxford 2014).

importantly, the perceived military threat of India—at the time of the nation’s birth.⁴⁴ External threat induced institutional choices that contradicted 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 turn of the twentieth century, and then, having successfully overthrown the Sultan, went on to form a “deep state” within the Kemelist republic.⁴⁵

In the terrorism context, a concrete example of hazardous reconfigurations of institutional arrangements is the Italian state’s response to the Red Brigade insurgency of the late 1970s. This entailed creation of “a nationwide network of neo-Fascist groups,” which ultimately turned their aims to “a fully-fledged coup d’état” aimed at reestablishing “Mussolini-style government in a ‘born-again’ Salo Republic.”⁴⁶ Paradoxically, development of this parastatal apparatus flowed from state weakness, the postwar “structural ‘unpreparedness’ of the Italian police.”⁴⁷ In a nice irony, an impulse to professionalize the security apparatus directly induced 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 that present a risk to democratic stability. Two 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 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 to terrorist organizations.⁴⁸ Ex ante designation, with attendant fiscal and 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.

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

⁴⁴ Aysha Jalal, *The Struggle for Pakistan: A Muslim Homeland and Global Politics* 2-6 (Harvard 2016).

⁴⁵ Mehtap Söyler, *Informal Institutions, forms of state and democracy: The Turkish deep state*, 20 *Democratization* 310, 315 (2013).

⁴⁶ Peter Chalk, *The Response to Terrorism as a Threat to Liberal Democracy*, 44 *Australian J Pol & Hist* 373, 379 (1998).

⁴⁷ Donatella Della Porta, *Institutional Responses to Terrorism: The Italian Case*, 4 *Terrorism & Pol Violence* 151, 160 (1992).

⁴⁸ See *Holder v. Humanitarian Law Project*, 130 S Ct 2705 (2010).

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.⁴⁹

Both of these hypotheticals involve the elimination of ex ante safeguards on the improper use of a security power to 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 range from disclosure requirements respecting the frequency and scope of erroneous or unjustified applications of a specific security power, or 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, which can use privileged access to information or political decision-makers to resist even plainly warranted changes in institutional form.⁵⁰ The result is a “path dependency” in that institutional form.⁵¹

This path-dependency effect will be especially pronounced if the political system is characterized by plural veto-gates, and, as a result, tends toward sclerosis. Under such conditions, exogenous shocks such as terrorism attacks will be important platforms for policy and institutional change. If the manner in which security-related powers are deployed changes largely in response to exogenous security shocks, moreover, it is also likely that the pattern of resulting changes will be asymmetrically tilted toward enabling change. Further, where 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.⁵²

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. Balkin and 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.⁵³ Rather, they contend, “new technologies of surveillance,

⁴⁹ On the suppression of civil society, see Ginsburg and Huq.

⁵⁰ Mark J Roe, *Chaos and Evolution in Law and Economics*, 109 Harv L Rev 641, 651 (1996) (“Either information or public choice barriers could induce strong-form path dependence.”)

⁵¹ Scott E. Page, *Path Dependence*, 1 Q J Polit Sci 87 (2006).

⁵² C Christine Fair, *Why the Pakistan army is here to stay: prospects for civilian governance*, 87 Intl Aff 571, 576-77 (2011).

⁵³ 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)

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.⁵⁴

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. Balkin and Levinson, in my view, are too quick to draw a plumb-line between technological change and institutional metamorphoses. Policy change is more complex as a process, and more uncertain in its results, 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 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.⁵⁵ 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 of late for “exceptional access” to encrypted communications and data-storage devices through the creation of “keys” to access such data upon issuance of a warrant.⁵⁶ Cryptographers have resisted this proposal on the ground that any compromising of end-to-end would impose greater social cost than the deterrence obtained by easier access to devices.⁵⁷ The law-enforcement push failed, notwithstanding an attempt to leverage a high-profile fracas over one of the San Bernardino terrorists’ iPhones. 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.”⁵⁸ 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.

⁵⁴ Id

⁵⁵ Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 Harv JL & Pub Poly 117, 125 (2015).

⁵⁶ Statement of James Comey, Director of FBI, House Judiciary Committee Hearing *Encryption Tightrope: Balancing Americans’ Security and Privacy*, FBI, (Mar. 1, 2016), <https://www.fbi.gov/news/testimony/encryption-tightropebalancingamericans-security-and-privacy>.

⁵⁷ Harold Abelson et al., *Keys Under Doormats: Mandating Insecurity by Requiring Government Access to All Data and Communications* 1-3 (2015), <https://dspace.mit.edu/bitstream/handle/1721.1/97690/MIT-CSAIL-TR-2015-026.pdf>.

⁵⁸ Ellen Nakashima and Andrea Peterson, *Obama Faces Growing Momentum to Support Widespread Encryption*, Wash Post, Sept 16, 2016, https://www.washingtonpost.com/world/national-security/tech-trade-agencies-push-to-disavow-law-requiring-decryption-of-phones/2015/09/16/1fca5f72-5adf-11e5-b38e-06883aacba64_story.html?utm_term=.f1b23ef53df1.

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.⁵⁹ But new technologies of coercion can and do dampen democratic participation in significant ways. 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.⁶⁰ 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.⁶¹ What I suggest here is simply the same political suppression can occur, under the right institutional conditions, on a somewhat grander scale.

I have offered here examples from the U.S. context of terrorism creating the conditions for political entrepreneurs to secure new 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 provide a terrain of governing bodies primed for and conducive to substantial retrogression in democratic norms, it not their outright collapse. Nevertheless, I do not think it is overly speculative to be concerned about the democratic costs of new security measures.

C. *Terrorism and Populism*

The third, and perhaps most interesting, pathway between terrorism and democratic decline flows, paradoxically, through the 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 turn, politicians selected by dint of their populist appeals tend to be averse to the main tenets of democracy as I have defined it.

Populism has emerged as a potent political form in both Europe and North Americas in the last decade.⁶² But it has a longer pedigree. It can be seen earlier in Latin America and Asia, and also in earlier twentieth-century Europe. Populism is not a well-defined term. In a cogent recent effort at definitional clarity, 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

⁵⁹ O’Donnell at 37.

⁶⁰ Amy E. Lerman & Vesla M. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control* 150-51 (Chicago 2014).

⁶¹ Aziz Z. Huq, *The Consequences of Disparate Policing*, 101 Minn L Rev – (forthcoming 2017).

⁶² John Judis, *The Populist Explosion: How the Great Recession Transformed American and European Politics* (Public Affairs 2016).

corresponding rejection of competitive elections and the possibility of legitimate political opposition.⁶³ In harmony with Müller, 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.”⁶⁴

Populist regimes can be discerned today in Venezuela, Poland, Hungary, Russia, and Poland—all countries that have experienced recent substantial democratic retrogression under populist rule.⁶⁵ 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.⁶⁶

Populism has left- and right-wing variants. The connection between terrorism and democratic decline is most apparent with the latter. In Europe, increasing support for populism is associated negative views of immigrants. Right-of-center populist parties such as the Dansk Folkeparti, the Bündnis Zukunft Österreich (Alliance for the Future of Austria), and the Dutch Party for Freedom alike coalesce around restrictive immigration measures aimed at stanching Muslim migration partly in the name of ensuring security.⁶⁷ 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 right-of-center populism’s emotional appeal.⁶⁸

Hence, population wide surveys in European countries find that perceptions of a security threat from Islamist terrorism predicted negative views toward Muslim migrants.⁶⁹ More specifically, quasi-experimental studies show that media exposure to high-profile terrorist events, even in nations that do not experience that political violence directly, causes increased anti-immigrant sentiments.⁷⁰ This study found the effect to peak in geographic areas that have experienced recent spikes in unemployment.⁷¹ Today, some of the highest levels of anti-immigrant sentiment are found in Hungary and Slovenia, which have experienced spikes of support for populist candidates at the polls.⁷²

In this 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

⁶³ Jan-Werner Müller, *What is Populism?* 19-28 (Pennsylvania 2017).

⁶⁴ Nadia Urbinati, *The Populist Phenomenon*, 3 *Raisons Politiques* 137, 137 (2013).

⁶⁵ Eg, Joanna Fomina & Jacek Kucharczyk, *Populism and Protest in Poland*, 27 *J Dem* 58 (2016).

⁶⁶ Judis, at 12-18.

⁶⁷ Farid Hafiz, *Shifting borders: Islamophobia as common ground for building pan-European right-wing unity*, 48 *Patterns of Prejudice* 481, 485 (2014).

⁶⁸ Hafiz, at 481-82.

⁶⁹ Richard Wike and Brian J. Grim, *Western Views Toward Muslims: Evidence from a 2006 Cross-National Survey*, 22 *Intl J Pub Op Res* 4-5 (2010).

⁷⁰ Joscha Legewie, *Terrorist Events and Attitudes toward Immigrants: A Natural Experiment*, 118 *Am J Soc* 1199, 1218-20 (2013).

⁷¹ *Id* at 1223.

⁷² Zan Strabac and Ola Listhaug, *Anti-Muslim prejudice in Europe: A multilevel analysis of survey data from 30 countries*, 37 *Soc Sci Res* 278, 283 (2008).

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 U.S. context, for example, Tom 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), but also of the coalitional politics within which potentially demagogic leaders operate.⁷³ Where 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, after all, are organized around economic grievances as well as security fears.⁷⁴ Perhaps economic insecurity is sufficient to generate pressure for populist positions.

The best studies available to date do not support this argument. Studying data on the shifting positions of political parties in European countries, for example, 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 explanations for populism's appeal.⁷⁵ 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.⁷⁶ 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 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 one story of democratic decline, but many. The typologies offered here is a step to understanding some of those mechanisms.

I have identified three potential ways in which terrorism might conduce to democratic recession in this essay. I do not believe that terrorism directly precipitates the

⁷³ Ginsburg and Huq.

⁷⁴ Martin Eiemann, *How Trump Fits into the History of American Populism*, 33 *New Persp Q* 29 (2016).

⁷⁵ Ronald Inglehart and Pippa Norris, *Trump, Brexit, and Rise of Populism: Economic Have-Nots and Cultural Backlash* 2-3 (Aug 16, 2016), <https://research.hks.harvard.edu/publications/getFile.aspx?Id=1401>

⁷⁶ *Id.* at 45-46.

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 I have described: The incidence of terrorism, that is, could instigate both a process of institutional change that weakens restraints on coercive authorities that might be employed to unravel democratic practice. At the same time, terrorism encourages 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 furnish respectively the means and the motivation to engage in democratic retrogression. When they occur simultaneous—and there is no reason they always will—it is quite plausible to think 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 Richard Fallon, who has suggested that “the obligation of fidelity to specific, constitutionally and statutorily established legal norm” can give way if “consequence-based pulls of obligation to the overall legal order ... achieve a supervening legal force.”⁷⁷

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 counter-terrorism, 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 all sides.

⁷⁷ Richard H Fallon, *Interpreting Presidential Powers*, 63 Duke LJ 347, 371 (2013).

