Turning the Kaleidoscope: Fractured Narratives and Altered Presumptions in Anti-Terrorism Detention Practices

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DEDICATION

This thesis is dedicated to the memory of my beloved parents, Ann Mary Kennedy Duffy and Thomas Lawrence Duffy. My mother died when I was a teenager, and my father died suddenly in April 2012. They each continue to inspire me in different ways. They both believed in the importance of life-long education, and in the need to constantly work hard for social justice. This dissertation is for them.

"Go gcasfar le chéile sinn arís, go gcoinní Dia i mbosa a láimhe thú."[1]

[1] This is the ending of a traditional Irish blessing, origin unknown, sometimes called "May the Road Rise Up to Meet You."

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ABSTRACT

This thesis deconstructs some of the discourse surrounding post-9/11 terrorism detention regimes. In the crisis atmosphere that immediately followed the 9/11 attacks, a number of baseline presumptions quickly emerged and appear to have been accepted as foundational bases for various forms of extraordinary detention practices. This phenomenon played out differently in various places, but many of these practices had commonalities in terms of the foundations on which they were established.

Over time, many of these presumptions have solidified, and they have now gained acceptance as familiar. As the practices are increasingly normalized, critique of them becomes problematic and difficulties arise in determining proper future steps. For various reasons, including the crisis atmosphere under which the practices arose, differences in values across national jurisdictions, and differences in judicial treatment of government initiatives, the narrative surrounding how suspected terrorists should be detained has ultimately become somewhat fractured. Frequently, inconsistent standards are now applied to different terrorism suspects, with some being detained entirely outside of the criminal-justice system, and the bases for these discrepancies are seemingly difficult to explain. A question arises as to whether the fracturing is symptomatic of an underlying structural crack in the foundation of these changed practices, relating back to the issue of the underlying presumptions.

This thesis questions the presumptions underscoring these altered practices to suggest that a further challenge is required before the international community can effectively move forward in addressing terrorism detentions. It does so by drawing from elements in argumentation theory to question the soundness of the discursive foundations that supported many of these changes. More than ten years after 9/11, these initial presumptions continue to factor heavily in national anti-terrorism strategies, so the question of whether they are sound has continuing relevance.

Many factors were assembled to paint the picture that emerged immediately after the 9/11 attacks. When one shifts the proverbial kaleidoscope, those pieces can be reassembled to create a new, equally viable, picture arising from the same constituent parts. Unpacking the discourse that arose after the attacks can provide insights into new ways to view these practices. By looking back, it may be possible to construct a new way of looking forward.

RÉSUMÉ

Cette thèse déconstruit le discours supportant certains régimes de détention d'individus suspectés de terrorisme mis en place après le 11 septembre 2001. Dans l'atmosphère de crise qui a suivi les attentats, un nombre de présomptions ont rapidement été avancées et, semble-t-il, simplement acceptées comme bases de référence pour diverses mesures de détention exceptionnelle. Bien que l'impact de ce phénomène ait pu varier par endroit, il demeure que nombreuses de ces mesures reposent sur des fondements communs.

Avec le temps, plusieurs de ces présomptions se sont solidifiées, et ont maintenant acquis une large reconnaissance. Au fur et à mesure que les pratiques se normalisent, il devient de plus en plus difficile de les critiquer et de déterminer quelles pourrait être les prochaines étapes. Pour de multiples raisons, y compris l'atmosphère de crise dans laquelle les mesures de détention exceptionnelle se sont développées, mais aussi les différences de valeurs entre les juridictions nationales et dans le traitement judiciaire des initiatives gouvernementales, le discours entourant la façon dont les individus suspectés de terrorisme doivent être détenus s'est d'une certaine manière fracturé. Souvent, les critères appliqués diffèrent d'un suspect à l'autre; certains individus étant mêmes détenus avec un processus entièrement étranger au système de justice criminelle, et la source de ces divergences n'est pas évidente. La question est donc de savoir si cette fracture n'est pas en réalité que le symptôme d'un problème de fondations, à savoir les présomptions à la base de ces mesures de détention.

Cette thèse remet en cause les présomptions sous-tendant ces mesures altérées et suggère qu'un tel exercice est nécessaire pour que la communauté internationale puisse progresser sur la question de la détention d'individus suspectés de terrorisme. Éléments de la théorie de l'argumentation sont utilisés afin de sonder le bien-fondé des arguments ayant supporté bon nombre de ces changements. Plus de dix ans après les attentats, les présomptions avancées initialement ont encore d'importantes répercussions sur les stratégies anti-terrorisme nationales, ce qui rend la démarche d'autant plus pertinente.

De nombreuses pièces se sont assemblées pour produire l'image qui commença à prendre forme au lendemain du 11 septembre. Cependant, si l'on tourne le kaléidoscope, ces mêmes pièces peuvent se recombinées pour créer une image différente, mais tout aussi valable. Décomposer les éléments constitutifs du discours post-attentats aide à jeter un nouvel éclairage sur les mesures de détention exceptionnelle. Regarder en arrière, peut, en l'instance, aider à trouver de nouvelles façons d'aller de l'avant.

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It is impossible for me to find adequate words to thank my doctoral supervisor, Professor René Provost. His advice, patience, diligence, and encouragement were invaluable and greatly appreciated. I have learned a great deal from him. No matter how busy he was, he was always willing to talk to me about my project, to speak frankly when he disagreed with me, and to encourage me when I needed it most. He provided many important points and resources and helped me to frame my ideas, while always respecting my approach to the thesis. I appreciate that he challenged me to constantly seek to improve my work. He provided me with a number of important academic opportunities, which have been critical in shaping my career. I will always be grateful for his mentorship and support and consider myself fortunate to have had the opportunity to work with somebody I so greatly respect.

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Finally, thank you to my family, who supported me, especially in the painful last few months after the unexpected illness and death of my father. Although my father did not live to see me complete this thesis, we spoke about my program, and he gave me advice and encouragement based on his own graduate experiences, which I will always remember.

While finishing this thesis, I worked high up in the University of Calgary's Taylor Family Digital Library, next to an enormous window, with a beautiful view of downtown Calgary and, on clear days, of the Canadian Rockies. A peregrine falcon couple returns to the University every year, and their nest is directly across from the window where I worked. I found watching them to be a welcome diversion, and I had a perfect view as they went about the business of raising their three babies. It was touching to watch the care the parents showed for their little family, and to see the hours of determined practice it took for the babies to learn to fly. During the stressful days of writing, I was grateful for their constant reminder that there is, indeed, life outside of a doctoral thesis.

"At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."[2]

[2] *Rumsfeld v Padilla*, 542 U.S. 426 (2004)(Stevens, J., dissenting). The Star Chamber was a court in England, which operated from approximately 1487 until 1641. The Star Chamber evolved over time, growing in use as a political weapon against those who opposed the Crown's policies. Its judges had the power to order imprisonment and torture. Proceedings were, especially later, held in secret, with no right of appeal, and punishment could be severe and quickly enforced. Although the Star Chamber was abolished in 1641, it is still referred to as an expression for a judicial proceeding that is arbitrary, abusive, and secret, and as the antithesis of one respecting individual freedoms. See Max Radin, "The Right to a Public Trial" (1931-1932) 6 Temp. L.Q. 381 at 381-382 (explaining the role of the Star Chamber in the concept of a right to have a trial that is public); Thomas G. Barnes, "Star Chamber Mythology" (1961) 5:1 The American Journal of Legal History 1-11 (explaining the background and connotations of references to the Star Chamber, although disagreeing in some of the specifics as to the reputation of the Star Chamber).

INTRODUCTION: Fractured Narratives and Altered Presumptions in Anti-Terrorism Detention Practices

A. The Beginning of a Conversation

This thesis undertakes a deconstruction of some of the discourse surrounding certain extraordinary detention practices, specifically those implemented in a number of liberal democracies after the terrorist attacks of September 11, 2001 ("9/11").[3] As a preliminary definition, "extraordinary detention," or some similar term, is used to loosely describe terrorism-related detentions, or limitations on freedom, or limitations on judicial process, that take place outside of the criminal-justice system, or, where a wartime scenario is at play, a detention outside of the traditional international humanitarian law paradigm. Because this thesis addresses a number of practices, some more closely resembling traditional detention than others, it was necessary to identify a phrase that included all of the related practices when speaking in general terms about these alterations. It is noted that some might argue a question of degree in terms of the deviation from these traditional paradigms, such as a distinction between security certificates or control orders and the use of torture or targeted killing. For the purpose of this thesis, however, these distinctions are not addressed, because the issue is not so much a discussion of which form of deviation is worse, but one of whether the discursive foundation more generally supported the changes from the more traditional paradigms.

As a preliminary roadmap to this thesis, explained more fully throughout this Introduction, this deconstruction is undertaken the following way. Chapter 1 lays out a theoretical framework that will be applied throughout the thesis. In each of the subsequent chapters, a different form of

[3] This short designation adopts the American abbreviation for dates, with the month first and then the day. Although this method of designating a date is reversed from that used in many other places, the particular designation of "9/11" has become a form of shorthand in the discourse referring to the events of that day, and, thus, is adopted herein.

post-9/11 discourse is deconstructed and viewed through the lens of argumentation theory, with an assessment of how this form of discourse may have translated into specific normative developments.

Chapter 2 deconstructs the assertion that the attacks were new or unprecedented in a way that required the construction, in some instances, of parallel detention regimes outside of the criminal-justice system. That assertion was frequently expressly stated, or at least stated in portions. If the two components were not always explicitly connected in the discourse, it was strongly indicated that they were connected in practice. Thus, that chapter deconstructs an actual assertion.

In Chapter 3, the notion of the Other as terrorist is analyzed. This presumption represents a different form of discourse than that considered in Chapter 2, because the idea that terrorists were a specifically constructed Other -- namely non-citizen males whose national origin was from a predominantly Muslim country, and sometimes of a certain age group – was rarely admitted to, and often denied, by national governments, although as explained throughout that chapter, it was prevalent nonetheless. Thus, the form of discourse considered in Chapter 3 was one that was often more implied than stated, and even often denied.

In Chapter 4, a third form of discursive analysis is undertaken. Rather than deconstructing a particular statement, that Chapter looks to a form of argumentation used in several different contexts. The binary form of argument, in which options are presented as an “either/or” scenario, was a dominant form of persuasion used in the early days after the attacks and continues to the present day. It was commonly seen in examples like the idea that changes had to happen to “balance” liberty and security, as well as through other examples explained more fully in that chapter.

Before turning to this discourse analysis, however, some context is required, presented in this Introduction. Since 9/11, in situations involving an “extraordinary detention,” the person held typically does not face a trial

before a traditional criminal court, frequently does not have the procedural protections of a criminal proceeding if some form of hearing is held before another body, and generally does not have a set sentence after a hearing, with some exceptions, such as a few of the cases heard before the Military Commissions at Guantanamo Bay.[4] Measures encompassed under the idea of extraordinary detention generally involve some form of traditional detention, but they might include other measures that limit liberty without the norms of criminal judicial process, such as security certificates, control orders, torture, targeted killing, or the use of special advocates to allow secret evidence – with the common feature being that all of these measures infringe on individual liberties, obviously to varying degrees, without a prior adjudication in a criminal proceeding.[5] Consequently, the following definition, employed by the Office of the High Commissioner for Human Rights, in describing the treatment of irregular migrants, is a broader statement that generally encompasses what is meant by "detentions" herein: "administrative deprivation of liberty. Detention is to be considered as confinement within a narrowly bounded or restricted location which the detainee cannot leave."[6] The detention, or other deprivation of liberty, is considered extraordinary for the purpose of this work if it takes place as a result of a proceeding that is not

[4] Some of the detainees held at Guantanamo Bay have been subject to hearings before the Military Commissions, created in the aftermath of 9/11. While there are, therefore, hearings in some of these cases, they are included in the definition of "extraordinary detentions" used herein, because these courts are not criminal courts under the U.S. Constitution, and they are the subject of ongoing controversy surrounding their legitimacy. For a further discussion of some of the issues surrounding the Military Commissions, see Chapter 4, below.

[5] In some respects, it sounds peculiar to refer to targeted killings as infringing on liberty, as that seems a rather mild way of describing such an extreme measure. Nonetheless, targeted killings are included because they involve many of the same lapses in terms of judicial process. It is not difficult to analogize the use of targeted killing by the U.S. government to the use of the death penalty – allowed in many U.S. states – without any prior judicial process. Because of the obvious incursion on individual rights, and the assertion by the U.S. Government, discussed in more detail later in this thesis, that no judicial process is required to undertake these killings, they are included here.

[6] Office of the High Commissioner for Human Rights, Migration Task Force, "Administrative Detention of Migrants" n. 3, online: Office of the High Commissioner for Human Rights <http://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf >.

included within the criminal-justice system, either because the proceeding itself is entirely separate, or because traditional procedural protections, such as the right to counsel, the right to specific forms of judicial review, or the right to know the nature of the charges or evidence, are abridged on an assertion of national security, in a manner that would not be permitted in a criminal proceeding.[7] Moreover, these "extraordinary detentions" are most commonly used in terrorism-related cases.

In terms of the parameters of this project, it has, of necessity, evolved. As this work has moved forward, it has become increasingly apparent that it is not what was originally envisioned. Rather than answering all questions, it instead raises new ones that do not necessarily lend themselves to easy or obvious answers. Moreover, each time one seeks to answer a particular question, another quickly arises, related to that answer, and it is clear that no single work can conceivably answer every one of the potential questions in this *milieu*. That is perhaps not surprising, given the multi-faceted nature of recent anti-terrorism discourse, and the complexities of this area of law, both within and across legal regimes, combined with the varying ways in which

[7] It is recognized that some of those protections might be abridged in the context of a criminal matter, such as where the Government asserts a national-security justification for keeping evidence secret under Section 38 of the *Canada Evidence Act*. Such a procedure is built into Canada's evidence rules for criminal matters and involves an adjudication as to whether the evidence can be admitted. The Act calls for a separate application before the federal court, and not the trial judge, when the Government seeks to withhold evidence based on national security concerns. See *Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 38 [*Canada Evidence Act*]. This would not be considered an extraordinary detention scenario, however, because it is within the parameter of a traditional criminal proceeding, and the Supreme Court of Canada has ruled that, while Section 38 is constitutional, if it would result in an unfair trial, the detainee must be released. *R v Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110 at para 78 (pointing out that "… if the end result of non-disclosure by the Crown is that a fair trial cannot be had, then Parliament has determined that in the circumstances a stay of proceedings is the lesser evil compared with the disclosure of sensitive or potentially injurious information."). This differs from the assertion in the case of extraordinary detentions, in which the Government often claims it can withhold secret evidence, and, if unfairness to the detainee results, the detention can still continue on national security grounds. For a Canadian example, see the procedure for special advocates in Canada. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 85-85.1 (providing greater procedural protection than the prior process, in which the detainee was simply barred from secret evidence, but still not allowing the special advocate to communicate the evidence to the detainee without permission) [IRPA].

this discipline has developed, especially in the past ten years in different jurisdictions.

That multi-faceted nature, however, lends itself to the possibility of multi-faceted analysis, with different potential layers of assessment, designed to reveal various layers of issues. Rather than presenting conclusions regarding anti-terrorism discourse and the way that anti-terrorism detentions have developed, it has become increasingly apparent that this work, at best, begins a conversation, one that may have the potential to expand going forward. An objective is to perhaps raise new questions, or to explore ongoing questions in new ways, with the idea of providing a different perspective on some of the underlying issues. This perspective has continuing relevance, as the structural soundness of current anti-terrorism practices, and perhaps more importantly of practices to be implemented going forward, can be assessed on some level by looking back to the underlying presumptions and general argumentation elements that gave rise to the current and future initiatives in this area.

It will be maintained that a peculiar form of argumentation structure and a novel form of discourse developed after the 9/11 attacks, and that this form of argumentation was used to persuade members of the public, the legislative branches, and the judiciary that certain threshold changes had occurred, which justified unprecedented governmental action.[8] This work does not purport to address terrorism as a general matter, but focuses on changes to detention practices as a result of the 9/11 attacks. The rhetoric used to advance a number of presumptions, explicitly or implicitly, formed the basis on which new detention and interrogation standards were built.

[8] See Piotr Cap, *Legitimisation in Political Discourse: A Cross-Disciplinary Perspective on the Modern US War Rhetoric* (UK: Cambridge Scholars Press, 2006) at 2 (noting that "a consistent pattern of rhetoric was developed in the aftermath of the WTC attacks, aiming to justify military retaliation on account of the apparent imminence of danger facing the American citizens. To this day, the most salient premise of the White House rhetoric has been the construal of the terrorist threat as existing within the U.S. borders. Unlike in the past, when America was going to *foreign* wars in Korea, Vietnam, or, recently, Kosovo, the war has come "home.") [Cap, Legitimisation].

Premises present the starting point of argumentation, but all premises are not the same. A premise may be based on established fact, such as that provided through a presumption, or it may be based on subjective values or be something simply presented for the sake of argument, to be proven later. A presumption, by definition, when used as a starting point for an argument, is a truth that does not require proof.[9] Identifying these starting points, and considering whether things presented as presumptions were, indeed, presumptions, can help to assess the soundness of these underlying arguments.

Much of this discourse process occurred in the aftermath of a shocking and horrific terrorist attack, when there was a widespread perception of imminent danger and of an ongoing emergency. It is acknowledged that the 9/11 attacks were such that a perception of threat was legitimate, and even obviously reasonable, and that much of the resulting discourse, as well as certain governmental initiatives, were also legitimate.

Some of the discourse and some of the reactions, however, were questionable, especially where hastily constructed and based on an initial reaction to a publicly viewed scene of mass murder. In such a climate, hasty responses can emerge, which must be better examined as reactions calm and time passes. Once certain concepts were accepted in this climate, however, they often quickly became familiar, in spite of their sometimes hasty creation. Over time, they crystallized into foundations for certain changes. From there, the changes evolved in ways that may not have been supported by the underlying presumptions, if, indeed the underlying premises were proper presumptions.[10] As that has happened, a fracturing of the

[9] See Chaim Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, translated by John Wilkinson and Purcell Weaver, Center for the Study of Democratic Institutions (Notre Dame, IN: University of Notre Dame Press, 1969) [Perelman & Olbrechts-Tyteca, *The New Rhetoric*].

[10] Much of this process echoes the idea of "normalization" described by Foucault. See Michel Foucault, *The History of Sexuality,* vol 1, translated by Robert Hurley (New York:

narrative has arisen on a number of levels, which is difficult to explain in terms of argumentation logic, as certain internal inconsistencies suggest that there may be an underlying problem in the logic of the structures built on these presumptions.[11]

Law, particularly in common-law jurisdictions, such as those discussed herein, is evolution. By its very nature, it involves a series of changes over time, usually starting from some baseline point. Rules about the proper basis for that evolution exist in such common law notions as *stare decisis*, where the decisions of certain courts are binding on others, and such notions are designed to ensure a certain consistency for those who are subject to the law. Moreover, while laws may evolve, there is often an underpinning idea against which changes must be measured in order for the law to have legitimacy. Constitutional Law provides probably the most pointed example of this, as those countries having a written constitution will often make arguments as to whether, for instance, a new piece of legislation is constitutional. Much of the jurisprudence relating to anti-terrorism detentions has been promulgated under this dynamic, such as the *Charkaoui I* case in Canada, measured under Canada's *Charter of Rights and Freedoms*, or the *Boumediene* decision in the U.S., based on the U.S. Supreme Court's reading of the U.S. Constitution's *habeas corpus* provision.[12] In the United Kingdom, as an example, a similar process is undertaken when alleged human-rights violations are measured for validity against the *European Convention on Human Rights.*[13] These different instruments have generally

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Random House, 1978) at 89, 144 (discussing normalization, rather than law, as a basis for power) [Foucault, *The History of Sexuality*].

[11] An example of a "conversation" demonstrating one way in which the narrative has fractured is presented in this Introduction, Section C, below. Other examples appear throughout the thesis.

[12] See *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9 [*Charkaoui I*]; *Boumediene v Bush*, 553 U.S. 723 (2008) [*Boumediene*].

[13] See e.g. *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56 [*Belmarsh Detainees Case*].

served as baseline measures when courts have assessed the validity of post-9/11 anti-terrorism detention practices.

While this is the formal structural basis under which the validity of many laws and undertakings can be measured, does this mean that this is the only form of evolutionary process that can shed light on the viability of legal norms?[14] In various disciplines, argumentation theory can be used as a lens through which to assess societal and legal phenomena.[15] Argumentation theory, borrowed primarily from the field of philosophy, can be explicitly used by those in law to consider the structural soundness of particular normative innovations.[16] A question arises as to whether legitimacy of laws can be assessed through this use of argumentation theory, not to undertake a positivist measure of the laws against a baseline within the existing legal system, but to look in a larger sense at the structural soundness of the argumentation that always underscores the development of new legal regimes, particularly those subject to the type of controversy associated with post-9/11 extraordinary detention. This thesis seeks to make a contribution to one potential application of that argumentation theory to a particular range of normative legal changes, viewed through the lens of the public discourse that surrounded those changes. As described in more detail in Chapter 1, below, the analysis draws from a number of other theoretical foundations as well.[17]

It is not suggested herein that a definitive proof can be made based on argumentation theory, or that support or lack of support for an argument, derived through an application of argumentation theory, determines, on its

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[14] See generally Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Great Britain: Polity Press, 1996)(suggesting that discourse theory provides a means of determining the legitimacy of laws promulgated through the democratic process, because the process can provide one potential indicator of validity) [Habermas, *Between Facts and Norms*]; Jürgen Habermas, *Theory of Communicative Action, vol I : Reason and the Rationalization of Society* (Boston: Beacon Press, 1981) [Habermas, *Theory of Communicative Action*].

[15] See e.g. Trudie Govier, *A Delicate Balance: What Philosophy Can Tell Us About Terrorism* (Cambridge, MA: Westview Press, 2002).

[16] See e.g. Perelman & Olbrechts-Tyteca, *The New Rhetoric*, *supra* note 9.

[17] See Chapter 1, below, for a more detailed exposition of the theoretical approaches applied throughout this thesis.

own, the validity of an argument. Rather, as suggested by Jürgen Habermas when laying out his ideas of discourse theory, this approach provides a practical way to look at argumentation as a social practice.[18] The objective is to reconstruct the normative underpinnings that make up the discourse used for effective arguments. On the other hand, if these underpinnings have flaws, that could be one possible indicator that any normative changes resulting from that particular argument should be more closely examined. These presuppositions, though, according to Habermas, cannot be definitively assessed solely through the logical properties of argument, nor does this thesis suggest that they are. Rather, he suggests that there are different aspects of argumentation, of which the process of argumentation is only one. The process of argumentation is most similar to what is considered to be traditional logical argumentation.[19]

As noted in the translator's introduction to Habermas's work, *Between Facts and Norms*:

> When a claim is contested, actually bringing about such rational acceptance requires actors to shift into a *discourse*, in which, the pressures of action having been more or less neutralized, they can isolate and test the disputed claim solely on the basis of arguments.[20]

Thus, this thesis contributes by starting a new strand of conversation on the already much-discussed subject of post-9/11 anti-terrorism detention practices, with the hope that the manner of constructing that conversation will give insights, not just into the legitimacy of those detention practices, but also into the manner in which we move forward on evolving legal norms. The

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[18] Habermas, *Theory of Communicative Action*, *supra* note 14 at 26.
[19] *Ibid.*
[20] Habermas, *Between Facts and Norms*, *supra* note 14, at xv; see also Thomas McCarthy, *The Critical Theory of Jürgen Habermas* (Cambridge: MIT Press, 1978); Michael Salter, "Habermas's New Contribution to Legal Scholarship" (1997) 24 J.L. & Society 285 (reviewing Habermas's book *Between Facts and Norms*).

realization that this can only be the beginning of this conversation echoes a similar sentiment set forth by Clifford Geertz in his work *Local Knowledge:*

> When, a decade ago, I collected a number of my essays and rereleased them under the title, half genuflection, half talisman, *The Interpretation of Cultures*, I thought I was summing things up; saying, as I said there, what it was I had been saying. But, as a matter of fact, I was imposing on myself a charge. In anthropology too, it so turns out, he who says A must also say B, and I have spent much of my time since trying to say it. The essays below are the result; but I am now altogether aware how much closer they stand to the origins of a thought-line than to the outcomes of it.[21]

B. Methodological Choices

In the course of determining the pathway followed herein, certain methodological choices were made. First, it is acknowledged that there are numerous controversies surrounding anti-terrorism detention practices that could not be expounded upon, as illustrative points were chosen that appeared most effective in providing examples of the issues surrounding particular presumptions.[22] The objective in choosing three discursive elements, identified herein as presumptions, was to lay out the theoretical construct to be applied here and to try, then, to actually apply it to elements

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[21] Clifford Geertz, *Local Knowledge* (New York: Basic Books, 1983), at 3 [Geertz, *Local Knowledge*].

[22] For instance, there has been an ongoing controversy as to the definition of "terrorism," and it is apparent that some national governments followed diverging views as to what this could entail, which, in turn, may vary from the definitions set forth by the United Nations. While this controversy is acknowledged, it has not been laid out as one of the foundational presumptions in this thesis, in part because of the difficulty of extrapolating it as a presumption across a number of national jurisdictions. For a detailed, transnational discussion of some of the controversies surrounding this definition, see Sudha Setty, "What's in a Name? How Nations Define Terrorism Ten Years After 9/11" (2011) 33 U Penn J Int'l L 1 (using examples from the U.S., the UK, and India to suggest that the definitions relating to terrorism have changed in the years since 9/11, purportedly in favour of heightened security, with the result being an adverse impact on certain minority groups and questions arising as to whether these jurisdictions have departed from certain values relating to the Rule of Law) [Setty, What's in a Name?]; see also discussion, *infra* notes 61-67 for some exposition of this issue.

that had differing forms to see if commonalities could be identified. To do so, other controversial aspects might have served equally well and those are acknowledged, even where they might not be expressly included in this work. Moreover, emphasis on particular points that are arguably problematic does not suggest that there are not other, legitimate actions that governments have undertaken. Those are acknowledged as well.

The contribution herein is an attempt to unpackage some of the discourse that underscored certain controversial changes in normative detention practices since the 9/11 terrorist attacks, and to reconstruct that discourse through the lens of particular components of argumentation and discourse theory. In doing so, this work draws on the existing, and increasingly plentiful, scholarship relating to post-9/11 anti-terrorism detentions, which spans across a number of disciplines. It attempts to carve out a new avenue in that scholarship, drawing together, to varying degrees, elements from the fields of philosophy, linguistics, and law, with the dominant discipline being that of law. In some sense, it involves a methodology that echoes that of Paul W. Kahn, in his *Cultural Study of Law*, in which law and rule-making are evaluated, not from *within* in terms of the existing structures, but from *outside*, through a different lens than that typically used to assess normative legal structuring.[23]

The objective is to consider whether the picture changes when the component parts are disassembled, and then thus reassembled, much like the process that takes place when one turns a kaleidoscope. When a kaleidoscope is turned, two complete, but different, pictures emerge, even though all of the same component parts are used, with the change being the result of an alteration in position and emphasis for those parts. Each picture may be potentially legitimate, or at least have indicia of legitimacy, as it is rare that only one definitive truth can emerge from any given situation, but

[23] Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: The University of Chicago Press, 1999) [Kahn].

more than one picture can certainly be constructed from the same component parts. Indeed, some elements of post-9/11 discourse and detention practice may well be sound and may remain static, but altering other elements, which are not necessarily so, still presents a different overall picture. Similarly, if some of the elements in the kaleidoscope picture are structurally unsound, collapsing them repositions the other elements to change the overall outlook as well.[24]

This kind of approach suggests an internal reconfiguration, taking the package of factors that were assembled in creating arguments and reassembling them a new way. It does so, however, mindful as well that this internal reconfiguring has a context, and that various factors from outside of the box might play into the final view of the picture produced. A corollary might be, for instance, a suggestion that some perception of the kaleidoscope image has to do with who is actually viewing the image. In his work *Local Knowledge*, Clifford Geertz expresses a similar idea in discussing the fields of law and anthropology, when he says:

> Law, as I have been saying, somewhat against the pretensions encoded in woolsack rhetoric, is local knowledge; local not just as to place, time, class, and variety of issue, but as to accent – vernacular characterizations of what happens connected to vernacular imaginings of what can. It is this complex of characterizations and imaginings, stories about

[24] The metaphor of a kaleidoscope is used to explain the process of disassembling and then reassembling components into valid, but different, pictures. It is not intended to suggest illusion, although the working of a kaleidoscope does involve a certain form of illusion between the mirrors and the use of light. Rather, the idea here is to use the metaphor to explain the methodology applied and the idea of the intended outcome, that a reconfiguration of a picture can come about through such a reconfiguration of the component parts. It is also implied that the elements that are changed into the new picture tend to be those that are of questionable validity, but sometimes a change in emphasis is possible, without necessarily undermining the validity of the prior iteration. The concept of a kaleidoscope as metaphor has been used in other contexts, notably by novelist Marcel Proust and anthropologist Claude Lévi-Strauss. See e.g. Marcel Proust, *Remembrance of Things Past, part. II, Within a Budding Grove*, translated by C.K. Scott Moncrieff and Terence Kilmartin (France: Pleiade, 1919); Claude Lévi-Strauss, *The Savage Mind* (Chicago: University of Chicago Press, 1968) at 36-37; Joseph Campbell, *Masks of God: Primitive Mythology* (New York: Penguin,1987) at 61.

> events cast in imagery about principles, that I have been calling a legal sensibility. This is doubtless more than a little vague, but as Wittgenstein, the patron saint of what is going on here, remarked, a veridical picture of an indistinct object is not after all a clear one but an indistinct one. Better to paint the sea like Turner than to attempt to make of it a Constable cow.[25]

Geertz similarly suggests that even facts are not as objective as often perceived, but that they, too, are framed through a particular perspective. As an example, he notes:

> The realization that legal facts are made not born, are socially constructed, as an anthropologist would put it, by everything from evidence rules, courtroom etiquette, and law reporting traditions, to advocacy techniques, the rhetoric of judges, and the scholasticisms of law school education raises serious questions for a theory of administration of justice that views it as consisting, to quote a representative example, 'of a series of matchings of fact-configurations and norms' in which either a 'fact-situation can be matched with one of several norms" or 'a particular norm can be … invoked by a choice of competing versions of what happened.' If the 'fact-configurations' are not merely things found lying about in the world and carried bodily into court show-and-tell style, but close-edited diagrams of reality the matching process itself produces, the whole thing looks a bit like sleight-of-hand.
>
> It is, of course, not sleight-of-hand, or anyway not usually, but a rather more fundamental phenomenon, the one upon which all culture rests: namely, that of representation … the point here is that the 'law' side of things is not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real … The problem it raises is how that representation is itself to be represented.[26]

Thus, it appears that a variety of kaleidoscopic views can be derived from any given scenario. As time passes, and the narrative that began in the

[25] Geertz, *Local Knowledge*, *supra* note 21, at 215.
[26] *Ibid* at 173.

early days after the 9/11 attacks begins to crystallize in many ways, the potentially competing narratives diminish. In moving forward on anti-terrorism detention practices, the starting point for discussions is often the current state of detention practices. The inertia appears to have shifted to create a presumption in favour of certain types of extraordinary detention regimes, or of the larger idea that extraordinary regimes are acceptable in terrorism cases, and that presumption now often serves as a starting point for debate. The suggestion herein is that, in order to effectively look forward in this area, it might prove useful to look back, to question whether the actual starting point is, indeed, the optimal one, and whether the structures built on certain presumptions are sufficiently sound to serve as bases for practices moving forward. In some ways, there is a current fracturing of the anti-terrorism narrative, again both within and across national jurisdictions, and a question arises as to whether this fracturing is a symptom of an underlying problem in the reasoning used to build extraordinary detention regimes.[27]

The intention here is not to suggest that only one or two narratives are legitimate, or to definitively suggest that all aspects of the present narrative lack legitimacy. Rather, it is to suggest that there might be equally viable and competing narratives for any given situation, and that there might, arguably, be at least one narrative that is more sound than the one currently developing in this area. Just as the kaleidoscope must be turned to reconstitute the parts into a new picture, only one picture may be viewed at any given time, even though additional pictures may later be revealed by turning the kaleidoscope again. This thesis turns the kaleidoscope to focus on three major discourse-based presumptions and forms of argumentation used after the 9/11 attacks – identified as the Chapter headings for Chapters 2, 3, and 4, *supra*, -- that may constitute part of the shift. It does so to examine the potential new image that is revealed, but recognizes the pre-

[27] Evidence of this type of fracturing can be seen in the conversation presented in Section C, below.

existing picture that was apparent before that turn, as well as recognizing that additional turns of the kaleidoscope might reveal entirely different pictures by again reconstituting the component parts.

No definitive result can be obtained through this methodology, and the ultimate argument is not necessarily dependent on the success of each of the constituent parts. This methodology does, however, provide a useful manner through which to examine the processes of argumentation since 9/11, as it can give insights into ongoing debates over detention paradigms, as well as potentially giving insight into the larger issue of how we construct laws, not just within the anti-terrorism realm. Argumentation theory is already used, at least implicitly, in the daily practice of law, as arguments are built with an eye to structuring existing law and facts to build a persuasive case. It is arguably useful as well to assess the discourse that leads to normative legal changes, as this shines a light on the process, potentially exposing structural flaws that may undermine the stability of the final product.

Additionally, when determining the proper methodology to use here, choices had to be made in terms of the geographic parameters considered, in the interest of keeping the project manageable. Those parameters evolved during the course of this thesis. The original intention was to lay out a form of comparative assessment, primarily focusing on four countries – the U.S., Canada, the UK and, to a lesser extent, Australia, all chosen because of certain similarities in legal tradition and because of particular areas both of similarity and of differences in their post-9/11 responses. The ultimate approach taken does not involve such a traditional comparative analysis, but, rather, draws on a cross-section of approaches in a number of liberal democracies to identify trends and themes. To advance components of that argument, examples are drawn from practices undertaken in the U.S., Canada, the UK, and Australia, with some discussion of practices elsewhere in the final chapter. It is maintained that the extraordinary detention practices that were undertaken after the 9/11 attacks emanated out of the U.S., and

that the U.S. influence was a dominant component, especially in relation to threshold presumptions, even where specific practices in particular jurisdictions did not mirror, or even conflicted with, those undertaken by the U.S. Thus, while this project is not a discussion of U.S. law necessarily, the emphasis on U.S. actions will necessarily be heavier than on those of other national jurisdictions discussed, by virtue of the overall methodology used. This emphasis is consistent with the idea of going back to the discourse that arose in the early days after the 9/11 attacks and to follow the thread of where certain presumptions led.

As the theoretical aspect has developed, it has become increasingly necessary to relate back most heavily to developments in the U.S. shortly after the attacks occurred, and to follow the threads from there. Because the attacks occurred in the U.S., and the U.S. was the target, it is logical that changes would have emanated from there, especially in light of the recently heavy influence the U.S. has had on countries around the world. That influence was exerted and can be seen in some of the stark language used in the days after the attacks, such as when U.S. President George W. Bush told the nations of the world that they were "with us or with the terrorists."[28]

Thus, while there is discussion of the practices in the four countries discussed herein, that discussion is not undertaken with equivalent emphasis on all four. Rather, examples are drawn from the jurisdictions when they are most illustrative of the over-arching points. This is not as originally

[28] President George W. Bush, "Address to a Joint Session of Congress and the American People" (20 Sep. 2001), online: The White House < http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> [Bush, 9/20 Speech]. This either/or philosophy was repeated numerous times over the coming years, representing a perspective that those not joining the U.S. in its Global War on Terror were actively supporting the enemy. This is a strong statement, and could be difficult to ignore in many ways by countries that had positive relations with the U.S., and an interest in continuing to have such a strong relationship. For a montage of similar statements by the U.S. President, watch YouTube, "With Us or Against Us," online: <http://www.youtube.com/watch?v=-23kmhc3P8U>. For a discussion on the use of "us versus them" rhetoric as a legitimizing tool, see John Oddo, "War legitimation discourse: Representing 'Us' and 'Them' in four presidential addresses," (2011) 22 Discourse & Society 287 (assessing speeches by U.S. Presidents Franklin D. Roosevelt and George W. Bush that are characterized as "call(s) to arms.").

envisioned, but it developed as an emphasis on underlying presumptions necessitated relating back to the foundational discourse used to begin building extraordinary detention regimes. In addition, a portion of the thesis looks back before 9/11, and practices in Israel and in the UK, relating to Northern Ireland, are discussed as well, primarily in relation to their influence on post-9/11 changes to detention practices.

C. A Conversation Between Representatives of Branches of the U.S. Government: A Fractured Narrative in Practice

As detention practices were cobbled together in the early, crisis-driven days after 9/11, some incongruous practices appeared to result. This section illustrates the type of fracturing that has occurred in many respects in relation to the post-9/11 detention narrative, where different lines of detention paths appeared to emerge, without necessarily a clear indication of which path should apply to whom. The example relates to the U.S. anti-terrorism responses after 9/11, where, arguably, the fracturing of the detention narrative was more profound than it was elsewhere.

On December 25, 2009, Umar Farouk Abdulmutallab, who came to be known in the popular media by the unfortunate moniker of the "Underwear Bomber," or alternatively as the "Christmas Day Bomber," or "Underpants Bomber," was flying to the U.S. from Amsterdam. During the flight, a group of passengers and members of the flight crew successfully subdued him after it was discovered that he was attempting to set off explosives that were hidden in his pants.[29] This incident was clearly minor in terms of the physical

[29] "Underwear Bomber Abdulmutallab Sentenced to Life," *BBC* (16 February 2012), online: BBCNews <http://www.bbc.co.uk/news/world-us-canada-17065130>; Brenda Bowser Soder, "Abdulmutallab Life Sentence Demonstrates Strength of Federal Courts in Terrorism Cases," (16 February 2012), online: Human Rights First <http://www.humanrightsfirst.org/2012/02/16/abdulmutallab-life-sentence-demonstrates-strength-of-federal-courts-in-terrorism-cases/> (noting, as of that date, that the federal courts had significantly more prosecutions than the Military Commissions with six, all of which were being critiqued as lacking legitimacy); United States Department of Justice, Office of Public Affairs, *Press Release: Umar Farouk Abdulmutallab Sentenced to Life in Prison for*

damage it caused, but reports suggested that, had his attempt been successful, it could have killed everybody on the plane, and the attempt triggered a strong governmental response on national security and led to some incongruous debates.[30]

Attempted Bombing of Flight 253 on Christmas Day 2009 (16 February 2012), online: USDOJ <http://www.justice.gov/opa/pr/2012/February/12-ag-227.html>.

[30] The attempt led to the implementation of a number of "emergency" measures, which initially included not allowing international passengers into the U.S. to have any personal items in their laps or to leave their seats for an hour before landing, but the measures were later eased up in some of these respects. The emergency measures were ultimately replaced by more permanent measures. See U.S. Department of Homeland Security, "Secretary Napolitano Announces New Measures to Strengthen Aviation Security" (2 April 2010), online: Homeland Security <http://www.dhs.gov/ynews/releases/pr_1270217971441.shtm> (announcing "enhanced" security measures for people traveling into the U.S., which replaced the "emergency" measures implemented after the attempted attack on December 25, 2009 and were purportedly developed after international consultations, including the United Nations International Civil Aviation Organization.). See also White House, *Surface Transportation Security Priority Assessment*, at 8-13 (March 2010), online: whitehouse.gov <http://www.whitehouse.gov/sites/default/files/rss_viewer/STSA.pdf> (outlining goals of revised security measures and describing them as ensuring "[a] secure and resilient transportation network, enabling legitimate travelers and goods to move without significant disruption of commerce, undue fear of harm, or loss of civil liberties."); United States Transportation Security Administration, *TSA Guidance for Passengers on New Security Measures for International Flights to the U.S.* (2 April 2010), online: Transportation Security Administration <http://www.tsa.gov/travelers/airtravel/guidance_international_flights.shtm>. In announcing the new measures, the U.S. Government did not include a comprehensive listing, instead describing them in general terms relating to things like the use of enhanced imaging technology, and describing the measures as: "[t]o more effectively mitigate evolving terrorist threats, the new security directive utilizes multiple, random layers of security, both seen and unseen, and all passengers may be subject to enhanced screening."). In response to questions from reporters relating to the multiple layers of security, Government officials confirmed that this included using national origin and religion as screening factors, but denied this was racial profiling, as, officials argued, these factors were just one of a number of random factors that might be employed. See CNN Wires Staff, "U.S. announces new airport security measures" (2 April 2010), *CNN*, online CNN.com <http://www.cnn.com/2010/TRAVEL/04/02/airline.security/index.html?hpt=T1l> (quoting a U.S. official as saying these factors were just part of "fragmentary screening" used to identify people for additional screening, and, thus, do not constitute racial profiling).

C.1. The Conversation Begins: The Legislative Branch[31]

As Abdulmutallab was taken off of the plane in Michigan, authorities began to prepare criminal charges against him. He was initially questioned without the traditional *Miranda* admonition, although this was read to him sometime after his arrest.[32] This sequence of events stirred considerable outrage among some U.S. lawmakers. For instance, the Senate Minority Leader, Mitch McConnell, joined by a number of other U.S. Senators, sent a widely discussed letter to U.S. Attorney General Eric Holder.[33] The tone of the letter implies a certain carelessness on the part of the U.S. Government

[31] Cf Peter Hogg & Allison Bushell. "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75 (one of a series of articles published about the so-called "dialogue theory" in Canadian Constitutional Law). The metaphor of the dialogue has been considerably challenged in Canada, and it does not easily translate to the U.S. system of law-making and judicial review because of differences in structure in terms of the separation of powers from that of the Canadian government.). For a discussion of some of the critique about this theory in Canada, see generally Peter Hogg, Allison Bushell, et al "*Charter* Dialogue Revisited – Or "Much Ado About Metaphors" (2007) 45 Osgoode Hall L.J. 1 (response by the original authors and others to ongoing critique of the dialogue metaphor among academics and courts, including the Supreme Court of Canada).

[32] *Miranda* rights are named after a U.S. Supreme Court ruling, *Miranda v Arizona*, 384 U.S. 436 (1966). The Court ruled that "...The person in custody must, prior to interrogation, be clearly informed that he or she has the right to remain silent, and that anything the person says will be used against that person in court; the person must be clearly informed that he or she has the right to consult with an attorney and to have that attorney present during questioning, and that, if he or she is indigent, an attorney will be provided at no cost to represent her or him." *Ibid.*

[33] Kasie Hunt, "Republicans Rip Eric Holder on Miranda Rights for Underwear Bomber" (27 January 2010), *Politico*, online: Politico <http://www.politico.com/news/stories/0110/32073.html>. A copy of the original letter can be found at "Letter to The Honorable Eric H. Holder Jr., Attorney General, United States Department of Justice," (27 Jan. 2010), online: Project Vote Smart <http://209.18.106.110/speech_detail.php?sc_id=523995&keyword=&phrase=&contain=> [McConnell Letter to Holder]. The debate differs in relation to the case of Faisal Shahzad, the suspect in the attempted car bombing in Times Square in May 2010, because, unlike Abdulmutallab, Shahzad is a U.S. citizen, and no parallel system of criminal justice has successfully been put forth for U.S. citizens accused of terrorism offenses. See BBC News, "NY bomb-plot suspect 'faces terrorism charge,'" *BBC* (4 May 2010), online: BBC <http://news.bbc.co.uk/2/hi/americas/8660370.stm>. But see Ryan Grim, "Faisal Shahzad Arrest: Lieberman Proposes Taking Away Citizenship of Suspected Terrorists" (4 May 2010), *Huffington Post*, online: Huffington Post <http://www.huffingtonpost.com/2010/05/04/faisal-shahzad-arrest-lie_n_562834.html> (indicating some conversations, at least, in the days after Shahzad's arrest, about stripping him and other terrorism suspects of U.S. citizenship). The issue of the role of citizenship in the fracturing of the narrative will be discussed in more depth in Chapter 3.

in its handling of the arrest, including concern about the Government's decision not to "thoroughly interrogate Abdulmutallab," and adding:

> We remain deeply troubled that this paramount requirement of national security was ignored — or worse yet, not recognized — due to the administration's preoccupation with reading the Christmas Day bomber his Miranda rights.
>
> Apparently there was little, if any, coordination among key components of the administration's national security apparatus on how to treat Umar Farouk Abdulmutallab. Shockingly, the administration then made the hasty decision to treat him as a civilian defendant--including advising him of a right in a civilian law enforcement context not to cooperate--rather than as an intelligence resource to be thoroughly interrogated in order to obtain potentially life-saving information.[34]

Among a list of specific questions, one was "[w]hy was such a modest amount of time, apparently less than an hour, devoted to questioning Abdulmutallab prior to telling him that he did not have to cooperate?"[35]

In a U.S. criminal case, an hour of questioning prior to the reading of *Miranda* rights would, in itself, be deemed a serious defect, as information obtained through such questioning could be inadmissible in court, but, according to the Senators' letter, the variance from typical protections should have been even greater. Moreover, the letter suggests an option, in which the Government can treat a terrorism suspect as a criminal defendant, or as "an intelligence" resource to be "thoroughly interrogated in order to obtain potentially life-saving information," thus entirely bypassing the criminal-justice system.[36] In the end, the delay before the *Miranda* warning was given led to

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[34] *Ibid,* McConnell Letter to Holder.

[35] Presumably the reference to telling him he did not have to cooperate refers to the "right to remain silent" portion of the *Miranda* admonition.

[36] *Ibid.* The letter does not explain what is meant by a "thorough" interrogation, and a question arises as to whether the Senator was referring to the use of so-called "enhanced interrogation techniques," controversially used against detainees at places like Guantanamo Bay, Abu Ghraib, and Bagram. In April 2012, the U.S. Senate Select Committee on Intelligence indicated that it would be releasing an approximately 5,000-page report on "enhanced interrogation" used by the U.S., based on a three-year-long study. As of the date

an argument over admissibility of statements he made shortly after his arrest, and the U.S. federal judge who heard the case ruled that national security interests, including the imminent need to determine whether another attack was about to take place, justified the delay, and his statements were ruled admissible.[37]

The Senators' letter goes on to note that members of the U.S. Senate wanted answers as to how this "ill-advised" decision could have been made. The letter was signed by several members of the U.S. Senate, including John McCain, the Republican Presidential candidate in 2008.[38]

As a preliminary matter, it is important to note the obvious, and apparently unquestioned, presumption underpinning the letter of the U.S. Senators – that there is, in fact, a distinct and parallel system, apart from the U.S. criminal justice system – that could, on the discretion of governmental officials, have been applied to Abdulmutallab. This system, the letter suggests, would have allowed the U.S. to simply decide to avoid its criminal-justice system. Moreover, the letter expresses considerable indignation that this apparently parallel system was not used, implying that this parallel system not only exists, but has become the dominant system of choice in certain cases.

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of writing of this thesis, the report had not yet been released. It is known, however, that it includes a general condemnation of the use of "enhanced interrogations" and expressly refutes claims by some officials that Osama Bin Laden was found through information coming from the "enhanced" interrogation of Khalid Sheikh Mohammed, known as KSM, who is known to have been waterboarded 183 times. Scott Shane, "Role of Torture Revisited in Bin Laden Narrative" (2012) *New York Times*, online: NYTimes: <http://www.nytimes.com/2012/05/01/world/americas/senators-reject-claim-that-torture-helped-hunt-for-bin-laden.html >; see also David Usborne, "Waterboarding and 'Enhanced Interrogation' Shown to be Ineffective" (28 Apr 2012), *The* Independent, online: The Independent <http://www.independent.co.uk/news/world/americas/waterboarding-and-enhanced-interrogation-shown-to-be-ineffective-7685174.html> [Usborne, Enhanced Interrogation Ineffective].

[37] Michael Haggerson, "Federal Judge Rules Accused Plane Bomber's Hospital Statements Admissible" (15 September 2011), *Jurist,* online: JURIST <http://jurist.org/paperchase/2011/09/federal-judge-rules-accused-plane-bombers-hospital-statements-admissible.php>.

[38] McConnell Letter to Holder, *supra* note 33.

C.2. The Executive Branch

U.S. Attorney General Eric Holder responded to the Senators' letter, explaining in some detail the circumstances under which Abdulmutallab was arrested and interrogated, and he explained in a larger sense the policies of the U.S. Government in relation to use of the criminal-justice system in terrorism cases.[39] Rather than beginning from a point at which the presumption was in favour of the criminal-justice system, Holder instead went to lengths to argue in favour of using that system, a strategy that conveys an implicit assumption that it is up to the party advocating for the use of the criminal-justice system to establish its appropriateness, rather than for those advocating against use of that system to rebut any presumption in its favour. For instance, Holder wrote:

> Those policies and practices, which were not criticized when employed by previous Administrations, have been and remain extremely effective in protecting national security. They are among the many powerful weapons this country can and should use to win the war against al-Qaeda.
>
> …
>
> I am equally confident that the decision to address Mr. Abdulmutallab's actions through our criminal justice system has not, and will not, compromise our ability to obtain information needed to detect and prevent future attacks. There are many examples of successful terrorism investigations and prosecutions, both before and after September 11, 2001, in which both of these important objectives have been achieved -- all in a manner consistent with our law and our national security interests.[40]

[39] Eric Holder, Office of the Attorney General, "Letter from U.S. Attorney General Eric Holder to The Honorable Mitch McConnell," (3 Feb. 2010), online: The United States Department of Justice <http://www.justice.gov/cjs/docs/ag-letter-2-3-10.pdf> [Holder Letter to McConnell].
[40] *Ibid.*

Holder went on to explain that, when he made the decision to proceed under the criminal-justice system, all relevant agencies were aware of his decision, and none objected. Specifically, he argued "[n]o agency supported the use of law of war detention for Abdulmutallab, and no agency has since advised the Department of Justice that an alternative course of action should have been, or should now be, pursued."[41]

Holder noted that it had always been the policy, "without a single exception" to proceed under the criminal-justice system for all suspected terrorists arrested within the borders of the United States.[42] This parameter, that the criminal-justice system was considered the sole recourse for those arrested within the U.S., had not been explicitly stated before, and, in spite of the suggestion that there were no exceptions, Holder later explained that only two people arrested within the U.S. had been detained under the laws of war. One was Jose Padilla, arrested at Chicago's O'Hare Airport, and held for over three years as an unlawful enemy combatant until being transferred to the criminal justice system, where he was ultimately convicted of a conspiracy offense relating to terrorism.[43] Holder explained that in Padilla's case, as in the case of Ali Saleh Kahlah Al-Marri, it was later deemed erroneous not to proceed under the criminal-justice system, and those cases were ultimately transferred.[44] While Holder's introduction strongly suggested that the criminal justice and war paradigm were competing and available structures, Holder appears to have ended with a conclusion that, for those arrested within the U.S., the criminal-justice system was the presumptive option.[45]

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[41] *Ibid.*
[42] *Ibid.*
[43] See *ibid.* The circumstances of Padilla's detention are discussed in considerable detail in Chapter 2, below.
[44] *Ibid.* As discussed in more detail in Chapter 2, below, it was not at all clear that the decision to transfer Padilla's case to the criminal-justice system was undertaken as an admission that failing to do so from the beginning was a mistake.
[45] It does not appear, in fact, that the U.S. use of altered detention practices was always based entirely on whether the person was arrested within the U.S. A notable example where that was not the case involved the case of John Walker Lindh, known in the media as the

The letter then continued to detail successful uses of the criminal-justice system to prosecute terrorists, with Holder suggesting that more than 300 terrorism cases were successfully prosecuted under President Bush's Administration. He specifically described the case of the so-called "shoe bomber," Richard Reid, whose factual scenario closely resembles that of Abdulmutallab, and who was criminally convicted in U.S. federal court.[46]

As to interrogation, Holder again emphasized that Abdulmutallab was arrested within the United States, and stated that all defendants arrested and interrogated within the U.S., regardless of whether the cases were terrorism-related or not, were entitled to *Miranda* warnings. Here, Holder appears to have returned to the idea that terrorism is, in fact, a criminal-justice issue, and indistinguishable from other criminal matters in this respect.

Returning to the language of war, Holder reiterated the U.S. Government position that it was, in fact, at war, and that

> we must use every weapon at our disposal. Those weapons include direct military action, military justice, intelligence, diplomacy, and civilian law enforcement. Each of these weapons has virtues and strengths, and we use each of them in the appropriate situations.[47]

Finally, Holder concluded his letter by suggesting, once again, that the criminal-justice system was one of several available tools, as he wrote:

"American Taliban." Lindh was captured on the battlefield in Afghanistan in November 2001. It was not immediately clear that he was a U.S. citizen, but when it was ultimately discovered, Lindh was transferred to the U.S., where he stood trial before a U.S. federal court on a number of criminal charges relating to providing support to a terrorist organization. Lindh entered a plea agreement and was sentenced to 20 years in prison. He is serving his sentence at a U.S. federal prison in Indiana. See *Statement of Facts: USA v. John Lindh*, Criminal No. 02-37 (E.D. Va. 2002), online: U.S. Department of Justice <http://www.justice.gov/ag/statementoffacts.htm>; Adam Liptak, "John Walker Lindh's Buyer's Remorse" (23 April 2007), online: The New York Times <http://www.nytimes.com/2007/04/23/us/23bar.html?_r=1&ref=johnwalkerlindh>. Lindh was captured at the same time as Yaser Hamdi, also a U.S. citizen, but Hamdi's case played out quite differently, as discussed in Chapter 2, below.

[46] See *ibid,* Holder Letter to McConnell.

[47] *Ibid*

> The criminal justice system has proven to be one of the most effective weapons available to our government for both incapacitating terrorists and collecting intelligence from them. Removing this highly effective weapon from our arsenal would be as foolish as taking our military and intelligence options off the table against al- Qaeda, and as dangerous. In fact, only by using all of our instruments of national power in concert can we be truly effective. As Attorney General, I am guided not by partisanship or political considerations, but by a commitment to using the most effective course of action in each case, depending on the facts of each case, to protect the American people, defeat our enemies, and ensure the rule of law.[48]

In defending the decision to proceed under the criminal-justice system, Holder used language that seemed to concede the point raised in the Senators' letter, that the U.S. had a number of competing systems available for these cases, depending on the circumstances. He did not argue that the criminal-justice system was presumptively adequate, or that it was presumptively constitutionally mandated. The way he framed this argument left the inference that, again, the U.S. Government may choose what system to use, although he did suggest that the choice is diminished for those arrested within the borders of the U.S.[49] Without eliminating the military option, for military circumstances, he could have presented the argument in terms of long-standing constitutional principles, which do not make use of the criminal-justice system for such an arrest merely optional, as one of several valid options. That he did not do so suggests an acceptance of the fracturing of the system even by a government official advocating for use of the criminal-justice system in a particular case.

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[48] *Ibid*

[49] An analysis of this letter exchange can be found at Scott Horton, *The Holder-McConnell Letter* (4 February 2010), *Harper's Magazine*, online: Harper's Magazine <http://www.harpers.org/archive/2010/02/hbc-90006481> (arguing that the policies of the Obama Administration on terrorism detentions are virtually indistinguishable from those of the Bush Administration, that the criminal and military models are each equally viable depending on which is most expedient, and that the criminal-justice system has proven more effective in terms of successful convictions than the military commissions system – again, advocating in favour of use of the criminal-justice system, but in a way that suggests a permissible either/or scenario).

To demonstrate how inconsistent some of the discourse has been, after Holder's detailed explanation of how suspected terrorists captured in the U.S. should be read *Miranda* rights, there were reports of an interview given by President Barack Obama, shortly after he took office, in which he had challenged claims that the U.S. criminal-justice system was inadequate to handle terrorism cases. After clarifying that he disagreed with such claims, President Obama added "Now -- do these folks deserve Miranda rights? Do they deserve to be treated like a shoplifter -- down the block? Of course not."[50]

After quoting Obama on the subject, the same article also quotes former U.S. Attorney General Michael Mukaskey, who suggested:

> Holding Abdulmutallab for a time in military custody, regardless of where he is ultimately to be charged, would have been entirely lawful -- even in the view of the current administration, which has taken the position that it needs no further legislative authority to hold dangerous detainees even for a lengthy period in the United States …[51]

Mukaskey's comments seem to suggest that, not only are there now parallel and equal systems available to a government where terrorism is alleged, but that there is also the option of blending the systems, guided only by the likely success of the blending.[52]

In a later speech, Holder again suggested that Military Commissions were an appropriate alternative to the criminal-justice system. In discussing

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[50] Stephen F. Hayes, "Obama disagrees with Holder on Miranda rights" (5 February 2010), online: *Washington Examiner* <http://www.washingtonexaminer.com/opinion/columns/OpEd-Contributor/Obama-disagrees-with-Holder-on-Miranda-rights-83587417.html> [Hayes]. At one point, Holder said, in a television interview, that the U.S. Government was considering seeking to "revise" the *Miranda* warning for terrorism suspects. Nico Pitney, "Eric Holder: Miranda Rights Should Be Modified For Terrorism Suspects," (9 May 2010), *Huffington Post*, online: Huffington Post <http://www.huffingtonpost.com/2010/05/09/eric-holder-miranda-right_n_569244.html>.

[51] *Ibid,* Hayes.

[52] See James D. Fry, "The Swindle of Fragmented Criminalization: Continuing Piecemeal Responses to International Terrorism and Al Qaeda," (Spring 2009) 43:3 New Eng. L. Rev. 377.

the U.S. Government's controversial use of targeted killings, Holder talked about the ongoing "war" regarding terrorism, specifically describing the particular tools the U.S. Government asserts it can appropriately use:

> But federal courts are not our only option. Military commissions are also appropriate in proper circumstances, and we can use them as well to convict terrorists and disrupt their plots. This Administration's approach has been to ensure that the military commissions system is as effective as possible, in part by strengthening the procedural protections on which the commissions are based. With the President's leadership, and the bipartisan backing of Congress, the Military Commissions Act of 2009 was enacted into law. And, since then, meaningful improvements have been implemented.[53]

C.3. The Judicial Branch

While members of the other branches of government argued over the proper system to which Abdulmutallab should be subjected, his case proceeded in U.S. federal court. Ultimately he pled guilty to eight criminal charges relating to terrorism, and he was sentenced to life in prison.[54] The convictions included counts, among others, of conspiracy to commit an act of terrorism, attempt to use a weapon of mass destruction, and attempted murder within the special aircraft jurisdiction of the U.S.[55]

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[53] The United States Department of Justice, "Attorney General Eric Holder Speaks at Northwestern University School of Law" (5 March 2012), online: U.S. Justice<http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> [Holder Speech].

[54] For a detailed discussion of the Abdulmutallab case, including links to many of the underlying documents, see Sung Un Kim, "Federal Court Sentences Attempted Plane Bomber to Life Imprisonment," (17 February 2012), online: JURIST <http://jurist.org/paperchase/2012/02/federal-court-sentences-accused-plane-bomber-to-life-imprisonment.php > [Sung Un Kim].

[55] See the indictment: *USA v Abdulmutallab*, Case 2:10-cr-20005-NGE-DAS (E.D. Mich 2010); see also Ryan J. Reilly, "Conservatives Quiet After Saying Civilian System Couldn't Handle Underwear Bomber" (17 February 2012), online: TPMMuckraker <http://tpmmuckraker.talkingpointsmemo.com/2012/02/conservatives_quiet_after_saying_civilian_system_couldnt_handle_underwear_bomber.php> (listing statements by various

One other example illustrates the fracturing of the narrative on these issues, specifically in relation to some of the discourse emanating from U.S. courts. There were a number of cases in which members of the judiciary expressed considerable cynicism about the war paradigm as a parallel option for terrorism detentions. One example arose during the sentencing of Richard Reid, the so-called "shoe bomber," who was arrested after trying to ignite an explosive in his shoe during a flight into the U.S., and who was referenced in Holder's letter as one of the cases in which the criminal-justice system was successful.[56] After U.S. District Court Judge William Young sentenced Reid to life in prison, Reid began critiquing U.S. policies, suggesting he was a soldier in "war" with the U.S. In his response, Judge Young told Reid:

> We are not afraid of any of your terrorist co-conspirators, Mr. Reid. We are Americans. We have been through the fire before. There is all too much war talk here. And I say that to everyone with the utmost respect.
>
> …
>
> You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether it is the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist.
>
> And we do not negotiate with terrorists. We do not treat with terrorists. We do not sign documents with terrorists.
>
> We hunt them down one by one and bring them to justice.
>
> So war talk is way out of line in this court. You're a big fellow. But you're not that big. You're no warrior. I know warriors. You are a

government officials, urging the U.S. Government to transfer his case to a military commission, in comparison with near-silence on the issue after his conviction).

[56] See Holder Letter to McConnell, *supra* note 48.

> terrorist. A species of criminal guilty of multiple attempted murders.[57]

C.4. Formalizing of Parallel Processes

The U.S. Government continued to suggest the existence of parallel proceedings, either of which could be selected in a given case. In March 2010, Harold Koh, legal advisor to the U.S. Department of State, made a speech to the American Society of International Law. In the speech, he reiterated comments made earlier by President Obama, in a speech at the U.S. National Archives. Koh addressed the legalities of a number of controversial processes espoused by the U.S. Government, and he, too, suggested that the government had, essentially, an equal choice between whether to pursue cases under the criminal-justice system or military commissions. As Holder had in the specific context of the Abdulmutallab case, Koh spoke of the criminal-justice system and its effectiveness as if he was making a concession. Instead of suggesting that a presumption existed in favour of that system, he situated it as one of a number of equally possible, competing options, referring to it as "effective," rather than as mandatory. Specifically, he said:

> … we have a national security interest in trying terrorists, either before Article III courts or military commissions, and in keeping the number of individuals detained under the laws of war low.
>
> Obviously, the choice between Article III courts and military commissions must be made on a case-by-case basis, depending on the facts of each particular case. Many acts of terrorism

[57] CNN, Transcript: "Reid: 'I am at war with your country" (31 January 2003), online: CNN <http://articles.cnn.com/2003-01-31/justice/reid.transcript_1_court-sentences-allah-court-hearing?_s=PM:LAW> (containing a partial transcript of the courtroom exchange between Richard Reid and Judge Young); for more information on Richard Reid, see *U.S.A. v Reid*, NO. 02-10013-WGY (United States District Court for the District of Massachusetts 2002), online: U.S. Courts <http://pacer.mad.uscourts.gov/dc/opinions/young/pdf/richardreid.pdf>.

committed in the context of an armed conflict can constitute both war crimes and violations of our Federal criminal law, and they can be prosecuted in either federal courts or military commissions. As the last Administration found, those who have violated American criminal laws can be successfully tried in federal courts, for example, Richard Reid, Zacarias Moussaoui, and a number of others.

With respect to the criminal justice system, to reiterate what Attorney General Holder recently explained, Article III prosecutions have proven to be remarkably effective in incapacitating terrorists. In 2009, there were more defendants charged with terrorism violations in federal court than in any year since 9/11. In February 2010, for example, Najibullah Zazi pleaded guilty in the Eastern District of New York to a three-count information charging him with conspiracy to use weapons of mass destruction, specifically explosives, against persons or property in the United States, conspiracy to commit murder in a foreign country, and provision of material support to al-Qaeda. We have also effectively used the criminal justice system to pursue those who have sought to commit terrorist acts overseas. On March 18, 2010, for example, David Headley pleaded guilty to a dozen terrorism charges in U.S. federal court in Chicago, admitting that he participated in planning the November 2008 terrorist attacks in Mumbai, India, as well as later planning to attack a Danish newspaper.[58]

D. Simplicity in the Discourse: Complexities in the Reality

Since the 9/11 attacks, there has been a virtual explosion of scholarship relating to terrorism.[59] Various aspects of initiatives purportedly designed to fight terrorism have been dissected and analyzed, with numerous suggestions put forth as to the best way to address the dangers

[58] Harold Hongju Koh, "Speech to the Annual Meeting of the American Society of International Law: The Obama Administration and International Law" (25 March 2010) online: U.S. Department of State <http://www.state.gov/s/l/releases/remarks/139119.htm> [Koh Speech].

[59] It would not be possible to present a comprehensive listing of all of the books and articles written on terrorism, or even specifically on detention-related issues, in this thesis. Instead, this Introduction, and indeed the entire thesis, seeks to situate the arguments herein within the larger existing literature.

posed by terrorism suspects. As debates continue to rage on controversial issues, such as appropriate detention and interrogation practices, certain national jurisdictions continue to move towards a more systematic, and apparently permanent, approach to extraordinary detentions in terrorism cases.[60] In many respects, although terrorism represents an increasingly complex phenomenon, and legal regimes designed to address it are also often quite complex, the discourse surrounding these issues has been surprisingly simplistic.

It is highly unlikely that any definitive answer can be found to address the question of how best to approach terrorism-related detentions, but that does not mean that certain parameters cannot be established. Moreover, it is unlikely that any one piece of scholarship will provide a definitive answer to even one of the underlying questions, such as what would constitute appropriate detention standards. The reality is that terrorism is a constantly morphing phenomenon, and it is likely to continue to be so. Even the definition of terrorism continues to be the subject of considerable controversy, in spite of the fact that it is often treated in popular discourse, and by policy makers, as if it has a clearly understood meaning. Scholars and members of the international community have long grappled with creating an exact definition of terrorism, and were doing so long before 9/11.[61] The difficulty of pinpointing a definition of terrorism is often

[60] See e.g. Andrea Prasow, "Falling Short: Justice in the New Military Commissions" (2009), online: Human Rights Watch <http://www.hrw.org/en/news/2009/12/08/falling-short-justice-new-military-commissions>; see also *Military Commissions Act of 2009, National Defense Authorization Act for Fiscal Year 2010*, Pub.L. 111-84, H.R. 2647, 123 Stat. 2190 (2009) (continuing the military commissions with some evidentiary changes) [MCA 2009]; Peter Finn, "Justice task force recommends about 50 Guantanamo detainees be held indefinitely" (22 January 2010), *The Washington Post*, online: The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012104936.html>.

[61] See Jordan J. Paust, "A Definitional Focus" *reprinted in* Yonah Alexander and Seymour Maxwell Finger, eds., *Terrorism: Interdisciplinary Perspectives* (New York: The John Jay Press, 1977) at 18-45.

simplistically put in the idea that "one person's terrorist is another person's freedom fighter."[62]

Mark Burgess describes this obstacle in the discourse:

> Defining terrorism has become so polemical and subjective an undertaking as to resemble an art rather than a science. Texts on the subject proliferate and no standard work on terrorism can be considered complete without at least an introductory chapter being devoted to this issue.[63]

This thesis does not follow the pattern described above in attempting to establish a baseline definition of terrorism in its introduction or elsewhere. Rather, it is noted that the meaning of terrorism is, indeed, so amorphous as to make it difficult to establish a definitive and all-encompassing explanation of what it means, leading to difficulties in determining systematic responses.[64] Much of the post-9/11 discourse, such as the declaration of a "War on Terror," tends to suggest that this is a phenomenon that lends itself to an easy characterization, which is not necessarily the case, as the conversation, above, demonstrates. Like many other elements of the discourse surrounding anti-terrorism initiatives, and particularly those after 9/11, it appears that often complicated concepts are discussed in broad generalizations or in highly simplistic terms, with either/or language used, or with certain issues simply accepted as universal realities. This tendency appears, as will be discussed at length throughout this thesis, to be prevalent on all sides of the political, and ultimately legal, debate.[65]

Analyzing the language and argumentation strategies used since 9/11, by proponents on all sides of the various debates, provides a meaningful

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[62] This quote has gained the status of common usage, and there are varying ideas as to its origin.
[63] Mark Burgess, "Terrorism: The Problems of Definition" (1 August 2003), online: Center for Defense Information <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1564>.
[64] See Setty, What's in a Name?, *supra* note 22.
[65] See e.g., the portion of the "conversation," discussed in Section C, above, in which the representative of the U.S. executive branch appears to have accepted the existence of parallel, competing detention regimes, even where he was defending the use of the criminal-justice system.

insight into the way that the successful creation of a particular perception is dispositive in how a situation will actually develop. The impulse to define terrorism is understandable, since one cannot respond to a phenomenon unless one understands what it actually entails. A question arises, though, as to whether "terrorism" really is a single concept that can be addressed through a uniform, cure-all approach. It is difficult, for instance, to compare the situation that has historically existed in Israel – where anti-terrorism initiatives, and certainly detention practices, are much more aggressive than in most liberal democracies – and the situation existing in many other countries, where there have been periodic attacks, or thwarted attacks, but where terrorism does not necessarily disrupt daily life the same way.[66] Similarly, the increased violence in Mexico, perpetrated by drug gangs, is considerably more disruptive to national security than, at least to date, terrorism has been in many of the countries implementing stringent post-9/11 changes.[67] Questions arise as to whether the situations in these places can be, or should be, described as the same phenomenon, and as to whether a proper response to one situation is appropriate in the other. It initially appears as if using one term to describe these various scenarios may, itself, cause an oversimplification of what is, indeed, a complicated and diverse phenomenon.

Where terrorism is presented as one clear, easily identified concept, the response can more readily also be presented in similarly simplified terms. The anti-terrorism initiatives undertaken in a number of countries, and particularly since 9/11, arguably relate directly to the way public discourse was presented and perceived, especially in the early days after the attacks.[68]

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[66] A more detailed discussion of Israel's anti-terrorism approach is discussed in Chapter 4, below.

[67] There has, in fact, been some commentary suggesting that the drug-related violence in Mexico can be classified as terrorism. See e.g. Sylvia M. Longmire & John P. Longmire IV, "Redefining Terrorism: Why Mexican Drug Trafficking is More than Just Organized Crime" (2008) *Journal of Strategic Security* 35.

[68] See Michael E. Tigar, *Thinking About Terrorism: The Threat to Civil Liberties in Times of National Emergency* (Chicago: American Bar Association, 2007) at 1-2 ("However, the

Politicians, often supported by the media, painted a stereotypical portrait of the typical terrorist, or equally dire pictures of lost civil liberties, and those diametrically opposed images were presented as the alternatives as nations grappled with how best to protect themselves from terrorist attacks. If subsets of these extreme positions arose, it could be said that they fell within the box created by these supposedly competing ideas, with, for example, the idea of finding a proper "balance" between liberty and security fitting within the limiting parameters of this box.[69] It is notable that many of the ideas, presented in the early days after 9/11 as established presumptions, have been accepted, not just by those opposing revised detention standards, but even accepted, implicitly or explicitly, by those opposing these alterations.[70] Once the concept of "terrorism" is invoked, a series of seemingly automatic assumptions seems to arise, and certain presumptions are often unquestioningly accepted in this context that would not necessarily be accepted in another context.[71]

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terms terror and terrorism are being used in a dual and, therefore, dangerous way. They are epithets, but they are also words used increasingly in laws and judicial decisions as the predicate for governmental conduct directed against individuals and groups.") [Tigar].

[69] This "balance" scenario is discussed in Chapter 4, below.

[70] See generally Robert Chesney & Jack Goldsmith, "Terrorism and the Convergence of Criminal and Military Detention Models," 60 Stan. L. Rev. 1079 (February 2008)(delineating the parameters relating to terrorism detentions as to what has been categorized under a military detention model, and what remains under the criminal justice model, and comparing the two as if they are equally available options); Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, Human Rights First (2008), online: Human Rights First <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.> [Zabel & Benjamin I]; Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts: 2009 Update and Recent Developments*, Human Rights First, online: Human Rights First <http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf> (providing a detailed case for the effectiveness of the U.S. criminal justice system in addressing terrorism cases, and doing so from the position of arguing that the criminal-justice system can be effective, rather than from the starting premise that there is no other equally available system) [Zabel & Benjamin II].

[71] Sometimes, this tendency presents itself with certain broad presumptions being simply accepted. In a book review, for instance, Professor Lawrence Friedman refers repeatedly to the original author's proposal for "reinvigorating the rule of law as a guiding principle in American domestic and foreign policy-making." This statement, characterizing an argument being made by somebody in favour of the dominance of civil liberties, suggests, first, that it is now assumed that the rule of law is no longer a component of the American legal system, and, second, that an argument in favour of the rule of law is required, implying that the

The portrait of the "international terrorist," a term that, in itself, could arguably be said to create questionable presumptions, is, for instance, that of the Other, a male, within a certain age group, Muslim, a non-citizen of whichever country is considering the issue, and originally from one of a delineated group of countries in the Middle East.[72] This portrait, however, aside from being obviously discriminatory, is simply not an accurate portrayal of who is a terrorist, as evidenced by cases such as those of Timothy McVeigh, convicted in the Oklahoma City attack, or "Jihad Jane," who pled guilty to criminal terrorism charges in the United States.[73] The effect of this broad generalizing of the stereotypical terrorist is that how a suspect is treated in terms of judicial process often has more to do with who the person is than with what the person is alleged to have done.[74] Where there are disputes over whether to proceed under the criminal-justice system, as opposed to whether another system is more effective, this issue of othering

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presumption has shifted away from it. One might question if the more appropriate way to frame the issue is that those seeking to deviate from the rule of law bear the burden of establishing that they are permitted to do so. See Lawrence Friedman, "The Terror Government: Reconciling National Security Imperatives and the Rule of Law" (Summer 2009) 1 N. Eng. L. Rev. on Remand 1 (reviewing Natsu Taylor Asito, *From Chinese Exclusion to Guantanamo Bay: Plenary Power and the Prerogative State* (Boulder: University Press of Colorado. 2007)).

[72] See a more detailed discussion of this phenomenon, in Chapter 3, below; see also regulations promulgated in the U.S. shortly after the attacks, calling for special registration of "certain immigrants," and identifying the immigrants for the program as being male, over the age of 16, and from a list of certain countries, which, not surprisingly, were almost all primarily Muslim countries. See United States Department of Justice, "Rules and Regulations, Immigration and Naturalization Service (INS)," 8 CFR Parts 214 and 264, [INS No. 2216-02; AG Order No. 2608-2002], RIN 1115-AG70, "Registration and Monitoring of Certain Nonimmigrants: Final Rule," 67 F.R. 52584 (12 August 2002), *codified at* 8 C.F.R. 264.1(f); [INS No. 2232-02; AG Order No. 2612-2002]; "Registration and Monitoring of Certain Nonimmigrants From Designated Countries," 67 FR 52584 (6 September 2002).

[73] Timothy McVeigh is widely known as one of the U.S. citizens ultimately convicted of the bombing attack on the federal building in Oklahoma City. Other than being male, he does not fit any of the demographic characteristics of the stereotypical post-9/11 terrorist. "Jihad Jane," as she is commonly called in the media, is a blonde, blue-eyed American citizen from Pennsylvania, named Colleen LaRose, who entered a guilty plea in relation to a plot to attack a Swedish cartoonist, perceived to have insulted Islam. See *Profile: Jihad Jane from Main Street*, (11 March 2010), *BBC*, online: BBC News <http://news.bbc.co.uk/2/hi/americas/8561888.stm>; Ed Pilkington, "'Jihad Jane' Pleads Guilty to Murder Attempt on Swedish Cartoonist" (2 February 2011), online: The Guardian <http://www.guardian.co.uk/world/2011/feb/02/jihad-jane-pleads-guilty-cartoonist-murder>.

[74] See Chapter 3, below.

of those caught within this system is far too often simply overlooked. When discussing the relative merits of an alternative system, surely the fact that immutable characteristics are the biggest predictor of whether somebody will be subjected to that system is, at the very least, sufficiently important to be discussed at the outset.

It is this lack of precision in language, this seemingly unquestioning acceptance of questionable presumptions, and this use of imprecise concepts serving as predicates for often profound structural changes that form the backbone of the questions addressed herein. It will be argued that quickly formed presumptions, often combined with imprecise, simplistic language, have been superimposed on the existing factual scenario to serve as the foundation of revised terrorism detention practices in a number of places. This acceptance of these presumptions led to a significant shift in a number of national legal systems. These shifts, in turn, raise significant questions as to the viability of other aspects of national criminal-justice systems, as well as to the continued viability of pre-existing constitutional standards.[75]

The objective of this exercise is not merely to point out flaws in the process by which certain changes were undertaken. Rather, it is to draw from theoretical sources to examine the way people responded to the attacks, with the idea, not of resolving the threat of terrorism, but of perhaps breaking down the process under which changes were implemented, with an eye to identifying patterns in such changes. It is likely and even inevitable that terrorist attacks will continue. While the future cannot be predicted, knowing how thought processes and arguments proceed in the face of such emergencies could be helpful in avoiding repeated mistakes in response to future events.

[75] For instance, once it is accepted that the criminal-justice system can be set aside in a case involving alleged terrorism, questions arise as to whether it can be done in other cases too, such as within the so-called “War on Drugs” or for an accused member of organized crime.

The process by which changes were undertaken had, at its heart, not just the perceived facts of what happened, and what constituted the threat, but also the values and political views of those responding. Specific concepts, drawn from the area of legal philosophy, as to the structural components of a valid argument, can be superimposed on the factual changes that took place after 9/11, and can be used to shift the kaleidoscope to reveal at least one alternative narrative to the one that developed. Rather than a side-by-side analysis of those changes, this thesis will draw on specific thematic elements from a number of national jurisdictions.

E. Conclusion: The Roadmap

This deconstruction is undertaken the following way. Chapter 1 lays out a theoretical framework that will be applied throughout the thesis. In each of the subsequent chapters, a different form of post-9/11 discourse is deconstructed. The statements serving as foundational presumptions for each chapter, and, to an extent, for extraordinary detention practices implemented after 9/11, are not necessarily linear in structure across each chapter. Drawing on the analogy of the kaleidoscope, these three forms of discourse represent different layers of the foundational structures that underscored many post-9/11 extraordinary detentions. The nature of the discourse used was such that it had varying forms and levels.

Chapter 2 deconstructs the assertion that the attacks were new or unprecedented in a way that required the construction, in some instances, of parallel detention regimes outside of the criminal-justice system. That assertion was frequently expressly stated, or at least stated in portions. If the two components were not always explicitly connected in the discourse, it was strongly indicated that they were connected in practice. Thus, that chapter deconstructs an actual assertion.

In Chapter 3, the notion of the Other as terrorist is analyzed. This presumption represents a different form of discourse than that considered in Chapter 2, because the idea that terrorists were a specifically constructed Other -- namely non-citizen males whose national origin was from a predominantly Muslim country, and sometimes of a certain age group – was rarely admitted to by national governments. In some cases, such as in the U.S., particular immigration initiatives were expressly aimed at people in that group, so denying it entirely would have been difficult, but that designation, while published in the Federal Register for the various "special interest" programs, was not often publicly discussed. At the same time the discourse that was used specifically asserted that Al Qaeda was "hijacking Islam" and that retaliation against people based on their being Muslim was not acceptable. Thus, the form of discourse considered in Chapter 3 was one that was often more implied than stated, and even often denied, but was nonetheless obvious from the approaches taken. In spite of government denials regarding this presumption, as discussed in Chapter 3, there is voluminous academic and judicial writing that accepts that this was, indeed, a starting presumption.

In Chapter 4, a third form of discursive analysis is undertaken. Rather than deconstructing a particular statement, that Chapter looks to a form of argumentation used in several different contexts. The binary form of argument, in which options are presented as an "either/or" scenario, was a dominant form of persuasion used in the early days after the attacks and continues to the present day. It was commonly seen in examples like the idea that changes had to happen to "balance" liberty and security. The ongoing argument about the choice between the war and the crime paradigms for detention and process present another example. And, drawing to an extent on the analysis in Chapter 2, much tension has been seen between the "old" way of doing things and the "new" way as represented by a new world after 9/11.

In fact, it is not necessarily so obvious that liberty and security are commensurable elements to be balanced, or that one must reject one to choose the other. The war-versus-crime debate, peculiar to the U.S., has played out extensively since the attacks, but the chapter will address the possibility that the U.S. is not really choosing between these paradigms in an either/or manner. Finally, after 9/11, there has been much talk about having to choose between old approaches and new ones. This distinction is important, because calling something “new” suggests that it is untested, and that thus success of these new initiatives can only be assumed from the arguments used to support them. If, in fact, the initiatives are not “new” at all, but draw from “old” practices undertaken elsewhere, the structure of the argument changes considerably, as the experiences elsewhere can enrich the debate and give some indication as to the soundness of the arguments used to support the undertaking. Chapter 4 thus critiques the argumentation strategy of binary-based discourse, through the lens of these three specific examples.

"**BEFORE THE LAW** stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. "It is possible," says the doorkeeper, "but not at the moment." Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him." These are difficulties the man from the country has not expected; the Law, he thinks, should surely be accessible at all times and to everyone, but as he now takes a closer look at the doorkeeper in his fur coat, with his big sharp nose and long, thin, black Tartar beard, he decides that it is better to wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at one side of the door. There he sits for days and years. He makes many attempts to be admitted, and wearies the doorkeeper by his importunity. The doorkeeper frequently has little interviews with him, asking him questions about his home and many other things, but the questions are put indifferently, as great lords put them, and always finish with the statement that he cannot be let in yet. The man, who has furnished himself with many things for his journey, sacrifices all he has, however valuable, to bribe the doorkeeper. The doorkeeper accepts everything, but always with the remark: "I am only taking it to keep you from thinking you have omitted anything." During these many years the man fixes his attention almost continuously on the doorkeeper. He forgets the other doorkeepers, and this first one seems to him the sole obstacle preventing access to the Law. He curses his bad luck, in his early years boldly and loudly; later, as he grows old, he only grumbles to himself. He becomes childish, and since in his yearlong contemplation of the doorkeeper he has come to know even the fleas in his fur collar, he begs the fleas as well to help him and to change the doorkeeper's mind. At length his eyesight begins to fail, and he does not know whether the world is really darker or whether his eyes are only deceiving him. Yet in his darkness he is now aware of a radiance that streams inextinguishably from the gateway of the Law. Now he has not very long to live. Before he dies, all his experiences in these long years gather themselves in his head to one point, a question he has not yet asked the doorkeeper. He waves him nearer, since he can no longer raise his stiffening body. The doorkeeper has to bend low toward him, for the difference in height between them has altered much to the man's disadvantage. "What do you want to know now?" asks the doorkeeper; "you are insatiable." "Everyone strives to reach the Law," says the man, "so how does it happen that for all these many years no one but myself has ever begged for admittance?" The doorkeeper recognizes that the man has reached his end, and, to let his failing senses catch the words, roars in his ear: "No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it."[76]

[76] Franz Kafka, *The Trial* (New York: Schocken Books Inc., 1935) at 213-215 [*The Trial*]. This Parable is sometimes published as a separate entity called "Before the Law." See

CHAPTER 1: Turning the Kaleidoscope: Viewing Post-9/11 Anti-Terrorism Measures Through Differing Theoretical Frames

A. Introduction: Fractured Narratives and Tangled Webs[77]

Before the kaleidoscope can be turned in relation to terrorism detention practices, it is necessary to explain the theoretical context in which this new perspective will be presented. The process under which an argument is built has everything to do with the perceived success of its outcome. The starting point of a debate, understandings of what can be assumed to be true and what must be proven to be true, the burden of proof on such questions, and the over-arching imposition of values are among the critical points to be assessed in considering the efficacy and outcome of a proffered argument.[78] This is hardly a new concept, as politicians, theorists, and lawyers have known this since time immemorial. While these structural building blocks are often recognized as a strategic component to developing a successful argument, they are not as often considered after the fact, when one is assessing the validity of policy changes that have already been implemented after a campaign of persuasion directed to the public, legislative bodies, and judicial bodies. These components, however, can be as useful in assessing the structural soundness of past changes as they are in laying out a future argumentation strategy.

Jacques Derrida, "Before the Law," in Jacques Derrida, *Acts of Literature* (New York: Routledge, 1992) at 181-220 [Derrida, Before the Law]. The notion that various of the famous notions from Kafka's work can be applied to detention and trial procedures in modern-day terrorism has arisen in a number of works, and is perhaps not terribly surprising, given the parallels between the descriptions in Kafka's work and some of the specific arguments raised in opposition to many of the post-9/11 terrorism detention practices. See e.g. Steven T. Wax, *Kafka Comes to* America*: Fighting for Justice in the War on Terror - A Public Defender's Inside Account* (Other Press: New York, 2008) [Wax].

[77] A portion of this title is based on the famous quote, "Oh what a tangled web we weave, When first we practise to deceive!" Sir Walter Scott, Marmion, Canto vi. Stanza 17. It is not necessarily suggested that the "tangled web" of rhetoric discussed herein came about as the result of deception as suggested by the quote, but rather that it came about as a result of hastily implemented changes, undertaken without adequate analysis as to the validity of the underpinnings of those changes, which often resulted in incongruous outcomes.

[78] Perelman & Olbrechts-Tyteca, *The New Rhetoric*, *supra* note 9.

By breaking down the discourse and foundational components of an implemented policy, one can expose new views on those changes that are not available simply from looking at the final product, and, in relation to normative changes, may not be available by applying validity arguments within the existing context of legal analysis. This assessment of the etiology of a particular policy is one invaluable tool in determining whether the policy is sound and whether it should be pursued going forward. It can also provide insight into responses in other situations that may not be factually identical.

The 9/11 attacks provoked a response that was distinct, in several respects, from responses to prior terrorism incidents, and those distinct elements provide a useful basis for assessing the structural components of the changed practices. In particular, a number of liberal democracies, not directly the target of the 9/11 attacks, undertook specific changes to their own domestic detention practices, or to larger practices, sometimes in response to the attacks, and sometimes in response to the particularly wide-reaching, and assertive, reaction of the U.S. Government. It is obvious that, in many cases, the arguments advanced, most obviously by the U.S., had an impact on international legal developments, as well as on national law in a variety of places.[79] Certain, but not necessarily all, of the presumptions underscoring changes in the U.S. were accepted in other liberal democracies as well. As a result, it is possible to draw conclusions as to the processes that were followed, and were not followed, in various places, in order to extrapolate some larger themes as to the structural soundness of the implemented changes.

Before 9/11, responses to terrorist attacks were more often undertaken by the national jurisdiction that was targeted in a given attack or series of attacks, and the specific responses tended to be local within their

[79] See Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005)[Helen Duffy].

jurisdictions.[80] International law addressed the issue of terrorism before 9/11, but direct domestic national responses were more likely to be limited to the country that was targeted in a given attack.[81] The post-9/11 response, however, was a bit different, in that it appears to have resulted in a peculiar combination of local and global responses. Each jurisdiction that responded to the attacks did so in ways that, with some elements of commonality, also had distinct differences. Many of the differences arose as jurisdictions looked to their own values and constitutional principles in struggling to find the proper response, and as the international legal community attempted as well to respond to the attacks.[82] At the same time, certain trends emerged, suggesting that the threat was global in nature, complicating many of these local responses and causing some commonalities to emerge in many of the responses. National jurisdictions looked to each other more frequently and more explicitly to see how others were responding to this perceived new threat regarding terrorism, and many liberal democracies did so under the shadow of an extremely assertive response from the U.S. Government, illustrated by President Bush's unequivocal statement telling the world that they were with the U.S. or with the terrorists.[83]

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[80] As examples, when the UK was dealing with the height of the issues relating to Northern Ireland, it promulgated laws and policies internally, although some of these have been subject to review by the European Court of Human Rights. Other countries did not necessarily reconfigure their own anti-terrorism measures in direct response to the issues in the UK. A similar comment can be made about Israel, which has a long history of dealing with terrorism, and which has promulgated a complex set of laws and policies to respond to this perceived threat. There is no obvious thread of other countries necessarily using these attacks as a direct basis for reconfiguring their own anti-terrorism initiatives, although it appears that the U.S. may well have drawn on the experiences in the UK and Israel in formulating its own response to 9/11. That connection, however, came about as a result of the 9/11 attacks more than obviously as a direct reaction to the pre-existing terrorism situation in either place. For a more detailed discussion of anti-terrorism policies in the UK relating to Northern Ireland, and in Israel, see Chapter 4, below.

[81] See generally Helen Duffy, *supra* note 79

[82] See *ibid*; see also Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011)(providing an exceptional explanation of the way that the international community and national jurisdictions around the world did and did not respond to the terrorist attacks of 9/11) [Roach, *The 9/11 Effect*].

[83] Bush, 9/20 Speech*, supra* note 28.

One common feature of virtually every country that directly reacted to the 9/11 attacks was the emergence or enhancement of an extra-judicial system of detention, interrogation, and/or trial. Where the criminal-justice system had traditionally dominated in cases in which terrorists had been captured, and in many places did so under threshold constitutional standards, those principles shifted in many ways after 9/11. Countries began to use different mechanisms to establish a system under which at least a dual process existed, which allowed governments to avoid the criminal-justice system and its specific protections of judicial process for some people accused of terrorism. The particular mechanisms of this dual justice varied, with most places prominently using their immigration systems to detain people. In places like the United Kingdom and Australia, where the immigration system has been used on some level as an argument for detaining people deemed to be security risks, "control orders" emerged as a tool to limit a suspected person's individual liberty, regardless of citizenship, potentially indefinitely, and with abridged judicial process and no requirement of a criminal conviction.[84]

The specific mechanisms also evolved, more in some places than others, and sometimes in different directions, so early uniformity, or at least similarity, across jurisdictions often fractured as time passed. In the UK, the evolution had several iterations, first involving the replacement of immigration detentions with control orders, and then replacing control orders with Terrorism, Prevention, and Investigation Measures (TPIMs), which focus more on surveillance of the person targeted than on restrictions on freedom, as control orders had.[85] Some insight into the controversy many of these

[84] See generally Clive Walker, *The Threat of Terrorism and the Fate of Control Orders* (January 2010), Pub. L 4; David McKeever, *The Human Rights Act and Anti-terrorism in the United Kingdom: One Great Leap Forward by Parliament, but are the Courts Able to Slow the Steady Retreat that has Followed?* (January 2010) Pub. L. 110.

[85] David Anderson, Q.C., Independent Reviewer of Terrorism Legislation, *The Terrorism Acts in 2011 Report of the Independent Reviewer on the Operation of The Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (June 2012), online: Terrorism Legislation

undertakings provoked can be seen in relation to control orders, which, unlike many other extraordinary detention regimes, tended to involve some form of house arrest rather than imprisonment. As the UK was phasing out control orders, the independent reviewer, charged with reviewing national anti-terrorism laws, said of them:

> The purely preventative aim of the control order system, its separation from the criminal justice process, its application to home citizens and the length of time for which an individual could be subject to it … placed it towards the more repressive end of the spectrum of measures operated by comparable western democracies.[86]

The United States, in addition to heavily utilizing its immigration system, also developed a structure loosely based on the standards used during times of war, going so far as to refer to its endeavours as a "War on Terror."[87] One component of that "war" involved invasions of Afghanistan and Iraq, and a number of countries joined forces with the U.S. on one or both of these military operations. But the war terminology of the U.S. went beyond the battlefields of Afghanistan or Iraq, and beyond those applied by any other country, and it resulted in the building of a military commission system, under which, it came to be believed, anybody captured on any offense related to terrorism, even if not on a traditional battlefield, could potentially be tried

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Reviewer <http://terrorismlegislationreviewer.independent.gov.uk/publications/report-terrorism-acts-2011?view=Binary>.

[86] David Anderson, Q.C., Independent Reviewer of Terrorism Legislation, *Control Orders in 2011 Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (Mar 2012), online: Terrorism Legislation Reviewer <http://terrorismlegislationreviewer.independent.gov.uk/publications/control-orders-2011?view=Binary> at 4 [Anderson Control Order Report]

[87] This terminology, controversial from the outset, was abandoned for some time after U.S. President George W. Bush left office. Much of the war terminology has more recently been revived, particularly in relation to the continued use of Military Commissions at Guantanamo Bay and the issue of targeted killings. The war paradigm is discussed further in Chapter 4, below.

outside of the criminal-justice system – assuming, of course, that the person was not a U.S. citizen.[88]

The detention-related changes that were implemented after 9/11 can be broadly summarized in three categories, and somebody accused of some affiliation with terrorism could, in the years that followed the attacks, face the prospect of encountering any of these scenarios, often depending on who the person was and the year in which they encountered the accusation. First, there were actions taken that were arguably outside of the law, such as the creation of an extraterritorial prison structure, evidenced by the U.S. detentions at Guantanamo Bay, or the U.S. increased use of "extraordinary rendition" to transfer prisoners to secret prisons around the world, operated by the Central Intelligence Agency, not to mention an increase in the use of targeted killings.[89] The notion of people detained indefinitely, often in secret, with abridged or no judicial process, and possibly under conditions of torture, would not be a concept that fits easily into any pre-existing legal structures, at least any deemed legitimate in western democracies. The emergence and asserted legitimacy of such approaches represented a profound change to pre-existing norms.

Second, there were, of course, changes that were implemented within existing legal structures, at least arguably, such as the creation of new laws

[88] Early attempts to classify U.S. citizens as "unlawful enemy combatants" were invalidated by the U.S. Supreme Court. See the discussions of the cases of Yaser Hamdi and José Padilla, discussed in detail Chapter 2, below.

[89] See *Roach: The 9/11 Effect*, *supra* note 82, at 168-235 (describing the U.S. approach as extra-legalism). Canada became embroiled in one of the more highly publicized cases involving extraordinary rendition when Maher Arar, a Canadian-Syrian dual citizen, was detained by the U.S. during a plane change in New York and sent to Syria, where there was credible evidence that he was tortured. A subsequent Commission of Inquiry determined that Canada contributed to what happened to Arar, who now lives in Canada, and the Government of Canada paid him reparations and officially apologized. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar*: *Analysis and Recommendations* (2006), online: Security and Intelligence Review Commission <http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf> [Arar Commission Report].

in direct response to the attacks.[90] In the United States, Canada, the United Kingdom, and Australia, specific anti-terrorism legislation was enacted after 9/11, and that legislation typically went through various iterations in the following years.[91]

Finally, new spins were put on normative structures that were already in place. The most obvious example of this is the way that countries quickly turned to existing immigration legislation, which typically had exclusion provisions based on terrorism activity, and began using this legislation as a primary means of detaining people suspected of terrorism activity, thus avoiding national criminal-justice systems entirely and promulgating the notion that non-citizens were more likely than citizens to be terrorists.[92] Sometimes this existing legislation was revised to allow the government greater latitude in these cases, such as in Canada, where the *Immigration and Refugee Protection Act* security-certificate provisions, in place and used before 9/11, were revised, including an expansion of the range of who could be detained under the provision, adding permanent residents as one of the included possible groups of people.[93] Another example of detentions that fell

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[90] Arguments can be raised relating to the legitimacy of such laws, but this category refers to the fact that they were enacted under the existing processes for enacting new legislation. Anti-terrorism laws addressing a range of issues were promulgated in virtually every country that responded directly to the 9/11 attacks. Australia stands out for a rather extensive network of legislation because of 9/11, further influenced by the Al Qaeda attack in Bali in October 2002, in which a number of Australian citizens were among the victims. Kent Roach refers to the Australian approach as "hyper-legislation." *Roach: The 9/11 Effect*, *supra* note 82, at 309-360. The Bali attacks also affected Indonesia's public demeanor, where, previously, government officials had angrily denounced U.S. claims that terrorists were operating within their country, a different tone emerged after these attacks. Australia's Prime Minister at the time, John Howard, objected to characterizing those attacks at "terrorism," calling it "too antiseptic an expression to describe what happened. It's too technical." See Rachel S. Taylor, "Indonesia and Australia: Bali's Blackest Day" (2002), 49:12 World Press Review, online: Worldpress.org <http://www.worldpress.org/Asia/797.cfm> [Taylor].

[91] See *ibid,* Roach, *The 9/11 Effect*.

[92] See the discussion of detentions of non-citizens in Chapter 2, *infra*; see also *Charkaoui I*, *supra* note 12 (explaining the post-9/11 use of security certificates to detain people under the immigration system and finding a portion of that process to be in violation of Section 7 of the *Charter of Rights and Freedoms*).

[93] IRPA, *supra* note 7. This revision, for instance, allowed for the detention of Adil Charkaoui, a permanent resident of Canada, under a security certificate in 2003. Charkaoui is arguably the most well-known of a group of five men who were called, in the media, the "Secret Trial

within this category might by the war paradigm applied by the U.S. While aspects of that paradigm might arguably fit into the first category, the U.S. advocated for these detentions by arguing for their placement within the pre-existing standards relating to the laws of war, although obviously with some new twists.[94]

The U.S. influence also played out in opposing ways. In the years immediately following the attacks, a number of national jurisdictions, generally considered to be repressive in terms of human rights, arguably used terrorism as a pretext for repressive undertakings.[95]

Where, before 9/11, there was a criminal-justice approach to terrorism that dominated, after 9/11, these structures became fractured, and parallel legal universes emerged. Regardless of which of these approaches was implemented, however, it has become apparent that a presumption had arisen in certain cases that that the previously existing legal structures were entirely inadequate to deal with terrorism. Whatever means were chosen by many national governments to implement change, change was implemented, and it was done under the obvious assumption that change was necessary.

The conversation developed, though, not from a presumption that the prior structures were adequate, but, apparently, from a presumption that they

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Five," as he was ultimately the named party on two decisions of the Supreme Court of Canada. See *Charkaoui I*, *supra* note 12; *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 (reprimanding employees of the Canadian Security and Intelligence Service ("CSIS") for destroying evidence it claimed to be relying on to support the security certificate against Charkaoui) [*Charkaoui II*].

[94] See discussion of the crime-versus-war binary in Chapter 4, Section C, below.

[95] Suggestions that this was happening began to emerge quickly after the 9/11 attacks. See e.g. "'War on Terror' Curbing Human Rights" (16 January 2002), *BBC,* online: BBC <http://news.bbc.co.uk/2/hi/americas/1763641.stm >; Amnesty International, "Saudi Arabia - Countering Terrorism with Repression" (11 September 2009), online: Amnesty International <http://www.amnesty.org/en/news-and-updates/report/saudi-arabia-countering-terrorism-repression-20090911>; Amnesty International, "Sri Lanka: Release Thousands Being Held Under Repressive Law" (8 March 2011), online: Amnesty International <http://www.amnesty.ca/media2010.php?DocID=370 >; "Repression in Turkey: Enemies of the State" (17 March 2012), online: The Economist <http://www.economist.com/node/21550334> (describing the use of anti-terrorism as a pretext for cracking down on those seen as enemies of the government, particularly journalists).

were not adequate, thus often supporting the establishment of entirely distinct justice regimes. Because there seems not to have been a presumption in favour of criminal justice in all cases, competing narratives sprang up and were treated as if they were parallel and equal possibilities. A starting presumption, however, in favour of criminal-justice standards that have been long-standing, and generally successful, in addressing the threat of terrorism, might have led to a more unified conversation in terms of how to address detentions of terrorists. To operate under such a presumption does not necessarily mean that the criminal-justice system is adequate in all cases, but it would mean that those arguing it is not adequate would bear the burden of proof on that issue, on a case-by-case basis, instead of the burden falling on those arguing in favour of using the pre-existing criminal justice system, as it actually seems to have played out.[96]

B. Blurry Boundaries and Vague Discourse

The criminal-justice system did not, therefore, enjoy an apparent presumption of validity in some of the post-9/11 cases, and, instead, those in decision-making positions sought out entirely distinct systems to use relating to many of these detainees, leading to an often complex mix of various areas of law and policy. The distinctive post-9/11 discourse has allowed for a blurring of boundaries between areas of the law that were previously seen as more distinct, making meaningful analysis of the proper disposition of a particular case often simply confusing.

An example of some of the confusing nature of this post-9/11 discourse emerged in a much-parodied statement made by then-U.S. Secretary of Defense Donald Rumsfeld. In explaining the challenges facing

[96] Chapter 2, below, will address the way presumptions appear to have played out against the criminal-justice system, rather than in favour of those pre-existing systems, partially based on the presumption that the attacks of 9/11 were so as to have necessitated the building of a new detention regime.

the U.S. in its attempts to address the post-9/11 risk of terrorism, and specifically responding to allegations that evidence of weapons of mass destruction in Iraq was lacking, Rumsfeld commented:

> as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns -- the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.[97]

Rumsfeld's words demonstrate an undercurrent sense that there was an unknown danger lurking, implying that any preventive action could be justified to prevent that unknown danger from striking. The unknown nature of this threat served to excuse national governments from making a particularized showing that their initiatives had a direct link to addressing the threat, thus allowing for sometimes broad measures with questionable connections to the prevention of terrorism. Such language may have had particular resonance in the very manner in which the 9/11 attacks occurred, striking with no warning in a busy metropolitan city on what was otherwise a typical, sunny September day. In the aftermath of that particular attack, it is likely that national governments had greater license to assure people that broad measures were needed to prevent an unknown and only vaguely identified threat. Thus, the boundaries were more easily blurred.

In part because of the U.S. declaration of a War on Terror and also because of military initiatives such as those in Afghanistan and Iraq, the line between criminal procedure and the laws of war frequently blurred, at least in relation to detention practices. Traditionally, criminal detentions are based on individual conduct in violation of criminal laws. The purpose of detention has

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[97] U.S. Department of Defense, Donald Rumsfeld, "DoD News Briefing - Secretary Rumsfeld and Gen. Myers" (12 February 2002), online: U.S. Department of Defense <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636> [Rumsfeld Remarks].

been punishment, and arguably, rehabilitation and prevention of future criminal acts, and the actual sentence served is of a specified duration set at the end of a full judicial proceeding. Detentions in armed conflicts are traditionally based on status as a combatant in a particular military organization, the intent of detention is preventive, and the person is held until the armed conflict is over.[98] In post-9/11 terrorism detentions, however, it often appears as if these distinctions blurred.

An obvious sign of this blurring of the two areas is seen in the decision to conduct trials, in U.S. federal court, for several people who had formerly been designated as "unlawful enemy combatants" for years, and held at Guantanamo Bay without trial before the decision was made to try them in criminal court.[99] In most cases, that decision to try detainees in the U.S. did not hold, as political opposition caused the U.S. Government to back down.[100]

This crossover from one system to another is a peculiar feature of post-9/11 terrorism detentions, particularly within the United States.[101] The *habeas corpus* petition hearings, held in U.S. federal court as a result of the U.S. Supreme Court decision in *Boumediene v Bush*, provide another such

[98] This distinction is described in Colleen E. Hardy, *The Detention of Unlawful Enemy Combatants During the War on Terror* (El Paso, TX: LFB Scholarly Publishing, 2009)(explaining the parameters of the U.S. designation of unlawful enemy combatants and historical instances of similar designations)[Hardy].

[99] See Committee on Homeland Security, U.S. House of Representatives, "9/11 Trials/Guantanamo Detainees" online: U.S. House of Representatives <http://homeland.house.gov/issues/911-trials-guantanamo> (describing, in somewhat partisan terms, the sequence of events under which President Obama announced he would be transferring "dangerous" Guantanamo detainees to the U.S. and then reversed course after meeting opposition to the plan).

[100] *Ibid.*

[101] There is argument that some of this crossover has precedent in the idea of trying people for war crimes committed during an armed conflict. This scenario, however, is different than a war crimes case, because the people transferred to the national criminal-justice system, such as Jose Padilla, had previously been held under the war paradigm on a governmental argument that they could not possible be tried in a national criminal court, until they were, in fact, tried in a national criminal court. A detailed discussion of the Padilla case is presented in Chapter 2, below.

example.[102] Such *habeas* process is typically within the purview of the criminal-justice system, although the people seeking the review have been argued by the U.S. to be outside of the purview of the criminal-justice system and face, if their detentions continue, trial before a military commission rather than a criminal court. Thus, for a variety of reasons, it appears that the post-9/11 discourse led to hybrids in terms of detention and judicial process in some cases.

C. A Shift of the Kaleidoscope

Untangling the scenario that has emerged since 9/11 is a rather complex task. One method for attempting to do so is to break down the component parts that led to these varying scenarios to question whether matters that were treated as foundational presumptions were, in fact, valid presumptions, or, if valid, the only possible presumptions. Even the most seemingly straightforward situation can be subject to differing interpretations if one changes starting points and argumentation elements, much, again, as one does in turning a kaleidoscope.

The Parable presented at the beginning of this chapter, from Franz Kafka's book, *The Trial,* presents a vehicle through which to explain this methodology. Kafka's name is often invoked in discourse surrounding claims that a system of justice has elements of the arbitrary or the chaotic. The post-9/11 world in particular has been described as "Kafkaesque" by some of those critical of the changes that national governments have undertaken in their approach to terrorism, particularly in relation to interrogation and

[102] See e.g. Maureen T. Duffy, "Justice Delayed as Justice Denied: The Ongoing Plight of the Algerian Group," *Pulse of Democracy* (17 February 2009), online: <http://www.pulsdemokratije.net/index.php?id=1364&l=en> (telling the story of the "Algerian Six," including Lakhdar Boumediene, the named party on the Supreme Court case, and explaining the outcome of their subsequent *habeas corpus* petitions); *Boumediene*, *supra* note 12.

detention practices.[103] The comparison likely draws from Kafka's short story about torture, *In the Penal Colony*, or from *The Trial*.[104]

In *The Trial,* Joseph K. ("K") is arrested and imprisoned for an unknown crime, and ultimately executed after a judicial proceeding in which he is unable to ascertain the rules, to understand the evidence, or to ever understand that with which he has been charged.[105] In the post-9/11 era, often characterized by secrecy in detentions, proceedings, charges, and evidence, and in a world in which "special" tribunals, such as the U.S. Military Commissions, have been created solely to address what is perceived as a "new" threat of terrorism, the comparison to Kafka's world has a certain intuitive appeal. It is, however, quite a surface comparison, and neither Kafka's world nor the post-9/11 world are so easily and obviously explained.

Kafka's parable, a story told to K. in *The Trial*, is therefore useful to demonstrate how a meaning may seem straightforward in the first instance,

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[103] See e.g. Wax, *supra* note 76; Maureen Webb, *Illusions of Security: Global Surveillance and Democracy in the Post-9/11 World* (New York: City Lights Books, 2007); Geoff Brumfiel, "Physicians Protest Colleague's Terrorism Detention" (November 2010) *Nature News*, online: Nature News <http://www.nature.com.ezproxy.lib.ucalgary.ca/news/2010/101108/full/news.2010.592.htm> (" ... his colleagues are publicly protesting what they describe as his Kafkaesque detention"); Kevin Johnson, "Rights groups detail 'Kafkaesque' U.S. detentions," (27 June 2005) *USA Today*, online: USA Today <http://www.usatoday.com/news/washington/2005-06-26-detentions_x.htm>; Andrew Grice & Nigel Morris, "UK terror suspects being held in 'Kafkaesque world,'" (23 February 2006) *The Independent*, online: original no longer available, reproduced at Yahoo Groups <http://groups.yahoo.com/group/IslamicNewsUpdates/message/6333 >; Murray Dobbin, "Harper's Hitlist: A Kafkaesque nightmare for abandoned Canadians" (7 April 2010), online: Rabble.ca <http://rabble.ca/news/2010/04/harpers-hitlist-kafkaesque-nightmare-abandoned-canadians>; Michael Kinsley, "The Name Is Kafka . . . Franz Kafka," (16 June 2006), *The Washington* Post, online: The Washington Post < http://www.washingtonpost.com/wp-dyn/content/article/2006/06/15/AR2006061501795.html>; Deborah Sontag, "'Who Is This Kafka That People Keep Mentioning?'" (21 October 2001), *New York Times Magazine,* online: NYTimes <http://www.nytimes.com/2001/10/21/magazine/who-is-this-kafka-that-people-keep-mentioning.html?pagewanted=all>; Frédéric Mégret, "Justice in Times of Violence" (2003) 14:2 European J. Int'l L 327, 340 (citing Franz Kafka, *In the Penal Colony* (1914) as an example of Kafka as "the *visionnaire* of our society's propensity for the absurd" in critiquing the argument that terrorists should be "judged expeditiously").

[104] See *The Trial*, *supra* note 76

[105] See *ibid, The Trial*; Franz Kafka, "In the Penal Colony," in Franz Kafka, *The Metamorphosis and Other Stories*, translated by Donna Freed (New York: Barnes & Noble, 1996).

but may actually be amenable to a wide range of different interpretations. On some level, it raises insights as to the meaning of law, which can be extrapolated to the more practical realm that is the focus of this thesis.[106] It seems, indeed, that post-9/11 detention discourse was often Kafkaesque, not just in presenting elements of the arbitrary and even sometimes of the absurd, but also in the way it was structured to allow for only one possible scenario – a perspective that was and is open to challenge.

C.1. Kafka's Parable and "The Law"

Kafka's parable does not have an unequivocal, obvious meaning. Scholarly writings about the parable similarly contain strong disagreements as to what it means, and Kafka himself added to this lack of precision in the way his character, the Priest, explains the story in *The Trial*.[107] The priest recounts, and then explains, the parable to K. His interpretation has echoes of a positivist view, suggesting that the man must accept what he is told about the law, because it is the law, and it exists as a framework to permissible conduct.[108] The legality, or even fundamental justice, of the situation is found solely in the fact that the legal structures and procedures have been followed to the letter.

One might spin the kaleidoscope, however, to present an entirely different view of this story. A less narrow view might be, for instance, inspired by Kahn's *Cultural Study of Law*.[109] Kahn critiques the tendency of legal scholarship to view the law within the narrow and internal ambit of law

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[106] See Robin West, *Narrative, Authority and La*w (Michigan: The University of Michigan Press, 1993), at 84 (advocating reading various of Kafka's works for their "tremendous and multiple insights into the nature of law.").
[107] See *The Trial*, *supra* note 76.
[108] The concept of a positivist view of the law is one that limits the law in ways that tend to be rather formalistic and rule based. For an exposition of various views of this and other perspectives on what constitutes the law, see Ronald Dworkin, *Law's Empire* (London: Collins, 1986).
[109] *Kahn*, *supra* note 23.

reform, an approach that suggests that there are certain fundamental structural elements, within which any conception, or study, of the law must operate.[110] In critiquing this approach, Kahn talks about some of the flaws in the perceived structure, as well as in the nature of the discourse that gives rise to this form of scholarship:

> By taking up the project of legal reform, however, the scholar becomes a participant in legal practice and, therefore, a part of the very object that he or she set out to investigate. This collapse of the distinction between the subject studying the law and the legal practice that is the object of study is the central weakness of contemporary legal scholarship … the legal scholar comes to the study of law already understanding herself as a citizen in law's republic. She is committed to "making law work," to improving the legal system of which she is a part. Collapse refers to the failure of an analytic possibility, not some sort of transitional experience.[111]

Kahn's approach suggests that, by stepping outside of the law as constructed by normative standards, and not perceiving it from the view of an inside participant, one can truly assess its nature. What, then, would happen if one were to view Kafka's parable outside of the dominant public and political discourse of normativity? Spinning the kaleidoscope, and allowing for different perspectives outside of the normative framework, reveals more than one viable scenario as to what the parable means. One is that Kafka is presenting the story of an arbitrary denial of access to justice, presented as denial of access to "the Law." Viewed through this lens, the ending is significant, when the man asks the Doorkeeper why nobody else has sought access while he waited, and the Doorkeeper explains that this door exists only for him, that this denial of access applies only to him, and thus suggests, perhaps, that the road to the law is different for him than it is for everybody else. Viewing this story through a cultural lens, rather than through a strict

[110] *Ibid.*
[111] *Ibid* at 7.

normative lens, one might argue that it is not dispositive to look to what the existing legal structures require, because the structures themselves are flawed in their foundation and must be set aside for a higher conception of law, or at least for a different understanding of the nature of the law. If the parable is perceived as relating to access to justice, one might thus argue that the arbitrary denial of access for this man is an obvious violation of the Rule of Law.[112]

Lord Thomas Bingham writes, in his formulation of the elements of the Rule of Law, that "[t]he law must be accessible and so far as possible intelligible, clear and predictable."[113] Denying the man from the country access to the law for unexplained reasons, with no recourse, and through a set of standards to be applied only to him, raises questions as to legitimacy under a conception of the Rule of Law, regardless of whether the process of doing so conforms to technical normative standards. On the other hand, there is the possibility that everybody has an individual door leading to the Law, and that the scenario of the man from the country is thus not arbitrary, but shares commonalities to what others seeking the law face.

Others may, however, spin the kaleidoscope yet again, to formulate an entirely different picture based on these same facts. One interpretation is that the man is somewhat of a fool, passively believing what he is told about this being the only path to the law, and sitting there, without protest, without researching his options, and without challenging what he is told, until he dies. Rather than being unjustly barred from access to the law, the man has essentially imprisoned himself, and is thus to blame for his own predicament. That view of the story presents an entirely different picture in terms of Kafka's representation of the meaning of the law, and suggests, not that the

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[112] For one articulation of the parameters of the Rule of Law, see Tom Bingham, *The Rule of Law* (London: Penguin Group, 2010) at 37 (published by Lord Thomas Bingham, in which he lays out his own theories on the much-debated concept of the Rule of Law, and particularly does so within the context of terrorism detentions. Among other things, Lord Bingham writes, the Rule of Law demands equal access to justice) [Bingham].

[113] *Ibid.*

Government has done something wrong in arbitrarily denying him access to justice, but that, instead, the man has foolishly wasted his life and has failed to avail himself of alternative, and potentially available, means of access simply because he has failed to consider possibilities outside of the four corners of the normative standards with which he has been presented. This interpretation is supported by the description of the man, over the years, focusing his full attention on this Doorkeeper and this door, and forgetting about all the other Doorkeepers and all the other doors. Then again, this fact could symbolize the way that assumptions lead to the view that only one narrative is possible, and equally viable, competing narratives become marginalized and ultimately forgotten. Recalibrating the lens and applying a cultural study of law would raise some concerns about legitimacy of the framework itself and would not provide passive compliance as the only viable option, or even as an acceptable option.

Even the nature of the characters involved can change, under this cultural view, and depending on the factual perspective from which the assessment starts. If one steps away from a normative view of right and wrong in terms of the existing legal structure, and instead looks at the situation from a larger perspective, the scene significantly shifts. If, for instance, one assumes that the man is powerless before the stronger law, and that he is an innocent seeking redress, then the facts to follow are viewed through this lens, and the picture presented is that of a tragic, unjust, unacceptable outcome. If, however, one were to reverse the roles, to blame the man for his misfortune, and to present the Doorkeeper as the long-suffering, patient character, as Kafka himself does, through the priest telling the Parable, the scene shifts, and empathy with the characters shifts as well.

Kafka includes, in his unfinished novel, a conversation that discusses what the story might mean, although the conversation perhaps leaves more questions than it answers.[114] In the novel, the priest who tells the story

[114] See *The Trial*, *supra* note 76.

defends the Doorkeeper by explaining that is he only following his duty, and that it is not up to the Doorkeeper to question the process. The priest explains:

> The patience with which [the Doorkeeper] endures the man's appeals during so many years, the brief conversations, the acceptance of the gifts, the politeness with which he allows the man to curse loudly in his presence the fate for which he himself is responsible – all this lets us deduce certain feelings of pity.[115]

Thus, the priest assumes that the man from the country is, himself, responsible for his own situation. Is that responsibility a function of the man's insistence on believing he must wait outside the door, or is it something larger, such as a presumption that the man is guilty of something that means he deserves to sit indefinitely outside the door, with no right of access? Indeed, if it is vindication in a criminal proceeding that the man from the country seeks, the presumption should, under traditional principles, be one of innocence, not of guilt, as the priest's comments seem to imply.[116]

K laments that under the priest's perspective of the story, all that the Doorkeeper says must simply be accepted – a rather positivistic view -- but the priest disagrees, saying "it is not necessary to accept everything as true, one must only accept it as necessary."[117]

Thus the image shifts and the man becomes the antagonistic character, with the Doorkeeper as the noble guardian of the law, willing to adhere to this important task through years of tribulation and harassment

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[115] *Ibid* at 217.

[116] C.f. Michel Foucault, "Why Study Governmentality?" Lecture at the College de France of February 8, 1978, *reprinted in* Michel Senellart, *Michel Foucault: Security, Territory, Population,* translated by Graham Burchell (New York: Palgrave Macmillan, 2007), at 115-130 (one of a series of lectures given by Michel Foucault, in which he discussed his theories around "Governmentality," relating to problems of the state and population, and he defines "Governmentality" as the art of government, not limited to the state but present in other human dynamics as well).

[117] *Ibid* at 219-220.

from this problematic man. This latter interpretation can be further bolstered by another shift in the perception of the man as an outside, even aggressive, intruder, seeking to break down the very structures protecting the proverbial "Law" and stopped only by the great dedication of the Doorkeeper. The same facts can be seen quite differently, not just based on the lens through which they are viewed, but also based on the starting presumptions of the person looking through the lens.

There are other potential interpretations as well, such as the larger possibility that there is, in fact, no law at all. Rather, it might just be that one person, the Doorkeeper, is simply stronger than the other and able to impose his will accordingly.[118] Or, alternatively, the man is wrong in assuming there is law and that he has some entitlement to it, continuing to annoy the patient Doorkeeper for years based on this assumption. Much of the ambiguity about the nature of law may well reflect Kafka's larger sense that the law is not as clear as one might believe:

> Our laws are not generally known; they are kept secret by the small group of nobles who rule us. We are convinced that these ancient laws are scrupulously administered; nevertheless it is an extremely painful thing to be ruled by laws that one does not know … The very existence of these laws, however, is at most a matter of presumption … There is a small party who are actually of this opinion and who try to show that, if any law exists, it can only be this: The Law is whatever the nobles do.[119]

This thesis is obviously not about Kafka's parable, but the parable presents a capsule example of the larger theoretical approaches that might be of value in relation to the post-9/11 responses and of the techniques that might effectively deconstruct those responses. The parable arguably shares many factual characteristics with the post-9/11 story, with arguments on one

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[118] C.f. Franz Kafka, *The Problem of Our Laws*, in Nahun N. Glatzer, ed, *Franz Kafka: The Complete Stories and Parables*, (Berlin: Schocken Verlag 1971), at 437-438 [*Kafka: The Problem of Our Laws*].
[119] *Ibid.*

side of arbitrary denial of access to justice, and arguments on another side of necessity and of a proverbial Doorkeeper standing as the sole guardian of law and order, of "freedom" and even of fundamental safety against an outside intruder.[120] If adjusting the lens can so significantly change the view of a story as seemingly simple as Kafka's parable, it seems ineluctable that the much larger and more complex story of post-9/11 rhetoric and legal changes can also be deconstructed, viewed through a new lens, and thus seen in a different light.

Jacques Derrida was one of many scholars to discuss the possible meaning of Kafka's Parable. Derrida suggests a range of lenses through which the parable might be viewed, such as the idea that the word "Before" in the title of "Before the Law" may mean more than one thing. It may have a procedural aspect, as in being brought before a judge or other judicial body. Alternatively, it could be temporal rather than spatial and refer to a circumstance that occurred before the law came into being, an assumption, if accepted, that would add an additional dimension to the various potential interpretations provided above.[121] Derrida gives the passage an existential spin, suggesting that the door is only there for the man, because each must reach an end via an individual path.[122] He notes that the man from the country believes "the law ... should be accessible at all times and to everyone. It should be universal."[123] Derrida speculates about the factors that might make the law inaccessible, such as illiteracy, thus adding additional potential nuance to the story's meaning.[124] He also speculates about the type of "law" intended in Kafka's parable, such as whether it is moral law, natural law, or some other type.[125]

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[120] Bush, 9/20 Speech, *supra* note 28.
[121] *Derrida: Before the Law*, *supra* note 76.
[122] *Ibid.*
[123] *Ibid* at 196-197.
[124] *Ibid* at 197.
[125] *Ibid* at 192.

C.2. Kafka, the Law, and Anti-Terrorism

Given the way that anti-terrorism detention measures developed in several liberal democracies after 9/11, this sort of reconfiguring of the kaleidoscope lens can also significantly change the overall picture presented. If one starts with the "us against them" notion, and with the clear and unequivocal "good versus evil" rhetoric quickly espoused in particular by the U.S. Government after the attacks, the picture takes on an absolute and irrefutable perspective, in which nothing must be held back to fight a great evil, and in which asserted necessity becomes paramount, with all opposition to those initiatives deemed to be obstacles to that necessity. Safety becomes supreme, and stark images, such as that publicly espoused by then-U.S. Secretary of State Condoleeza Rice, of a mushroom cloud, presumably over an American city, are enough, in their own right, to justify any action, often on the barest assertions of necessity. Disagreement with the measures taken are seen through an equally stark lens, either as misguided, or even as an assertion in favour of the terrorists themselves.[126] Much of this discourse, which began in the political arena, worked its way into normative legal developments.

Many of these discourse strategies could arguably be encompassed under the relatively newly articulated concept of "lawfare," which is a term gaining increasing use to describe "using – or misusing – law as a substitute for traditional military means to achieve an operational objective."[127] It is increasingly obvious that the legalities of various measures are argued in the

[126] CNN Transcripts, "Interview With Condoleezza Rice; Pataki Talks About 9-11; Graham, Shelby Discuss War on Terrorism" (8 September 2002), online: CNN <http://transcripts.cnn.com/TRANSCRIPTS/0209/08/le.00.html> (quoting Condoleeza Rice as saying The problem here is that there will always be some uncertainty about how quickly he can acquire nuclear weapons. But we don't what (sic) the smoking gun to be a mushroom cloud."); see also *Piotr Cap*, *Legitimisation*, *supra* note 8.

[127] Michael P. Scharf & Shannon Pagano, "Foreword: Lawfare!" (2010) 43 Case Western Res. J Int'l L 1 (quoting Charles J. Dunlap Jr., "Lawfare Today: A Perspective," (2008) 3 Yale J Int'l Aff 146).

public forum, and that persuasive techniques through political discourse are used to bolster assertions relating to various legalities. Presented with that starting point as a foundation for building detention and interrogation structures, it is not surprising that many of those structures arguably represented a significant shift from pre-existing norms.

If, however, one begins with a more nuanced perspective, not just relating to the nature of the cast of characters, but also relating to the necessity and cost of various responses, the focus can be adjusted and the picture may change. If the actual threat is more closely examined to define its parameters, if the nature of the "enemy" is identified with more precision, if the actual links between proposed responses and the threat are more clearly articulated, it is entirely possible that a new, viable picture of appropriate parameters for terrorism detentions could emerge. This is not to say that turning the kaleidoscope will reveal an absolute truth, or a truth at all, but it may reveal that the current picture is, itself, not an absolute and unequivocal truth. Turning the kaleidoscope should, at the very least, present another viable perspective from a reconstruction of the same parts, and, at the very least, serve to help provide a more complete picture than that which currently exists. To assess the measures implemented particularly since 9/11, therefore, it appears that a useful undertaking would be to deconstruct the rhetoric and legal structures that were so quickly espoused after the attacks, to apply a more broad, cultural perspective to the threat and to the responses implemented, and to then turn the kaleidoscope to see what emerges.[128] An underlying premise herein is that, before national jurisdictions can move forward in addressing the threat of terrorism, they must go back to examine the structures that were often so hastily assembled after 9/11, to attempt to ensure that future initiatives are built on a solid foundation. Going back is thus critical to moving forward.

[128] Drawing again on the approach of the cultural study of law as laid out by Kahn, *supra* note 23.

Kafka's simple Parable thus serves as a sort of capsule example for this thesis, with some dominant themes. The first is the notion that the man, presented as an everyman, is steadfast in his belief that the law is universal and available to all, but that he learns, too late, through the final statement of the Doorkeeper, that this may not be true, and that the law can, in fact, be arbitrary and unpredictable, really only accessible to some. This discovery calls into question the meaning of law itself. The second theme is the idea of unquestioning acceptance of normative standards of the law, or, alternatively, quick acceptance of the justifications underlying those normative standards, even where the standards appear inconsistent with other ideals that, themselves, are generally included within the meaning of the "law." If law is a dynamic, interactive entity, rather than simply a set of written, normative instructions, one must deconstruct paradigms that have been implemented to consider alternative narratives. This is especially so in the case of post-9/11 detention practices, in which there have been questions raised as to how those changes may have infringed on constitutional protections. If reconfiguring the kaleidoscope presents a viable image that does not carry such a contention of constitutional violation, identifying that alternative scenario is certainly worthwhile. Breaking down the elements that were built into these detention paradigms, thus, is a first step to determining whether the kaleidoscope can be turned at all.

What if, as presented in the Parable and in Kafka's larger story, *The Trial*, the uniformity of judicial process were to vanish, and consistency in procedure and rules were replaced by arbitrary, incomprehensible rules that ultimately deny a party access to a judicial body to ever present a case or defend against an allegation? Moreover, what if, in denying that access, no viable alternative is presented? Finally, what if this shift towards the arbitrary is accompanied by the suggestion that the changes must be accepted without question, or if the only justification is a generalized, unsubstantiated

statement of necessity? Does such a shift change the underlying structure of what is understood to be the law?

Access to the law, if the law is seen as some form of justice, is expected to be non-discriminatory, predictable, and a means to an end.[129] When that process is subverted, made available only to some, or infused with arbitrary rules that destroy a sense of predictability, the implications can be significant, and not simply confined to the particular cases directly affected by this shift. In Kafka's Parable, the man seeks access to the law through what he believes to be the only possible route, but through a route he cannot understand, which is arbitrary, seems to him to single him out for disparate treatment, and serves as a roadblock rather than a means of achieving justice. What Kafka's story lacks under that interpretation is a sense of reasoning as to why such a subversion might be permissible. Absent the priest's bare assertion of "necessity," as he tells the story to K., no further reason is presented, and one must speculate as to whether an appropriate reason would lend a different perspective to the plight of the man from the country. The outcome of the story, if it does represent a denial of access to justice, is not limited to the man himself, but has an impact on everybody who expects to be protected under the larger umbrella of the rule of law, as what happened to him, if permissible, could arguably happen to anybody. Indeed, although the reader knows this door is just for this man, it is entirely possible that similarly inaccessible doors already exist for everybody else as well.

Thus *The Trial*, in relation to the novel itself, can serve as a metaphor for post-9/11 detention practices, as a simple, stark story that serves as a cautionary tale for the way that some argue liberal democracies are heading with their anti-terrorism detention measures. Rather than focusing on the larger story, this thesis uses the Parable in its metaphorical sense to

[129] See *Bingham*, *supra* note 112; A.V. Dicey, *An Introduction to the Study of the Law of the Constitution,* 5th ed (London: Macmillan, 1897).

demonstrate that there are differing, and often marginalized, views that might better characterize possible post-9/11 approaches to detention practices. To truly make the comparison between the Parable and post-9/11 detention practices, however, one must question the meaning of the Parable, to deconstruct its elements, and to see how viewing it from different angles changes its meaning. The same methodology could be followed to assess post-9/11 changes, so it appears that Kafka's tale might demonstrate a comparative element that goes beyond the elements of the story itself.

D. Deconstructing the Anti-Terrorism Discourse[130]

The detention regimes that national jurisdictions put in place after 9/11 were largely initially structured in an environment of crisis, with a perception of an imminent and horrific threat. Those initial steps, while often altered, in many ways served as building blocks for future developments in terrorism detention practices. It does not appear, however, that a departure of the sense of imminent crisis led to a full deconstruction, or adequate challenging, of the initial presumptions on which the detention structures were established.[131] An overwhelming amount of scholarship has been produced

[130] The terms "anti-terrorism" and "counter-terrorism" are often used interchangeably. It has been argued that they mean different things, that "anti-terrorism" refers to defensive measures, and that "counter-terrorism" refers to assertive, proactive steps to prevent terrorism. U.S. Department of Defense, *Instruction Number 2000.16* (2 October 2006), online: Department of Defense <http://www.dtic.mil/whs/directives/corres/pdf/200016p.pdf>. For the purpose of this thesis, the term "anti-terrorism" will be used to encompass both concepts, as they are not measurably different for the purposes used herein.

[131] Jacques Derrida and other philosophers have used a form of deconstruction to address the phenomenon of terrorism itself. Such deconstruction has not been specifically applied to post-9/11 detention practices, however, and, as it is a useful practice for understanding terrorism, it is also a methodology that leads to a better understanding of the nature of post-9/11 detention practices. Similarly, the notion of reconstruction has also been applied to the phenomenon of terrorism, but not specifically to the shifts in detention paradigms since 9/11. The methodology of first deconstructing and then reconstructing the steps followed in building post-9/11 detention practices is similar to that applied within this thesis, drawing in part from the approaches taken on similar issues by scholars like Derrida and Jürgen Habermas. See e.g. Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago: The University of Chicago Press, 2003)

since 9/11, with debates over the appropriate paradigm to follow in enunciating proper detention standards.[132] A question arises, however, as to whether the issue is best addressed by selecting among those existing paradigms, or if the premises on which the paradigms themselves were built should be challenged in order to suggest an approach to fighting terrorism.

Deconstruction is a term of art**,** often attributed to Jacques Derrida, and the term is used in this thesis in a similar, but not identical, sense, as Derrida himself has indicated that there is much misunderstanding about his notion of deconstruction, and that it is a technique that does not necessarily apply universally.[133] The intention herein is not to break down existing terrorism detention structures in a pejorative or partisan manner, but to examine the process by which the current structures were built and to address many of the tensions in the discourse surrounding them, such as the constant tension that seems to exist between those advocating for such regimes and those arguing that they represent an impermissible incursion into traditional and fundamental constitutional norms relating to individual rights. Although Derrida himself suggests that deconstruction does not necessarily have universal application, his deconstruction approach has been posited as an important methodology for approaching the analysis of legal norms for several reasons:

> First, deconstruction provides a method for critiquing existing legal doctrines; in particular a deconstructive reading can show how arguments offered to support a particular rule undermine themselves, and instead, support an opposite rule. Second, deconstructive techniques can show how doctrinal arguments are informed by and disguise ideological thinking. This can be of value not only to the lawyer who seeks to reform existing

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[*Derrida & Habermas*]; see also W. J. T. Mitchell, "Picturing Terror: Derrida's Autoimmunity" (1987) 33:2 Critical Inquiry 277-290.

[132] As expanded upon throughout this thesis.

[133] See generally Peter Goodrich et al, eds., *Derrida and Legal Philosophy* (UK: Palgrave Macmillan, 2008); Jacques Derrida, *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore: Johns Hopkins University Press, 1998) [Derrida, *Of Grammatology*]; compare Perelman & Olbrechts-Tyteca, *The New Rhetoric*, *supra* note 9.

> institutions, but also to the legal philosopher and the legal historian. Third, deconstructive techniques offer both a new kind of interpretive strategy and a critique of conventional interpretations of legal texts.[134]

As new approaches to terrorism detention and process were carved out in the days after 9/11, much of the early, crisis-laden discourse served as building blocks to anti-terrorism initiatives. As time passed, these structures gained an aura of familiarity, and debates over the threshold presumptions faded within much of the academic literature, as well as on the political front. The deconstruction espoused herein aims to return to that starting point to consider some of the underlying premises, implicit and explicit, that led the argument and the legal normative changes to its present form.

The analysis is also aided by aspects of Kahn's cultural study of law, in which norms are not examined within the framework they create, but, rather, are viewed through a new lens outside of those frameworks, to yield new perceptions. Kahn describes the relationship between genealogy and architecture in assessing law. He notes "[a]rchitecture is bound by genealogy – we cannot make something out of nothing."[135] As Kahn suggested in his approach:

> …I have described the current state of legal studies and proposed a new object for a discipline of law: not legal rules, but the imagination as it constructs a world of legal meaning. I have argued that this discipline must combine a genealogical and an architectural approach. Genealogy traces the history of the central concepts of a legal order; architecture looks at the structure of those concepts and their relationships to each other. Together they take up the problem of the "historical *a priori*," in its double aspect of contingency and necessity – i.e., the

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134 J.M. Balkin, "Deconstructive Practice and Legal Theory," (1986-1987) 96 Yale L.J. 743 at 744 [*Balkin*].

135 *Kahn*, *supra* note 23 at 43; see also Michel Foucault, *Archaeology of Knowledge,* translated by AMS Smith (London: Tavistock Publications Ltd, 1972).

> historically contingent, conceptual conditions of our experience of law's rule.[136]

In order to effectively assess the legitimacy of current anti-terrorism standards, and certainly in order to speculate as to viable future developments, it is necessary to break down the existing structures into some of their constituent elements, to look at the architectural process that was used to build them, and to assess the validity and soundness of those structures through this methodology. The present and the future cannot be effectively assessed without a breakdown of what has happened in the past.

These initial post-9/11 debates remain relevant for various reasons. First, the detention-related responses since 9/11 have not had the characteristics of temporary, emergency measures, but, rather, have in many cases gained indicia of permanence, thus making the underlying presumptions of continuing relevance.[137] Second, terrorism is not a phenomenon of the past, but continues to present a threat around the world. It continues to change, and few would argue that the risk of another, massive attack such as that seen on 9/11 has been eliminated. Third, this area remains one involving considerable controversy, and national jurisdictions continue to espouse new and controversial approaches to terrorism detentions, often based on past practice and past presumptions. Deconstructing the post-9/11 discourse and the presumptions on which many of the present structures have been built could provide a more effective framework for any permanent detention systems.

The impact of the 9/11 attacks on the U.S. was arguably the most profound. Discourse emanating from that time suggested a sense of reinforcement of U.S. identity as being associated with "freedom," but the actions undertaken in its War on Terror suggested a certain fracturing of that narrative, even in relation to its own identity. The 9/11 attacks were, on some

[136] *Kahn*, *supra* note 23 at 91.
[137] See the discussion of "inertia" in this chapter, Section F.3, below.

level, a defining moment for the U.S., but it appears that they left a conflict between the self-perception of those in the U.S. and the actuality that arose from post-9/11 terrorism detentions, as asserted support for defending freedom accompanied an increased willingness to deprive certain people of individual liberty without the protection of constitutional safeguards.[138]

E. What Is the Discourse of Terrorism?

While this thesis focuses on the past status of terrorism discourse, it does so because the presumptions of the past continue into the future. Discourse analysis relating to terrorism can "demonstrate the linguistic and discursive means through which the future is claimed and appropriated by dominant groups and institutions."[139]

While terrorism is not a new phenomenon, it appears that a distinctive form of argument structure and a novel form of discourse developed after the 9/11 attacks to persuade members of the public, and of national legislative branches and the judiciary that a new type of danger was looming, which justified unprecedented governmental action.[140] After the attacks, Derrida argued in favour of the deconstruction of the concept of terrorism, with one author characterizing his argument as the

> only politically responsible course of action because the public use of it, as if it were a self-evident notion, in showing that the sets of distinctions within which we understand the meaning of the term *terrorism* are problem-ridden. In [Derrida's] mind not only does war entail the intimidation of civilians, and thus

[138] This notion is expounded upon at various points throughout this thesis, most particularly in Chapters 2 and 3, below.
[139] Patricia L. Dunmire, "'Emerging Threats' and 'Coming Dangers,'" in Adam Hodges & Chad Nilep, *Discourse, War and Terrorism* (Amsterdam: Hodges, 2007) at 19 [Dunmire: Emerging Threats].
[140] A more detailed discussion of this phenomenon is presented in Chapter 2; see also Cap, *supra* note 8 (describing the threat-based discourse used after 9/11 and its use in seeking support for various governmental actions); *Habermas and Derrida*, *supra* note 131.

> elements of terrorism, but no rigorous separation can be drawn between different kinds of terrorism, such as national and international, local and global.[141]

The post-9/11 terrorism rhetoric, which was arguably fuelled by a public discourse disseminated by a cooperative media, was used to advance a number of presumptions, on which new detention and interrogation standards were built, and the specific language often implied that the underlying presumptions were truths that had already been established, rather than simply assumed.[142] Derrida expressed surprise at what he perceived to be a certain naïve willingness on the part of the media to exploit the trauma of 9/11 to feed the notions of what may occur in the future.[143]

Where that much controversy swirled around the very meaning of even basic concepts on which detention structures were built, it is reasonable to assume that such questions remain, unless they were definitively resolved before the measures based on them were implemented. The anti-terrorism initiatives undertaken in a number of countries, and particularly since 9/11, drew on the way discourse was presented and perceived, especially in the early days after the attacks.[144] Public discourse often contained stark binaries, with either/or presentations of the issues – examples include the idea that those opposing anti-terrorism measures must support terrorists, that liberty must give way to security in all instances, that terrorism was either a crime or a war.[145] If subsets of these extreme positions arose, it could be said that they fell within the box created by these supposedly competing

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[141] *Ibid, Habermas and Derrida*, at xiii.
[142] *Ibid.*
[143] *Ibid.*
[144] See Tigar, *supra* note 68.
[145] A detailed discussion of the use of binaries in anti-terrorism discourse is presented in Chapter 4, below.

ideas, with, for example, the idea of finding a proper "balance" between freedom and security fitting within the limiting parameters of this box.[146]

It is self-evident that states have some degree of responsibility in preventing terrorist attacks, and it is this general notion of state responsibility that has been frequently invoked to argue that certain approaches must be taken to combat terrorism.[147] At the same time, various legal theories, international instruments and national constitutions establish a degree of state responsibility towards individuals in terms of fundamental notions of fair judicial process. It is the perceived conflict between these two general principles that has given rise to much of the distinctive discourse in the anti-terrorism detention context since 9/11. The discourse has tended to be presented in unequivocal terms, with little room for nuance.[148] The process by which changes were undertaken had, at its heart, not just the perceived facts of what happened, and what constituted the threat, but also the values and political views of those responding.

In approaching the post-9/11 terrorism detention structures through the lens of a cultural study of law, the particular architecture of the argumentation used to advance those systems is assessed in greater depth. Given the highly contentious nature of many of the changes that were

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[146] See Chapter 4, below; see also Chesney & Goldsmith; Zabel & Benjamin I, Zabel & Benjamin II, *supra* note 70 (all, as explained in Footnote 70, accepting to some extent the delineation of the crime-versus-war binary as a starting point, regardless of whether advocating for or against the dominance of the criminal-justice system)

[147] For a comprehensive discussion of the parameters of state responsibility in fighting terrorism, see Vincent-Joël Proulx, *Reconceptualizing International Law After 9/11: What Role for State Responsibility in the Prevention and Suppression of Transnational Terrorism?"* (DCL Thesis, McGill University Faculty of Law, 2011)[unpublished].

[148] As discussed in Chapter 4, below. Even the definition of what constitutes "terrorism" is treated as if it is well settled in the area of detention practices, when, indeed, there remains considerable controversy as to its meaning. See e.g. *Setty: What's in a Name? supra* note 22. The Supreme Court of Canada recently addressed some of these issues within the meaning of Canada's criminal code. See *R. v Khawaja*, 2012 SCC 69. See also Richard Jackson, "Constructing Enemies: 'Islamic Terrorism' in Political and Academic Discourse" (2007) 42:3 Government and Opposition 394, at 395 ("As a term of elite and popular discourse, terrorism has come to possess clearly observable ideographic qualities. That is, like 'freedom', 'democracy' and 'justice', 'terrorism' now functions as a primary term for the central narratives of the culture, employed in political debate and daily conversations, but largely unquestioned in its meaning and usage.")

implemented, and later modified, considerable debate was undertaken that served as a building block for subsequent developments.

F. Deconstructing and Reconstructing the Argument Using Argumentation Theory

Altering long-standing fair-trial protections is a substantial undertaking, and any justification offered for doing so should be carefully scrutinized. Breaking down the post-9/11 detention alterations into their component parts and examining the discourse used and the methodology by which arguments to justify the changes were structured can provide a meaningful view into the viability of those changes.[149]

Looking to the validity of argumentation, of course, has a long history, in the field of philosophy certainly, but also in the legal theory realm. The analysis undertaken is heavily influenced by some of Robert Alexy's *Theory of Legal Argumentation*, considered in conjunction with the preceding work of legal philosophers Chaim Perelman and Lucie Olbrechts-Tyteca, as originally established in their work, *The New Rhetoric*, and refined throughout the years.[150] In assessing some of the explanations behind changes to certain detention practices, this theoretical construct provides a useful lens to

[149] See Robert Alexy, "Discourse Theory and Fundamental Rights," in Augustín José Menéndez and Erik Oddvar Eriksen, *Arguing Fundamental Rights* (Springer: The Netherlands 2006), at 15 (noting that "[t]he relation between discourse theory and fundamental rights is close, deep, and complex.").

[150] See generally, George Pavlakos, ed, *Law, Rights and Discourse* (Hart Publishing: Portland, OR, 2007)(containing various essays exploring the theoretical works of Robert Alexy, including a chapter in which Alexy himself responds to each of the authors) [Pavlakos]; Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press: Oxford, 1989)[Alexy, *Rational Discourse*]; *Perelman & Olbrechts-Tyteca: The New Rhetoric*, *supra* note 9. *A Theory of Legal Argumentation* was originally written in German and presented as a thesis at Georg-August University of Gottingen in 1976. It was translated to English in 1988, and the revised paperback version was published in 2010. In his *Legal Theory* blog, Professor Lawrence B. Solum describes this book as "[o]ne of the most important books in the philosophy of law in the post-war period, essential reading for legal theorists." Lawrence B. Solum, "Legal Theory Bookworm" (20 Feb. 2010), *Legal Theory* online: Legal Theory <http://lsolum.typepad.com/legaltheory/legal_theory_bookworm/>.

question whether the post-9/11 detention changes were structurally sound as a matter of logic.

Alexy's work looks to discourse as a descriptive notion of the nature of law. Law is, he has noted, properly viewed through the lens of argumentation or discourse, and it exists as "predominantly a social practice, albeit one that has the structure of rational argumentation." He connects law to other areas involving reasoning, such as morality and ethics, and posits that law shares a "discursive structure" with those fields.[151] Thus, his theory negates a central point in the theoretical works on legal positivism, under which law is distinct from morality and ethics, and he characterizes his work as a response to positivism.[152] His approach provides some support for the notion that the structural soundness of normative measures can, at least in part, be assessed by looking at the underlying argumentation structure that built it.

Alexy draws from various German and Anglo-Saxon legal theorists in building his idea of rational discourse in legal philosophy.[153] As a starting point, Alexy describes a ruling of the first panel of the German Federal Constitutional Court, from 1973, in which the court wrote that all judicial rulings must be based on "rational argumentation." Alexy posits, early in his work, that rationality can be "extended to any situation in which lawyers engage in debate." Beyond its interest to legal theorists, Alexy suggests, rational argumentation is a practical requirement, for lawyers, certainly, as well as for "every citizen active in the public arena."[154]

Alexy goes on to explain, then, that the validity of legal judgments cannot be fully determined by an assessment of logical factors alone. For example, one might have a case in which both parties have presented normative components and accepted factual premises needed to prevail, but

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[151] *Ibid*, Pavlakos at 1.
[152] See Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, at 3-10 (Oxford: Clarendon Press, 2002) [Alexy, *The Argument from Injustice*]; Robert Alexy, "On Necessary Relations Between Law and Morality" (July 1989), 2:2 *Ratio Juris* 167.
[153] See generally *ibid.*
[154] *Ibid* at vii (quoting *BVferGE* (Decisions of the Federal Constitutional Court) 34,269 (287)).

discretion lies with the decision maker, and this discretion cannot so easily be described through objective criteria.[155] Even in the case of such value judgments, however, questions can be assessed as to the extent to which they can be explained through rational criteria, a process he refers to as the "objectivization of value-judgments."[156] He explains:

> Finding answers to these questions is of great theoretical and practical significance. At the very least, the scientific status of jurisprudence is dependent on the answers we give. In addition, our answers will have considerable bearing on the problem of the legitimacy of regulating social conflicts by judicial decisions.[157]

At the same time, Alexy acknowledges that consensus about major social issues, or at least a consensus sufficient to deal with the practical implications of those issues, is quite rare.[158] Still, a certain form of discourse can be identified that relates to the validity of legal outcomes. Empirical discourse relates to things like the frequency of certain forms of argument. Analytical discourse relates to the "logical structure of actual or possible arguments." Normative discourse relates to the validity of criteria for justifying legal determinations.[159] In assessing the rationality of legal discourse, Alexy looks to a number of scholars, including the argumentation theory of Chaim Perelman and Lucie Olbrechts-Tyteca, which will be expounded upon in the next sections.[160] Alexy considers portions of their rhetorical theory, which he describes as going back to the ideas of traditional argumentation expounded by people like Aristotle, although their assessment is not designed as a

[155] *Ibid* at 7.
[156] *Ibid* at 7-13.
[157] *Ibid* at 7.
[158] *Ibid* at 13.
[159] *Ibid* at 15.
[160] *Ibid* at 16.

historical study of those works, so much as an acknowledgment of the validity of the structuring components they espouse.[161]

F.1. Speaker As Audience: Tailoring to the Audience

A prominent factor in the theories of both Alexy and Perelman and Olbrechts-Tyteca has to do with a subjective element in argumentation – the receptiveness of the intended audience to the message given. For an argument to succeed, the audience must assent to the premises presented, and it must also assent to each step of the proof presented to support the argument.[162] Perelman and Olbrechts-Tyteca's idea of the audience includes a notion under which discourse is used to "condition" the audience.[163]

Perelman and Olbrechts-Tyteca posit that, in a sense, the speaker becomes the audience, adapting the argument and values to those that will most likely persuade that audience.[164] There is a distinction between a "universal audience," which adheres to logical conviction and a "particular audience," to whom the speaker directs the discourse, and which is subject to the arts of persuasion.[165] In addressing a so-called "universal audience," if such a thing truly exists, there is no need for persuasion or tailoring, and the argument is built solely on principles deemed to form the most logical

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[161] *Ibid* at 155-156.
[162] *Ibid* at 158. A premise is used here in the sense of a matter accepted at least for the sake of argument, but not necessarily proven, one based on what is preferable in terms used by Perelman & Olbrechts-Tyteca. A presumption can also be a form of premise, but one that is proven to be true. See generally *Perelman & Olbrechts-Tyteca: The New Rhetoric*, supra note 9.
[163] Perelman & Olbrechts-Tyteca: *The New Rhetoric*, *supra* note 9 at 160.
[164] See *ibid* at 96 (noting that this form of rhetoric depends on the particular nature of the audience for whom the argument is intended); see also Richard Long, "The Role of Audience in Chaim Perelman's New Rhetoric," (2006) 4 J. Adv. Composition, online: <http://www.jacweb.org/Archived_volumes/Text_articles/V4_Long.htm> ("In a phenomenological sense, argumentation achieves meaning only when the audience registers in the speaker's consciousness and vice versa. Rather than merely analyze the audience, the rhetor becomes the audience. The two merge, become one, and the union results in action. In this respect, Perelman's new rhetoric transcends audience analysis.") [*Long*].
[165] *Ibid,* Long.

progression of steps. For a "particular audience," however, the adaptation of the argument, and of the speaker, must occur.[166]

In the case of post-9/11 practices, as with perhaps many other modern incidents, those in the position of making and advancing decisions faced a difficult question in terms of audience. The attacks had a public element to them, not only because of the terrible loss of life, but because a significant portion of the attacks, including people jumping from the Towers and the second airplane strike, took place on live television. Those watching became first-hand witnesses to the events of that day. Particularly within the U.S., the days after 9/11 were characterized by considerable grief, anger, and fear of another attack. Rumours abounded as to other terrorist plots, people were given instructions for setting up contact networks in the event of another attack, and collective nerves were rattled by reports of ongoing anthrax attacks.[167]

Presenting a case to the public under these circumstances would present challenges in relation to the different educational levels and levels of understanding of the attacks and the responses thereto. At the same time, national leaders had to explain the attacks and appropriate responses to the other branches of government, and explanations given to elected legislative bodies might vary from those given to judicial bodies, complicated by an atmosphere in which large percentages of the public continued to closely listen to the arguments.[168] Such a dynamic might arguably always be an issue in a Democracy, but the sense of personal affront, personal risk, and

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[166] Perelman & Olbrechts-Tyteca: *The New Rhetoric*, *supra* note 9 at 160.

[167] This is based on the personal recollections of the author of this thesis, living in Chicago at the time of the attacks.

[168] The post-9/11 discourse may have had some unique characteristics in terms of the high interest level of all layers of audience, but it shares some characteristics of problems common for those in political life. See Perelman & Olbrechts-Tyteca: *The New Rhetoric*, *supra* note 9 at 19 (describing the nature of the audience for one speaking before Parliament as including not just those before him or her, but the wider public who will be reached by the discourse as well).

personal involvement in the 9/11 attacks could be argued to be higher for the average citizen than in relation to many other public matters.

A question arises, then, as to whether argumentation strategies designed to appease a distraught populace were transferred to arguments presented before legislative bodies and courts.[169] Ultimately, the intent in addressing all of these audiences was to persuade. Perelman and Olbrechts-Tyteca note that any argument is built upon the audience, reminding readers that "the end sought by eloquence always depends on the speaker's audience, and he must govern his speech in accordance with their opinions."[170] The important issue, they note, is not what the speaker knows or believes to be true, but that the speaker is familiar with the knowledge or beliefs of those being addressed.[171] Structural logic might be a good indicator of an effective argument, but it means nothing if that logic is not accepted by a particular audience, as, they say, "passions and reasons are not commensurable."[172] A persuasive speaker must therefore take into account emotional factors dominant in the intended audience, and the early days especially after the 9/11 attacks had a high level of emotional charge to them. The same argument, therefore, might not be effective with members of the public as with courts and legislative bodies, and yet it was impossible for these arguments not to overlap. Perelman and Olbrechts-Tyteca point out this problem with different layers of audience:

> Argumentation aimed exclusively at a particular audience has the drawback that the speaker, by the very fact of adapting to the views of his listeners, might rely on arguments that are foreign or

[169] This question could be raised in any scenario in which a highly public event is the subject of a reassessment of existing legal norms. The blending of audiences that may have occurred after 9/11 is not completely distinct in that respect. This, in itself, makes the sort of analysis applied to the scenario surrounding 9/11 relevant to other situations as well, so reviewing it in the 9/11 context has broad appeal.
[170] Perelman & Olbrechts-Tyteca: *The New Rhetoric*, *supra* note 9 at 23 (quoting Vico, *Opere*, ed. Ferrari, vol. II, *De Nostri Temporis Studiorum Ratione*, at 275).
[171] *Ibid* at 24.
[172] *Ibid* (quoting Pradines, *Traité de psychologie générale*, vol. II, pp. 324-325).

> even directly opposed to what is acceptable to persons other than those he is presently addressing.[173]

In describing this phenomenon as "the contact of minds," Perelman and Olbrechts-Tyteca explain that a common language that can be understood by the audience is necessary. It is not, however, all that is needed, and they use the example of *Alice in Wonderland*, involving a world in which the parties all speak the same fundamental language but in which the inhabitants feel no motivation to actually communicate with each other.[174] They quote Aristotle in describing the need for the speaker to connect with an audience, and in suggesting that the logical quality of an argument could, indeed, be tainted because of the need to alter it to so connect, depending on the nature of the audience. Aristotle went so far as to suggest that discussions not take place with certain audiences, as it would too extensively taint the logic of the underlying argument:

> A man should not enter into discussion with everybody or practice dialectics with the first comer as reasoning always becomes embittered where some people are concerned. Indeed, when an adversary tries by every possible means to wriggle out of a corner, it is legitimate to strive, by every possible means, to reach the conclusion; but the procedure lacks elegance.[175]

Thus, the idea is that argumentation is a dynamic, interactive process, which by definition morphs based on characteristics, not only of the speaker, but of the intended audience as well. Those parties must be considered when the elements of any argument are being considered. In any politically charged situation in which emotions run high, problems are likely to emerge in this subjective factor in terms of presenting a persuasive argument, and it, in the course of persuading the public of something, a risk always arises that this

[173] *Ibid* at 31.
[174] *Ibid* at 14-15.
[175] *Ibid* at 16-17 (quoting Aristotle, *Topics*, VIII, 14, 164b.).

same type of discourse, slanted towards emotion and sometimes away from logic to tailor to the audience, will make its way into normative legal developments.

F.2. "Persuading" versus "Convincing"

The rationality of an argument can be assessed, beyond the nature of the audience, also in terms of the objective sought. Perelman and Olbrechts-Tyteca posit that a person concerned with achieving a specified action through the presentation of an argument to an audience is more concerned with persuading than with convincing, as they define conviction as "the first stage in progression toward action."[176] For somebody concerned more with the rational nature of an argument, rather than with effecting a particular end, convincing is more important than persuading.[177] They define "persuading" as "argumentation that only claims validity for a particular audience." "Convincing," by contrast, they apply to argumentation that presumes to gain the adherence of every rational being."[178] Put another way, they equate persuasion with action and conviction with intelligence.[179] Those arguments that gain the acceptance of the universal audience are deemed "valid," while those that only gain acceptance by a particular audience are merely "effective."[180]

Political rhetoric, by definition, must be "effective," as it is addressed to the public and designed to gain the adherence of those who vote. In an atmosphere charged with anger and public fear, therefore, politicians may feel compelled to cater to public opinion and to present arguments that

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[176] Perelman & Olbrechts-Tyteca, *The New Rhetoric*, *supra* note 9 at 27. At this stage they appear to be using "convincing" and "conviction" as interchangeable terms. *Ibid*
[177] *Ibid.*
[178] *Ibid* at 28 (specifically differing from Kant, who put forward a more distinct differentiation between conviction and persuasion as two "different types of belief.").
[179] *Ibid.* at 29 (drawing in part from Kant's ideas in Immanuel Kant, *Critique of Poor Reason*, preface to the first edition (1781)).
[180] Ibid; Alexy, *Rational Discourse, supra* note 150 at 164.

appease those public sentiments. This does not, however, mean that the arguments presented are necessarily those that make the most logical sense, and that the arguments may have proven persuasive does not necessarily support validity in relation to those arguments. A question arises as to whether, in persuading much of the public as well as lawmakers and some judicial bodies, of the need for altered detention and interrogation standards after 9/11, national governments presented arguments that had the ability to "convince" rather than to merely "persuade" in the sense described by Perelman and Olbrechts-Tyteca.

Perelman and Olbrechts-Tyteca also point to one of the elements of Aristotle's notion of rhetoric, that of "epidictic" rhetoric, sometimes referred to just as "praise-and-blame" rhetoric, a technique that can have a strong persuasive effect, particularly when directed to a large audience composed of members of the public. According to Perelman and Olbrechts-Tyteca, the importance of use of this form of rhetoric had wrongfully been dismissed by numerous scholars, and, in fact, it tends to play an integral role in the art of persuasion to a given audience.[181] They explain:

> Unlike the demonstration of a geometrical theorem, which establishes once and for all a logical connection between speculative truths, the argumentation in epidictic discourse sets out to increase the intensity of adherence to certain values, which might not be contested when considered on their own but may nevertheless not prevail against other values that might come into conflict with them. The speaker tries to establish a sense of communion centered around particular values recognized by the audience, and to this end he uses the whole range of means available to the rhetorician for purposes of amplification and enhancement.[182]

[181] Perelman & Olbrechts-Tyteca, *The New Rhetoric*, *supra* note 9 at 49.
[182] *Ibid* at 51.

Particularly in the U.S. after 9/11, as explained at various points throughout this thesis, a form of epidictic discourse undoubtedly occurred. As explained in much more detail in Chapter 3, a sense of nationalism arose in the U.S., which quickly developed into an "us against them" type of rhetoric. In other countries that responded to the attacks, a similar discourse arose, either in the sense of identifying quite heavily with the U.S., especially in the early days after the attacks, or in a larger notion that it was all Western democracies, or democracies in general, that were under attack, still resulting in a form of resurgence of certain nationalistic ideas and a closing of ranks against a perceived danger from outside.[183] Moreover, as will be discussed in considerable detail in Chapter 4, a particular type of binary discourse developed, which tended to state the danger and the necessary response in simplistic, either/or types of language, which left little room for nuance and, almost of necessity, put audiences in a position of being told they had to choose one option or the other.[184] Combined with the sort of nationalistic language and emphasis on group identify expounded upon in Chapter 3, the discourse that dominated early after the attacks appears to fit well into Perelman and Olbrechts-Tyteca's idea of "epidictic" discourse, defined above.

F.3. "Inertia"

Another element of Perelman and Olbrechts-Tyteca's argumentation theory, which tends to be less discussed, although Alexy specifically praises it in his work, is the notion of "inertia," an idea that "an opinion that has been accepted in the past may not be abandoned again without sufficient reason."[185] The term "inertia" is based on the scientific notion of inertia, which

[183] For example, see the discussion of the headline in France's *Le Monde*, published shortly after the attacks, noting "*Nous sommes tous Américains*," in Chapter 3, below.
[184] See Chapter 4, below.
[185] Alexy, *Rational Discourse , supra* note 150 (citing Perelman & Olbrechts-Tyteca, *The New Rhetoric*, *supra* note 9 at 106).

derives from the study of physics. Inertia, in the study of physics, refers to the resistance of an object to a change either in its stationary state or in its state of motion – an object at rest tends to stays at rest and an object in motion tends to stays in motion.[186] The idea when applied to argumentation theory, then, would be that there may be resistance to accepting a particular idea, or to implementing a change, at the outset. Once that resistance is overcome, and the idea or change is accepted, however, the idea of inertia begins to favour the change, rather than the pre-existing idea that has now shifted. It is now difficult to move against the new idea. Thus, while inertia itself refers to resistance to movement, or stopping movement, it can undergo an over-arching shift in which a change is ultimately accepted, and thus the changed idea is then supported by inertia, or resistance to change.[187] A similar concept, put in different terms, can be found in Foucault's idea of normalization in which an idea, previously not accepted, gains initial acceptance and, as time passes, gains *indicia* of familiarity, or normalizes.[188] When this happens, there is a resistance to changing it back and a tendency to put the burden on anybody seeking that reversion to the prior iteration, rather than on those supporting the changed version.

Turning again to post-9/11 discourse, especially that undertaken shortly after the attacks, one might argue that politicians and lawmakers employed a form of discourse designed to appease public fears, and that the discourse may have had this as an objective more than a logical acceptability in terms of the proper approach to terrorism detentions. Once this discourse was put out for public consumption, incorporating, as will be discussed later in this thesis, a peculiar form of terminology that evolved specifically in

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[186] See Isaac Newton, *Newton's Principia: The Mathematical Principles of Natural Philosophy*, translated by Andrew Motte (New York: Daniel Adee, 1846)(American edition, in the public domain), online: U.S. National Archives <http://ia600300.us.archive.org/8/items/newtonspmathema00newtrich/newtonspmathema00newtrich.pdf> at 73-74.

[187] See Alexy*, Rational Discourse , supra* note 150 at 171 (citing *The New Rhetoric*, *supra* note 9 at 106).

[188] See e.g. Foucault, *The History of Sexuality*, *supra* note 10.

relation to the attacks, the passage of time lent the new language, and these initial persuasion-oriented responses, a certain air of familiarity. Many of the changes undertaken shortly after the attacks, in a climate of crisis and aimed at appeasing a frightened and angry populace, may well have been reasonable when designed to address an unknown and apparently imminent threat, and an assertion of necessity might support such short-term measures in a way they would not support them if they became normalized and permanent. Once they were implemented, and normalized to become familiar and accepted, the inertia may have shifted in their favour, putting the burden on those seeking to continue to dispute those changes, rather than on those supporting the changes. A form of inertia had set in, where the changes gained an indicia of familiarity without ever having been supported through the formalistic requirements of logical argumentation, and with the inertia shifted in their favour, the changes began to normalize.

The "conversation" set forth in the Introduction to this thesis arguably illustrates this phenomenon, and it appears to illustrate the impact of the type of "inertia" Perelman and Olbrechts-Tyteca were describing.[189] As the idea of some form of extraordinary detention has been entrenched now for years, much of the discourse, coming from both sides of the debate, appears to reflect an acceptance of those changes as permanent and appears to have accepted a presumption in favour of these changes when discussing their validity. The fractured nature of the discourse suggests that there are now multiple, equally viable systems of justice in relation to terrorism, and that, indeed, the perspectives of some lawmakers are that the new systems are favoured over the old. The inertia, if one were assessing provisions designed only to address an emergency, would still favour pre-existing constitutional norms, and derogations would have to be justified. Instead, the inertia in the post-9/11 discussion appears to favour the new detention standards, which are thus not treated as exceptional, and, in relation, for instance, to

[189] See Introduction, Section C, above.

Abdulmutallab, demands were actually made to justify derogations from these new standards.[190] The discussion presents an illustration of how the inertia may have shifted, at least in some respects, regarding post-9/11 detention and interrogation standards, and it also illustrates how these changes have indicia of permanency, rather than being treated as short-term, emergency changes.

Where, before 9/11, the inertia factor favoured traditional constitutional, criminal-justice standards relating to detentions, the implementation of emergency or wartime changes, the passage of time, and years of political discourse aimed at appeasing a portion of the populace, have all lent those changes an aura of familiarity and have shifted the inertia in their favour, if not always as to form at least as to the possibility of a parallel system for terrorism detainees. The inertia now favours some parallel detention scenario for terrorism detainees, which was not accepted before 9/11, and which is not accepted in other areas traditionally covered by the criminal-justice system.

This process under which the changes came about and became accepted is critical, particularly if that process raises questions about whether validity was adequately assessed as the changes were implemented, and about whether the larger impact on criminal-justice standards and constitutional norms was adequately analyzed as the changes were being contemplated. Moreover, if, indeed, some of the starting premises for these changes are, themselves, seriously flawed, this means that argumentation techniques may have been superimposed on an existing fact pattern to bring about a fundamental change in the rule of law, without the components of the rule of law necessarily being fully considered. A complicated situation such as the disposition of cases involving terrorism suspects would call for careful analysis of the argumentation techniques applied to justify often-significant changes in constitutional standards, and

[190] See *ibid.*

that does not appear to have expressly occurred.[191] Inertia now favours some of the changed standards, and the discourse used to build that inertia must be broken down and reassessed to determine whether such inertia is justified, or, alternatively, to argue that the inertia should shift back to traditional ideas of the rule of law and constitutional norms.

F.4. Structure of a Successful Argument

Theoretical discussions of argument structures outline the role of particular elements – building blocks of arguments -- and how the assembly of those elements can impact the outcome.[192] On its face, it appears obvious that such principles would be validly applied to legal argumentation, a discipline in which practice is built upon the success or failure of argument strategy. Premises and presumptions, of course, form a fundamental component of traditional legal arguments. Concepts such as the presumption of innocence, or burden of proof, permeate modern notions of criminal proceedings. These concepts, however, have a wider application to non-traditional components of legal structures, such as the role they play in the formation of policies, which, ultimately, may lead to the development of legal norms.[193]

[191] See Perelman & Olbrechts-Tyteca, *The New Rhetoric*, *supra* note 9 at 187 (noting "Persuasive discourse is effective because of its insertion as a whole into a situation which is itself usually rather complicated.").
[192] See Frans H. van Eemeren, Rob Grootendorst & Francisca Snoeck Henkemans, et al., *Fundamentals of Argumentation Theory: A Handbook of Historical Backgrounds and Contemporary Developments* (New Jersey: Lawrence Erlbaum Associates, 1996), at 103 [van Eemeren, *Argumentation Theory*](explaining various theories of argument structure).
[193] See generally James B. Freeman, *Acceptable Premises: An Epistemic Approach to an Informal Logic Problem* (UK: Cambridge University Press, 2005) at ix-xi (describing when a premise can be accepted as valid, and when it is subject to questioning, thus subjecting the one putting it forth to a burden of proof of its validity).

Perelman and Olbrechts-Tyteca explored the role of presumptions, premises, and values in *The New Rhetoric*.[194] Alexy draws considerably from their theories in his Rational Discourse theory, and it is this element of that theory – the study of the structuring of arguments, including identification of the starting place for the argument – that is especially instructive to the analysis in this thesis. In building their theory of legal argumentation, Perelman and Olbrechts-Tyteca sought to enhance the existing field of logic by applying it to the area of practical reasoning.[195] In relation to the post-9/11 terrorism detention structures, very little of such specific analysis has been applied, and the argumentation structures of Perelman and Olbrechts-Tyteca, or similar notions of logical reasoning, have not been explicitly used as a lens to assess these changes.[196]

A relevant component of their work is the idea of going backwards to deconstruct successful arguments, in order to examine specific characteristics of the underlying premises, a concept used in argumentation theory that has echoes of Derrida's deconstruction approach.[197] In developing their analysis, they began, not with the presumptions that fuelled the arguments, but with the end arguments that were deemed successful, looking back from that starting point at the various steps undertaken to build the arguments.[198] In so doing, they concluded that there were certain

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[194] van Eemeren, *Argumentation Theory*, *supra* note 192 (Perelman and Olbrechts-Tyteca's theory draws on earlier works, including Aristotle's more classic theories of argumentation, the works of Belgian philosopher Eugène Dupréel (of whom Olbrechts-Tyteca was a student), and the mathematical formulations of German mathematician and philosopher Gottlob Frege). *Ibid* at 93, n. 1, 95; Perelman & Olbrechts-Tyteca, *The New Rhetoric*, *supra* note 9.

[195] Perelman & Olbrechts-Tyteca, *The New Rhetoric*, *supra* note 9.

[196] Again, legal changes are sometimes viewed through the lens of some aspect of argumentation theory, as Robert Alexy's theory demonstrates. Some notions of argumentation have been applied in relation to the post-9/11 fight against terrorism, such as the deconstruction and reconstruction approaches applied directly to the phenomenon of terrorism by Derrida and Habermas, described at *Derrida & Habermas*, *supra* note 131. Detention paradigms, more specifically and within this context, however, have not been assessed this way, particularly through the type of parameters laid out by Perelman & Olbrechts-Tyteca.

[197] van Eemeren, *Argumentation Theory, supra* note 192 at 94.

[198] *Ibid* at 95.

characteristics of successful arguments, and the premises on which they were based, that were designed to appeal, on various levels, to specific audiences.[199]

Perelman and Olbrechts-Tyteca refer to "points of departure" as the pivotal starting point for any successful argument.[200] A "premise" is something that may be created to specifically appeal to a given audience, and, thus, used as the point of departure for the argument being presented to that audience. Perelman and Olbrechts-Tyteca refer to two classes of premises, the "real" and the "preferable," and their distinction has been explained as follows:

> In premises relating to reality, a claim is laid to recognition by the universal audience. This class of premises comprises facts, truths and presumptions. Premises relating to what is preferable have to do with the preferences of a particular audience. This class comprises values, value hierarchies, and *loci*.[201]

Perelman and Olbrechts-Tyteca note that "facts and truths" are premises that are not subject to discussion or debate. An example given by one author is that Madrid is the capital of Spain.[202] A "presumption" is defined as

> premises that imply that something is real or actual. They too are regarded as enjoying the agreement of the universal audience. In contrast to facts and truths, however, it is expected, perhaps even assumed, that the supposition involved will at some stage be confirmed. An example of a presumption is the supposition that a person's actions will say something about that person's character. When such a presumption is used as a premise, everyone is taken to agree with it and it is expected that cases will occur which confirm the presumption.[203]

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[199] *Ibid.*
[200] Perelman & Olbrechts-Tyteca*, The New Rhetoric*, *supra* note 9 at 102.
[201] *Ibid.*
[202] *Ibid.*
[203] *Ibid* at 103.

Similarly, the definition of values is presented as

> premises that are related to the preference of a particular audience for one thing as opposed to another. They serve as guidelines in making choices: "As personal liberty is very important, I shall vote for the party that will provide more police." Values are also a basis for the forming of opinions: "I prefer grape juice to coke, because I like natural products."[204]

van Eemeron *et al.*, writing at length about Perelman and Olbrechts-Tyteca's theories, note the importance of values to arguments, commenting that "[a]greement over values makes a common course of action possible."[205] In addition to values themselves, Perelman and Olbrechts-Tyteca refer to "value hierarchies," in which one presenting an argument must be aware of the subjective perspective placed on different values by a specific audience – an example, perhaps, in terrorism discourse being whether an audience is more likely to value notions of individual liberty or those of personal safety.[206]

Presumptions and other forms of premises may be explicitly stated in presenting an argument, or they may be implied from surrounding circumstances.[207] One may disagree with premises in certain ways. First, one might disagree with the "status of premises," or, in other words, with the fact that a premise is assumed to be truthful when its validity needs still to be proven. Second, one might disagree with the "choice of premises," or with the specific matters set forth as points of departure for an argument. Third, one might disagree with the verbal presentation of premises, or, in other words, if the word choices used in presenting the argument are perceived to be biased or to otherwise change the validity of the underlying premise.[208]

This thesis will explore the use of specific premises – designated herein as presumptions under Perelman and Olbrechts-Tyteca's definition --

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[204] *Ibid.*
[205] van Eemeren, *Argumentation Theory, supra* note 192.
[206] See Perelman & Olbrechts-Tyteca*, The New Rhetoric*, *supra* note 9 at 102.
[207] *Ibid* at 104-105.
[208] *Ibid.*

in framing the arguments for altering detention standards for terrorism suspects. Because presumptions are used as premises in argumentation, but all premises are not presumptions, certain ideas will be put forth and identified as presumptions, because the discourse surrounding them demonstrates that they were laid down as proven points of departure for post-9/11 discourse. The factors identified herein were treated as premises based on reality – which can include presumptions, when, in fact, there is evidence to suggest that they were really, at best, premises related to what is preferable, or ideas that were used to form arguments that were likely to persuade a specific audience, but that did not have the foundational stability to be treated as presumptions. In so doing, and in deconstructing the arguments and turning the kaleidoscope to view them through the lens of argumentation theory, it will provide a potential alternative view of what could have happened after 9/11, with a view to providing alternative suggestions to future anti-terrorism measures.

G. Conclusion

Kafka's Parable demonstrates that a turn of the kaleidoscope even on a simple story can bring about a significant change in interpretation. On some level, calling his story simple may be inaccurate, as it is likely that it was intended to have significant nuance and varying potential interpretations, as even the conversation between K. and the Priest demonstrates. By shifting the points of departure, the emphasis to be place on certain factors, and the values superimposed on the Parable, more than one potentially reasonable narrative emerges as the meaning of the story.

A significant criticism of the post-9/11 discourse is that it was often built on argumentation factors quite similar to some of those described by scholars like Alexy and Perelman and Olbrechts-Tyteca, undertaken in an atmosphere of a perceived crisis and designed to persuade a particular

audience, drawing heavily on techniques designed to persuade rather than to convince via logic. Like Kafka's Parable, the presentation of necessary detention shifts was often couched in language that suggested that the situation was much more straightforward than it was. This does not mean that there is no potential validity to any of the changes or their elements, so much as that the changes came about through a use of argumentation strategy that, applying models such as that laid out by Perelman and Olbrechts-Tyteca, raises questions as to whether the points of departure were treated as presumptions – a form of premises based on reality – when they were, at best, premises based on matters of preference, representing values and not facts. If the latter, then some assessment of those baseline arguments must be undertaken to assess the structural soundness of the resulting changes.

Inspired by the argumentation and discourse theories described in this Chapter, the next three chapters undertake to assess particular discourse that dominated particularly in the early days after 9/11. Three statements are identified, and they are chosen based on a suggestion that they may have served as foundational structures to at least the general idea that extraordinary detention measures of some sort were justified and necessary for detainees suspected of terrorism-related actions. These ideas are threaded through much of the public discourse, and national responses give evidence of the adoption of many of these ideas in ultimate revisions to these standards. Each statement is expressly identified as a "point of departure," expressly drawing from Perelman and Olbrechts-Tyteca's terminology. They are so designated because a connection can be seen between the statements used and normative changes. In setting each one out as a thematic basis for the individual chapters, it is suggested that national governments used discourse that presented these ideas as if they were premises based on reality – and specifically as presumptions, which fit under that category – when, at best, they were really premises based on

preference, designed to persuade a particular audience and not having the requirements to convince, as the term is used by Perelman and Olbrechts-Tyteca, a universal audience. This foundational distinction suggests a potential flaw in any structures built on them. As inspired as well by Perelman and Olbrechts-Tyteca, a question arises as to whether these premises, which do not, in fact, have the force of presumptions, led to structural shifts in terrorism detention practices, which normalized over time as inertia began to favour the changed standards.

Thus, while Derrida distanced himself to some extent from the type of argumentation theory set forth by scholars like Perelman and Olbrechts-Tyteca, later works, such as that of Alexy, suggest that some combination of these methodologies might present some indicator, if not a definitive answer, as to whether these arguments have sufficient structural soundness to support the changes that were undertaken. Deconstructing the discourse to view it through the lens of somewhat formalized argumentation theory can allow for a particular turning of the kaleidoscope and for a presentation of the issues from a new perspective.

These questions are raised, mindful of Habermas's caution that logical argumentation strategy does not serve, by itself, as an indicator of the validity of argumentation, but, rather, can be one of several factors. Raising questions as to this factor, however, may suffice to at least suggest that a re-evaluation of the logical properties underpinning these changes would be beneficial. This is especially so when a fracturing of the narrative, as illustrated in the Underwear Bomber conversation in the Introduction, suggests some possible cracks in the current logical structure of detention practices. If the structure of these systems is, indeed, flawed, or even just subject to question, it is logical to assess those questions before continuing to build on the foundations that were laid in the early days after 9/11.

The three "points of departure" chosen for this study were selected, in part, because they represent elements that were threaded throughout the

discourse, and, in part, because they are different in nature. Mindful of the metaphor of the kaleidoscope, the idea is to examine different, and not necessarily linear or analogous, layers of discourse to see what picture emerges. Taken together, these elements might represent one complete turn of the kaleidoscope, or each could be considered separately to represent three possible turns and three possible competing narratives. Either way, the question is ultimately raised as to the existence of competing narratives different from the current scenario.

"We conclude that Canadian conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice. That conduct may be briefly reviewed. The statements taken by CSIS and DFAIT were obtained through participation in a regime which was known at the time to have refused detainees the right to challenge the legality of detention by way of habeas corpus. It was also known that Mr. Khadr was 16 years old at the time and that he had not had access to counsel or to any adult who had his best interests in mind ... Canada's participation in the illegal process in place at Guantanamo Bay clearly violated Canada's binding international obligations ... In conducting their interviews, CSIS officials had control over the questions asked and the subject matter of the interviews ... Canadian officials also knew that the U.S. authorities would have full access to the contents of the interrogations (as Canadian officials sought no restrictions on their use) by virtue of their audio and video recording ... The purpose of the interviews was for intelligence gathering and not criminal investigation. While in some contexts there may be an important distinction between those interviews conducted for the purpose of intelligence gathering and those conducted in criminal investigations, here, the distinction loses its significance. Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew that Mr. Khadr was being indefinitely detained, was a young person and was alone during the interrogations. Further, the March 2004 interview, where Mr. Khadr refused to answer questions, was conducted knowing that Mr. Khadr had been subjected to three weeks of scheduled sleep deprivation, a measure described by the U.S. Military Commission in Jawad as designed to "make [detainees] more compliant and break down their resistance to interrogation" ...

...

This conduct establishes Canadian participation in state conduct that violates the principles of fundamental justice. Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects."[209]

[209] *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paras. 24-25 (internal citations omitted) [*Khadr II*].

CHAPTER 2: Hasty Inductive Generalization: "New" Realities Require New Detention Paradigms [210]

Advanced as Presumption/Point of Departure: The attacks of 9/11 represented a new threat, or exposed an existing threat not previously seen, which necessitated a presumption that pre-existing criminal-justice systems were inadequate and that new detention and interrogation paradigms were necessary to effectively address this new threat.

A. Crisis Shifts in Long-Standing Detention Paradigms

A.1. The Presumptive Inadequacy of National Criminal-Justice Systems

This Chapter begins with a statement, identified as a point "Advanced as Presumption/Point of Departure." The statement contained is not a direct quotation, but represents a consolidation of various statements, which represent, in varying forms, a frequently asserted basis for accepting revisions to constitutionally protected detention standards in a number of

[210] A "Hasty Inductive Generalization" is an argumentation fallacy under which "a person generalizes from a single anecdote or experience, or from a sample that is too small or too unrepresentative to support his conclusion: Too narrow a range of human experience is taken as a basis for reaching a conclusion about all experiences of a given type." Trudy Govier, *A Practical Study of Argument* (Belmont, CA: Wadsworth Inc., 1988) at 331 [Govier, *A Practical Study of Argument]*. It is recognized that identifying this particular fallacy rests on an assumption that extraordinary detentions would otherwise be deemed wrongful if not for the necessity of the "new" risk presented by terrorism, but, as described throughout this chapter, that appears to be the line of argumentation undertaken. For discussions of the arguments about the "new" nature of the risk exposed or created by the 9/11 attacks, see e.g. The 9/11 Commission, "The Foundation of the New Terrorism," in *The 9/11 Commission Report* at 47-70, online: 9/11 Commission <http://www.911commission.gov/report/911Report.pdf> [9/11 Commission Report]; Davis Brown, "Use of Force Against Terrorism After September 11: State Responsibility, Self-Defense and Other Responses," (2003-2004) 11 Cardozo J. Int'l. & Comp. L. 1 (beginning with the statement that the terrorist attack on 9/11 was "unprecedented in its scope"). The phrasing in the chapter title is inspired from a number of sources, including the Statement of Ambassador Valeriy Kuchinsky, Ukrainian Representative to the United Nations, *Transcript of the 4370th Meeting of the Security Council*, at 3 U.N. Doc. S/PV.4370 (Sep. 12, 2001)); see also Paul Gilbert, *New Terror, New Wars* (Washington, DC: Georgetown University Press, 2003).

liberal democracies. Such a statement is presented at the outset of each of the remaining chapters in this thesis, as the turn of the kaleidoscope is undertaken by examining some of the more dominant discourse used in the days, months, and now years since 9/11.

As explained in the Introduction, the particular statements chosen across Chapters 2 through 4 vary in discursive form, allowing for a different type of analysis of the discourse in each chapter, or a differing perspective obtained from turning the discursive kaleidoscope. The statement identified in this chapter is categorized as a hasty inductive generalization, drawing on some of the commonly identified fallacies in argumentation theory, because of a quick assumption relating to 9/11 and its exposure of a new threat that was articulated almost immediately after the attacks, and it was presumptively linked to a second assumption that this "new" threat required "new" detention regimes.[211] The discursive form of the statement assessed herein is distinct from those considered in Chapters 3 and 4, because it was a statement that was often explicitly made by those seeking to justify altered detention scenarios, or at least, if the entire statement was not made, the portions were present in the discourse, as explained in the following section. Even where the two components were not always explicitly connected in the discourse, it was strongly indicated that they were connected in practice. Thus, this chapter deconstructs a presumption that was actually publicly presented.

It is not at all clear that this statement can be supported as a presumption, classified by Perelman and Olbrechts-Tyteca as one of the possibilities for a premise based on reality.[212] Rather, with the horrific images from the 9/11 attacks fresh in the minds of millions of people, it is possible that this statement was, at least initially, a premise based on what is

[211] See *ibid,* Govier, *A Practical Study of Argument.*
[212] See *The New Rhetoric*, *supra* note 9, at 102.

preferable, that it had an intuitive appeal that had more to do with the values of those involved than with more objective logical properties.

This scenario gave rise to the constant spectre presented of a future threat as undermining the validity of the criminal-justice system in terrorism detentions. In some cases, it appears as if the fractured narrative surrounding detention practices caused an underlying instability in some of the procedural structures long identified as mandatory in certain national systems of justice. Representatives of several national governments, as well as international organizations such as the United Nations, employed discourse starting immediately after the attacks suggesting that the world had changed, that the attacks themselves were unprecedented, and that they suggested a catastrophic shift in the national security landscape.[213] This led to a number of specific reactions, and to several high-profile shifts in traditional criminal-justice procedural standards. Implicit in the stated presumption that the attacks were unprecedented was the idea that the only way to address this unprecedented event was to avoid the pre-existing criminal-justice system, and to build a new detention regime adequate to address this unprecedented type of risk. It is these ideas that are assessed together, as one depends on the other. This Chapter will focus primarily on the presumption giving rise to the additional presumption that the criminal-justice system is inadequate to address the threat of terrorism, and that some form of detention structure, outside of the traditional criminal-justice system, is required because of the particular nature of the threat revealed on 9/11 and thereafter.

The quotation presented before the first page of this Chapter is from the second of two decisions of the Supreme Court of Canada (SCC) relating to Omar Khadr, a well-known Canadian who has been held at Guantanamo Bay since 2002, having first been detained there when he was 16 years

[213] See *supra* note 210 and sources therein.

old.[214] The fact that there have been two Canadian Supreme Court decisions relating to Khadr, who is being held by the U.S. and not by Canada illustrates the rather tangled and exceptional nature of some of these cases. That quote, however, illustrates, whether intentionally or not, some of the confusing nature of the discourse in this area. The SCC repeatedly referred to the purpose of the interrogation, whether in Khadr's criminal case or for intelligence.[215] Khadr, however, was not facing a criminal court in the U.S., but, rather, was facing a proceeding before a Guantanamo Bay Military Commission, an entity created in the wake of the 9/11 attacks and not part of the U.S. criminal-justice system. The SCC applied standards of criminal justice, which is another example of the fracturing of the narrative, as the Canadian *Charter* protections were applied as if Khadr was facing a criminal trial, even though detainees before the Military Commissions are explicitly excluded from the U.S. criminal-justice system, supposedly based on their status as "unlawful enemy combatants."[216] The Military Commissions at Guantanamo Bay represent one of the most extreme of the extraordinary detention structures created after 9/11. The mingling of this purported military system with the criminal-justice system is difficult to avoid, however, given the nature of the charges presented there.

Moreover, this type of mingling is evidenced by the *habeas corpus* hearings before U.S. federal courts, which resulted from the U.S. Supreme Court's decision in *Boumediene v Bush.*[217] This particular form of fracturing, including the emergence of what appears to be a hybrid military/criminal paradigm, will be discussed in much more detail in Chapter 4, below, but is

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[214] See *Khadr II*, *supra* note 209 (in which the SCC found that Canadian officials had violated Khadr's Section 7 *Charter* rights in the handling of interrogations of the teenaged Khadr at Guantanamo Bay, but declined to order the Executive to seek Khadr's repatriation due to Crown Prerogative relating to issues of international relations); see also *Canada (Justice) v Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28 (ordering Canadian officials to turn over the fruits of an interrogation of Khadr, undertaken at Guantanamo Bay)[*Khadr I*].
[215] *Khadr II*, *ibid* at paras. 24-25.
[216] See generally *ibid*; *Khadr I*, *supra* note 214.
[217] *Boumediene, supra* note 12; see also Chapter 4, below.

mentioned here to demonstrate the sort of confusion that could arise from the sudden splintering away from the criminal-justice system, where terrorism cases had traditionally been heard. Even a national Supreme Court, attempting to characterize the proceeding for the purpose of ruling on a claim of violation of constitutional rights, apparently found the discourse in this area difficult to decipher.[218]

Rumsfeld's comment about "unknown unknown," contained in the Introduction, while giving rise to some parody, also contains an element of truth.[219] Particularly as the 9/11 attacks were happening, and shortly thereafter, there was considerable confusion as to who was responsible, the extent of the plans for attack, and how to respond. This confusion was understandable, given the sudden nature of the attacks in the middle of a metropolitan area that had never seen anything like it, and given the obvious intention of the hijackers to carry out the attacks in a surprise manner. Thus, it is entirely possible, analogizing in some ways to the scenario giving rise to an emergency response, discussed later in this chapter, that some of the practices critiqued herein might have been more readily justifiable in those early days, when governments did not know the full nature of the threat. The justification, if it can be found, in that scenario, would lie, not in whether the attacks were unprecedented, or new, but in the unknown nature of the threat, particularly at the outset. Again, this argument analogizes to that presented through emergency responses, and, as time passed, and considerable information became known to various governments about Al Qaeda, this

[218] Evidence of that apparent confusion can be found in both of the SCC's decisions relating to Khadr. In the first decision, in 2008, the SCC characterizes the U.S. Supreme Court as having found the military commissions to be illegal, and this was part of its rationale for its ultimate ruling. See *Khadr* I, *supra* note 214 at paras 21-26; see also *Khadr II*, *supra* note 209 at paras. 24-25. If one compares the decisions from the U.S. Supreme Court with the rulings relating to Khadr, it appears that the SCC is expanding what the U.S. Supreme Court actually said. In invalidating some of the processes of the Military Commission, the U.S. Supreme Court did not, in fact, declare that the Military Commissions themselves were illegal. See *ibid, Khadr I* at paras. 21-26 and U.S. Supreme Court cases cited therein.
[219] Rumsfeld Remarks, *supra* note 97.

factor may have lessened as a potential justification, but its existence is acknowledged.

The approach in this chapter, however, is to examine a different underlying presumption, which appears in many ways to have been a foundational factor in changes that became permanent in some ways. When addressing this topic, however, it is additionally noteworthy to look at the workings of these parallel paradigms in the years since 9/11, not just the early structures, as compared to the criminal-justice system. While some cases fell outside of the criminal-justice system, the vast majority actually continue to be handled within that system.[220] Indeed, most national jurisdictions expanded their criminal laws relating to terrorism, and certain countries, most particularly the U.S., had significant, success in completing criminal prosecution of these cases within traditional criminal-justice paradigms.[221]

By contrast, six cases have been brought to completion before the U.S. Military Commissions, and many of those, such as that of Omar Khadr, referenced above, are plagued by claims of a lack of legitimacy in the mechanism of prosecution.[222] Others at Guantanamo Bay, some already

[220] See Zabel & Benjamin I, *supra* note 70.
[221] See *ibid.* Various deconstructive tools could be used on the proceedings undertaken within the criminal-justice paradigm after 9/11 as well, but such an analysis is outside of the scope of this study.
[222] See e.g. Audrey Macklin, "Comment on Canada (Prime Minister) v Khadr (2010)" (2010), 51 S.C.L.R. (2d); see also Audrey Macklin, "The Government Has Not Kept Its Word in the Omar Khadr Case" (17 Jul 2012), online: The Star <http://www.thestar.com/opinion/editorialopinion/article/1227330--the-government-has-not-kept-its-word-in-the-omar-khadr-case > (writing "[a]fter eight years of brutal captivity that began at age 15, and facing certain conviction before a cheap facsimile of a real court, Omar entered into a plea agreement with the United States. The agreement required Omar to confess to the charges against him, and accept an additional eight-year sentence (on top of the eight years of pre-trial confinement)."); see also some of my commentary on the Khadr case, Maureen T. Duffy, "Between a Rock and a Hard Place: An Unjust Ending to an Unjust Process for Omar Khadr" (2010), online: ABlawg <http://ablawg.ca/2010/10/27/between-a-rock-and-a-hard-place-an-unjust-ending-to-an-unjust-process-for-omar-khadr/> (where I wrote, in response to the plea agreement, and specifically critiquing a U.S. press release suggesting fairness in its handling of Khadr's case: "The U.S. Military Commission proceeding against Khadr cannot be viewed in … a factual or legal vacuum, and legitimacy is, at best, an elusive ideal for the U.S. Government in this case.").

held for approximately ten years, may never face even a Military Commission, much less a criminal court, and the U.S. has hinted that they may just be detained indefinitely.[223]

Immigration-based extraordinary detentions have fared in a similar way. In the UK, the Belmarsh detainees, the subjects of controversy when the UK initially began heavily using its immigration system for detentions, have not been subjected to criminal charges.[224] Similarly, control orders in the UK led to much litigation, but never resulted in an actual criminal prosecution, and that system has also been abandoned.[225] In Australia, only two cases proceeded under their own version of control orders.[226] In Canada, the so-called "Secret Trial Five," who were the focus for much of the security-certificate controversy since 9/11, have had varying case outcomes, with the security certificates against Hasan Almrei and Adil Charkaoui quashed (Charkaoui's being quashed after the government withdrew secret evidence, citing national security concerns), and three others pending, with the Supreme Court of Canada agreeing to hear the case of Mohamed Harkat, including the issue of constitutionality of the special-advocate regime.[227]

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[223] See Barack Obama, "Remarks by the President on National Security: National Archives, Washington, D.C." (21 May 2009), online: The White House Office of the Press Secretary <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>. (commenting "[o]ur goal is not to avoid a legitimate legal framework. In our constitutional system, prolonged detention should not be the decision of any one man. If and when we determine that the United States must hold individuals to keep them from carrying out an act of war, we will do so within a system that involves judicial and congressional oversight.") [Obama National Security Speech].

[224] Anderson Control Order Report, *supra* note 86.

[225] *Ibid.*

[226] Bronwen Jaggers, Law and Bills Digests Section, Parliament of Australia, *Anti-terrorism Control Orders in Australia and the United Kingdom: a Comparison* (29 April 2008), online: Parliament of Australia < http://www.aph.gov.au/binaries/library/pubs/rp/2007-08/08rp28.pdf> at 6-10 [Jaggers, *Control Order Report*](discussing the cases of Jack Thomas, sometimes referred to in the media as "Jihad Jack," whose case is discussed further in this Chapter, below, and David Hicks, who was returned to Australia from Guantanamo Bay after pleading guilty before the Military Commission for providing material support for terrorism, and was subject for a short time to a control order after serving the remainder of his sentence in Australia).

[227] This nickname has been used by the popular media to describe the five men at the center of the post-9/11 security certificate debate. A documentary is in production, called "The Secret Trial Five" about the men. See "The Secret Trial Five," production pending,

Returning to the U.S., of approximately 5,000 special-interest detainees held under various immigration programs after 9/11, not one case led to a successful criminal conviction.[228]

If the ultimate objective of these "new" detention paradigms, outside of the criminal-justice system, was to detain terrorists and stop this "new" threat, one questions whether they have been successful, or whether a presumptively valid criminal-justice model would have been a more strategic approach. Implicit in the point of departure that began this chapter is the notion of necessity. Necessity was also cited by the Priest in explaining the Doorkeeper's actions in Kafka's Parable.[229] In each case, it appears that a mere assertion of necessity is not enough to support fracturing from established principles of criminal justice, and that the extraordinary detention structures created considerable controversy and litigation for a relatively low number of detainees, at least in relation to the numbers who went through the criminal-justice system in the same time period. It appears, then, that outcomes do not support the notion that the 9/11 attacks exposed a threat that required the creation of extraordinary detention structures to combat terrorism.

Of course, the objective may not have been to secure criminal convictions, but, alternatively, to hold people in a preventive manner, not

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information online: <http://secrettrial5.com/issue#the_secret_trial_5>. This designation is, in fact, a misnomer, for a number of reasons. First, there have been more than five people detained on security certificates, as this is an instrument that has been in existence since before 9/11. See *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *Ahani v Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 72; 2002 SCC 2. The number refers to five of those subject to a security certificate, who appear to have been caught in the wave of response to 9/11. Second, there is not, in fact, an issue of a "secret trial" in those cases. The proceedings themselves are not secret, and the issue that was controversial was the use of secret evidence, not secret proceedings. Third, there have been no "trials" *per se* as a trial generally suggests a full adjudication on the merits. Rather, under the security certificate regime, the reasonableness of the security certificates are periodically reviewed, so, while there are hearings, the use of the word "trial" suggests something akin to a criminal proceeding, and that is somewhat misleading. See generally *Charkaoui I*, *supra* note 12; see also *Minister of Citizenship and Immigration, et al v Mohamed Harkat, et al*, (Federal Court)(Civil)(By Leave)(34884).

[228] See David Cole, *Enemy Aliens* (New York: New Press, 2005) [Cole, *Enemy Aliens*].

[229] Kafka, *The Trial*, *supra* note 76.

because of past actions, but because of a fear of future actions, which raises different issues. Moreover, in the U.S., it has been suggested that one concern with finally bringing many of the Guantanamo detainees before a criminal court would be the admissibility of evidence obtained through "enhanced interrogation."[230] The U.S. Government has, in fact, asserted intelligence gathering as the true objective of detentions such as those at Guantanamo Bay. As referenced in the Introduction, however, a report is due to be released shortly, concluding that so-called "enhanced interrogation" was not, in fact, effective in preventing terrorist attacks.[231] If the "new" extraordinary detention regimes were deemed necessary to prevent the "new" threat of terrorism, there is no published evidence to suggest that they accomplished this end, at least not in a systemic matter that would correspond with the systemic nature of some of these altered practices.

Perelman and Olbrechts-Tyteca's methodology involved examining the structure of successful argumentation and breaking down the component parts.[232] A comparison between outcomes in the criminal-justice system relating to terrorism and that in extraordinary detention structures does not, on its face, suggest that the argument being assessed herein was, in fact, a successful one. Still, questions as to the validity of the underlying arguments can also derive from looking at the component parts.

A.2. Forward-Looking Threat-Based Discourse

The 9/11 attacks themselves were the trigger for much of this asserted need to change detention structures, but the type of discourse used to justify many governmental responses had much more of a forward-looking nature, rather than a having a focus on the attacks themselves – supporting the idea

[230] See e.g., Mark A. Drumbl, "Guantanamo, *Rasul* and the Twilight of Law" (2004-2005) 53 Drake L. Rev. 897.
[231] See *Usborne: Enhanced Interrogation Ineffective*, *supra* note 36.
[232] Perelman & Olbrechts-Tyteca*, The New Rhetoric*, *supra* note 9 at 95.

that the point of departure was not punishment for the attacks, but the asserted need to address a new threat that they purportedly exposed. This type of language as been described by some linguists as "anticipatory discourses," because the language is based on the potential for a future threat, rather than on a past incident.[233] It was not necessarily the 9/11 attacks themselves that were used to justify shifts, but a sense that greater threats loomed on the horizon, and that extraordinary actions were necessary to thwart these potential future threats. The link between altered detention practices and this new threat was often established through representations by national governments that they had the ability to stop future horrors, if they were only given the means. Patricia Dunmire describes this as "agentive" discourse, because it suggests that "social actors are seen as highly effective agents who can bring about effects on future events."[234] Dunmire notes, for example, that, in the U.S., the "agentive" power of two entities – the United States and its enemies – is laced throughout post-9/11 governmental discourse.[235] She examines this issue in relation to the way the U.S. Government justified the War in Iraq. She has written about examples of this type of discourse in that context, including language such as that relating to "[s]hadowy networks of individuals" that can easily cause suffering.[236] An example of the use of future dangers to justify pre-emptive war includes:

> Given the goals of rogue states and terrorists, the U.S. can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons do not permit that option. We cannot let our enemies strike first.[237]

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[233] Dunmire: Emerging Threats, *supra* note 139 at 19.
[234] *Ibid.*
[235] *Ibid.* This binary – the sort of "us" versus "them" language often employed in the wake of 9/11, will be deconstructed in Chapter 3, below.
[236] *Ibid.*
[237] *Ibid* at 25.

Dunmire's study relates specifically to the discourse used by the U.S. Government to justify the invasion of Iraq. It is apparent, however, that such forward-looking, threat-based discourse was the underpinning for a range of exceptional measures, certainly including extraordinary detention scenarios.

A.3. Discourse Leading to Perceptible Shifts

The discourse of future threat was linked with an asserted need for urgent and extraordinary action, including changes in detention and interrogation practices. The form of these new regimes varied from place to place, and sometimes varied based primarily on characteristics of the detainees. An over-arching theme, though, was that the long-standing principles of criminal process could be set aside when the specter of terrorism was attached to a given case, because of an assertion of necessity, and based on the obvious assumption that the pre-existing detention structures were not adequate.

While there may well have been individual or finite circumstances under which there was a valid necessity for extraordinary actions, it cannot simply be assumed, based on generalized statements, that the attacks created a need to build larger new detention structures, or to assume that those already in existence were entirely inadequate. If, indeed, it could be established that the existing structures were not adequate in a particular instance – and this would have to be established rather than simply stated -- the logical next step would seem to be to adapt those structures somehow, rather than to simply set them aside entirely and to establish a parallel system. To the extent that a parallel system might be deemed necessary, it logically should have been seen as a last resort, instead of the presumptive first resort it often was. Aside from the problem underlying the immediate presumption away from the criminal-justice system in many of these cases, the inertia then began to favour revised practices, and it appears to often have become incumbent on those wishing to rely on the criminal-justice

system to justify doing so. This inertia appears to have shifted away from a presumption in favour of such systems in some cases, and in favour of the parallel paradigm, as the conversation about the "Underwear Bomber," laid out in the Introduction to this thesis, illustrates. It is not claimed that entire national systems were set aside, but that such systems were often presumptively set aside in relation to certain people to whom even a suspicion of terrorism affiliation was attached.

Long-standing criminal-justice standards were shifted by this presumption, which tended to serve as a widely accepted premise for a range of alterations in various parts of the world. Predictability, uniformity, and presumptions favouring those accused of crimes appeared to destabilize, and in many cases were replaced by structures that lacked those characteristics. In the most extreme instances, such as in the case of "military commissions" created at Guantanamo Bay, these structures were hastily implemented, with procedural safeguards so at odds with traditional criminal-justice standards that they have had to be repeatedly revised over the ensuing years, as a result of ongoing challenges before the U.S. Supreme Court and responsive legislation, thus creating an ongoing and additional pattern of unpredictability for those subject to these fora.[238] As

[238] See The White House*, President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* (13 November 2001), online: The White House <http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html> (establishing Military Commissions at Guantanamo Bay) [Military Order]; *Rasul v Bush*, 542 US 466 (2004)(finding that Guantanamo Bay detainees had standing to seek *habeas corpus* review in U.S. courts)[*Rasul*]; *Detainee Treatment Act of 2005*, H.R. 2863, Title X (establishing procedures for Combatant Status Review Tribunals, and limiting appeals from these tribunals, and limiting the ability of Guantanamo Bay detainees to seek *habeas corpus* or any review in U.S. courts, in response to the *Rasul* ruling); *Hamdan v Rumsfeld*, 548 U.S. 557 (2006)(finding that the Military Commissions could not proceed because they lacked proper procedure and violated the Uniform Code of Military Justice and the Geneva Conventions, specifically Common Article 3) [*Hamdan*]; *Military Commissions Act 2006*, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), enacting Chapter 47A of title 10 of the United States Code (and amending section 2241 of title 28)(responding to *Hamdan* and establishing revised procedures for the Military Commissions) [MCA 2006]; *Boumediene*, *supra* note 12 (holding that the detainees at Guantanamo Bay had a right to *habeas corpus* hearings under the U.S. Constitution); *Military Commissions Act 2009*, Title XVIII of the National Defense Authorization Act for Fiscal Year 2010 (Pub.L. 111-84, H.R. 2647, 123 Stat. 2190, enacted October 28, 2009)(clarifying procedures for the Military

some men continue to remain in custody for years after 9/11, with no prospect of any full judicial hearing relating to their detentions, many of the 9/11 detainees seem to share characteristics with Kafka's man from the country, who dies waiting for his case to be heard and who never manages to successfully navigate the arbitrary and incomprehensible rules to find justice.[239]

A.4. Changes Radiating Out from the U.S.

As explained earlier in this thesis, the starting point for this discussion will be changes implemented in the U.S. A U.S.-centric approach is not intended to suggest that U.S. developments are more important, or otherwise of greater value, but, rather, serves as a point of reference in discussing post-9/11 shifts in detention paradigms. To assess the underlying presumptions or premises leading to more current shifts, it is necessary to trace some of the origins of these presumptions. There is some debate over the extent of U.S. influence after 9/11. Professor Kent Roach, for instance, has argued against the notion that the U.S. led the charge to change detention practices in specific response to 9/11. He has argued, instead, that it was the UK that had the most obvious influence on other national jurisdictions in terms of their detention and interrogation structures after 9/11.[240] This is a departure from the more common notion that it was the U.S. that heavily influenced international developments in its self-proclaimed "War on Terror."

Commissions and revising some of the more controversial aspects of the 2006 legislation) [MCA 2009].

[239] This thesis uses the masculine to refer to the detainees kept after 9/11 under revised process, because research has not revealed any women held under these revised circumstances. In the U.S., shortly after the attacks, immigration directives designating certain people as "special interest" detainees specifically stated that those to be given this treatment were males of a certain age and national origin. The gender bias is less explicit in other contexts, but the impact of these practices has a disparate impact on males. This gender bias is discussed in more detail in Chapter 3, below.

[240] Roach, *The 9/11 Effect*, *supra* note 82 at 13.

Arguably there is truth in both assertions. The U.S. had, by far, the most significant influence on other national jurisdictions in terms of imposing a presumption that the existing criminal-justice paradigms did not work. Notions such as that of "the Other" as terrorist quickly radiated out of the U.S., where some statistics suggest that approximately 5,000 "special interest" detainees were subjected to secret, revised proceedings under the immigration system.[241] This happened, in the U.S., with little protest, and without the significant litigation that led to cases like the landmark *Charkaoui I* case in Canada, or the *Belmarsh Detainees* case in the UK, where governments also initially relied on their immigration systems to address terrorism. In ruling on these issues, national high courts in Canada and the UK, for instance, seemed more inclined to look to each other than to jurisprudence in the U.S., so in terms of the specifics, it appears that the influence may well have emanated out of the UK.[242]

This presupposes, of course, that national jurisdictions did, indeed, influence each other, or that it matters if they did. Given the timing and similarities of the responses, it seems reasonable, and even unavoidable, to assume that some jurisdictions were influenced by others.[243]

While maintaining that it was, indeed, the U.S. that triggered a response in many other national jurisdictions, both initially and in an ongoing manner, after the attacks, it must be acknowledged that there is considerable

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[241] Cole, *Enemy Aliens*, *supra* note 228 (this statistic was compiled by Professor Cole in relation to a combination of immigration-based programs after 9/11 that led to detentions related to terrorism of "special-interest" detainees). Of course, there is a long history in many national jurisdictions of demonizing immigrants or certain groups in times of perceived crisis. While that idea is not new, this particular manifestation took its own form after 9/11, and initiatives directed to non-citizens of certain national origins became prominent. See Chapter 3, below.

[242] See e.g. *Charkaoui I*, *supra* note 12 (the SCC expressly referred to the UK system of using special advocates in anti-terrorism cases in which secrecy was being asserted as necessary.).

[243] See Roach, *The 9/11 Effect*, *supra* note 82 (discussing the manner in which the UK influenced a number of national jurisdictions after 9/11); see also Victor Ramraj, Michael Hor, Kent Roach, and George Williams, eds., *Global Anti-Terrorism Law and Policy*, 2nd ed (Cambridge: Cambridge University Press, 2012)(describing anti-terrorism responses in a number of national jurisdictions)[*Ramraj: Global Anti-Terrorism Law and Policy*].

merit in Roach's point that the *form* of the responses in a number of national jurisdictions was often more heavily influenced by actions taken in the UK than by those taken in the U.S. Why the UK would have been so influential can be considered on a number of levels, such as the fact that Canada and Australia, for instance, shared a common heritage with the UK in terms of their legal systems, as well as the possibility that the UK was simply viewed as having a more sophisticated understanding of how to address the threat of terrorism, based on its long experience dealing with the Irish Republican Army.[244] In some cases, it also appears that an initial willingness to follow the U.S. led some national leaders to problems back home, where such initiatives were not met with the enthusiasm they often encountered among the populace in the U.S.[245] Still, however, one cannot deny the influence of the U.S. on the UK, particularly in the post-9/11 era, even if there was deviation in many respects in the actual form of the responses.

It is obvious that the very existence of post-9/11 changes were a direct result of U.S. influence around the world, and, while some of that related to horror over the attacks themselves, much of this influence was intentionally exerted with discourse such as "you are with us, or you are with the terrorists."[246] It is tempting to separate out the U.S. response from those in places like the UK, Canada, Australia, or elsewhere, as there are some structural differences in the U.S. approach, and the particular elements varied in so many ways. There seems to be, at least in terms of the origins of the responses, however, significant integration that includes the U.S., so it is

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[244] See generally Roach, *The 9/11 Effect* and *Ramraj: Global Anti-Terrorism Law and Policy*, *ibid*. Obviously the U.S. also shares much of its legal system with the UK because of its origins, but the history of the break from the UK is quite different, so its legal system has evolved in a more idiosyncratic way.

[245] In 2003, for instance, after Canada had joined the U.S. in its invasion of Afghanistan, and the U.S. was indicating it was about to invade Iraq, street protests took place in Canada. Ultimately, Canada did not join the U.S. in its invasion of Iraq. This is based on the author's personal recollection from Montreal at that time.

[246] Bush, 9/20 Speech, *supra* note 28.

included as a cohesive part of this study with the other countries considered, with exceptions made express where they occur.

A.4.1. Trends for Detentions Inside National Borders Versus Outside National Borders

The U.S. influence is most obvious where those responses looked outward from national borders. That the UK, Canada, and Australia, as examples, joined the U.S. in its invasion of Afghanistan, and the UK and Australia as well in the U.S. invasion of Iraq, provides strong evidence of the extent of U.S. influence on some national responses. In dealing with detainees captured in those confrontations, as well, it appears that the U.S. was heavily influential, as can be seen by the cooperation of these governments, on varying levels, regarding detention of their citizens at the U.S. prison in Guantanamo Bay. Arguably, while Australia and the UK ultimately secured the release of their nationals from Guantanamo Bay, Canada in particular demonstrated a willingness to defer to the U.S. in its detention and treatment of Canadian citizen Omar Khadr.[247] The willingness of Canada's executive to defer to the U.S. entirely on this matter led to a highly unusual showdown with Canada's courts, resulting in the two rulings of the Supreme Court of Canada, rebuking the Canadian Government for its actions, but falling short of ordering it to act on Khadr's behalf.[248] At the same

[247] See C.R.G. Murray, "The Ripple Effect: Guantánamo Bay in the United Kingdom's Courts" (February 2, 2010) Pace International Law Review (OC)15-44 (discussing Khadr briefly, as well as the status of other western citizens, including David Hicks, of Australia and Moazzam Begg of the UK).

[248] One trend that emerged after 9/11 was a tendency for conflict to arise between national high courts and national executives on matters relating to terrorism detentions. The Khadr case, referenced earlier, involved an especially obvious tension between the Supreme Court of Canada and the Executive Branch in Canada, rather unusually, as Khadr is being detained by the U.S. and not by Canada. See e.g. *Khadr II*, *supra* note 209. This second ruling especially involved strong language by the Supreme Court of Canada, but a recommendation, rather than an order, in terms of a remedy, as the Court did not want to intrude on executive authority. The Canadian Government has been criticized for not pursuing that recommendation, and, as of the writing of this thesis, Khadr remains at Guantanamo Bay. See *Khadr v Canada (Prime Minister)*, 2010 FC 715, [2010] 4 F.C.R. 36 (sharply criticizing the Canadian Government for not actively pursuing repatriation of Khadr

time, the U.S. Supreme Court declined to review Khadr's case, even though he is being held by the U.S. Government.[249]

When it came to detainees within their own borders, however, it appears that many jurisdictions were less inclined to be influenced by the U.S. in terms of form or extent of the changes and that, there, as Roach posits, the influence of the UK was much more obvious.[250] In relation to detentions and interrogations of those captured within national borders and accused of terrorism, Roach persuasively asserts that "British antiterrorism law has had a much greater effect on other countries than American law, much of which is dauntingly complex and idiosyncratic."[251] Similarities can be seen through such examples as the use of control orders in Australia, implemented in a different manner, but nonetheless comparable to those implemented in the UK. Canada's use of immigration detentions initially mirrored those undertaken in the UK, although the UK abandoned this mechanism for a system of control orders. Canada declined to follow the UK's example in this latter respect, but did initiate a system of special advocates for cases involving secret charges or secret evidence, and in its first *Charkaoui* ruling, the Supreme Court of Canada said it was recommending this system based on the UK model.[252]

It does not necessarily follow, however, that all of this happened because U.S. law is necessarily so complex, or that the complexity is a factor in why other jurisdictions did not mirror U.S. initiatives even when they did respond to the attacks. Given ongoing disputes over the very nature of things like torture, the laws of war, and U.S. constitutional provisions relating to procedural fairness, one might argue that complexity is not inadvertent, and

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after the SCC Khadr II ruling. This ruling was stayed and then essentially rendered moot when Khadr pled guilty before the Military Commission).

[249] The U.S. has declined to intervene more than once in Khadr's case, both in relation to the Military Commission and to a civil suit filed by his family on his behalf. The most recent denial was in 2011. See *Khadr v Obama*, No. 10-751, *certiorari denied* (2011).

[250] See Roach, *The 9/11 Effect*, *supra* note 82.

[251] Roach, *The 9/11 Effect*, *supra* note 82 at 13.

[252] See *Charkaoui I*, *supra* note 12; Jaggers, *Control Order Report*, *supra* note 226.

that it is, in fact, much more difficult to refute arguments that seem overly complex. Broken into their constituent components, however, many of these legal regimes might arguably be, not so much complex, as simply convoluted, representing in some respect a questionable mingling of different areas of law. In using terminology from various substantive disciplines, often completely out of its original context, and choosing to adopt some elements of substantive law while discarding others, the U.S. may have given an aura of complexity to something that may not have warranted it.[253] It is unquestionable that U.S. law in this area appears considerably more complex than comparable paradigms in most other countries, but that very complexity could be subject to critique, as a question arises as to whether an appearance of complexity could dissuade people from critiquing the underlying actions.

A.5. Emergency Initiatives

The U.S. considered Al Qaeda and the Taliban to be threats to national security even before the 9/11 attacks, and, in 1999, then-President Bill Clinton declared a national emergency as a result of this perceived threat.[254] The emergency-related discourse, not surprisingly, and not unreasonably in the early days, accelerated after 9/11. Some of the resulting extraordinary detention scenarios do not appear to have been intended, initially, as systematic, permanent changes.[255] Instead, they began as purported emergency measures to respond to a catastrophic attack. In the U.S., then-President George W. Bush declared a formal state of emergency a few days after the attacks, and this state of emergency has been renewed

[253] This concept is developed at greater length in Chapter 4, below.
[254] See *Executive Order 13129: Blocking Property and Prohibiting Transactions With the Taliban* (July 4, 1999), online: Federation of American Scientists <http://www.fas.org/irp/offdocs/eo/eo-13129.htm>.
[255] Cf David Dyzenhaus, "The Permanence of the Temporary: Can Emergency Powers be Normalized?" in Ronald Joel Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press 2001) at 21.

regularly.[256] Some of the critique of treating many of the post-9/11 initiatives as emergencies is the idea of an open-ended emergency – a scenario that has been employed elsewhere, such as in Israel in response to the threat of terrorism.[257] In spite of this declaration of emergency, and a great deal of "emergency" oriented discourse, few of the initiatives relating to extraordinary detention of terrorists are couched in terms of emergency, temporary provisions.[258]

Emergency language, dominant in the early days after 9/11, faded as time passed. Even when such discourse prevailed, there was considerable disagreement expressed as to whether there was, in fact, a true emergency situation relating to terrorism in places like the U.S. or Canada. In 2002, David Dyzenhaus and Roger Thwaites noted:

> Western legal orders are not living in a time of emergency or terror, despite the best efforts of our leaders to tell us otherwise. Additionally, the idea that the way to deal with the challenges to

[256] See *Declaration of National Emergency by Reason of Certain Terrorist Attacks*, 50 U.S.C. 34 § 1621 (14 Sep. 2001)(renewed periodically). The initial declaration, as it appears originally and as renewed, indicates that the President would be invoking a number of federal statutes that grant the President special powers during times of war or national emergency. In addition, the United States Congress passed two authorizations, the first being the *Authorization for Use of Military Force*, Publ. L. 107 – 40 (18 Sep. 2001) (authorizing the use of military force against those responsible for the 9/11 attacks) and the second being the *Authorization for Use of Military Force Against Iraq Resolution of 2002*, Pub.L. 107-243, 116 Stat. 1498(16 Oct. 2002), both granting the President extraordinary military authority in direct response to the attacks. Referring to the state of emergency he declared in September 2001, then-U.S. President George W. Bush then issued the military order, which created the initial military commissions at Guantanamo Bay Detention Centre. See Military Order, *supra* note 238.

[257] For a discussion of how common-law countries can address emergencies, such as the threat of terrorism, see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006); for further discussion of the concept of emergencies as they relate to terrorism see Victor Ramraj, ed., *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press: Cambridge 2008) [Ramraj, *Emergencies*].

[258] See Kent Roach, "Ordinary laws for emergencies and democratic derogations from rights" in *ibid, Ramraj* at 229 (noting "Although I am sceptical about whether the post-9/11 debate is really about emergencies, I am not sceptical about the fact that modern society will confront genuine emergencies.").

> the West sharpened by the events of 9/11 is by waging a 'war on terror' was from the beginning and is, evermore, preposterous.[259]

In addition to the formal declaration of emergency, the U.S. Congress passed two authorizations for the use of military force, and President Bush issued a military order, which established the military commission system at Guantanamo Bay. The declaration of emergency, the initial authorization for the use of military force against those responsible for the 9/11 attacks, and the military order establishing the military commissions, including details on things like the initial rules of evidence for the commissions, were all issued as of November 2001, two months after the attacks.[260]

At the same time, the "U.S.A. Patriot Act" was passed by both Houses in the U.S. Congress and signed into law by President Bush in late October 2001, approximately six weeks after the attacks, in spite of being a lengthy and complex document, containing amendments to a large number of federal statutes.[261] Among other things, the Patriot Act, which contained a number of temporary, sunset provisions, allowed for special detention provisions for immigrants who were of interest to the U.S. Government.[262]

Rhetoric by those in positions of power in the U.S. exuded a sense of extreme crisis, which certainly could be supported by the horrific images from the sites of the attacks and from initial uncertainty as to who was responsible for the attacks. When the U.S. Government moved quickly to curtail certain constitutional protections for those accused of terrorism, criticism sprang up,

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[259] David Dyzenhaus & Roger Thwaites, "Legality and Emergency – The Judiciary in a Time of Terror," in Andrew Lynch, Edwina MacDonald, & George Williams, eds., *Law and Liberty in the War on Terror* (New South Wales: The Federation Press, 2002) at 9.
[260] For a more extensive discussion of the circumstances surrounding the signing of the USA Patriot Act, see Maureen T. Duffy, "The U.S. Immigrations in the War on Terror: Impact on the Rule of Law," (unpublished Master's thesis) at 10-12 [Duffy*, Master's Thesis*].
[261] *Ibid*; See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* , Pub. L. No. 107-56, 115 Stat. 272 (2001) (revising various sections of the U.S. Code) [USA Patriot Act].
[262] *Ibid*.

which was addressed in stark terms. The following statement by then-U.S. Attorney General John Ashcroft, is an example of such discourse:

> Some people in our country seem more concerned about respecting the dignity and privacy of criminals and terrorists than they are about having an airport full of people obliterated, or a completely booked hotel blown to bits. Perhaps they think, Let's not get so upset about attacks on our embassies or military bases. Maybe, they surmise, the terrorists have good reason for attacking us. We have no right to be harassing innocent people in our country. For some people, not even the grotesque images that filled our television screens after al Qaeda's blatant attacks on 9/11 seem enough to wake them out of their utopia feel-good world.[263]

Beyond that, however, it is apparent that the shock of such a catastrophic attack in a country previously deemed to be at very low risk for such an attack, coupled with continued threats by representatives of Al Qaeda against a number of other countries, reasonably led those in power in a number of other democracies to consider that they, too, might be at some risk of attack. Obviously, that response was enhanced, and perceived as confirmed by some, by subsequent high-profile attacks, including, for instance, the anthrax scare in the U.S., the "7/7" attacks in London, the attack in Madrid, the attack in Mumbai, and the attack in Bali.[264] Thus, the sense of crisis and the direct response to 9/11 happened in a number of liberal democracies and was, by no means, limited to the U.S.[265]

Some years after the attacks, there was some acknowledgment, even by those in positions of power in the U.S., that a certain haste precluded thoughtful analysis of initial changes in detention standards. For example, in

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[263] John Ashcroft, *Never Again: Securing America and Restoring Justice* (New York: Hachette Book Group USA, 2006) at 259.
[264] See N. Kaldas, "Australia and the Changing Terrorist Threat" (2007) 1:1 Policing: A Journal of Policy and Practice 61 (explaining that the fears raised by the 9/11 attacks were subsequently confirmed by further attacks in London, Madrid, Mumbai, Bali and elsewhere).
[265] See generally Roach, *9/11 Effect*, *supra* note 89.

a speech in May 2009, U.S. President Barack Obama made the following comments about the U.S. response immediately after 9/11:

> Unfortunately, faced with an uncertain threat, our government made a series of hasty decisions. I believe that many of these decisions were motivated by a sincere desire to protect the American people. But I also believe that all too often our government made decisions based on fear rather than foresight; that all too often our government trimmed facts and evidence to fit ideological predispositions. Instead of strategically applying our power and our principles, too often we set those principles aside as luxuries that we could no longer afford. And during this season of fear, too many of us -- Democrats and Republicans, politicians, journalists, and citizens -- fell silent.[266]

It appears, however, that there was no accompanying shift back to the standards that existed before those "hasty decisions" were made. On the contrary, the shifts have evolved into familiar, accepted, and increasingly permanent changes – normalization if put in Foucault's terms. Not only were there significant changes that took place in the early days after 9/11, expounded upon throughout this thesis, but, from one year to the next, the parameters of terrorism detention standards have continued to shift as disputes continue between courts and lawmakers, or even just as lawmakers have reconsidered some of their initial stances. The result has often been an internally inconsistent, arguably arbitrary, system, under which completely different systems of justice might be available to two people accused by the same government of virtually identical conduct. It seems unlikely that this arbitrary nature was originally intended, or that it is consistent with long-standing constitutional notions of fair trial procedure, which were intended to avoid just this sort of arbitrary access to justice. If, indeed, the intent of the changes was to address the underlying, clearly serious, allegations regarding

[266] Obama National Security Speech, *supra* note 223.

conduct, it seems rational that the systems employed to do so would be consistent from one person to the next.

Many of the initiatives that were put in place, however "hasty" those initial decisions may have been, have gained a certain permanence with the passage of time, in some ways perhaps fuelled simply by the fact that they are now familiar. The reactions to some of the actions taken by democratic governments after 9/11 are somewhat more muted years later, when the extremes – such as torture – still elicit strong responses, but the more insidious changes, such as an apparent shift from the presumption of innocence in some cases, have gained a certain familiarity and are thus questioned much less often and much less strenuously than in the early days after 9/11. It is not entirely clear if that reduced questioning results from the "slow creep of complacency," which has made the prospect of fully untangling the complex web of initiatives undertaken since 9/11 simply too difficult.[267] As a pragmatic matter, it is simply easier to begin an argument with the existing, familiar set of standards than it is to go back and untangle the various layers of the initiatives undertaken since 9/11. Moreover, the niche of "terrorism" has created in the minds of many a seemingly permanent state of exception, and there is little analysis of larger questions, such as what those alterations mean for detention standards in all other criminal cases, or what they might mean for the viability of over-arching constitutional norms and/or democratic standards. Some argue that, in the wake of 9/11, many traditionally liberal political democracies shifted their structures more towards that notion that has heretofore been associated with more authoritarian regimes, at least in relation to practices surrounding the

[267] Quoting Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action, [2009] UKHL 28, at para. 84 (Lord Hope of Craigshead).

detention of terrorism suspects.[268] One author characterizes the shift as follows:

> the soft and facilitating state was replaced by a strong and intrusive state, and the categorical gap between rights-based democracies and authoritarian polities narrowed worryingly under a declared open-ended state of emergency and the so called 'war on terror'.[269]

The author refers to this as "democracy without moorings."[270] It does appear, with the complex set of standards now allowing for "exceptions" to traditional constitutional values, as if the foundational structure of some previously fundamental changes may have, indeed, become less stable, particularly in relation to pre-existing standards of criminal justice. This shift appears, in many respects, to have been based on threshold presumptions, the first of which is that the attacks of 9/11 were so unprecedented that they exposed the need to develop a new paradigm of detention and interrogation standards where terrorism is concerned.

B. The "Unprecedented" Nature of the 9/11 Attacks

While, as described above, much of the discourse of threat was based on a forward-looking risk that had to be averted, it was still mingled with an invocation of the horrors of the 9/11 attacks, particularly in the early days after the attacks, where they were frequently described as unprecedented.

[268] See e.g. Dora Kostakopoulou, "How to do Things with Security Post 9/11," (2008) 28 Oxford J. Legal Studies 317 at 318 [Kostakopoulou]; Roach, *The 9/11 Effect*, *supra* note 82.
[269] *Ibid, Kostakopoulou*.
[270] *Ibid* at 319.

The sense quickly emerged that these unprecedented attacks called for an unprecedented response.[271]

Assertions that the attacks were unprecedented began immediately after they occurred and may not have been surprising, given the horrific image of terrorists using planes full of civilians as weapons, the high number of casualties, the massive damage to property including buildings with high symbolic value, and the resulting fall-out in terms of trauma, financial implications, and ongoing threats. That the catastrophic attacks on the World Trade Center Towers were witnessed on live television by millions of people added to the already considerable shockwave they created and made the quick acceptance that the attacks were "unprecedented" and required new rules much easier to quickly accept.

The day after the 9/11 attacks, the Ukrainian representative to the U.N. Security Council was already talking about the need for significant changes in response to the attacks, noting:

> The magnitude of yesterday's attacks goes beyond terrorism as we have known it so far … we therefore think that new definitions, terms and strategies have to be developed for the new realities.[272]

Other remarks supported this idea. In a press release announcing the adoption of U.N. Security Resolution 1368, representatives noted that

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[271] See e.g. Benjamin Wittes, *Law and the Long War, the Future of Justice in the Age of Terror* (New York: Penguin Press, 2008)(arguing for a "new kind of Constitution for the War on Terror" in the U.S., suggesting that, while the U.S. detention practices shortly after 9/11 may have failed, the U.S. Government was correct in asserting that terrorism presents an unprecedented threat in terms of nature and scope). But see International Commission on Jurists, Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Assessing Damage, Urging Action* (Geneva 2009)(arguing that U.S. policies, in particular, after 9/11 had to fail because they were *based* on the incorrect premise that the attacks were sufficiently unprecedented as to necessitate deviating from the rule of law long in place); see also Brown, *supra* note 210.

[272] *Brown*, *supra* note 210 (quoting Statement of Ambassador Valeriy Kuchinsky, Ukrainian Representative to the United Nations. Transcript of the 4370th Meeting of the Security Council, at 3 U.N. Doc. S/PV.4370 (Sep. 12, 2001)).

"[m]any agreed that the whole world, and not just one country, had been plunged into an unprecedented time of peril, fear and uncertainty."[273] German Chancellor Gerhard Schröder remarked, the day after the attacks, "[t]oday we are still horror-struck by an unprecedented terrorist attack on the principles that hold our world together," further suggesting that "yesterday's terrorist attack demonstrated once again that security in our world is not divisible. It can only be achieved by standing together more closely for our values and by working together to implement them."[274]

Not all, however, so quickly espoused the view that the attacks were unprecedented in a way that mandated unprecedented responses. Five weeks after the attacks, Jacques Derrida critiqued some of the language that was already arising as accepted. For instance, he critiqued the type of language, admittedly used throughout this thesis, that designated the event simply by a date. This, he said, gave rise to certain inferences:

> When you say "September 11" you are already citing, are you not? You are inviting me to speak here by recalling, as if in quotation marks, a date or a dating that has taken over our public space and our private lives for five weeks now. Something *fait date*, I would say in a French idiom, something marks a date, a date in history; that is always what's most striking, the very impact of what is at least felt, in an apparently immediate way, to be an event that truly marks, that truly makes its mark, a singular and, as they say here, "unprecedented" event. I say "apparently immediate" because this "feeling" is actually less spontaneous than it appears: it is to a large extent conditioned, constituted, if not actually constructed, circulated at any rate through the media by means of a prodigious techno-socio-political machine. "To mark a date in history" presupposes, in any case, that "something" comes or happens for the first and last time, "something" that we do not yet really know how to identify,

[273] See Press Release SC/7143, "Security Council Condemns 'In Strongest Terms" Terrorist Attacks on United States, (2001), online: United Nations <http://www.un.org/News/Press/docs/2001/SC7143.doc.htm/> (paraphrasing remarks of M. Patricia Durrant, Jamaica).

[274] German Chancellor Gerhard Schröder, "Full Solidarity with the United States (September 12, 2001), online: German History Docs <http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3724>.

> determine, recognize, or analyze but that should remain from here on in unforgettable: an ineffaceable event in the shared archive of a universal calendar, that is, a supposedly universal calendar, for these are—and I want to insist on this at the outset—only suppositions and presuppositions.[275]

As this debate developed over the years, invocation of past catastrophic attacks was sometimes used to argue that the attacks were not unprecedented.[276] An example is found in the contention by Jennifer Daskal in 2009, arguing against the use of preventive detention in the United States, in part, based on the fact that the 9/11 attacks were, indeed, not unprecedented in the sense that they required new detention regimes:

> … over the past 230 years, the United States has endured two world wars, a lengthy cold war, waves of domestic terrorism, and a civil war that almost broke the nation apart, without passing legislation that would allow the state to detain people for extended periods based on a prediction of future dangerousness.[277]

The debates over whether 9/11 was unprecedented appear to, in many ways, have created a cyclical sort of argumentation. Everything is unprecedented in some way, and it would be disingenuous to suggest that there were not many unprecedented aspects to the 9/11 attacks. It is the second component of this presumption, the place of the criminal-justice system, that is most dominant in having spurred structural changes to detention standards after 9/11. The question should be, if it is asked at all, whether the criminal-justice system was adequate to handle the scenario raised by the 9/11 attacks and whether, if it is deemed inadequate, changes

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[275] *Derrida & Habermas*, *supra* note 131 at 86.

[276] See e.g. Jennifer Daskal, "*A New System of Preventive Detention? Let's Take a Deep Breath,*" 40 Case Western Res. J. Int'l L. 561, 562 (2009)(noting further that those actions undertaken in those emergency situations were invariably later "resoundingly repudiated as mistaken experiments that are contrary to the United States' commitment to due process and the rule of law.").

[277] *Ibid.*

could be made within the existing parameters of that system, rather than looking to new systems outside of that paradigm. If the attacks were unprecedented, but the existing system was still adequate, no change would be needed. If the attacks were, in fact, precedented in terms of the threat posed, but because of some characteristic of the criminal-justice system, it was, indeed, not adequate to address the threat, then a much stronger argument for change is presented. And, of course, if the attacks were indeed so unprecedented as to support the necessity of avoiding the criminal-justice system, then the argument for change is likely the strongest yet. It is not mandatory, however, that the attacks be found unprecedented, nor is it necessary that finding them to have been precedented means no changes are warranted.

In other words, the actual question is not really whether the attacks were unprecedented, but whether there was something new about the attacks, or the threat they exposed, which necessitated an assumption that long-standing principles of constitutional fair trial procedures were inadequate, even where those structures were largely maintained during past crises, or abandoned to later remorse.[278] A question to consider is whether, indeed, this underlying presumption, even if it could have been valid short-term after the attacks, has become normalized in the Foucault sense, to have been woven into the fabric of the normative developments in this area going forward.[279] Those two elements of the question cannot be separated, as they are inextricably linked in the way the presumption was created to support the changes made.

[278] See *ibid.*
[279] See Foucault, *The History of Sexuality*, *supra* note 10; Perelman & Olbrechts-Tyteca: *The New Rhetoric, supra* note 9.

C. Some Characteristics of the Changes in Detention and Interrogation Standards – Changes from Within

The discourse employed by national governments after 9/11, and in many respects continuing to the present day, led to various structural shifts. Some shifts were unique to particular national jurisdictions, and others appeared to be much more systemic across jurisdictions but also across different type of proceedings. The link made between the threats being articulated and the response in terms of resulting changes is undeniable, at least in terms of what governments were articulating as the reasoning behind the changes. What is less clear, however, is a demonstrable link between the articulated threat and a true justification for these changes in terms of the changes being the most effective way to deal with terrorism detentions.

After the attacks, certain liberal democracies claimed sweeping powers in regard to the use of extraordinary detention practices in terrorism cases. Many of these changes quickly occurred in the days after 9/11, and it is the shift in presumption, accompanied by the type of inertia described by Perelman and Olbrechts-Tyteca, or perhaps normalization in Foucault's terms, that almost immediately created a presumption in favour of these changes, based primarily on generalized threat articulations.[280] As time has passed, the presumption in favour of these changes has solidified in many ways, and those arguing that these cases must proceed under the criminal-justice system must do so in a way that rebuts the presumption against the system, not generally, but often in relation to anti-terrorism cases. This, therefore, represents a significant, and arguably unprecedented, shift, in the viability of national systems of criminal justice.

Arguments did continue, of course, in favour of the criminal-justice system, but they often did so under this new structure, in which the governmental changes enjoyed a presumption in their favour. An example is

[280] See *ibid,* Foucault, *The History of Sexuality*; *ibid, Perelman & Olbrechts-Tyteca: The New Rhetoric.*

found in the work undertaken by Richard B. Zabel and James Benjamin, documenting every criminal prosecution for terrorism in the U.S. for a specified time period. Between 2002 and 2006, they considered prosecutions relating to international terrorism, noting an exceptionally high rate of success in terms of prosecutions, and also outlining the way courts handled the evidentiary issues that the government claimed served as the basis for assuming the criminal-justice system is inadequate for many of these cases.[281]

Zabel and Benjamin's work was, by necessity, framed as a response to the U.S. Government's assertions that the criminal-justice system was not adequate to address issues of international terrorism. In the introduction, they note, in response to arguments, for instance, for a special "national security" court, "A premise of such arguments is that the traditional court system is not well-equipped to handle international terrorism cases. We aim to explore that premise."[282]

This characterization of the issue was necessary because of the dominating presumption that the criminal-justice system was inadequate. If, indeed, the presumption continued to be in favour of the criminal-justice system, it would have been the U.S. Government that would have been required to present its case, to establish that the criminal-justice system was not adequate, rather than those seeking to support the criminal-justice system having to present their case, as has been the norm in many respects since 9/11. Because, however, some governments stated that there was a need and acted quickly to move outside of traditional criminal-justice paradigms, the inertia shifted in favour of many of these new regimes, and those arguing that traditional and long-standing fair-trial processes had to be

[281] See *Zabel & Benjamin I*, *supra* note 70. It is not necessarily suggested that successful prosecutions support the success of the criminal-justice system, as a presumption of innocence would support a much lower number of convictions as well. Rather, the point is that U.S. courts handled hundreds of prosecutions during the time that the U.S. Government was pushing for extraordinary detention and trial structures, and apparently handled many of the issues that had been claimed to be outside of their competence.
[282] *Zabel & Benjamin I*, *supra* note 70.

observed had the burden of overcoming a presumption against their position. Zabel and Benjamin concluded that the criminal-justice system, alone, did not suffice to handle terrorism – mentioning that other options, including things like intelligence and military – were necessary tools.[283] There is, however, a difference between addressing *terrorism* and addressing *terrorism detentions and judicial procedure*, and that distinction is often lost in much of this debate. While noting strains on the criminal-justice system, Zabel and Benjamin also noted, among other things, that this system is adaptable, and has been adapted in practice, commenting that

> experience has shown that the justice system has generally remained a workable and credible system. Indeed, the justice system has shown a key characteristic in dealing with criminal terrorism cases: adaptability. The evolution of statutes, courtroom procedures, and efforts to balance security issues with the rights of the parties reveals a challenged but flexible justice system that generally has been able to address its shortcomings.[284]

It would not be possible or useful to attempt a comprehensive assessment of every change made by every national jurisdiction after 9/11.[285] Rather, several thematic changes are used as examples to demonstrate the types of shifts that appear to have directly resulted from the perception of a future and continuing threat after 9/11.

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[283] *Ibid* at 2.
[284] *Ibid.*
[285] See generally Roach, *The 9/11 Effect*, *supra* note 82 for an assessment of changes made in a number of national jurisdictions, assessing both similarities and disparities.

C.1. An Overarching Shift Away from the Presumption of Innocence and from the Mandatory Nature of *Habeas Corpus* Review -- Moving Away from the *Magna Carta* [286]

Predictability is considered a critical component in criminal law, with the notion that a person cannot be deprived of liberty based on a crime that did not exist as of the time of the conduct, or under procedures that are not transparent and fair. It is not just the substantive notice that something is a crime that underpins most modern criminal law proceedings, but also the idea of fair judicial process, under which an accused, facing a loss of liberty, understands what he or she needs to do in order to refute the charges and thus try to avoid incarceration. The fundamental importance of a person's individual liberty has long underscored legal presumptions, which tended to weigh in the detainee's favour, most notably in relation to the presumption of innocence, often either stated or read into national constitutions.[287]

Recent trends, however, for terrorism suspects have shown an increasing movement towards a presumption of guilt, and an onus on the detainee to prove innocence, rather than on the government to establish guilt, as explained through subsequent sections of this Chapter, below, or at least so hinder the detainee from presenting a defense as to raise questions about legitimacy.[288] There is an obvious difference between placing the burden of proof on the State, which has made the accusation and seeks to take punitive action, and placing it on the detainee, who is at an enormous

[286] It is recognized that sometimes the presumption does not necessarily relate to guilt or innocence, but to future dangerousness. That is the issue when the topic of so-called "preventive" detention arises, and it is addressed further in Chapter 4, below. For most of the extraordinary detention trends discussed herein, though, while future dangerousness is an issue as it is in traditional criminal cases, most subject to these extraordinary processes are at least suspected of some past association with terrorism, even if the suspected association might have a tenuous basis.

[287] See e.g. U.S. Const. amend. 5, 6, & 14; *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss. 7 & 11 (d).

[288] This critique comes up in most extraordinary detention scenarios, especially where secret evidence is asserted as necessary, including the Military Commissions at Guantanamo Bay, the security certificate regime in Canada, the control orders (now eliminated) in the UK.

disadvantage in relation to the State in terms of resources, and who is facing extreme personal consequences for failure to meet the burden of proof. The spectre of somebody deprived of liberty, perhaps for life, without ever being told the charges against him, or having full access to a court with transparent procedures, or even in some cases having access to legal counsel, is no longer the "stuff of nightmares" in many places.[289] It is a reality, although more in some places than in others.

One theme is that, overall, these pre-existing liberty presumptions have shifted. The initial, somewhat reflexive, reaction in many countries after 9/11 was a tendency to engage in detentions that had the potential to become indefinite, without accompanying criminal charges. As legal challenges inevitably arose to such practices, some initial commonalities among different countries in terms of how they handled these cases began to dissipate. In all of these cases, the starting presumption was not that the individual should be free, or that the individual should be presumed innocent. Rather, it appears, instead, as if the beginning presumption is that the person is guilty, or dangerous if the objective of the detention is purely preventive, and should be detained, at which point an analysis begins as to whether lesser restrictions can be implemented. A common characteristic of these restrictions is that none of them involve the pursuit of actual criminal convictions, or at least, none of the restrictions are punitive measures in response to criminal convictions. Rather, they are exclusively preventive in nature, with the intention of decreasing the likelihood that the affected person will commit an act of terrorism at a future date.[290]

For instance, since 9/11, the question of a detainee's right to petition a court to challenge the lawfulness of his detention – known as *habeas corpus*

[289] *Belmarsh Detainees Case, supra* note 13 at para 155.
[290] For an example of the apparent increased acceptance that preventive detentions are an inevitable in the fight against terrorism, see Stephanie Cooper Blum, *The Necessary Evil of Preventive Detention in the War on Terror: A Plan for a More Moderate and Sustainable Solution* (Amherst, NY: Cambria Press, 2008).

– has been hotly debated, more in some countries than in others.[291] This right to petition for *habeas corpus* is a long-standing principle of freedom stemming from the English common-law tradition, and, as such, it has had a dominant place in legal systems deriving from the English tradition, such as those considered herein. The significance of this principle was reaffirmed by the UK House of Lords, when assessing post-9/11 domestic terrorism detentions, as follows:

> In urging the fundamental importance of the right to personal freedom, as the sixth step in their proportionality argument, the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day.[292]

Much has obviously been written about the history of the *Magna Carta* and that history is primarily relevant here only to illustrate the long-standing relevance of *habeas corpus* in these legal systems before 9/11, to compare with the way *habeas corpus* rights were affected afterwards. The above quotation presents *habeas corpus* as a guarantee that has been continuous in the British legal tradition from its inception with *Magna Carta.* In the United States, this traditional common-law notion continued after the separation from Great Britain, and it has been so integral that it is the only individual freedom referenced in the original U.S. Constitution – other concepts of individual freedom tend to be contained within the amendments to the

[291] In the U.S., much of this debate was put to rest by a landmark ruling of the U.S. Supreme Court in *Boumediene*, *supra* note 12, although the decision was specifically relating to Guantanamo Bay detainees, and the U.S. Government continues to argue that for other detainees, such as those held at Bagram, there is no right to *habeas corpus* review in U.S. courts. See *Al Maqaleh v Gates*, No. 09-5265 (U.S. Ct. App. D.C. Cir 2010)(appellate court ruling upholding a denial of *habeas corpus* review to detainees at Bagram.) [*Al Maqaleh*].
[292] *Belmarsh Detainees Case*, supra note 13 at para 36.

Constitution, particularly, but not exclusively, in the Bill of Rights, which includes the first ten amendments.[293]

While the *Magna Carta* is widely cited for setting forth the notion of *habeas corpus*, it is not a source of legally binding authority, so much as the source of the tradition for this protection. As one author argues, it represents more a set of principles, and he explains, "the point is not that *Magna Carta* provides the grounds for a specific legal right but that it stands for or, at least, represents the start of a tradition of understandings about how governments should behave vis-à-vis the citizenry."[294] Questions certainly arise as to whether, since 9/11, this understanding in countries deriving part of their legal tradition from principles such as those in *Magna Carta* have changed that "tradition of understandings" about a government's relation to its citizens.

In considering whether executive detentions, without criminal charges, should be acceptable, particularly in those jurisdictions deriving their history from the tradition that includes the principles of the *Magna Carta*, the words of William Blackstone still resonate:

> OF great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper … there would soon be an end of all other rights and immunities … To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. *But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a*

[293] See U.S. Const. Art. I, s. 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[294] David Clark, "The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law," (2000) Melbourne University Law Review 34 (this article discusses the ongoing significance of the Magna Carta, including the role of *habeas corpus* in Australian law, assessing that significance as of a time shortly before the 9/11 attacks. The author notes "Magna Carta is part of the legal and political legacy of Australia and New Zealand.")(citations omitted).

> *less public, a less striking, and therefore a more dangerous engine of arbitrary government*.[295]

Blackstone eloquently laid out the scenario under which *habeas corpus* might be properly suspended, and his words resonate with the general view taken of this right by modern legal systems deriving from the British common-law tradition:

> And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it feels proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing … In like manner this experiment ought only to be tried in case of extreme emergency; and in these the nation parts with it's (sic) liberty for a while, in order to preserve it for ever.[296]

In the U.S., before 9/11, suspensions of *habeas corpus* were rare and generally in response to a perceived emergency – of finite duration and generally repudiated in later, less-crisis-driven times.[297] Before 9/11, the U.S. President had only attempted to suspend *habeas corpus* once, as Abraham Lincoln did so during the U.S. Civil War. Lincoln ultimately sought Congressional approval for this suspension. In addition to this action, he also sought to try civilians suspected of aiding the Confederates before military commissions within the U.S.[298]

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[295] Blackstone, William, *Commentaries on the Laws of England*, (1765, Book 1) at pp. 130-31, online: The Avalon Project at Yale Law School <http://www.yale.edu/lawweb/avalon/blackstone/bk1ch1.htm> (emphasis added) [Blackstone].
[296] *Ibid.*
[297] A notorious example was the detention of people of Japanese origin or descent, including both citizens and non-citizens, in camps during WWII because of a presumption of disloyalty. This practice ultimately led, many years later, to a formal apology by the U.S. Government. See *Korematsu v United States*, 323 U.S. 214 (1944).
[298] See *Ex parte Milligan*, 71 U.S. 2 (1866).

In one of its most famous decisions, *In re Milligan*, responding to this suspension, the U.S. Supreme Court described the type of circumstances that might justify trials, in the U.S., of American citizens by military commissions. This could conceivably be permissible, the Court said, on a very temporary basis, and only in the physical proximity of a great emergency, "[i]f, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law."[299] Only then, the Court said, can martial law be implemented, adding, "as necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power."[300]

The threat situation in the U.S., for instance, since 9/11, seems less onerous than it did during the U.S. Civil War, when President Lincoln reportedly could see enemy troops from the White House windows. Lincoln famously suspended *habeas corpus* during the Civil War, when the risk to the country was quite obvious. The trend in liberal democracies, after 9/11, has been towards wider-ranging, and more permanent, shifts in fundamental notions relating to *habeas corpus* than those contemplated during the U.S. Civil War. It is unclear of whether the U.S. Government was mindful of the admonition from *In re Milligan* in the way that it structured limitations on *habeas corpus* rights relating to terrorism detainees. The modern, terrorism-related Military Commissions are held at Guantanamo Bay, which the U.S. Government tried, unsuccessfully, to argue was outside of the jurisdiction of the U.S. By definition, as well, those held at Guantanamo Bay are not U.S. citizens, so the suspensions are factually distinguishable from those described in *In re Milligan.* The attempts to limit *habeas corpus* rights relating to terrorism detainees arguably outside of the U.S. have had less *indicia* of

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[299] *Ibid* at 127-128 (citations omitted). I discussed this case to an extent in my Master's thesis, although in the context of normative changes regarding immigration-related terrorism detentions in the U.S. See *Duffy: Master's Thesis*, *supra* note 260.
[300] *Ibid* (citations omitted).

the temporary than past incidents, with the subjects of those limitations differing from those in past scenarios.

C.2. Secret Detentions

Another characteristic of the altered detention practices after 9/11 is that traditional notions of procedural fairness have frequently eroded for those suspected of terrorism. Separate and apart from overarching changes relating to the presumption of innocence, specific components of what have traditionally been deemed elements of fair process have also undergone a perceptible shift in some cases. Traditionally, with certain, express exceptions, the presumption has been for criminal proceedings to be open, with the general idea that such openness helps to ensure fairness.[301] Secrecy, however, has become a major aspect of terrorism detentions since 9/11, usually on a claim that it is necessary for national security reasons. The extent of that secrecy varies considerably, as do the specific aspects of detentions to which secrecy applies. For example, the U.S. stands out among other nations in having sought to keep the very fact of detention a secret – a practice that seems to be less common in other liberal democracies that altered their practices after 9/11.[302] It was based on that secrecy that, for instance, the Center for Constitutional Rights, in representing the *Turkmen* plaintiffs, a group of "special-interest" detainees held in the U.S. under its immigration system shortly after 9/11, represented to the Court that it could not identify all the members of the class.[303]

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[301] See e.g., Blackstone's admonition against the potential for abuse from secret detentions, Blackstone, *supra* note 295.

[302] In other liberal democracies, the tendency has been towards an increased assertion of the need to use secret evidence, rather than complete secrecy surrounding the fact of detention or the actual proceedings. Secret evidence is, as well, an issue within the U.S. however. See Daphne Barak-Erez & Matthew Waxman, Secret Evidence and the Due Process of Terrorist Detentions, (2009) 48 Colum. J. Transnat'l L 3.

[303] *Turkmen v Ashcroft*, Class Action Complaint and Demand for Jury Trial, No. 02-CV-02307-JG (filed 17 April 2002) (E.D.N.Y 2002), complaint and all court filings online:

It is now known that, shortly after the 9/11 attacks, the U.S. Government ordered that immigration proceedings for the so-called "special-interest detainees" be held in secret, including an order that the very fact of their detentions be kept secret.[304] This policy became widely known after publication of the "Creppy Memo," which lays out the parameters of secrecy to be applied to these cases.[305]

The American processes frequently seemed to include detaining people overseas as well, often through secret transfers, known as "extraordinary rendition."[306] The U.S. has been accused of secret practices that could arguably be characterized as kidnapping. One example involves the case of Majid Khan. Khan had previously been granted asylum in the U.S. and was a long-term resident of Maryland. He alleged that, while on a trip to Pakistan in March 2003 to visit his wife shortly after his marriage, he was "kidnapped." He further alleges that he was then held in secret by the CIA for three and a half years, during which, he alleges, he was tortured. Khan has said he made self-incriminating statements to end the torture. According to a *habeas corpus* petition, Khan was one of 14 "ghost detainees" then transferred to Guantanamo Bay in September 2006, shortly before passage of the Military Commissions Act of 2006.[307] The Center for Constitutional Rights sought *habeas corpus* relief on behalf of Khan, alleging

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Findlaw.com <http://lawcrawler.findlaw.com/scripts/lc.pl?CID=ILC-LawcrawlerHomepage&sites=findlaw.com&sites=findlaw.com&entry=Turkmen> [Turkmen Initial Complaint].

[304] The “special interest” detainees will be discussed in more detail in Chapter 3, below.

[305] *Duffy*, supra note 260, at 7-8, 12-14 (outlining various U.S. Government efforts to keep these proceedings secret, including the release, under great pressure, of a partial list of the detainees, with their names and other information redacted); see also generally Cole, *Enemy Aliens*, *supra* note 228.

[306] As referenced earlier, the most well-known case of this practice involved Maher, a Syrian-Canadian citizen who was detained while changing flights in New York and ultimately sent to Syria, where he was tortured. See *Arar Commission Report, supra* note 89. There was also considerable controversy over so-called “black sites” where the U.S. allegedly used locations in Europe to facilitate transferring people to third countries in more distant locations, allegedly for the purpose of torture. See generally Michael C. Jensen, “Torture and Public Policy: *Mohamed v Jeppesen Dataplan, Inc*. Allows "Extraordinary Rendition" Victims to Litigate Around State Secrets Doctrine” (2010) Brigham Young University L Rev 117-133.

[307] MCA 2009, *supra* note 60.

that it is unconstitutional to deny such relief to a long-term resident and immigrant to the U.S. – a factor that distinguishes Khan's case somewhat from those of the other Guantanamo detainees.[308]

Khan's brother, a U.S. citizen, says that he was interviewed repeatedly by the FBI, and that he asked about his brother's whereabouts. The family heard nothing of or from Khan for three years, until, they say, a reporter came to their home and told them that President George W. Bush had mentioned Khan's name in a speech on September 6, 2006.[309] The CCR filed the *habeas* petition on Khan's behalf on September 29, 2006.[310]

The White House posts Presidential speeches on its website, and the transcript of President Bush's speech indicates that he said, relating to Khan:

> Once in our custody, KSM was questioned by the CIA using these procedures, and he soon provided information that helped us stop another planned attack on the United States. During questioning, KSM told us about another al Qaeda operative he knew was in CIA custody -- a terrorist named Majid Khan. KSM revealed that Khan had been told to deliver $50,000 to individuals working for a suspected terrorist leader named Hambali, the leader of al Qaeda's Southeast Asian affiliate known as "J-I". CIA officers confronted Khan with this information. Khan confirmed that the money had been delivered to an operative named Zubair, and provided both a physical description and contact number for this operative.[311]

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[308] Center for Constitutional Rights, "*Khan v. Bush / Khan v. Gates*: Synopsis," online: centerforconstitutionalrights <http://ccrjustice.org/ourcases/current-cases/khan-v.-bush-/-khan-v.-gates> [Khan Synopsis]. Full pleadings and other related documents, including Khan's Combatant Status Review Tribunal transcript from Guantanamo Bay, are available on this site.

[309] *Ibid.*

[310] *Ibid*; see also *Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10020*, online: centerforconstitutionalrights <http://ccrjustice.org/files/Majid%20Khan%20CSRT%20Transcript.pdf> (unclassified and partially redacted, including portions in which he describes the torture allegations).

[311] The White House, Office of the Press Secretary, Transcript: "President Discusses Creation of Military Commissions to Try Suspected Terrorists" (6 Sep 2006), online: The White House <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>. "KSM" is a shorthand reference to Khalid Sheikh Mohammed, another Guantanamo detainee, who the Bush Administration has accused of involvement in the 9/11 attacks. *Ibid.*

It is notable that, as of the date of President Bush's speech, none of the people to whom he referred had been convicted of any crime. Nonetheless, he referred to Khan, for instance, as a "terrorist," rather than as an "alleged terrorist" or a "suspected terrorist."[312] Khan's case is unusual in that he was a long-term resident of the U.S., and had legal immigration status there. If he had achieved U.S. citizenship, as his brother did, he would not have been eligible for trial by Military Commission or detention at Guantanamo Bay, and that would have been the only factor deciding his fate, regardless of any alleged conduct.[313] It is also somewhat unusual that his whereabouts were kept secret for three years and only ultimately revealed through a speech by the U.S. President. His case provides an example of the extreme nature of secrecy that could sometimes surround even the existence of these detentions. Khan went through a series of complex legal proceedings in the U.S. in challenging his detention, complicated by changes to the law that were occurring regarding Guantanamo Bay.[314]

Again, research does not suggest that the other liberal democracies discussed herein kept actual detentions secret, or indulged in secret proceedings for terrorism suspects since 9/11. Some controversies in this sense have arisen elsewhere, such as in the UK, where there has been a dispute over a proposed secrecy amendment to legislation surrounding court hearings regarding intelligence evidence, known as Closed Material Procedures or CMPs. These proceedings are not used in criminal cases, although they are used in some cases involving the Special Immigration Appeal Commission. Debates over the proposed expansion of this tool have legislation included whether these proceedings could be used to withhold

[312] See *ibid.*
[313] See *Military Order*, *supra* note 238(designating that certain people, excluding U.S. citizens, could be subject to trial by military commission).
[314] Khan Synopsis, *supra* note 308.

evidence from people during *habeas corpus* hearings, with both sides differing on that issue.[315]

C.3. Secret Evidence and Secret Allegations

What has been more common, however, are disputes over the use of classified, or secret, evidence in detention proceedings, or scenarios under which a detainee does not have a full accounting of the nature of the accusations underlying the detention. Canada, for instance, has encountered considerable controversy for its use of secret evidence in its "security certificate" proceedings, an issue that was at the heart of the Supreme Court of Canada's *Charkaoui I* decision, discussed in the following section.[316] Some permutations on this issue are laid out as examples below.

C.3.1. Attempts to Continue Using Secret Evidence with Supposedly Heightened Procedural Protections

Countries have struggled with the supposedly competing claims of national security versus a detainee's right to know the case against him, with differing results. Within the UK, and Canada, for example, the systems of special advocates have endured considerable criticism. A major reason for

[315] See Owen Bowcott, "Secret Court Proposals Threaten *Habeas Corpus* Safeguards, Charity Warns" (13 Jul 2012), online: The Guardian <http://www.guardian.co.uk/law/2012/jul/13/secret-court-habeas-corpus-reprieve> (describing the debates that occurred in a late-night session of the House of Lords, where the expansion would still not extend to criminal matters); see also "*Special Advocates' Memorandum on the Justice and Security Bill Submitted to the Joint Committee on Human Rights*, (14 June 2012), online: Reproduced on Wordpress: <http://adam1cor.files.wordpress.com/2012/06/js-bill-sa-response-final-final.pdf> (containing objections from the special advocates in the UK to the pending legislation and purporting to represent the views of almost all of the special advocates, with none seriously objecting).

[316] See generally *Charkaoui I*, *supra* note 12; see also Maureen T. Duffy & René Provost, "Constitutional Canaries: The Elusive Quest to Legitimize Security Certificates in Canada" (2009) 40 Case Western J Int'l. L 531 [Duffy & Provost] (critiquing the Supreme Court of Canada's decision in *Charkaoui* as well as the subsequent revision of the IRPA to provide for special advocates).

that is that it allows for the special advocate to be granted access to evidence that is sealed for national-security reasons, but not for the special advocate to communicate any of that information to the detainee or counsel.[317] Thus, the detainee could still face the possibility of detention – or other restrictions on liberty in the case of a control order – on evidence that he has never seen, and has never been granted the opportunity to refute.[318]

The House of Lords expressed concern about this scenario, first in one of three decisions issued on the same day in October 2007.[319] While upholding in general, at least as of that date, the control orders in those cases – with the exception of one they deemed to involve overly restrictive conditions – some of the Lords expressed concerns about the use of secret evidence in the special-advocate proceedings.[320] Lords Bingham and Brown both pointed out that, due to the serious nature of the liberty deprivations in these cases, procedural fairness is important.[321]

One of the Law Lords quoted from Canada's *Charkaoui I* decision, in stating that the controlled person should see the evidence being used against him.[322] Lord Bingham wrote extensively of international authorities, all pointing to the same conclusion – that procedural fairness required that an accused be fully apprised of the evidence being used against him.[323] He

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[317] See generally David Jenkins, "There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology," (2011) 42:270 Columbia Human Rights L Rev 279; Fiona de Londras, "Can Counter-Terrorist Internment Ever be Legitimate?" (2011) 33:3 Human Rights Quarterly 596 (suggesting that, while there are legitimacy concerns with current detention models, without trial, of terrorists, there could, arguably, be a model conceived that would have a stronger sense of legitimacy).

[318] See generally three cases decided on the same day by the House of Lords in the UK, critiquing particular components of the control order procedures. *Secretary of State for the Home Department v MB (FC)*, [2007] UKHL 46, 34-40, 54, 60-77, 82-87 (U.K.) [MB]; *Secretary of State for the Home Department v JJ and Others* [2007] UKHL 45, H 56 (U.K.) [JJ]; *Secretary of State for the Home Department v E and another*, [2007] UKHL 47 (U.K.) [E] [collectively Three Control Order Cases].

[319] *Ibid, MB.*

[320] The House of Lords also expressed concern about the conditions in one case, which involved a curfew of 18 hours, indicating that was excessively restrictive. *JJ*, *supra* note 318.

[321] *MB* , supra note 318, at paras 24, 90.

[322] *Ibid* at para 30.

[323] *Ibid* at paras 24, 90.

quoted from the U.S. Supreme Court case of *Hamdi v Rumsfeld*, for example, where the rights to be heard and to be notified were called "essential constitutional promises."[324]

He then discussed why he believed a system using special advocates, who are not allowed to communicate classified evidence to the accused or the accused's counsel, fails to meet the requirements of fundamental fairness:

> "The use of an SAA is, however, never a panacea for the grave disadvantages of a person affected not being aware of the case against him." The reason is obvious. In any ordinary case, a client instructs his advocate what his defence is to the charges made against him, briefs the advocate on the weaknesses and vulnerability of the adverse witnesses, and indicates what evidence is available by way of rebuttal. This is a process which it may be impossible to adopt if the controlled person does not know the allegations made against him and cannot therefore give meaningful instructions, and the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given. "Grave disadvantage" is not, I think, an exaggerated description of the controlled person's position where such circumstances obtain. I would respectfully agree with the opinion of Lord Woolf … that the task of the court in any given case is to decide, looking at the process as a whole, whether a procedure has been used which involved significant injustice to the controlled person …[325]

Lord Brown expressed his reservations more bluntly:

> I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be

[324] *Ibid* at para 30 (quoting *Hamdi v Rumsfeld*, 542 US 507 (2004)).
[325] *Ibid* at para 35 (citations omitted).

> sacrificed on the altar of terrorism control. By the same token that evidence derived from the use of torture must always be rejected so as to safeguard the integrity of the judicial process and avoid bringing British justice into disrepute … so too in my judgment must closed material be rejected if reliance on it would necessarily result in a fundamentally unfair hearing.[326]

The use of secret evidence presents a peculiar problem in terms of analysis. Public statements rarely explain the reason for keeping the evidence secret. Without the evidence being revealed, however, it is impossible to really accurately assess the need for such processes. Moreover, there is the general suspicion that secrecy tends to raise, that somebody seeking to hide something has something to hide. Such a proposition may go too far, as secret evidence is not an unheard-of concept even in traditional criminal proceedings. As mentioned earlier, Canada's *Evidence Act*, for example, specifically provides procedures for situations in which the Crown asserts that evidence in a trial must be kept secret, often for national security reasons, including procedural safeguards.[327] The use of secret evidence is always necessarily problematic, but, where it is, procedures that create unfairness for the detainee, or those otherwise falling short of the protections generally attributed to trials under the criminal-justice system may raise questions of fairness and legitimacy. While there may be individual circumstances in which the need for secrecy can be established, its widespread application to many of these cases raises some concerns. This accusation has specifically been raised in regard to the U.S., where is has been claimed, for example, that the government seeks to classify certain information, not for national security, but to cover its use of torture.[328] Without

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[326] *Ibid* at para 91 (citations omitted).
[327] *Canada Evidence Act, supra* note 7.
[328] Such an allegation was made by Majid Kahn, discussed *supra* notes 307-313. See Scott Shane, "Detainee's Lawyers Rebut C.I.A. on Tapes," (19 January 2008), online: *The New York Times*: <http://www.nytimes.com/2008/01/19/washington/19detain.html?_r=2&scp=2&sq=Guant%E1namo&oref=slogin&oref=slogin> [*Shane: C.I.A. Tapes*] (alleging that C.I.A. agents

seeing any of the evidence, however, such claims must remain, to some extent, speculative.[329]

D. Special Mechanisms That Bypassed the Criminal-Justice System Entirely

There have been accusations that extraordinary detention practices have really been instituted to allow governments to improperly and entirely circumvent the criminal-justice system. Such an allegation has been raised, for instance, relating to the tendency, particularly by the U.S., to detain people abroad, and then to argue that the detainee is not in a location that would subject the government to U.S. constitutional protections. This question appears in many aspects of post-9/11 domestic detentions. In the case of immigration detentions, for instance, unless one truly believes that terrorism is an immigration matter, it seems clear that the very use of the immigration system, rather than the criminal-justice system, to detain terrorism suspects involves an avoidance of the criminal-justice system. In abridging procedural protections, such as using secret evidence to justify detaining people, it appears that governments are seeking, in the cases of terrorism detainees, to avoid the fundamental procedural protections that have been, previously, a threshold requirement for any government to detain a person under criminal-justice systems. These examples, described in

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videotaped an interrogation session with him in 2003, in which he alleges he was tortured. The issue arose in part because of the C.I.A.'s claims that it did not videotape interrogations after 2002, and an ongoing scandal relating to the apparent destruction of these interrogation tapes).

[329] Criticism both of preventive detention and the use of secret evidence have continued to emanate from judicial rulings. In February 2009, in a ruling that was consistent with the House of Lords ruling in the *Belmarsh Detainees* case, the ECHR ruled, as to the same detainees, among other things, against the preventive detention scheme in the UK, including the following language: "The Court does not accept the Government's argument that Article 5 § 1 permits a balance to be struck between the individual's right to liberty and the State's interest in protecting its population from terrorist threat." *A and Others v United Kingdom*, App. No. 3455/05 2009 ECHR (2009). Shortly thereafter, in June 2009, the UK House of Lords once again criticized control orders, strongly stating that the scheme of using secret evidence does not allow for fair judicial proceeding. *Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action*, [2009] UKHL 28 [AF].

preceding sections of this chapter, provide systemic indicators of this change and demonstrate an overall trend towards avoidance of the criminal-justice system.

Perhaps, however, this general trend can be most vividly illustrated in some of the individual detention cases that do not generally fit under the more sweeping changes previously described in this chapter. While most of the people detained after 9/11, under extraordinary detention practices, did not have citizenship status in the countries of detention, there have been exceptions to that rule, and some of these altered detention practices have affected citizens as well.[330] Again, while some of the specific factual and legal parameters of those exceptional detentions may vary, a theme still emerges that at least raises questions as to whether governments are simply trying to sidestep the criminal-justice system and whether further inquiry into the reason for that strategy is required.

To illustrate this trend, this section addresses the cases of two extraordinary detainees. The first is Jose Padilla, an American citizen, who was held by the U.S. Government, without trial, for three and a half years as an "unlawful enemy combatant." The second detainee is Joseph Thomas, an Australian citizen who was, in fact, tried before the criminal system in Australia, convicted, had his conviction overturned on appeal, and was then subjected to a control order, limiting his freedom.

D.1. United States: Unlawful Enemy Combatants – Example: The Case of Jose Padilla

The Jose Padilla case is arguably one of the strangest examples of an extraordinary approach to a post-9/11 detention in the U.S. His detention status was changed more than once, and, in each instance, the timing suggested that it was changed specifically to avoid the criminal-justice

[330] The differential treatment of non-citizens versus citizens permeated national responses to 9/11 and will be discussed at length in Chapter 3, below.

system. He is a U.S. citizen, who was arrested at Chicago's O'Hare Airport in May 2002, after arriving on a flight from Pakistan.[331] He was initially detained on a material-witness warrant. He filed a challenge to that detention, and, before that matter could be decided, U.S. President Bush declared him an enemy combatant and ordered that he be taken into military custody.[332] Because he is a U.S. citizen, however, he was held at a prison within the U.S., which is itself rather unusual, given the U.S. Government's long-standing, and continuing, claims that it is too dangerous to bring terrorism suspects to the U.S. – one of the arguments used to justify such detention centres as that at Guantanamo Bay.

Padilla was then held with no criminal trial, and was still being held in 2004, when the U.S. Supreme Court declined to decide his case on the merits, based on its conclusion that Padilla's attorney had named the wrong person in a *habeas corpus* petition.[333] During the time of his detention, it was widely reported that the U.S. Government was accusing him of conspiring to produce a so-called "dirty bomb" for use in an attack on an American city. The allegations were reported to have been based on statements made by another terrorism-related detainee, Abu Zubaydah, amidst claims that the interrogation of Zubaydah was carried out using coercive tactics.[334]

Padilla continued to be held as an enemy combatant, and his case continued to follow a strange procedural path. In September 2005, a federal appellate court upheld the President's authority to detain Padilla as an enemy combatant, a disposition that was then appealed to the U.S. Supreme Court. In December 2005, the U.S. Government filed an "emergency" petition before the same appellate court, seeking permission to transfer Padilla to a

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[331] *Rumsfeld v Padilla*, *supra* note 2 (outlining the facts of the Padilla detention to that date); see also Tung Yin, "Enemies of the State: Rational Classification in the War On Terrorism," (2007) 11 Lewis & Clark L. Rev. 903, 930.
[332] *Ibid, Rumsfeld v Padilla* at 431 (referring to "Authorization for Use of Military Force, PL 107-40, September 18, 2001, 115 Stat 224).
[333] *Ibid* (the quote presented before the Introduction, above, is from Justice Stevens's dissent to the Court's refusal to hear this case).
[334] *Ibid* at 430-431.

civilian court for criminal trial, and for the order from the previous September to be vacated – with the accompanying suggestion that this would render the pending Supreme Court case moot. The appellate court refused the Government's request, forcing the Government to seek permission from the U.S. Supreme Court, which granted the request and denied hearing on the case.[335]

In refusing, the appellate court made the frank suggestion that there could be "in the absence of explanation, at least an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court…"[336] In the order refusing the request, the justices came close to accusing the U.S. Government of outright dishonesty, including the following remarkable statement:

> The government has held Padilla militarily for three and a half years, steadfastly maintaining that it was imperative in the interest of national security that he be so held. However, a short time after our decision issued on the government's representation that Padilla's military custody was indeed necessary in the interest of national security, the government determined that it was no longer necessary that Padilla be held militarily. Instead, it announced, Padilla would be transferred to the custody of federal civilian law enforcement authorities and criminally prosecuted in Florida for alleged offenses considerably different from, and less serious than, those acts for which the government had militarily detained Padilla. The indictment of Padilla in Florida, unsealed the same day as announcement of that indictment, made no mention of the acts upon which the government purported to base its military detention of Padilla and upon which we had concluded only several weeks before that the President possessed the authority to detain Padilla, namely, that Padilla had taken up arms against United States forces in Afghanistan and had thereafter entered into this country for the purpose of blowing up buildings in American cities, in continued prosecution of al Qaeda's war of terrorism against the United States.

[335] *Hanft v Padilla*, 546 U.S. 1084, 126 S. Ct. 978 (2006); *Padilla v Hanft*, 547 U.S. 1062, 126 S. Ct. 1649 (2006).
[336] *Padilla v Hanft*, 432 F.3d 582 (4th Cir. 2005).

> The announcement of indictment came only two business days before the government's brief in response to Padilla's petition for certiorari was due to be filed in the Supreme Court of the United States, and only days before the District Court in South Carolina, pursuant to our remand, was to accept briefing on the question whether Padilla had been properly designated an enemy combatant by the President.[337]

The Court was careful to note that its comments were based on the timing of the pleadings, and on the unexplained disparity between the facts as presented to justify the military detention, and those presented in the subsequent criminal indictment, noting that it was in no position to determine if the appearance this raised was based on fact.[338]

As pre-trial preparations began in the newly instituted criminal case, Padilla's lawyers argued that he was mentally unfit to stand trial. Specifically, they argued that he suffered from post-traumatic stress disorder as a result of years of solitary confinement with no court proceedings, and, they alleged, as a result of torture by his captors, a claim the U.S. Government denied. After a hearing, the court found him fit to stand trial.[339] He was ultimately found guilty on conspiracy charges related to providing support to terrorist organizations, and sentenced to 17 years in prison on January 22, 2008.[340] The Government had sought a much higher sentence of 37 years, and, when she announced her ruling, the judge noted that there was no evidence linking Padilla, or his co-defendants, with any actual terrorism attack. She compared the crimes for which he was convicted to much more serious crimes, such as that of Terry Nichols, who had been convicted in the Oklahoma City

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[337] *Ibid* at 584.
[338] *Ibid* at 585.
[339] Peter Whoriskey, “Judge Rules Padilla Is Competent to Stand Trial,” (1 March 2007) *The Washington Post*, online: *washingtonpost.com*: <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/28/AR2007022801377.html>.
[340] Kirk Semple, "Padilla Sentenced to 17 Years in Prison," (22 January 2008), *The New York Times*, online: *NYTimes:* <http://www.nytimes.com/2008/01/22/us/22cnd-padilla.html?ex=*1358744400*&en=79875802c6ca7fc9&ei=5088&partner=rssnyt&emc=rss>.

bombing. The judge gave Padilla credit for time served for the 3 ½ years in which he had been held in military detention.[341] In September 2011, after a series of appeals, a federal appellate court deemed the sentence in Padilla's case to have been too lenient and sent it back to the trial court.[342] A parallel civil action continued, based on Padilla's claim that he had been tortured while in U.S. custody. In May 2012, a federal appellate court found that John Yoo had qualified immunity due to his position at the time of the alleged conduct, and, thus, ruled that Padilla could not pursue his lawsuit. The Court based its ruling on the conclusion that it was not entirely clear at the time of the conduct that terrorism-related detainees were entitled to the same constitutional protections afforded those detained under the criminal-justice system. Additionally, while the court conceded without deciding that the treatment of Padilla amounted to torture, and that torture of an American citizen violates the U.S. Constitution, it declined to find that Padilla's treatment was in fact torture, primarily because of ongoing debates at that time relating to the definition of torture.[343] The Court noted that at the time of the alleged conduct:

> Here, of course, the Supreme Court had not, at the time of Yoo's tenure at OLC, declared that American citizens detained as enemy combatants had to be treated at least as well, or afforded at least the same constitutional and statutory protections, as convicted prisoners.[344]

The constant, questionably timed changes in Padilla's detention status do raise a serious question as to whether the government was primarily attempting to hold him indefinitely, but to avoid having to meet fundamental

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[341] *Ibid*
[342] *Ibid*; *United States v Padilla et al*, No. 08-10494 (11th Cir. 2011)(finding that the trial court failed to properly apply the "terrorism enhancement" in sentencing under U.S. Sentencing Guidelines Manual § 3A1.4 (2001)).
[343] *Padilla v Yoo*, 678 F.3d 748 (9th Cir 2012).
[344] *Ibid*.

due process to justify the detention. That, as the appellate court previously noted, must remain speculative. What is not speculative, however, is that the U.S. Government held Padilla for years under its newly designated status of unlawful enemy combatant, asserting that it was not possible to try his case before an Article III Court in the U.S.[345] The Government then completely changed positions, requesting that Padilla's case be transferred to a civilian court, and, in the open criminal trial, very few of the allegations the Government had been making publicly about Padilla appeared.

The disparities between the government's accounts before the appellate court, when it argued he was a dangerous enemy combatant who could not be safely put on trial, and its factual allegations in the subsequent criminal filing just a few weeks later, do raise at least an appearance of improper avoidance of the criminal system, based on unsubstantiated claims of a national-security need. The Padilla case illustrates, as did other cases such as those of Ressam and Reid, that the criminal justice system is at least presumptively capable of handling cases of those accused of terrorist acts – evidently including this case, which the U.S. Government has long argued was not possible -- and that allowing a government to sidestep criminal procedural protections can lead to abuse.

D.2. United Kingdom and Australia: Control Orders – Example: The Case of "Jihad Jack"

In Padilla's case, although the government was unhappy with the sentence, a criminal conviction was ultimately secured. What happens, however, when a government holds a criminal trial for somebody it accuses of terrorism, and that person is not successfully convicted?

Australia provided one answer to this question, in a scenario upheld by its High Court in *Thomas v Mowbray*. Australia's criminal code had been

[345] U.S. Const. Art. III (providing for the system of federal courts).

amended to allow for such orders under certain circumstances for those suspected of terrorism-related offenses.[346] The case concerned Joseph Thomas, known locally as "Jihad Jack."[347] Thomas was arrested in Pakistan in 2003, and alleged to be in possession of an Australian passport that had been altered, purportedly to conceal some of his travels.[348] He was initially detained, then removed to Australia in June 2003, where he remained free for 17 months until he was arrested and charged with terrorism-related offenses in November 2004.[349] Thomas was initially convicted of receiving funds from a terrorist organization, as well as possessing a falsified passport.[350]

On appeal, Thomas successfully argued that he had made incriminating statements under circumstances that were not voluntary, and, thus, that they should not have been admitted at his trial.[351] At his trial, Thomas testified, and the judge accepted as true, that he was arrested in Pakistan while traveling home to Australia, and was taken to a waiting vehicle "not handcuffed or shackled, but blindfolded and hooded."[352] The appellate court decision gives further details on the circumstances under which Thomas was questioned. Thomas claims that, although he was wearing a hood, he could hear, from the accents, that two of the people interrogating him were Americans, and he says he made false statements out of fear of being sent to Guantanamo Bay or otherwise detained indefinitely.[353] Over time, Thomas says the interrogation deteriorated to being extremely coercive, and that he told them what he thought they wanted to

[346] *Thomas v Mowbray,* [2007] HCA 33 [*Thomas v Mowbray*].
[347] See e.g. Tom Allard*, Jihad Jack Wife's Terror Link* (29 August 2006) online: *The Sydney Morning Herald* <http://www.smh.com.au/news/national/jihad-jack-wifes-terror-link/2006/08/28/1156617275236.html?page=fullpage#contentSwap1>.
[348] *R. v Thomas* [2006] VSCA 165.
[349] *Ibid* at paras 1-2.
[350] *Ibid* at para 3.
[351] *Ibid* at para 5.
[352] *Ibid* at para 9.
[353] *Ibid* at para 10.

hear.[354] Alastair Adams, an Australian consular employee, was allowed to see Thomas approximately two weeks after he was captured, and described an exchange with Pakistani officials and Thomas, which suggested that the officials were threatening Thomas with being sent to Guantanamo Bay.[355]

The Court of Appeal's opinion included detailed information on subsequent interviews, including transcripts and accounts by other people, to demonstrate the coercive nature of those interviews.[356] The Court concluded that the evidence of the statements should not have been admitted at trial, and reversed the conviction of the lower court.[357]

The Court of Appeal issued its ruling on August 18, 2006.[358] On August 27, 2006, a federal magistrate issued an interim control order for Thomas.[359] Under the control order, Thomas was required "to remain at his residence in Williamstown, Victoria, between midnight and 5 am each day unless he notified the Australian Federal Police of a change of address … to report to the police three times each week … to submit to having his fingerprints taken. He was prohibited from leaving Australia without the permission of the police … from acquiring or manufacturing explosives … from communicating with certain named individuals, and from using certain communications technology."[360]

On August 2, 2007, the High Court, in a separate case challenging the validity of the control order (and not considering the underlying criminal case), upheld the control order as valid.[361] The Court noted that the order had been entered in an *ex parte* proceeding, and that the specific procedural

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[354] *Ibid* at para 16-18.
[355] *Ibid* at para 21.
[356] *Ibid* at para 24-61.
[357] *Ibid* at para 120.
[358] *Ibid.*
[359] *Thomas v* Mowbray, *supra* note 346 at para 1.
[360] *Ibid* at para. 2.
[361] See e.g. *ibid* at paras.1-33 (explaining the reasoning of Justice Gleeson for upholding the order).

posture of the case had meant that the control order was in effect longer than the norm.[362]

Since Australia does not have a written Bill of Rights, the majority of justices did not consider questions similar, for instance, to those considered by the *Charkaoui I* court in Canada under the *Charter*. Rather, the issues focused more on separation of power questions, with the majority finding that it was within the power of the Parliament to enact the relevant provision of the Criminal Code, and within the power of the judicial branch to enter such orders. For example, Justice Gleeson noted that a control order is designed to prevent an act of terrorism.[363] He wrote that an interim control order, such as the one before the Court, could only be issued on request of the Attorney General, based on a belief of "reasonable grounds that the order sought would substantially assist in preventing a terrorist act or suspect on reasonable grounds that the person in relation to whom the order is sought has provided training to, or received training from, a listed terrorist organization."[364] Justice Gleeson pointed out that the parties had not argued that it was beyond the authority of the Australian Parliament to provide for control orders in situations where it is deemed necessary to address the risk of terrorism.[365]

Thomas had argued that control orders are inappropriate, because they represent a punitive restriction on liberty in a case in which there has been no finding that a crime has been committed. Justice Gleeson found that proposition to be too broad, noting that there are circumstances under which restrictions on liberty based on potential future actions, which must thus be carefully delineated. Examples include "apprehended violence" orders made

[362] *Ibid.*
[363] *Ibid* at para. 9.
[364] *Ibid.*
[365] *Ibid* at para. 13.

by judicial officers, which do not involve detention, but which do involve restrictions on liberty.[366]

Justice Kirby wrote a scathing and lengthy dissent, arguing that the portion of the Criminal Code, allowing for these control orders, was invalid. He began by noting that "[t]errorism is not a new phenomenon … Conduct sharing features now associated with "terrorism" has occurred for centuries."[367] Like the appellate justices in the Padilla case, Justice Kirby raised the concern that the Australian Government was improperly sidestepping the criminal system – noting that the application for an interim control order was made within a week of the reversal of the conviction, he observed "[t]his sequence of events inevitably gave rise to an appearance, in the plaintiff's case, of action by the Commonwealth designed to thwart the ordinary operation of the criminal law and to deprive the plaintiff of the benefit of the liberty he temporarily enjoyed pursuant to the Court of Appeal's orders."[368]

Justice Kirby expressed great concern for the majority's upholding of the control-order scheme, writing:

> … However, in Australia, judges in federal courts may not normally deprive individuals of liberty on the sole basis of a prediction of what might occur in the future. Without an applicable anterior conviction, they may not do so on the basis of acts that people may fear but which have not yet occurred. Much less may such judges deprive individuals of their liberty on the chance that such restrictions will prevent others from committing certain acts in the future. Such provisions partake of features of the treatment of hostages which was such a shameful characteristic of the conduct of the oppressors in the Second World War and elsewhere. It is not a feature hitherto regarded as proper to the powers vested in the Australian judiciary. In Australia, we do not deprive individuals of their

[366] *Ibid* at para 19.
[367] *Ibid* at para 158 (citations omitted).
[368] *Ibid* at para 182. Shortly afterwards, a new trial was ordered for Thomas. *Ibid*.

> freedoms because doing so conduces to the desired control of others.[369]

Justice Kirby found "even more novel and offensive to principle" the notion that the Code allows for a deprivation of liberty, not just based on a fear of future acts by the person controlled, but based on a fear of future acts of others, sought to be thwarted by placing restrictions on the controlled person.[370] He warned:

> To do this is to deny persons their basic legal rights not for what they have been proved to have done (as established in a criminal trial) but for what an official suggests that they might do or that someone else might do. To allow judges to be involved in making such orders, and particularly in the one-sided procedure contemplated by Div 104, involves a serious and wholly exceptional departure from basic constitutional doctrine unchallenged during the entire history of the Commonwealth. It goes far beyond the burdens on the civil liberties of alleged communists enacted, but struck down by this Court, in the Communist Party Case. Unless this Court calls a halt, as it did in that case, the damage to our constitutional arrangements could be profound.[371]

Among what Justice Kirby described as "offending features" of the legislative scheme are the use of *ex parte* determinations, "uniform minimization of rights," and the "withholding of evidence" from the person so controlled.[372] Justice Kirby raised concerns that it was solely up to the judge to make findings based on this often-secret evidence, and he cited to other countries that employ a system of advocates for such determinations.[373]

These two cases provide examples of some of the personal experiences of people subject to extraordinary detention practices. While, again, each contains some features that are arguably unusual, each also

[369] *Ibid* at para 355.
[370] *Ibid* at para 357.
[371] *Ibid*.
[372] *Ibid* at para 364.
[373] *Ibid* at para 365.

involves extensive discretion on the part of the Executive, which caused members of the judiciary to at least raise the concern that the detentions were handled as they were simply because the Government was unable or unwilling to proceed under the criminal-justice system. Whether that speculation is ever proven to be true, these cases raise enough questions to suggest that a presumption against use of the criminal-justice system can raise serious problems.

E. Other Examples of Changes: Torture and Targeted Killings

E.1. Torture Becomes "Enhanced Interrogation"

As will be discussed further in Chapter 4, the U.S. adopted a peculiar "war" model in relation to terrorism that was not significantly followed by most other national jurisdictions. While a number of U.S. allies did participate in the military actions in Afghanistan and Iraq, thus employing a war-time approach to terrorism in that respect, countries outside of the U.S. did not unilaterally adopt the sort of military commission, war-detention scenarios, particularly for those who were not captured on the battlefields of Afghanistan and Iraq. It is partially for this reason that the "war" approaches of the U.S. are discussed separately in Chapter 4.

Nonetheless, to give an indication of the extent of the exceptions to traditional criminal-justice standards, and to acknowledge overlap in some cases between domestic responses and the U.S.-based "war" response, it is noted here that the variations found in post-9/11 extraordinary detentions were not limited solely to actual judicial proceedings or standards of traditional detentions. After 9/11, for instance, torture was revived as a subject of seemingly serious debate, as the U.S. employed tactics often referred to as "enhanced interrogation" that included waterboarding, sleep deprivation (known sometimes as the "frequent flyer" program), and stress

positions, and also which included allegations of much more serious actions, such as those that arose from the Abu Ghraib scandal. While asserting that it did not torture prisoners, the U.S. Government went to considerable lengths to justify its "enhanced interrogation" tactics.[374] Thus much of the War on Terror in this context became a war of semantics, as debates raged as to what form of mistreatment was serious enough to constitute torture. In what have come to be known as the "Torture Memos," government officials produced legal opinions as to what constituted torture, which was, in part, necessitated because of a U.S. federal statute calling for serious penalties for government officials ordering or engaging in acts of torture.[375]

Jeremy Waldron undertakes a shift of the kaleidoscope on this issue when he argues that one reason the arguments over torture heightened after 9/11 is that the starting point of the analysis changed. Torture, he argues, had a different status before 9/11, as a legal *archetype*, a symbolic and absolute ban that was symbolic of societal values renouncing the use of brutality in legal systems. Where torture is, instead, treated as just another legal rule, it loses that stature and is subject to erosions such as that evidenced by the "Torture Memos," in which degrees of mistreatment are argued.[376] Waldron summarizes this argument by saying:

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[374] Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 Colum. L Rev 1681 [Waldron, Torture and Positive Law].

[375] See *Crimes and Criminal Procedure: Torture*, 18 U.S.C. §§ 2340-2340A; See also e.g. John Yoo, Deputy Assistant Attorney General, Department of Defense, "Memorandum for William J. Haynes II, General Counsel, Department of Defense (9 January 2002), online: George Washington University <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>; Alberto R. Gonzales, "Decision re: Application of the Geneva Convention (sic) on Prisoners of War to the Conflict with Al Qaeda and the Taliban," (25 Jan 2002), online: George Washington University <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf >; Jay S. Bybee, Memorandum for Alberto R. Gonzales Counsel to the President," (1 Aug 2002), online: U.S. Department of Justice <http://dspace.wrlc.org/doc/bitstream/2041/70964/00355_020801_001display.pdf> (portions redacted) [Bybee Memo].

[376] Waldron: Torture and Positive Law, *supra* note 374.

> I argue that the prohibition on torture is not just one rule among others, but a legal archetype – a provision which is emblematic of our larger commitment to non-brutality in the legal system. Characterizing it as an *archetype* affects how we think about the implications of authorizing torture (or interrogation methods that come close to torture). It affects how we think about issues of definition in regard to torture. And it affects how we think about the absolute character of the legal and moral prohibitions on torture.[377]

Waldron's characterization is useful as his presentation immediately shifts the issue, so what may otherwise have had indicators of a logical argument, when torture is argued as simply another legal rule, may have a different appearance when the picture changes, and the starting point of the discussion is the idea that the prohibition on torture is an absolute, and not just another rule. His method of argumentation, thus, has similarity to the overall methodology espoused by people like Perelman and Olbrechts-Tyteca, with the point of departure being shifted to bring about an entirely different view of the issue.

This study does not attempt to necessarily present the voluminous commentary on the issue of torture, so much as to include it as an example in which the notion of the unprecedented nature of the 9/11 attacks -- and resulting exposed risk -- led to an acceptability of ideas that, before 9/11, were renounced. In the case of torture, this illustration is rather vivid, as this was one issue on which there was previously considerable consensus among countries that included the U.S. While the U.S. never accepted the label of "torture" for its "enhanced interrogation" methods, it is obvious that, instead, it undertook a semantic exercise, which significantly narrowed the idea of what would constitute torture beyond its pre-9/11 meaning. That this was based on the notion of an unprecedented risk is suggested by the language in one of the "Torture Memos," which explains, among other things, the President's authority in times of war, specifically referencing the war

[377] *Ibid* at 1681.

against Al Qaeda, and suggests that, under those exceptional circumstances, the statute that banned torture in the U.S. was presumptively unconstitutional. The memo portrays the 9/11 attacks as different in destructiveness than prior attacks and subsequent attacks and attempts, but ties them all together in noting a unified campaign of violence against the U.S., noting "we conclude that, under the current circumstances, necessity or self-defense may justify interrogation methods that violate Section 2340A."[378] Thus, the obvious suggestion is that, after 9/11, something was presumptively different about the threat posed by Al Qaeda, and that those circumstances are such that they can be specifically cited for justifying a different reading of what constitutes torture.

E.2. The Evolution Continues: Targeted Killings

This study focuses extensively on language espoused closer to the time of the attacks, with the objective of following those discursive threads to see what they became in terms of normative standards. Most recently, however, the U.S. has asserted a legal justification for the use of targeted killings in its fight against terrorism. While not a new controversy, it has increasingly become a public debate in recent years, and it obviously developed as extraordinary measures in this area became more familiar. In his speech in 2010, Harold Koh, on behalf of the U.S. Government, argued that targeted killings were legal in the "armed conflict" against Al Qaeda, justified, he said, both under international law and by the Authorization for Use of Military Force, passed by the U.S. Congress shortly after the attacks. He listed the common objections to the practice, generally refuting each with a statement that principles governing armed conflicts governed and permitted the practice. Specifically, Koh noted:

[378] Bybee Memo, *supra* note 375.

> As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks. As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians. Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.[379]

Koh's speech, as a representative of the U.S. Government, shows some variance from some of the positions he took before assuming that position, when he was writing as an academic at Yale and provides a, perhaps unintentional, example of the way discourse and argumentation can change depending on who is presenting the case, or on whose behalf one speaks.[380]

The controversy gained additional prominence after the U.S. targeted a U.S. citizen, Anwar al-Aulaki, killing him through a CIA drone strike in Yemen after alleging that he was an Al Qaeda operative.[381] Eric Holder, the U.S. Attorney General, made a speech, in which he outlined a justification for the use of such killings. In his speech, Holder repeatedly referred to al-Aulaki

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[379] *Koh Speech*, *supra* note 58.

[380] See e.g. Harold Hongju Koh, "Foreword: On American Exceptionalism" (2003) 55 Stan. L. Rev. 1479 (among other things criticizing the U.S. Administration for its flat presentation of issues without nuance and encouraging the U.S. to pursue an approach that rejects "double standards" and adheres to traditional ideals and legal principles); Harold Hongju Koh, "The Law Under Stress After September 11," (Summer 2002) 49:2 Yale L Rep 13.

[381] His name is typically spelled "al-Awlaki" in the popular media. In legal pleadings relating to his case and that of his son, the name is spelled "al-Aulaki," so that spelling is adopted herein. See Ryan Patrick Alford, "The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens" (2011) 4 Utah L Rev 1203, fn 3 (explaining the differing translations of the name from Arabic).

as a terrorist or Al Qaeda operative, even though no judicial proceeding had ever established any such action. Moreover, much of the controversy arose over the fact that al-Aulaki was a U.S. citizen, suggesting that there would be less quarrel, at least within the U.S., if non-citizens were targeted.[382] In referring to the Due Process Clause of the U.S. Constitution, Holder asserted that "[t]he constitution guarantees due process, not judicial process."[383] Holder's statement contradicts more than 200 years of constitutional jurisprudence in the U.S. as to the meaning of due process, and it is unclear whether it was simply an inappropriate statement, or whether it signals an additional shift in the U.S. approach to judicial process in terrorism cases. The issue of targeted killings has raised the question of whether the death penalty, already a controversial issue in the U.S., is now to be applied without even the benefit of any judicial process, on the President's say so. In the case of al-Aulaki, the question is unavoidable.

This is a fairly new controversy on the U.S. legal and political landscape, at least in relation to post-9/11 extraordinary detention practices. The practice itself is not new, but the fact that al-Aulaki was a U.S. citizen, along with statements made by U.S. officials justifying the attacks, caused the issue to gain prominence in the public discourse. Legal attempts to intervene before the strike that killed Anwar al-Aulaki were ultimately unsuccessful, with a U.S. court refusing to hear the case on its merits because it was a "political question" and granting a government motion to

[382] Associated Press, "US attorney general justifies 'targeted kill' programme," (5 March 2012), online: The Guardian <http://www.guardian.co.uk/world/2012/mar/05/attorney-general-targeted-kill-programme>.

[383] *Ibid*; see U.S. Const., amend. 5 ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

dismiss in December 2010.[384] Al-Aulaki was killed in a drone strike on September 30, 2011.[385]

It appears that this practice will result in further litigation, and the matter will not be resolved in the immediate future. The issue of use of this tactic by the U.S. Government against its own citizens has evoked an especially strong response, and the obvious question is whether this is objectionable simply because of the citizenship of those targeted. As of the writing of this thesis, Amnesty International and the Centre for Constitutional Rights have filed a lawsuit in U.S. federal court on behalf of surviving relatives of several people killed in a targeted strike. One of those killed was al-Aulaki's 16-year-old son, Abdulrahman Al-Aulaqi, also a U.S. citizen, who was also killed in Yemen, two weeks after the strike that killed his father.[386]

The debate relating to the U.S. use of targeted killing is developing some of its own distinctive discourse characteristics, separate and sometimes even in opposition to what has developed elsewhere in relation to terrorism detentions. The fact that a U.S. court refused to hear the case before Al-Aulaqi was killed is disturbing. Judicial approval would not, necessarily, legitimize the action, but it would be preferable to completely unchecked executive discretion on such a major action. Conversely, those advocating for targeted killing often suggest that it could be considered legitimate if structured in a way that allowed for judicial oversight.[387] A question arises as to whether courts are showing reluctance to hear these cases because the idea of targeted killing is such an extreme, and intuitively so at odds with fundamental values relating to fair judicial process, that

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[384] *Al-Aulaqi v Obama*, Civil Action No. 10-1469 (JDB), Memorandum Opinion (DC Cir 2010), online: Centre for Constitutional Rights <http://www.ccrjustice.org/files/2010.12.07_Al-Aulaqi%20Decision_0.pdf>.
[385] Centre for Constitutional Rights, "Al-Aulaqi v. Panetta: Synopsis," online: Centre for Constitutional Rights <http://www.ccrjustice.org/ourcases/current-cases/al-aulaqi-v-panetta>.
[386] *Al-Aulaqi v Panetta*, No. 12-cv-_____ (U.S. Dist. D.C. filed July 18, 2012)(original complaint), online: Centre for Constitutional Rights <http://www.ccrjustice.org/files/July-18-2012-Nasser-Al-Aulaqi-Complaint.pdf>.
[387] C.f. *National Defense Authorization Act for Fiscal Year 2012*, H.R. 1540 (2012) [*NDAA*].

courts do not want to be in the position of having to approve such actions, and thus to be complicit. Conversely, they may also not want to be in the position of blocking them if doing so really would result in a terrorist attack. This conversation is far from resolved and is certain to continue.[388]

A final note, previewing a more extensive discussion in Chapter 4, also relates to the U.S. While many national jurisdictions are arguably scaling back their extraordinary measures relating to terrorism, at least in respect to domestic terrorism detentions, it appears that, in some ways, the assertion of U.S. extraordinary detention authority is continuing to expand, both outside its borders, as demonstrated by the ongoing controversy surrounding the al-Aulaki scenario, and inside its Borders, relating to the controversial detention provisions of the National Defense Authorization Act (NDAA) for Fiscal Year 2012, allowing for military detentions within the borders of the U.S.[389] These measures may be more evolving than expanding, as some contraction can be seen as well, such as in the fact that no new detainees are being brought to Guantanamo Bay, and the U.S. Government has more recently renounced the use of "enhanced interrogation," while still arguing that information obtained through such interrogations should be admissible in court and in military commission proceedings.[390] Still, the increased potential for domestic extraordinary detention, ongoing presumptive acceptance of asserted governmental needs for secrecy, and the increasingly open use of such

[388] For some critique regarding targeted killing see e.g. Vincent-Joël Proulx, "If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists" (2005) 56:5 Hastings L J 801-900; Jeremy Waldron, "Can Targeted Killing Work as a Neutral Principle?" (2011) NYU School of Law, Public Law Research Paper No. 11-20, online: SSRN: <http://ssrn.com/abstract=1788226>; Claire Finkelstein, Jens David Ohlin, & Andrew Altman eds., *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012)(containing a chapter by Waldron similar to the afore-referenced paper).

[389] See NDAA, *supra* note 387.

[390] See *ibid*; see also Gabor Rona, Broad Definitions of Terrorism Will Continue to be Struck Down," JURIST – Hotline (30 May 2011), online: JURIST <http://jurist.org/hotline/2012/05/gabor-rona-terrorism-definitions.php> (explaining the controversies around this and other laws deemed to be too broad, as evidenced by the decision of a U.S. federal judge finding the detention provisions unconstitutional).

extremes as targeted killings, reinforce the continued validity of the use of these starting presumptions to assess current practice.

F. Conclusion

What emerges from these and many other examples is a sense that significant changes were frequently implemented in the days after the 9/11 attacks, not just in the U.S. but in a number of national jurisdictions. These changes related only to certain types of detainees, but often went to the very heart of what had been considered fair judicial proceeding, the right to be heard by a competent authority, to be apprised of any allegations, to challenge detention, to know the evidence to be produced, the right to counsel, and even the right not to be executed without some form of judicial process. The changes may have varied from place to place, both in form and extent, but change happened in a number of national jurisdictions, apparently based on the presumption that the 9/11 attacks were unprecedented in such a way that they required the use of alternative detention paradigms. If, indeed, national jurisdictions felt the need for change, the trend was to seek means of detaining people entirely outside of the criminal-justice system, or, alternatively, to pull away to the extent possible from pre-existing criminal-justice procedural protections, often on the back of this presumption, which does not appear to be as solid as assertions suggest.

More than ten years after the 9/11 attacks, these changes are not all rolling back, but are gaining an increasing indicia of familiarity, becoming institutionalized and normalized. One wonders, for instance, if an announced policy of targeted killings would have garnered so little reaction if the U.S. had done so before 9/11, or even in the few years immediately after the attacks. As time has passed, however, and as extraordinary deprivations of fair judicial proceeding have become increasingly normal, the “slow creep of

complacency," identified by Lord Scott, has attached.[391] A parallel system appears to have emerged for many of those to whom the accusation of terrorism has attached, regardless of whether there has ever been any proof of such activity. The narrative has fractured, and the criminal-justice system has been treated as presumptively outdated and not useful in a number of cases related to terrorism.

The presumption now favours these new regimes, and, constitutional provisions notwithstanding, many national jurisdictions have simply accepted this new presumption with surprisingly little protest. Rather, the mere assertion of a future threat has been adequate in many cases, was adequate in the early days after 9/11, and remains adequate today. In spite of some internal disputes about the specifics, and some national courts have checked executive discretion in this area, the over-arching idea that the criminal-justice system can sometimes be avoided where terrorism is alleged has been accepted, and detentions for what previously would have been criminal matters can now, with some limits, be sent through a parallel system. In the post-9/11 world, long-standing constitutional principles have been presumptively set aside on a mere and sweeping assertion of necessity, and the current situation has even evolved to one in which a U.S. citizen can be killed by the U.S. Government without a single charge being filed or any criminal proceedings instituted, and in which a court can refuse to stop such an action because it is a "political question."[392]

And yet, all evidence suggests that criminal courts are, indeed, capable of handling terrorism cases, where the government seeks to detain somebody for involvement in terrorism. That capability includes inchoate offenses, and, indeed, most criminal prosecutions are for actions allegedly related to planning, rather than actually undertaking, a terrorist attack. The

[391] *AF*, *supra* note 329 at para 84.
[392] *Al-Aulaqi v Obama*, Civil Action No. 10-1469 (JDB), Memorandum Opinion (DC Cir 2010), online: Centre for Constitutional Rights <http://www.ccrjustice.org/files/2010.12.07_Al-Aulaqi%20Decision_0.pdf>.

criminal justice system can also evolve to address any evidentiary issues that are argued to be specific to terrorism-related cases, and they have done so. It is therefore unclear why it was so often deemed permissible, after 9/11, for governments to presumptively set this system aside, to detain people through parallel systems entirely outside of the criminal-justice system.

Each of the national jurisdictions discussed in this chapter has undertaken a significant number of successful prosecutions in matters relating to terrorism, and their higher prosecution rates suggest, in fact, that criminal courts may well be more successful in protecting these countries from future terrorist attacks than many of the extraordinary structures. Jose Padilla, for instance, languished with no trial for years while the Government expended substantial resources keeping his case out of court. Once the case ultimately went to court, however, he was convicted and is likely to serve a long sentence. Without commenting on the particular circumstances of his case and conviction, which remain controversial, this outcome does suggest that governmental objectives can be better served by utilizing, rather than avoiding, the criminal-justice system.

In a speech made by U.S. Supreme Court Justice Anthony Kennedy in August 2010, he responded to a question about the use of military commissions instead of Article III Courts in the U.S. by saying that U.S. courts are perfectly capable of trying these cases.[393] A similar view was expressed by John G. Coughenour, the judge who presided over the trial of convicted "Millenium Bomber," Ahmed Ressam. Coughenour wrote an op-ed in the *New York Times*, in which he said:

> The case against Mr. Ressam demonstrates that our courts can protect Americans from terrorism. Through the commendable efforts of law enforcement authorities in 1999, Mr. Ressam was

[393] Associated Press, "Supreme Court Justice Kennedy Says Most Terrorism Cases Should be Tried in Civilian Courts" (19 August 2010), online: Fox News <http://www.foxnews.com/us/2010/08/19/supreme-court-justice-kennedy-says-terrorism-cases-tried-civilian-courts/>.

> captured before he was able to carry out his plan to bomb the airport. For two years after his conviction, thanks in part to the fairness he was shown by the court, Mr. Ressam provided intelligence useful to terrorism investigations around the world, as German, Italian, French and British authorities were willing to attest.
>
> After a fair and open trial in which Mr. Ressam was convicted by a jury of his peers, I stated at sentencing that "we have the resolve in this country to deal with the subject of terrorism, and people who engage in it should be prepared to sacrifice a major portion of their life in confinement." Mr. Ressam now sits in a federal prison, and his punishment has the imprimatur of our time-honored constitutional values.[394]

Where a government seeks to avoid criminal courts for these cases, the pre-9/11 discursive presumption favoured use of the criminal-justice system, and deviation from those courts, if ever allowed, would only occur on a government showing of truly extraordinary circumstances. The discourse used after the 9/11 attacks, however, appears to have given rise to a presumption against the criminal-justice system and appears to have arisen on a false premise that the 9/11 attacks were so unprecedented that they required a new approach. The development in these areas does not necessarily support that belief as a presumption. Thus, governments should re-examine this foundational statement, questioning whether it was, indeed, a presumption as presented, or simply a premise based on what is preferable, to use Perelman and Olbrechts-Tyteca's terminology. If the latter, and that appears to be the case, then foundational structures built on it should also be questioned before they are continued or expanded.

[394] John G. Coughenour, Op-Ed, "How to Try a Terrorist," (1 Nov 2007), The New York Times, online: NYTimes.com <http://www.nytimes.com/2007/11/01/opinion/01coughenour.html>.

"An individual who is detained under section 23 will be a person accused of no crime but a person whom the Secretary of State has certified that he "reasonably … suspects … is a terrorist" (section 21(1)). The individual may then be detained in prison indefinitely. True it is that he can leave the United Kingdom if he elects to do so but the reality in many cases will be that the only country to which he is entitled to go will be a country where he is likely to undergo torture if he does go there. He can challenge before the SIAC the reasonableness of the Secretary of State's suspicion that he is a terrorist but has no right to know the grounds on which the Secretary of State has formed that suspicion. The grounds can be made known to a special advocate appointed to represent him but the special advocate may not inform him of the grounds and, therefore, cannot take instructions from him in refutation of the allegations made against him. Indefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares, associated whether accurately or inaccurately with France before and during the Revolution, with Soviet Russia in the Stalinist era and now associated, as a result of section 23 of the 2001 Act, with the United Kingdom."[395]

[395] *Belmarsh Detainees* Case, *supra* note 13 at para 155 (Lord Scott of Foscote)(critiquing the system in the UK of detaining people under immigration provisions, potentially indefinitely, rather than proceeding with criminal prosecution of suspected non-citizen terrorists.).

CHAPTER 3: False Premise: Terrorists as "the Other"[396]

Advanced as Presumption/Point of Departure. Non-citizens, who are Muslim, male, or those whose national origin is from one of several largely Muslim nations, are presumptive terrorists and the targets of these terrorists are "Us," i.e., non-Muslim, Western, citizens, preferably native born, of whichever national jurisdiction is implementing policies.

A. Turning the Kaleidoscope to Consider the Terrorist "Other"

A further post-9/11 discursive spin of the kaleidoscope exposes another presumption and point of departure, that relating to the concept of "the Other." Immediately after the attacks, several national governments undertook detention initiatives that appeared to target people – or sometimes have a disproportionate impact on them – based on such immutable characteristics as religion, gender, national origin and citizenship. Investigative techniques often resembled the type of racial profiling that is so often critiqued in traditional criminal investigations, but it involved a new element, in which people in some places were detained, often with little or no judicial review, often in secret, often under the taint of what has been argued to constitute torture – with the primary, initial targeting involving these immutable characteristics. This focus becomes apparent from two dominant avenues of extraordinary domestic detentions immediately after 9/11 – the use of national immigration systems, and the "war" paradigm announced by the U.S., but followed, to lesser degrees, by a number of U.S. allies, including Canada, the UK, and Australia.[397]

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[396] A "false premise" is, just as it sounds, a point of departure for an argument that is simply not true. *Govier: A Practical Study of Argument*, *supra* note 210, at 86.

[397] See generally, *Roach, The 9/11 Effect*, *supra* note 240. Arguments have been ongoing since 9/11 about whether the criminal-justice system is most appropriate to address terrorism detentions. In fact, the criminal-justice system never stopped being used as a tool

The designation of a "false premise" was chosen for this point of departure, although all of the premises presented in this thesis were treated as presumptions even though they were arguably, in fact, false premises, not only not proven but simply not true. This presumption, relating to the terrorist Other, was chosen, however, because it is distinct in some ways from those used in the other chapters. First, it is hoped that it is apparent that this proposition is false. No national government openly stated this premise, and, in fact, the discourse used appeared to deny that this was, indeed a premise.[398] That is especially so in terms of people who were Muslim. Even as the so-called "War on Terror" was being declared, national leaders went to lengths to differentiate Islam from the beliefs held by the terrorists. U.S. President George W. Bush explicitly admonished Americans not to retaliate against those who were Muslim and went to lengths to show support for Muslim Americans.[399]

What is therefore distinctive about this presumption, then, in discursive terms, is that it is evidenced by actions taken more than by words spoken. The discourse surrounding those actions, while never explicitly identifying this group as the Other, did, when combined with various initiatives, lead to the undeniable presumption that there was, in fact, an Other, who was presumptively at least more likely to be a terrorist.

In some ways, the concept of citizenship, certainly within the U.S., but arguably in the other national jurisdictions discussed herein, changed after 9/11. It is not clear whether this change was in a larger sense, or if there emerged a new notion of citizenship only within the realm of anti-terrorism detentions. Where, before 9/11, citizens were viewed in many ways based on their formal citizenship status, after the attacks, this narrative fractured.

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in anti-terrorism. It is not used in particular cases, and it is those cases that are the focus herein.

[398] See Bush, 9/20 Speech, *supra* note 28.

[399] *Ibid.*

Citizenship came to be viewed in terms of allegiance, within the U.S. in particular, as evidenced by the palpable swell of national loyalty after the attacks. Citizens who showed such allegiance, or at least who were seen as doing so, were perceived as "us," while those who did not, or even those who criticized actions taken by the U.S. Government, especially, in response to the attacks, encountered considerable hostility.[400] Within the context of who was included within this restrictive idea of citizenship, even those who expressed loyalty, or did not criticize the government, could be viewed with hostility if they fell within certain subgroups, namely, Muslim, male, and of a certain age. If somebody within that subgroup, citizen or not, failed to express allegiance, or critiqued the U.S. response, the backlash was likely to be even greater. Moreover, in the context of non-citizens, those subjected to extraordinary detention practices were overwhelmingly non-citizens of the country involved, were Muslim, or with a national origin from a primarily Muslim country, and were male, as explained throughout this Chapter. A presumption arose, not necessarily explicitly stated but evidenced through various initiatives, that non-citizens were "the Other," and that presumption was bolstered if the non-citizen fell within one of these subgroups. Moreover, true citizens were seen as those who expressed allegiance, and an

[400] A famous example occurred with the country group, The Dixie Chicks, and demonstrated that people could be seen as not quite proper citizens if they said certain things, regardless of the other immutable characteristics.. Shortly before the invasion of Iraq in 2003, one of the group members, Natalie Maines, made a remark opposing the pending invasion and saying that they were ashamed that President Bush was from their home state of Texas, because of the plans to invade Iraq. The comment received a positive reaction from the London audience, but caused a significant backlash in the U.S., with boycotts, public destruction of their albums, and even death threats being directed to the group. They suffered an initial financial backlash, as sales of their records dropped dramatically in a very short time. Maines issued an apology, saying, among other things "I love my country. I am a proud American." The situation eventually turned, and the Dixie Chicks ultimately were financially successful, responding to the controversy in a 2006 song, "Not Ready to Make Nice." ABC News, "Dixie Chicks Speak Out on 'Primetime'" (24 April 2003), online: ABCNews <http://abcnews.go.com/Primetime/story?id=131980&page=1#.UCmjR2NYvcY> (explaining the controversy and backlash).

expression to the contrary could have a considerable exclusionary backlash, even if it did not involve extraordinary detentions.

In some ways, this reflection of citizenship, or of being one of "us" as related to perceptions of allegiance, evokes ideas of the othering of those of Japanese descent, whether citizens of the U.S. or Canada, or not, after the attack on Pearl Harbor in World War II. Extraordinary detention was deemed acceptable based on perceived loyalty, and that perception was based entirely on national origin. Citizens to be protected clearly did not include those of Japanese origin, who were treated as the Other and as a national security risk, without formal citizenship creating a clear dividing line. Perceived loyalty, in turn, seemed to have been based on rather blatant racism, with a presumption that those of Japanese origin were presumptively disloyal and thus could be deprived of their liberty and incarcerated solely because of their national origin. This approach was upheld during that time by the U.S. Supreme Court in the now-notorious *Korematsu* decision.[401] It ultimately led, many years later, to a formal apology and reparations to the victims, but it was evidence of the way that views of citizenship can fracture after a cataclysmic event.

After 9/11, by contrast, while evidence supports a conclusion that the Other had been identified as Muslim, and male, and more often a non-citizen, it was never explicitly stated as the basis for detention. The detentions during World War II of those of Japanese descent took place on a large scale, and it was explicitly enunciated that civilians, even including children, were being detained solely on national origin.[402] After 9/11, on the other hand, detentions were not so wide sweeping and all people who had those immutable characteristic were not detained. Nonetheless, it appears that these immutable characteristics were used as a starting point, and those accused of terrorism affiliation were invariably within this group.

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[401] *Korematsu v United States*, 323 U.S. 214 (1944).
[402] See Susan Kiyomi Serranot & Dale Minami, *Korematsu v. United States:* A Constant Caution in a Time of Crisis;" (2003) 10 Asian L.J. 37.

Before 9/11, one of the largest terrorist attacks within the U.S. occurred in Oklahoma City. The form of othering seen during World War II, and after 9/11, did not occur after that attack. There were several perpetrators, with perhaps the most prominent being Timothy McVeigh, an American citizen who supposedly undertook the attack as revenge for the deaths after the siege in Waco, Texas.[403] He was a member of the National Rifle Association, Caucasian, of varying religious beliefs, but originally Catholic, and he took the Catholic sacrament of the anointing of the sick before he was executed.[404]

After the Oklahoma City attack, citizenship and othering did not become the issues they were in the other instances. A catastrophic attack, including significant loss of life, including horrific images of children killed at their daycare, resulted in a criminal investigation, trials, and sentences. Caucasian, Catholic male U.S. citizens were not singled out for "special" investigation and detention. In many ways, the Oklahoma City and 9/11 differences fell along the lines of what was deemed "domestic" terrorism and what was "international" and the intuitive instinct to undertake othering may arise more readily when the attack triggering the reaction is not carried out by somebody who would normally be perceived as "us" in terms of at least citizenship and immutable characteristics. All terrorists are not constructed in the same way.

This presumption of "the Other" as a relevant factor in national responses has been heavily discussed in a wide range of literature, either through the use of the theoretical concept of the Other or through more traditional language regarding discrimination or equality.[405] In this Chapter,

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[403] Jinee Lokaneeta, "Revenge and the Spectacular Execution: The Timothy McVeigh Case, (2004) 33 Studies in Law, Politics, and Society 331.
[404] *Ibid.*
[405] For example, I participated in a conference in Szczecin, Poland, in September 2012, called "Who is 'us' and who is 'them' after 9/11 – Reflections on Language, Culture and Literature in Times of Ideological Clashes," online: University of Szczecin <http://www.us.szc.pl/main.php/usandthem2011>, which brought together academics from a wide range of disciplines to explore this phenomenon post-9/11. Existing works in law,

however, the issue is considered in a somewhat different manner from that dominating the post-9/11 anti-terrorism literature. First, again, it is viewed through the lens of Perelman and Olbrechts-Tyteca's argumentation formulations, as are the points of departures in Chapters 2 and 4, and, second, the manner of development of this iteration of "the Other" is argued herein not to be a stark creation of the 9/11 attacks, but, rather, a circular concept that has been ongoing between the involved entities for years, and

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English philology, linguistics, history, literature, film studies, and even music were presented, addressing this issue, which has been widely discussed across a range of disciplines and a range of geographical borders. The organizers at the University of Szczecin are presently editing a book on the subject. For other examples of works exploring the conception of the Other relating to terrorism, post-9/11, see Frédéric Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other,'" in Anne Orford ed., *International Law and Its "Others* (Cambridge, Cambridge University Press, 2006), online: SSRN <http://ssrn.com/abstract=918541> [*Mégret*]; Ryszard Kapuscinski, *The Other* (Krakow: Verso, 2008); Randa A. Kayyali, "The People Perceived as a Threat to Security: Arab Americans since September 11" (1 July 2006), online: Migration Policy Institute <http://www.migrationinformation.org>; Arab-American Discrimination Committee, *Report on Hate Crimes and Discrimination Against Arab Americans: The Post - September 11 Backlash: September 11, 2001 - October 11, 2002*, online: Arab-American Discrimination Committee < http://www.adc.org/PDF/hcr02.pdf>; Anthea Roberts, "Righting Wrongs or Wronging Rights? The United States and Human Rights Post-9/11," (2004) 15:4 EJIL 721-749; Office Of the United Nations High Commissioner for Human Rights, *The Rights of Non-Citizens* (2006) online: United Nations High Commissioner for Human Rights <http://www.ohchr.org/Documents/Publications/noncitizensen.pdf>; Daniel Moeckli, *Human Rights and Non-Discrimination in the War on Terror* (Oxford: Oxford Publishing, 2008)(assessing post-9/11 measures in the U.S., the UK, and Germany and concluding that discrimination based on national origin and citizenship were overwhelmingly issues); see generally David Dyzenhaus, ed., *Civil Rights and Security* (Ashgate 2009)[Dyzenhau*s, Civil Rights and Security*]; Annette Becker, "Between 'Us' and 'Them,'" in Adam Hodges & Chad Nilep, eds. *Discourse, War and Terrorism* (Amsterdam: John Benjamins Publishing Co., 2007), at 161 (noting "Political discourse is about taking sides. This becomes particularly apparent at times when a war, or a nation's active participation in a war, is at stake."); Amaney A. Jamal, *Race and Arab Americans Before and After 9/11: From Invisible Citizens to Visible Subjects* (Syracuse: Syracuse University Press, 2008); Detroit Arab American Study Team, *Citizenship and Crisis: Arab Detroit After 9/11* (New York: Russell Sage Foundation, 2009); see generally Ana Maria Salinas de Frias, et al eds. *Counterterrorism: International Law and Practice* (Oxford: Oxford University Press, 2012); David Brotherton & Philip Kretsedermas, *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today* (New York: Columbia University Press, 2008); Clark Butler, *Guantanamo Bay and the judicial-moral treatment of the other* (West Lafayette, Ind: Purdue University Press, 2007); Ruth Bienstock Anolik & Douglas L Howard, *The Gothic Other: Racial and Social Constructions in the Literary Imagination* (Jefferson, N.C.: McFarland & Co., 2004); Anthony Burke, *Beyond security, ethics and violence: war against the other* (London; New York: Routledge, 2007); Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Boston: The MIT Press, 2000).

which was ongoing well before the attacks.[406] The attacks themselves represented a cataclysmic part of this vicious cycle, and the responses may have developed as they did, in part, because of the constantly escalating nature of this phenomenon. Rather than representing a post-9/11 creation, the othering scenario after 9/11 was arguably also really an escalation of this ongoing cycle and was not necessarily different in nature from prior perceptions, so much as it was different in the extent of the reactions that used this othering as a Perelman and Olbrechts-Tyteca-type point of departure.

In addition, the Other permutations did not, in fact, have only one dimension to them. As discussed first in this chapter, there was a delineating of lines between the U.S, or the West, and those claiming to speak on behalf of Muslims, or the East. That thread of othering, which related more to national origin and religion, and to some extent gender, was ongoing long before and continued and perhaps expanded after 9/11.

The issue of citizenship as an identifying feature of the terrorist Other arguably followed a different course within the larger context of othering actions. To some extent it was dominant in the discourse leading up to 9/11, but it also became predominant in the early post-9/11 responses.[407] The form of othering that involves national origin, religion, and sometimes gender, which can be identified early in the post-9/11 responses, appears to continue, on some level, to the present, where Muslim males, particularly those from countries that have large Muslim populations, especially from the

[406] See e.g. Simon Reeve, *The New Jackals: Ramzi Yousef, Osama Bin Laden and the Future of Terrorism* (Boston: Northeastern University Press, 1999)(a pre-9/11 book discussing some already prominent figures in the world of "Islamic terrorism"). The use of the word "jackal" is pejorative in a way that may have racial implications, as a jackal is an animal found in Asia and Africa.

[407] It is not suggested that this was unique to the post-9/11 period, as discrimination against immigrants has a long, well-documented history in many parts of the world. It is suggested, however, that the interplay between the different presumptions after 9/11 meant that the non-citizen, or particular type of non-citizen, as Other was a perspective that was not quickly repudiated as in past crises, and that it has, in many ways, become embedded in the foundational structure of anti-terrorism detentions in a way that is different from what has happened in many other scenarios involving a perceived crisis.

Middle East, continue to disproportionately represent those being held under revised detention standards.

But the distinctions based on citizenship have increasingly blurred, at least in some respects, in a way that suggests that the early variations, based on definite delineations along citizenship lines, blurred, so some of the extraordinary measures, at least in some places, can be applied to citizens as well. This is a significant shift, and, in some ways it is unique to the post-9/11 world, because the initial justification – that some of these measures were appropriate because they only applied to non-citizens – served as a presumption that was both questionable and often not questioned. To extend the fruits of these shaky presumptions to citizens may give the appearance of a lessening in discriminatory conduct, but if the presumptions themselves are questionable, it also may mean simply that unstable foundations are supporting the use of revised detention standards against more people. In the particular case of post-9/11 extraordinary detention structures, eliminating the distinction between citizen and non-citizen specifically means that more men who are Muslim, or have national origin from a largely Muslim country, can potentially be targeted, as this could be and seems to have been, extended in some cases to citizens with these immutable characteristics. In that instance, the problems from the unstable points of departure remain and actually increase, rather than decrease, even the element of discrimination. Thus, in relation to the concept of the Other, there were several sub-levels of fracturing of the post-9/11 narrative.

A.1. The Non-Citizen Other

The shifting kaleidoscope is thus an especially effective metaphor to be applied within the othering scenario, as the possible internal permutations as to whether this occurred, and, if so, what characteristics were not just considered but given considerable weight, varied over place, time, and sometimes situation.

Beyond that, it appears that, while the concept of the Other, implicitly or explicitly, served as a point of departure for the post-9/11 trends, the narrative in relation to this presumption differed from those examined in Chapters 2 and 4, because it was rarely explicitly stated, but, instead, was an inference that arose from what actually was said and what was done. Across jurisdictions, the narrative relating to the Other, itself, fractured in the years following 9/11. Sometimes different othering characteristics played together, so it can be difficult to view them in isolation, even though they sometimes developed differently.

The form that the treatment of the Other took varied depending on what factor was used in undertaking this perspective. While citizenship was arguably the most admitted factor used to determine who would be subjected to revised detention standards and who would not be, this aspect of post-9/11 othering evolved over time, creating a different set of issues than those created by the perception, for instance, that Muslim males are the Others – something few governments openly admitted to using as a presumption -- and causing a form of fracturing, not just within national jurisdictions, but often from one country to another. Thus, while there is an overarching trend of the use of certain characteristics to identify the terrorist Other, there are also considerable differences in how this aspect played out.

An undercurrent to many of the post-9/11 changes was that, viewing the post-9/11 discourse through a Perelman and Olbrechts-Tyteca-type lens, a frightened populace could be best persuaded by a government assuring them that they were dealing with the perpetrators of 9/11 and those who would similarly cause them harm, and the distinction that several national jurisdictions made based on citizenship provided an obvious vehicle for governments to provide these dual assurances.[408] It was arguably more effective to use the type of persuasive discourse for this audience regarding

[408] See Perelman & Olbrechts-Tyteca, *The New Rhetoric*, *supra* note 9 and discussion of their argumentation theories in Chapter 1, above.

revised detention techniques by simultaneously reassuring them that they, themselves, would never be subject to these revised detention and procedural scenarios. In Canada, one example of this type of persuasion was a statement made in Parliament by then-Canadian Minister of Public Safety Stockwell Day, as revisions to the security certificate legislation were being debated in early 2008:

> I would encourage all colleagues to set aside partisanship to realize that the security certificates have been proven not to threaten the individual rights and freedoms of Canadians. As a matter of fact, the security certificate cannot even be applied against a Canadian citizen. It can only be used on foreign nationals or those who are not Canadian citizens.[409]

David Cole has suggested a pragmatic basis as to why this singling out of non-citizens might have been the case, noting that non-citizens, for instance, do not have the right to vote if they object to their treatment.[410] Thus, citizens can be reassured that the terrorists are somebody else, and that these Others are sufficiently different to justify limiting their procedural process rights. Moreover, that populace can be reassured that their own rights are not at risk. With the voting population thus reassured, the likelihood of success in enacting or advancing the proposed policy is likely increased.[411] Once the different standards applied to non-citizens gained an aura of familiarity after 9/11, however, there is some indication that the inertia shifted in their favour and that some of those deprivations began to apply to citizens as well.[412]

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[409] 142 39th Parl. Deb., H.C. 2nd Session, (2008) No. 041, at 1340, online: Parliament of Canada <http://www2.parl.gc.ca/HousePublications /Publication.aspx?Pub=Hansard&Doc=41&Language=E&Mode=1&Parl=39&Ses=2> (this quote was included in an article co-authored with my doctoral supervisor, Maureen T. Duffy & René Provost, "Constitutional Canaries: The Elusive Quest to Legitimize Security Certificates in Canada" (2009) 40 Case Western J Int'l. L 531 at 547) [Duffy & Provost].
[410] See Cole, *Enemy Aliens*, *supra* note 228.
[411] *Ibid.*
[412] See the prior discussions of control orders in the UK, or of the NDAA in the U.S.

In the U.S., recent examples include the controversial provision in the *National Defense Authorization Act of 2012*, which grants extended power for military detentions within the borders of the U.S., potentially calling for prolonged detentions without criminal trial, and which garnered considerable controversy because the wording is such that it could arguably include U.S. citizens.[413] The recent targeted killing of a U.S. citizen, accompanied by reports that U.S. President Barack Obama personally approves those on a list, thus far not disclosed, for targeted killings, suggests that, for U.S. citizens and non-citizens alike, the death penalty without trial may now be possible if the accusation involves terrorism.[414]

Finally, there has been an increasing shift in the focus within the world of anti-terrorism detentions. After 9/11, the overwhelming focus was on international terrorism. In such a scenario, it is more intuitively reasonable to consider factors such as citizenship, because, almost by definition, the terrorist threat is envisioned as originating from the outside. In recent years, however, the discourse has increasingly turned towards an inclusion of domestic terrorism, but a focus that is apparently influenced by the post-9/11 anti-terrorism paradigms. As this internal focus continues, and as national governments continue to apply post-9/11 structures and approaches to domestic terrorism, the potential is that the application of many of these types of extraordinary measures will increasingly include citizens of the national jurisdiction in question. This possibility seems realistic, as it is often difficult to distinguish, especially in the detention scenario, different approaches relating to international terrorism, as opposed to domestic terrorism, and the impulse is to extend at least some of the strategies employed in international terrorism detentions to domestic detention. If, however, those strategies have foundational problems, the solution to this

[413] See *Hedges et al v Obama*, 12 Civ. 331 (KBF) (S.D.N.Y. 2012), *appeal pending* (granting an injunction against enforcement of some of the detention provisions in the NDAA).
[414] The designation of this as the "death penalty" is mine, as the U.S. Government would likely dispute this characterization as more a measure of self-defense.

inconsistency might not be to extend them to domestic detention, but, rather, to reconsider whether they are appropriate in terms of international terrorism.

The stereotypical presumption of the terrorist Other as a Muslim male is an enduring image. The idea of the terrorist as non-citizen, however, is eroding, but the assumptions that fed this presumption in the early days after 9/11 appear to endure, and to increasingly be expanded to apply to citizens as well. The endurance of some of these structures as applied to citizens has arguably paved the way for a new normal that means they encounter less resistance than they might have in the past. Thus, while much questioning of the notion of the Other has been undertaken, it often happens in terms of current initiatives, and the apparently obvious solution is to extend these initiatives to groups not originally deemed to be within this "Other" group. If, indeed, the Other was a foundational and erroneously foundational presumption of these structures, however, the problem of the Other is not alleviated by extending the practices to other groups.[415] Rather, it can only be addressed by deconstructing the erroneous, Other-based presumptions that led to use of the practice in the first place, and, to the extent that practice was based on the notion of the Other, considering whether such reliance undermines its foundational structure enough to stop the practice entirely. In this sense, the use of a presumption after 9/11 has everything to do with the proper direction of anti-terrorism initiatives going forward.

A.2. The Other: A New Dimension to Said's Formulation

The use of "the Other" is obviously not a new concept in international relations, nor was the stated and fallacious antagonism between "Americans" and "Muslims" a newly cited justification for actions either by terrorists or by national governments. This old formulation, instead, was used in new ways, and the crisis climate that existed after 9/11 allowed national governments an

[415] See the *Belmarsh Detainees Case*, *supra* note 13 (discussing that remedying the discriminatory detention provisions would not alleviate the problem, because the provisions would not be appropriately applied to citizens either).

opening to expand it as a presumption, and to undertake legal and policy changes that would have been unthinkable before 9/11. In so doing, they often went too far, as national high courts frequently admonished them, but they went far enough to shift the inertia in such a way that vestiges of those early shifts continue to underscore some current detention standards.

Soon after the 9/11 attacks, a discourse emerged that clearly identified the "new" threat as originating from particular groups of people, and implied, rather than stating, that terrorists could be best identified based on certain immutable characteristics. This underlying presumption is arguably the most obvious, and the most enduring, of the post-9/11 presumptions addressed herein, and it manifested itself in a number of ways that are critiqued throughout this chapter. While rarely presented in explicit terms in public discourse – and, indeed, expressly denied in some of the post-9/11 discourse undertaken especially in the U.S. after the attacks – the immediate response to the attacks by several national governments demonstrates that this was a dominant underlying presumption. The idea of two sides – the West, or sometimes "America" versus the East, or sometimes "Muslims" continued to underscore much of the foreign policy decision-making in this area long after the attacks. For example, in a speech at Cairo University in 2009, U.S. President Barack Obama assumed such a rift in saying: "I consider it part of my responsibility as president of the United States to fight against negative stereotypes of Islam wherever they appear … But that same principle must apply to Muslim perceptions of America."[416]

The obvious implication, of course, is that no Muslims are American, and no Americans are Muslims, but that the two groups exist in separate, non-overlapping groups, and that they think as one entity and have a single, unified belief system, which is diametrically opposed to that of the other.

[416] Laura Meckler and Jay Solomon, "Obama Chides Israel, Arabs in His Overture to Muslims," online: The Wall Street Journal <http://online.wsj.com/article/SB124409999530984503.html>.

Even in this speech, in decrying the use of stereotypes, President Obama appears to, himself, engage in the most blatant form of stereotyping.

It is, of course, not uncommon for political discourse to present scenarios in stark, non-nuanced terms, most particularly in times of perceived emergency or danger.[417] Piotr Cap, has written, from a linguistics vantage point, about this phenomenon in developing theories relating to legitimization and proximization in political discourse, specifically in relation to U.S. Government discourse after 9/11. His emphasis is on the discourse surrounding the justification of the invasion of Iraq, but he writes of the larger discursive environment after 9/11, noting that, while there is a history of this type of discourse in the U.S. in times of war, it had a new dimension after 9/11:

> Although following the (sic) WWII the legitimization of each consecutive military involvement has drawn on the simplistic dichotomy of "us" and "them," the latter party usually symbolizing some kind of adversarial or plainly evil ideology that could potentially jeopardize the American system of beliefs and values or, in the long run, threaten the lives of the American people, it was not until after 2001 that the ideologies of evil and terror could be claimed, by analogy, to have already been operating within the American territory.[418]

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[417] See e.g. Annette Becker, "Between 'Us' and 'Them,'" in Adam Hodges & Chad Nilep, eds. *Discourse, War and Terrorism* (Amsterdam: John Benjamins Publishing Co., 2007), at 161 (noting "Political discourse is about taking sides. This becomes particularly apparent at times when a war, or a nation's active participation in a war, is at stake."); see also David Haugen, ed., *National Security: Opposing Viewpoints* (San Diego: Greenhaven, 2007)(collecting issues from various people, with opposing perspectives presented on certain questions, including some relating to the limitations of civil rights in the name of national security); Glenn Greenwald, *A Tragic Legacy: How a Good vs. Evil Mentality Destroyed the Bush Presidency* (New York: Three Rivers Press, 2007) at 8, 14, 26-32.

[418] *Cap, Legitimisation*, *supra* note 8 at 2 (using as an example statements made by President Bush on the evening of September 11, 2001, "[t]oday our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts … Terrorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America."). In many respects, the attack by the Japanese military on Pearl Harbor, during World War II, triggered a reaction to this perception of threat, but the physical distance of Pearl Harbor from the U.S. Mainland would suggest that there was still a sense that the Mainland itself was immune to such attack, which is an illusion that was arguably shattered on 9/11.

Moreover, the idea of presenting an enemy in stereotypical terms, or simply presenting another culture that way, has long been recognized and discussed in various academic disciplines, such as in Edward Said's formulation of the Other in *Orientalism*.[419] In the particular case of the 9/11 attacks, such a formulation seemed expedient when the U.S. Government, initially and in particular, faced immediate pressure to identify those responsible. When it emerged, shortly after the attacks, that the perpetrators were 19 non-U.S. nationals, most of whom were from Saudi Arabia, and some of whom were in the U.S. on visas that had been obtained under questionable circumstances, the characteristics of the terrorist "Other" began to formulate in the discourse and responses.[420] That was solidified when Osama Bin Laden's Al Qaeda network was identified as the entity responsible for the attacks.[421]

This theoretical concept of the terrorist as the Other, as identified herein, manifested itself in different, practical, ways in different places, but it was arguably the strongest thread linking together initiatives of national jurisdictions in the days after 9/11, and it is the most enduring undercurrent to extraordinary detention practices relating to terrorism. As with the other chapters in this thesis, this chapter begins with the responses that were undertaken immediately after the attacks, because that is when these foundational premises were laid as the groundwork for building extraordinary detention structures. The threshold presumptions defined herein appear to have served as the point of departure for many practices going forward. The presumption expounded upon in this chapter, though, is different from those

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[419] See Edward Said, *Orientalism* (London: Vintage Books 1978) [Said: Orientalism].
[420] See *The 9/11 Commission Report*, *supra* note 210.
[421] There was some initial controversy about whether Al Qaeda did, indeed, plan and undertake the attacks, originating from an initial denial by this organization of any responsibility. See e.g. CNN, "Bin Laden Says He Wasn't Behind the Attacks," (16 September 2001), online: CNN <http://articles.cnn.com/2001-09-16/us/inv.binladen.denial_1_bin-laden-taliban-supreme-leader-mullah-mohammed-omar?_s=PM:US>.

considered in the other chapters, because, first, it was probably the most dominant of the underlying presumptions, and, second, not only was it never proven as a presumption – thus serving, at best, as a premise – but it was frequently explicitly denied by national governments, whose actions demonstrated that they did, in fact, build initiatives on this concept as a foundational presumption.[422] Perelman and Olbrechts-Tyteca's formulation thus works in assessing a presumption under these circumstances, as it is apparent, whether acknowledged or not, that some presumption of the terrorist as the "Other" based on religion and/or national origin dominated the post-9/11 responses and clearly served as a point of departure, and that the inertia has shifted in favour of such presumptions in current approaches. It appears, however, that this presumption would be defined as more implicit than explicit, and that it was rarely stated even as a premise in governmental actions.[423]

As with the other presumptions outlined in this thesis, therefore, they remain relevant and subject to critique for any successful forward-looking perspective on anti-terrorism initiatives. As will be expounded upon in more detail in this chapter, the notion of the Other was occasionally explicit, but more often denied. Even where it was denied, however, certain undertakings make explicit some level of understanding of terrorists as the "Other," described above.

The following sections use a chronological approach to demonstrate some threads as to how these varying concepts of the Other served as an underpinning to post-9/11 detention and due process changes, as well as to give some indication as to how they changed.

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[422] See e.g., Bush, 9/20 Speech*, supra* note 28.

[423] The idea of the terrorist as "Other" was, of course, part of the express discourse. What was more implied than stated outright, though, was the construction of the terrorist Other as a Muslim male, and it was this component that appeared to be denied in the discourse, in contrast to actual practice. See generally Perelman and Olbrechts-Tyteca, *The New Rhetoric*, *supra* note 9 for references to the terminology being assigned to this discourse.

B. Protecting "Us" from "the Other"

Much of the discourse after, and even before, 9/11 appears dominated by an unyielding presentation of the issues as an "us" against "them" scenario. One author, from the United Kingdom, has suggested that the framing of these issues may have created what she calls a "cognitive filter" through which the issues are then viewed, noting:

> Yet, under the "war on terror" construction, politics is reduced to a simplistic and, in my opinion, flawed opposition between "us" and "them", which, in turn, lends further support for the emergence of a politics and laws of fear. The political realm is not only permeated by the Schmittean exclusionist discourse of friend v foe and the "enemy" becomes stereotyped, but dissidents and opponents are also seen as traitors or outsiders, at best. In this "duality trap", the institutional context of political violence is bracketed under the veil of simplistic explanations rooted in cultural differences or in envy and hostility towards American democracy and prosperity, such as "they hate us because we elect our leaders".[424]

Much has been written about "the Other" both in the post-9/11 context and in much broader senses. This idea, sometimes referred to as "Constitutive Other," is threaded through many areas in the field of law, and has been, for instance, discussed at length in the area of migration studies.[425] This is a relatively well-known and long-standing theoretical concept, which has been examined and revised by a range of scholars, such as Georg Hegel, Jean-Paul Sartre, Jacques Derrida, Emmanuel Levinas, and Edward W. Said.[426] Generally speaking, the Other has been defined in many

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[424] Kostakopoulou, *supra* note 288.
[425] See e.g. Delphine Nakache, *The "Othering" Process: Exploring the Instrumentalization of Law in Migration Policy* (DCL Thesis, McGill University Faculty of Law, 2008) [unpublished]; Frédéric Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'" (8 January 2005), in Anne Orford, ed., *International Law and Its "Others"* (Cambridge: Cambridge University Press, 2006) [Mégret, Savages].
[426] See e.g. Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 1985) at 129 (describing how things are viewed

different ways, depending on the analysis being undertaken. For example, it can be defined as a way in which one group views and treats another group, typically based on defining characteristics deemed to set the "other" group apart from the one viewing them. The notion of the Other is not necessarily always viewed in a negative light, and has been, in some cases, characterized as a means of establishing one's own identity. Thus, for instance, in establishing parameters of citizenship, the perspective of the Other might be a basis for determining who belongs within one national group, and who might belong in another.[427]

It is the conceptualization of the Other as an exclusionary tool between two groups that is of particular, although not exclusive, interest in this work, especially as articulated by Said, in his definitive book, *Orientalism*, and expounded upon in later works.[428] Said considers the phenomenon of the Other in terms of the need by one group to denigrate another. More specifically, he does so in relation to tensions between the "West" and the "East" – a tension that can arguably be said to underlie some aspects of the modern fight against terrorism, and one that makes application of his theories to the terrorism scenario especially compelling.

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in relation to their opposite); see also generally Jacques Derrida, *Théorie d'ensemble* (Paris: Seuil, 1968).

[427] For some more in-depth discussions of more recent permutations of the notion of the Other, see Desmond Manderson, "The Care of Strangers," which was originally published in the *Australian Financial Review*, and reprinted with permission as part of a McGill University program on discourse, online: <http://www.mcgill.ca/files/crclaw-discourse/manderson-carestrangers.pdf>; see also Desmond Manderson, *Proximity, Levinas, and the Soul of Law* (Montreal: McGill-Queen's University Press, 2007); Desmond Manderson, ed., *Essays on Levinas and Law: A Mosaic* (New York: Palgrave Macmillan, 2008). While not necessarily contributing to an academic understanding of the issue, a popular-culture reference to this concept can be found in the film "The Others," starring Nicole Kidman – a thriller very loosely based on Henry James' work, *The Turn of the Screw.* The film changes many elements of that original story, and appears to demonstrate that the idea of the Others as separate and distinct may be misleading, and that, in fact, what we perceive to be characteristic of the Others may actually be a reflection of a reality in ourselves. C.f. Said, *Orientalism*, *supra* note 419.

[428] See *ibid,* Said, *Orientalism*; Edward W. Said, *Covering Islam : How the Media and the Experts Determine How We See the Rest of the World* (New York: Vintage Books, 1997).

Under Orientalism, those primarily in Europe, or the former colonial powers, view those in the East, or those who were under their former colonial rule, as the exotic "Orient." The designation comes with a bundle of qualities, which have little basis in reality, but, instead, serve as a simplistic characterization of the East, created in the West, to preserve its self-perception of superiority. Said explains it as follows:

> Orientalism is never far from what Denys Hay has called the idea of Europe, a collective notion identifying "us" Europeans as against all "those" non-Europeans, and indeed it can be argued that the major component in European culture is precisely what made that culture hegemonic both in and outside Europe: the idea of European identity as a superior one in comparison with all the non-European ideas about the Orient, themselves reiterating European superiority over Oriental backwardness, usually overriding the possibility that a more independent, or more sceptical, thinker might have had different views on the matter.[429]

One wonders, for instance, if Said's type of ideas of the self-perceived superiority of the West in relation to the East factored into the ease with which citizenship and national origin – primarily singling out those from largely Muslim countries, or the "East"— were underlying notions in national responses after the attacks. It is well beyond the scope of this thesis to undertake a comprehensive analysis of the many theoretical writings on this concept of "the Other," at least in its broader sense. Specifically, the thesis draws from the negative connotations identified through this notion, such as that espoused by Said, in suggesting that the world of terrorism, specifically since 9/11, has been dominated, from all sides, by an amorphous, dangerous, and largely hidden "other." As Frédéric Mégret defines the Other, it can be seen as "'Other' at times barely mentioned, sometimes indirectly so, but which haunts the very beginnings and evolution of the laws of war. It is their dark alter ego, the 'uncivilized', 'barbarian', 'savage' from which the laws

[429] Said, *Orientalism*, *supra* note 419 at 7.

seek to distance themselves."[430] Because this Other is perceived as so dangerous, the usual laws are not adequate or otherwise cannot apply, and extraordinary measures gain an aura of legitimacy when applied to the Other.

C. A Spin in the Vicious Cycle of Terrorism-Related Othering

The attacks of 9/11, as well as a number of subsequent attacks, have been attributed to a terrorist group called Al Qaeda, run by Osama Bin Laden, who, until his recent death, seemed to have been perceived as a larger than life, purely evil entity. The long-stated purpose of Al Qaeda has been the creation of a Holy War, sometimes called *Jihad*, against the United States in particular, and sometimes stated to be against Westerners in general.[431] It is undeniable that the attacks of 9/11 were intended to inflict horrific loss of life and economic hardship on the U.S., and that the intended victims, on that day at least, were Americans.

Much academic writing has undertaken an assessment of the idea of the Other in national and international responses to terrorism, but it is actually an underpinning concept that cannot be fully deconstructed without an assessment of the way this concept may have driven the actual attacks themselves.[432] Said conceives of the "Other" as a concept expounded by the former colonial West towards the formerly colonized East. He describes the

[430] Mégret, *Savages*, *supra* note 425.
[431] See Patricia D. Netzley, *The Encyclopedia of Terrorism* (Greenhaven Press 2007) at 27-29.
[432] Some scholars would object to characterizing the portrayal of the West, or of the U.S., by Bin Laden as othering, as there is a line of thought that suggests that this can only be directed towards those perceived as the minority or those that have been the subject of persecution. Thus, the West could other the formerly colonized East, but characterizations directed at the West that involve stereotyping and similarly sweeping assumptions would not be deemed othering. This type of limitation is often seen in feminist scholarship. See e.g. Simone de Beauvoir, *The Second Sex*, translated by HM Parshley (UK: Penguin Books, 1947, translated 1953, 1972, 2005). This thesis rejects that notion, suggesting that the idea of "the Other" can have different implications in different factual circumstances, and that any generalized characterization of a group, based on immutable characteristics, as "them" can constitute othering, at least in line with Said's perspective of the Other as a reflection back upon ourselves.

construction of the Orient as a technique to allow for a reflection, not so much on actual characteristics of the Orient, but as a way of reinforcing Western identity, reflecting back on the West in such a way as to create an image of what it means to be the West in contrast to these Others.[433]

In the underpinnings of the 9/11 attacks themselves, at least as viewed through public statements made by those purporting to represent Al Qaeda and asserting some responsibility for the attacks, this type of notion is often explicit. Bin Laden, or whoever is the current person purporting to speak on behalf of supposedly Islamic fundamentalism, engages in othering of the West, and most particularly, although, not exclusively, the U.S., not so much to define characteristics of the U.S., but to create an identity of Islam in the minds of the audience he addresses. Frequent Al Qaeda statements, for instance, before the attacks, refer to the West, and, most particularly the U.S., as "Crusaders."[434] It is apparent that this term is not chosen by accident, but is intended to evoke reactions similar to those raised when recalling the actual Crusades, in which soldiers from the West, claiming to act on behalf of Christianity, invaded Muslim countries, with the express intention of conversion. The term is clearly chosen to evoke ideas of an identity, and as an attempt to seek agreement among those who are Muslim that "they" are attacking "us" to the very roots of that identity – seeking ownership of the terms of that perceived identity through the reflection coming back from his characterization of the West.[435]

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[433] Said, *Orientalism*, *supra* note 419.

[434] In this context, U.S. President George W. Bush was widely criticized when he said, after the attacks, in reference to the fight against terrorism, "this crusade, this war on terrorism is going to take a while." George W. Bush, *Remarks by the President Upon Arrival* (16 September 2001), online: The White House <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010916-2.html>. He did it again in February 2002, in complimenting Canada for joining the U.S.-led invasion of Afghanistan, Bush said "They stand with us in this incredibly important crusade to defend freedom, this campaign to do what is right for our children and our grandchildren." George W. Bush, *President Rallies the Troops in Alaska* (16 February 2002), online: The White House <http://georgewbush-whitehouse.archives.gov/news/releases/2002/02/20020216-1.html>

[435] In the speech he gave on September 20, 2001, U.S. President George W. Bush distinguished Islam from Al Qaeda, accusing people like Bin Laden of attempting to "hijack

In defending his call for attacks against civilians, Osama Bin Laden was frequently on record as asserting that targeting civilians was appropriate, because the U.S. has a long history of oppressing and killing civilians in Muslim nations and, thus, retaliation is justified. He painted the West, often interchangeable with the U.S., and sometimes including Israel, in his statements, as attempting to assert hegemonic control over Muslim nations and thus deserving of retaliation, at other times characterizing attacks on American civilians as self-defense.[436] In so doing, he appears, with some obvious distortions, to have painted the "West" in stark terms, as Said did. Said's focus was on the way the West characterized the East, with an eye to deconstructing what he perceived as inaccurate, simplistic, and stereotypical notions. Bin Laden-type rhetoric shines a mirror back from the East onto the West, characterizing it as oppressive as well, but attempting to suggest that this oppression justifies an assertive response by the East as revenge. Thus, he takes the concept to a new level, inverting and then expanding it, actually undertaking what might be characterized as othering himself in suggesting that actions by the U.S. Government, or Israel, or the West – however he puts it at any given moment – render those of American, Israeli, or Western culture as worthy targets for killing, and as somehow less deserving of life. In so doing, Bin Laden demonstrates othering in its most egregious form, using generalizations, associative concepts, and simplistic stereotypes to dehumanize those he characterizes as the Other – including Americans and anybody deemed to be "their allies." For instance, in his 1998 Fatwa, he said:

Islam." In many ways, this was an astute observation, as such a response appeared designed to deconstruct the type of identity Bin Laden was espousing for Muslims, based on a simplistic "us" versus "them" form of discourse. See Bush: 9/20 Speech, *supra* note 28.

[436] See e.g. Osama Bin Laden, "Declaration of War Against the Americans Occupying the Land of the Two Holy Places," online: PBSNewshour <http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html> [*Bin Laden*, *1996 Fatwa*]; Osama Bin Laden, "Jihad Against Jews and Crusaders," online: PBSnewshour <http://www.pbs.org/newshour/terrorism/international/fatwa_1998.html> [*Bin Laden*, *1998 Fatwa*].

> The ruling to kill the Americans and their allies -- civilians and military -- is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty God, "and fight the pagans all together as they fight you all together," and "fight them until there is no more tumult or oppression, and there prevail justice and faith in God."[437]

Shortly after the 1998 Fatwa was issued, in 1999, Bin Laden made a statement, broadcast on Al Jazeera, that American civilians were, in fact, soldiers because they paid taxes to the U.S. Government.[438] This attempt to put a factual support under his othering rhetoric is, itself, simplistic and overbroad, attempting to link conduct of the intended targets with his calls to kill them.[439]

It is clear that, if, indeed, Bin Laden's Al Qaeda was behind the 9/11 attacks, the attacks were intentionally directed at civilians, and the intention was to kill those civilians solely based on the fact that they were American. Of course, many people who were not American died on 9/11 as well, and a number of the people murdered were Muslim, thus undermining the intent of creating an act that was a stark action by Muslims against Americans.

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[437] *Ibid, Bin Laden*, *1998 Fatwa*.

[438] MSNBC, "Timeline of al-Qaida statements (June 10, 1999 Statement)," online: MSNBC.com <http://www.msnbc.msn.com/id/4686034/ns/world_news-hunt_for_al_qaida/t/timeline-al-qaida-statements/#.T71it3lYvDM> [Al Qaeda Statements, Timeline]; see also "Building an Organization, Declaring War on the United States," *The 9/11 Commission Report*, *supra* note 210.

[439] Although this would not justify Bin Laden's reasoning, it has an additional layer of irony in the fact that the payment of taxes in the U.S. is certainly not voluntary, with potential imprisonment for failure to do so. See generally U.S. Const. amend. XVI (granting Congress the power to levy taxes); *United States Tax Code,* 26 U.S.C. It is notable that, in May 2012, it was reported that U.S. President Barack Obama, in approving missions for targeted killing, considers all males found within the area of the target to be combatants. See Jo Becker & Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will" (May 2012), online: The New York Times <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=2&hp>; Benjamin Hart, "Jeremy Scahill Says Obama Strikes In Yemen Constitute 'Murder'" (2012), online: Huffington Post <http://www.huffingtonpost.com/2012/06/02/jeremy-scahill-says-drone-strikes-murders_n_1565441.html?ref=media> .

Nonetheless, the discourse of Al Qaeda leading up to the attacks, and that after the attacks, suggested the possibility that the attacks of 9/11 were a violent manifestation of othering, directed from the "Muslim" East to the "American" West.[440] Of course, the reality was much more complicated than that, on both sides, but that characterization of the attacks appears to have reflected a foundational motive.

In his denunciations of U.S. actions in places like Saudi Arabia and Palestine, Bin Laden arguably engaged in different levels of othering. Calling for attacks on Americans represents an outward form of othering, characterizing "them" as evil and dehumanizing Americans based on characteristics he attributed to them. At the same time, in calling for Muslims to unite, and in citing asserted wrongdoing in places like Palestine and Saudi Arabia, Bin Laden publicly represented that he spoke on behalf of those groups, and implied a unified way of thinking among large numbers of people, which he claimed to represent. In so doing, he was othering moderate Muslims in simplistic and stereotypical terms, which, in turn, later served to fuel the process of othering against predominantly Muslim countries. The cycle has many levels and is seemingly endless.

D. Post-9/11 Twists on Bin Laden's Othering

Thus, the 9/11 attacks arguably represented a stark form of othering, as do those other terrorist attacks in which civilians are intentionally targeted based solely on their national origin. In many ways, national governments reacted with a mindset that too closely resembled that of the terrorists themselves – with different internal characteristics, but similar in terms of structure -- thus perpetuating the problems involved in other-based violence.

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[440] See Hugo Slim, *Killing Civilians: Method, Madness, and Morality in War* (New York: Columbia University Press, 2008); Quintan Wiktorowicz & John Kaltner, "Al Qaeda's justification for 9/11," (Summer 2003) Middle East Policy Council Journal X:2 (citing "A Statement from Qaidat al-Jihad Regarding the Mandates of the Heroes and the Legality of the Operations in New York and Washington.") [Wiktorowicz & Kaltner].

The othering undertaken by a number of national governments was a response to a perceived othering directed at them – a disproportionate, misdirected response, perhaps, but a response nonetheless. To really understand the underpinnings of what many countries did after 9/11, it is critical to understand how these governments, and their populace, perceived this othering, and to recognize that, while the parameters of the response may have been problematic, they did not occur in a vacuum. A notion of Americans, or Westerners, as the "Other" was an underpinning to the attacks themselves, and a reactionary, reversed othering was the response. The two undertakings did not mirror each other, but it is undeniable that they occurred, and in both cases, they involved actions based on wide generalizations and characterization of people based on immutable characteristics.

In traditional warfare, othering is an inherent component.[441] The parameters of these others, however, tend to be easily defined, as wars often pit one national government against another, or alternatively involve the increasingly common scenario of civil war, which, while bearing some similarities to terrorism, still tends to entail conflicts that can be identified in terms of location and parties.[442] Thus, the enemy and locus of conflict are more easily identified in many ways. In the case of terrorism, particularly terrorism that is not state-sponsored, the "enemy" is less easy to identify, but can be just as deadly, if not more so. Responses to terrorist attacks, therefore, have a much higher risk of misidentification of who the enemy is, and that appears to be exacerbated when identification of the enemy is

[441] See e.g. Cole*, Enemy Aliens*, *supra* note 228 (discussing enemy alien legislation in the U.S. relating to times of war).
[442] The question of irregular combatants, however, is much more likely to arise in relation to civil war, however, where those fighting typically do not wear military uniforms and tend to be more integrated with the local populations and thus harder to identify.

based on characteristics that are immutable, rather than on individual actions.[443]

D.1. September 11, 2001

Recounting the events of 9/11 would not be useful, as that story has been told countless times, and most people are familiar with the specifics of what happened. It is now well known that the attacks were perpetrated by 19 men, most of whom were from Saudi Arabia, and all of whom purported to act on behalf of Al Qaeda, and in the name of Islam.[444] None of the perpetrators of the attack were U.S. citizens, and questions were later raised about the legal basis for admitting some of them to the country.[445] They had come to the U.S. before the attacks, and several of them had participated in flight training at schools in the U.S., obviously to prepare for hijacking the planes and flying them into the intended targets.[446]

Although it is known that more than 3,000 people died that day, many more were physically in the area, especially in New York, when it happened. Estimates of how many people were in the World Trade Center range from between about 14,000 to about 17,000.[447] Thousands more were in the immediate area. Similarly, while the numbers at the Pentagon were lower, the attack on the Pentagon still also affected a large number of people in the immediate vicinity of a large metropolitan area.[448] Moreover, false rumours abounded as to other attacks, with one report indicating that Camp David

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[443] The notion of the "War on Terror" as a war is discussed in much more depth in Chapter 4, below, particularly in relation to the idea of commensurability of security and freedom, often portrayed as requiring a balance.
[444] *The 9/11 Commission Report*, *supra* note 210.
[445] *Ibid.*
[446] *Ibid.*
[447] *Ibid.*
[448] This included Secretary of Defense Donald Rumsfeld, who was in the Pentagon when the plane hit. After feeling the impact, Rumsfeld reportedly ran to the crash site to help people there. *Ibid.*

had been attacked. As I was driving into downtown Chicago, with the then-Sears Tower in front of me, I heard a report that a plane was heading towards the Sears Tower, as the tallest building in the U.S. Traffic came to an almost complete halt, and people all around me were attempting to get cell-phone signals. Many were openly sobbing, which is one indicator that the personal reactions to the attacks went well beyond the geographic area in which they occurred.

As rumours of missing planes and potential targets abounded, the downtown areas, or at least governmental offices, in many cities were evacuated. Thus, the sense of imminent and personal threat expanded well outside of New York City, Washington D.C., and Pennsylvania. My office in Chicago was evacuated amidst rumours on the news that additional planes were still missing. News coverage of the attacks continued around the clock for several days, with the constant public message that the attack happened because somebody wanted to kill Americans.[449] The immediate, and obvious, reaction was a swelling of national patriotism, and, by the evening of 9/11, every house in my neighbourhood, for instance, was flying an American flag. In the days after the attacks, newspapers carried full-page pictures of the flag, usually with a message saying "United We Stand," an expression that became a sort of mantra, appearing in various places, including on signs and in windows of businesses and homes.

In addition to a collective sense of danger, brought about by the manner of the attacks, and the confusion that followed, the events of that day were further personalized simply by virtue of the fact that millions of people saw the second plane hit on live television, as well as seeing the Towers collapse. Millions, who were not physically close to New York City, watched

[449] This is based on my recollections of the day.

the events unfold, including the shocking sight of people jumping or falling out of the buildings.[450]

In some ways, 9/11 played out in slow motion, giving an unusual opportunity to hear the voices of the victims before the crashes, as some made phone calls from the various planes, and from the World Trade Center after the crashes, as numerous calls were made by people trapped in the buildings.[451] Many of those calls were recorded and subsequently released to the public, thus creating a sense of horror in hearing the victims' voices and of immediacy to the events.[452] These factors, combined, were somewhat distinctive to 9/11, and the reaction that followed was certainly influenced by a sense among many of having been eyewitnesses to the event.

The shock of 9/11, therefore, within the U.S. and beyond, was not simply because of the catastrophic loss of life, or the loss of Towers that had enormous symbolic value, but because of various unusual factors that served to personalize the attacks. Even as news accounts continued shortly after the Towers fell on 9/11, CNN, which was presenting live coverage of the attacks, was running taglines across the bottom of the screen, asking for people who

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[450] A third Building in the complex, known as WTC 7, collapsed later that day after being damaged when the Twin Towers collapsed.

[451] See e.g. "91 e-mails from Ground Zero," (2002), online: Law.com <http://static.911digitalarchive.org/REPOSITORY/MISC_COLLECTIONS/national_guard_bureau/CRRDB/data/documents/2586.pdf> (including e-mails beginning shortly after the attacks of people trying to track down co-workers); "Chilling final words of those who died inside the Twin Towers on 9/11," (2009), online: The Mirror <http://www.mirror.co.uk/news/uk-news/chilling-final-words-of-those-who-417979> (alleging that more than 1,000 calls were made in the ten minutes after the first plane struck, adding that some people reached their loved ones, and that others left messages); Ed Vulliamy, "The Real Story of Flight 93" (2 December 2001), online: The Guardian <http://www.guardian.co.uk/world/2001/dec/02/september11.terrorism1> (including the reported last words of Todd Beamer, "Let's roll," as heard over the phone when passengers joined forces to try to attack the hijackers).

[452] See Maria Godoy, "Sept. 11 Tapes: Sounds of Horror, Chaos, and Valor" (16 August 2006), online: NPR <http://www.npr.org/templates/story/story.php?storyId=5658516>; see also Jules & Gedeon Naudet, *9/11* (a documentary made by two French brothers who happened to be producing a film about a firefighting unit near the World Trade Center, and who captured the events of that day, including the first plane hitting the North Tower, scenes of people inside the Towers including rescue workers who did not survive, and the horrifying sound, from inside the World Trade Center, of people hitting the ground as they fell from the buildings).

were fluent in specific languages, including Arabic and Farsi. As people within the U.S. tended to close ranks against the horrors of the attacks, and as they were repeatedly told they were potential targets as Americans, a sense of a lack of personal security arose. Symbols of standing united abounded, and announcements that the U.S. Government was responding to protect people, including issuing calls for those who could speak Arabic and Farsi, created a parallel reaction in terms of looking outward to who the perceived enemy was. Even before the end of that day, the seeds had been planted for who would be considered "us" and who would be considered "them."

D.2. The Early Internal Reaction to 9/11

One obvious effect of the attacks was to make the danger of sudden and violent death seem imminent, and incidents in the days after the attacks, such as the anthrax scares, did little to reassure a shaky populace.[453] The 9/11 attacks have been so excessively discussed that, in many ways, the actual trauma they caused has tended to get lost, as is normal in relation to so many other catastrophic historical events, both before and after. But it is that sense of national trauma that is important to recognize, as it was an underpinning of the response that emanated out of the U.S. Moreover, although the attacks occurred in the U.S., the sense of imminence expanded well outside its borders, as nationals of a number of countries were killed, and Al Qaeda statements suggested that other Western nations were likely to be targets. The sense of an imminent threat may not have been as great outside of the U.S. in the early days after 9/11, but it was, nonetheless, there.[454] Othering, with the mirror-image type effect described by Said,

[453] *The 9/11 Commission Report*, *supra* note 210.

[454] I was in Montreal two weeks after the attacks. We got caught in an unusual traffic jam near downtown, and a visibly distressed woman in the car next to us rolled down her window and asked us if there had been a terrorist attack.

involves two levels, both internal and external. A sense of internal identity is needed to reflect out onto the perceived Other, as it is this sense of contrast that is the underpinning for this process.

In the early days after the attacks, American flags became extremely prominent in the U.S. Seemingly every car had a clip-on American flag, and wherever one went, enormous flags were prominent. Patriotic music ran on the radio in the first few days after the attacks, as 24-hour news coverage showed the horrors of the attack aftermath, full of graphic accounts of body parts in the area and interlaced with heart-wrenching scenes of people looking for their loved ones. The initial response within the U.S., and the unusual swell of patriotism, arguably represented a form of recoiling inward immediately after the attacks. It did not take long for that reaction to then turn around and to recoil back outward.

Patriotism and shock quickly gave way to a sense that some dramatic response was needed.[455] As described in Chapter 2, the language after the attacks immediately suggested that this was a "new" form of terrorism, which, given the horrific nature of what so many people had watched or experienced live, or heard through victim phone calls, was not treated as controversial.[456] With the calls for those speaking Arabic and Farsi, however, which ran as early as the day of the attacks, as well as quick statements by the U.S. Government that it was the notorious Al Qaeda network that was responsible for the attacks, the pulling together mentality that dominated in the U.S. began to be mirrored with an image of who the terrorists were. Thus, the "othering" took on another dimension.

[455] On September 12, 2001, I was driving to work and heard, on a popular music station, a song from World War II, called "Praise the Lord and Pass the Ammunition," one of many songs that had a call-to-arms tone that were played in those days. The song was originally written in 1942 as a response to the attacks by the Japanese military on Pearl Harbor. See Frank Loesser, "Praise the Lord and Pass the Ammunition," 1942.
[456] See *The 9/11 Commission Report*, *supra* note 210.

D.3. "*Nous sommes tous Américains*"[457]

The sense of internal unity, of a national identity, that Americans apparently experienced shortly after the attacks in some ways emanated outside of the U.S. borders, as allegiances seemed clear in the face of such a horrific loss of life. As the FAA closed U.S. airspace on 9/11, many planes were re-routed to Canada. People, unable to get back to the U.S., were stranded, and many people in Canada opened their homes to those travelers. People in Vancouver took in approximately 8,500 people, and those in the small town of Gander, Newfoundland, took in another approximately 6,500 people.[458]

Right after the attacks, there was an immediate international outpouring of condemnation, as well as sympathy for Americans. Flags flew at half staff in Canada.[459] The U.S. National Anthem was played at the Changing of the Guards at Buckingham Palace in the U.K.[460] Condolences from around the world, even from countries not traditionally friendly to the U.S., poured in. The most famous example of this outpouring of support and expression of unity with Americans was likely the editorial that ran in France's *Le Monde* on September 13, 2001, with a headline, which read "*Nous sommes tous Américains*:"[461]

> Dans ce moment tragique où les mots paraissent si pauvres pour dire le choc que l'on ressent, la première chose qui vient à l'esprit est celle- ci: nous sommes tous Américains! Nous sommes tous New-Yorkais, aussi sûrement que John Kennedy se déclarait, en

[457] *"Nous sommes tous Américains*," (13 Sep. 2001), *Le Monde*, online (reprint): *Le Monde* <http://www.lemonde.fr/idees/article/2007/05/23/nous-sommes-tous-americains_913706_3232.html> [*Le Monde*].
[458] See "Obama thanks Canada for aid on 9-11 in letter to PM" (9 Sep. 2011), online: CTVNews < http://www.ctv.ca/CTVNews/TopStories/20110909/stephen-harper-new-york-memorial-event-110909/>.
[459] This is based on my personal recollection.
[460] This had extra significance in that "The Star Spangled Banner," the U.S. National Anthem, was written by Francis Scott Keyes during the War of 1812, during a battle between the Americans and the British.
[461] *Le Monde*, *supra* note 457.

> 1962 à Berlin, Berlinois. Comment ne pas se sentir en effet, comme dans les moments les plus graves de notre histoire, profondément solidaires de ce peuple et de ce pays, les Etats-Unis, dont nous sommes si proches et à qui nous devons la liberté, et donc notre solidarité.[462]

Thus, again, the initial response was a form of othering that involved turning inward, and formulating a sense of unified identity within the U.S. and, to some extent, with the U.S. from outside of its Borders. At the same time, while expressing unity with the U.S., some national jurisdictions reacted with a sense that they, too, could be potential targets, just as the U.S. was. The image of such destruction in a busy urban centre, which did not generally experience such attacks, arguably sent shockwaves across a number of national jurisdictions in terms of the potential within their own borders as well. The reaction quickly shifted from shock to a call for a response. And in responding, this early unifying reaction was used in somewhat of a mirror manner, setting the stage for a classic "us" versus "them" binary in the discourse and in the responses.

D.4. "They Hate Our Freedoms"[463]

On September 20, 2001, then-U.S. President George W. Bush made a speech to a joint session of the U.S. Congress, in which he spoke about the fact that Americans were targeted, and he purported to answer the

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[462] *Ibid*:

> In this tragic moment when words seem inadequate to express the shock that is felt, the first thing that comes to mind is this: we are all Americans! We are all New Yorkers, as surely as John Kennedy said in 1962 in Berlin we are all Berliners. How could we not feel, as in the gravest moments of our history, strong solidarity with the people and this country, the United States, to whom we are so close and to whom we owe our freedom, and therefore our solidarity.

Ibid (translation by author).

[463] *Bush, 9/20 Speech, supra* note 28.

question of why "they" hated "us." In so doing, he appears to have laid the discursive groundwork for at least part of what would develop as the Global War on Terror, and he appears to have delivered a representation of a shift from internal othering, with a strengthening looking in on unifying American identity, to outward-looking othering, in which he painted Americans and "the enemy" in stark terms and characterized the coming fight clearly as one of good versus evil. Obviously this speech does not represent all of the national discourse that took place in the U.S. or elsewhere after the attacks, but, in many ways, because of the circumstance of when it was given and how it was received, it is arguable that it presented a discursive blueprint to much of the response to terror, and it contains language that supports the beginning of the othering cycle now shifting back to looking outward from the U.S., back towards the East.

He began by essentially establishing that Americans are good, and that the "others" who are the terrorists are clearly evil. The events of 9/11 may not have placed such a characterization out of the realm of reality as to those specific events, but President Bush, in his speech, stepped back and painted these characterizations in much more global terms.[464] For example, he said:

> Americans are asking, why do they hate us? They hate what we see right here in this chamber -- a democratically elected government. Their leaders are self-appointed. They hate our freedoms -- our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.[465]

[464] It is acknowledged that, even immediately after 9/11, there was considerable commentary suggesting that the actions of the terrorists were somehow justified by U.S. foreign policy. For the purpose of this thesis, however, that argument is not considered, and it is assumed that, as justified as disagreements with U.S. policy likely are, murdering more than 3,000 civilians with no warning and in a situation in which there is no declared state of war, can never be justified as a response. This commentary is, however, notable as presenting a much more nuanced perspective on the underpinnings of the attack, which may have, in terms of identifying root causes, more credibility than the assertion that the attacks merely represented a hatred of freedom.

[465] *Bush, 9/20 Speech*, *supra* note 28.

Having laid down a characterization of "us" as defenders of freedom and democracy, President Bush then identified "them." He presented information available at that point as to the identity of the attackers of 9/11:

> The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda. They are some of the murderers indicted for bombing American embassies in Tanzania and Kenya and responsible for bombing the USS Cole.
>
> Al Qaeda is to terror what the Mafia is to crime. But its goal is not making money, its goal is remaking the world and imposing its radical beliefs on people everywhere.
>
> The terrorists practice a fringe form of Islamic extremism that has been rejected by Muslim scholars and the vast majority of Muslim clerics; a fringe movement that perverts the peaceful teachings of Islam.
>
> The terrorists' directive commands them to kill Christians and Jews, to kill all Americans and make no distinctions among military and civilians, including women and children. This group and its leader, a person named Osama bin Laden, are linked to many other organizations in different countries, including the Egyptian Islamic Jihad, the Islamic Movement of Uzbekistan.
>
> There are thousands of these terrorists in more than 60 countries.
>
> They are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to plot evil and destruction. The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan we see al Qaeda's vision for the world. Afghanistan's people have been brutalized, many are starving and many have fled.[466]

[466] *Bush, 9/20 Speech*, *supra* note 28. In this speech, President Bush began using the language of warfare that came to underscore much of the "War on Terror," discussed at greater length in Chapter 4, below. At the same time, the pre-existing criminal justice system approach can be seen in this language, such as in referring to the terrorists as "murderers" or comparing terrorists to the Mafia. There is no War on Organized Crime, and it is apparent that, at this point of the speech, President Bush is drawing on criminal-justice concepts in making an analogy. Thus, in discursive terms, this speech represents a sort of bridge

Using absolute, unequivocal language, President Bush gave demands to Afghanistan and to the Taliban, but he also used language creating an obvious distinction between the Taliban, Al Qaeda and terrorists, and those more generally of the Muslim faith, noting, for instance:

> The Taliban must act and act immediately.
>
> They will hand over the terrorists or they will share in their fate. I also want to speak tonight directly to Muslims throughout the world. We respect your faith. It's practiced freely by many millions of Americans and by millions more in countries that America counts as friends. Its teachings are good and peaceful, and those who commit evil in the name of Allah blaspheme the name of Allah.
>
> …
>
> The terrorists are traitors to their own faith, trying, in effect, to hijack Islam itself.[467]

Having done so, however, the speech left some unanswered questions as to who the "enemy" was but began to present a roadmap suggesting that terrorists intent on destroying the U.S. were hiding in large numbers of countries around the world. "They" were everywhere.

The speech clearly drew on the sense of national unity that arose after the attacks – not surprisingly, as it was given only nine days after they occurred – and it used discourse to begin drawing the parameters between "us" and between "them." It also characterized the events of 9/11 and of the

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between the criminal-justice approach to terrorism detentions that was dominant before 9/11, and a beginning of a shift towards treating them, in loose terms, as a form of warfare. Another discursive element that arose in this speech is the notion that killing women is tantamount to killing children, which raises a number of gender-related issues. Aside from ignoring that, in the U.S., women increasingly serve in the military, it also perpetuates an outdated notion that women are to be equated with children in terms of helplessness, and thus suggesting that it is somehow more wrong to kill them than it is to kill men. This element of President Bush's speech is not further discussed herein, except to note that it presents yet another layer of othering.

[467] *Ibid.*

upcoming fight against terror, in terms that clearly left no room for middle ground and clearly defined who was right and who was wrong. This fight, according to President Bush, was all about the American identity that had emerged as so dominant since the attacks. It was about defending freedom itself:

> Tonight, we are a country awakened to danger and called to defend freedom. Our grief has turned to anger and anger to resolution. Whether we bring our enemies to justice or bring justice to our enemies, justice will be done.[468]

In cementing the idea of the Other as enemy, President Bush made it very clear that there were only two sides, "us" and "them," and that there was no room for disagreement:

> We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. **Either you are with us, or you are with the terrorists …** From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.[469]

Echoing the language of the Other as savage, which appears in many ways to fit into the long-standing models of the Other, President Bush characterized the fight in terms of who was civilized and who was not:

> This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom.

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[468] *Ibid.*
[469] *Ibid* (emphasis added).

> We ask every nation to join us. We will ask, and we will need, the help of police forces, intelligence services, and banking systems around the world. The United States is grateful that many nations and many international organizations have already responded -- with sympathy and with support. Nations from Latin America, to Asia, to Africa, to Europe, to the Islamic world. Perhaps the NATO Charter reflects best the attitude of the world: **An attack on one is an attack on all.**
>
> **The civilized world is rallying to America's side.** They understand that if this terror goes unpunished, their own cities, their own citizens may be next. Terror, unanswered, can not only bring down buildings, it can threaten the stability of legitimate governments. And you know what -- we're not going to allow it.[470]

As of that date, as the so-called "War on Terror" began, the lines had been clearly delineated as to who was friend and who was foe, and no discursive room had been left for a middle ground. At least initially, and within the U.S., this tone gained wide popular acceptance.

After this speech, President Bush's approval rating within the U.S. soared to approximately 90%.[471] While it is speculative as to the reason, it is assumed that this was a surge in support stemming from the internalization Americans undertook after the attacks and a cultural belief that Americans should support the President in times of national danger. It is, however, especially striking in this instance, when President Bush had been elected less than a year earlier under highly controversial circumstances. During his inauguration in January 2001, just eight months earlier, a planned walk in a public space had to be cancelled because of the actions of more than 20,000 protestors, including people who threw bottles and eggs at the motorcade.

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[470] *Ibid* (emphasis added); see also *Mégret: Savages, supra* note 425; *Said*, Orientalism, *supra* note 428.

[471] See Gallup Polls, "Presidential Approval Ratings," online: Gallup <http://www.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx> (showing President Bush's approval rating jumping from 51% on September 7, 2001, to 86% on September 14, 2001, and peaking at 90% on September 21, 2001, the day after his speech.).

The protests were called the largest since Richard Nixon's inauguration in 1973, during the protests to the Vietnam War.[472]

E. The "Other" Moves Forward as a Foundation for Responses

In Chapter 2, the discussion focused on the presumption that the 9/11 attacks were "unprecedented," or certain variations on that presumption, such as the notion that they were different in a way that required significant changes to various legal regimes, including detention standards. That presumption, of course, does not stand in isolation but is interlaced with the other presumptions discussed in this thesis. Thus, the variations that can be undertaken in shifting the kaleidoscope to reconfigure the components of the structures that were built are quite extensive.

In using the general idea of the attacks being unprecedented, the follow-up step was often to use the concept of the Other to single out people for the revised detention regimes that were, allegedly, necessitated by the unprecedented nature of the attacks, or to otherwise undertake policies that

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[472] See Angela Couloumbis, "Inauguration Protests Largest Since Nixon in 1973" (21 January 2001), online: Commondreams, reprinted from the *Philadelphia Inquirer*: <http://www.commondreams.org/headlines.shtml?/headlines01/0121-01.htm>.
For a discussion of the circumstances surrounding President Bush's election, see *Bush v Gore*, 531 U.S. 98 (2000)(*per curiam*)(ruling in favour of George Bush that a vote recount, ordered by the Florida Supreme Court, was unconstitutional). Because of the structure of the U.S. Electoral College system, and the outcome in the other states, Florida was decisive in determining the outcome of the election. Whoever won Florida was elected President that year. There were numerous controversies arising out of the way voting was handled in this election in Florida, which led to the ordered recount. Once the U.S. Supreme Court ruled, Al Gore conceded the election. Disputes continued, as various members of the House of Representatives attempted to contest the election, but failed to gain the support of a member of the U.S. Senate, as required by U.S. law. Ironically, Al Gore, as the outgoing Vice-President, presided over the proceeding certifying the election, based on his duties as the current Vice-President, and had to overrule the objections for lack of support from the U.S. Senate. See Michael Moore, *Fahrenheit 911* (Lion's Gate Films)(including a replay of the scene in Congress on the day the election was certified. The film is not at all an objective commentary on the actions of the U.S. Government after 9/11, but it contains a vivid scene showing the attempts to protest the election in Congress, and Al Gore having to overrule the objections). Part of the controversy arose because, while George Bush arguably won in the Electoral College, Al Gore received a higher number of popular votes, estimated at 543,895 more. See Federal Election Commission, "2000 Official Presidential General Election Results" (7 November 2000), online: Federal Election Commission <http://www.fec.gov/pubrec/2000presgeresults.htm>.

caused certain groups to be disproportionately represented among those detained. In so doing, the second presumption, of the terrorist as the Other, played into who the recipients of these revised approaches tended to be.

It is apparent from examining anti-terrorism responses across jurisdictions and across issues that non-citizens were significantly more vulnerable to revised practices than were citizens, although that was an initial trend that has changed more recently in some places. As discussed further in the following sections, the characteristics of a perceived Other can morph over time.

Carla Ferstman linked some of these presumptions the following way:

> There is a tendency to view terrorism as the most severe challenge to humankind's existence in our time; as an unprecedented and exceptional challenge. The fear of the unprecedented ill of terrorism tends to govern policy-makers' responses to it. Labeling the challenge as "exceptional" or "unprecedented" has dramatized the fight against terrorism as having absolute priority, and has served to legitimate exceptional policies, practices, executive measures and laws. This has led to a series of justifications in the name of terrorism, justifications which have been applied mainly against non-citizens – minorities, immigrants, asylum-seekers and refugees, and which have been said to be more effective in undermining personal security than any terrorist attack.[473]

David Cole's suggestion that this might have been the case because non-citizens, for instance, do not have the right to vote if they object to their treatment, has intuitive appeal.[474] This may, indeed, relate back to the concept of the Other in broader terms, as the differential treatment of non-citizens may be justified when they are successfully characterized as the Other, and such differential treatment may be perpetuated when those so

[473] Carla Ferstman, "The Human Security Framework and Counterterrorism: Examining the Rhetoric Relating to 'Extraordinary Renditions,' in Alice Edwards & Carla Ferstman, *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge: Cambridge University Press, 2010)(citations omitted), at 535.
[474] See Cole, *Enemy Aliens*, *supra* note 228.

distinguished do not have meaningful ways of objecting to their treatment. Moreover, this point relates back to Perelman and Olbrechts-Tyteca's arguments concerning the uses of different types of rhetoric, the importance of persuasive value, and the need to appeal to the values of the audience in question.[475] As a pragmatic matter, the voting populace would be more likely to accept the reduction of fundamental rights in exchange for an increased perception of safety if presented in a way that makes it unlikely that their own rights would be implicated.

While the specifics morphed and began to vary from one place to another, in the early days after the attacks, the terrorist Other was portrayed as having certain characteristics – a non-citizen, Muslim, male, and of a national origin in a country that is predominantly Muslim. As researchers at New York University have argued:

> … the construction of a terrorist "Other" has conflated notions of race, ethnicity, religion, national origin, gender, and political views, effectively racializing Islam, Muslims, and Muslim religious practice as radically threatening to U.S. national security interests. Muslim men have been constructed as particularly dangerous.[476]

E.1. A "War" on Terror

President Bush's September 20, 2001, speech represented a dividing line in terms of reactions to the attacks. While the dominant reaction within the U.S. before that was a form of closing of ranks, as evidenced by the "United We Stand" mantra, the reaction unequivocally turned back outward, from a focus on a unified U.S. identity to a unified outward response, turning

[475] See Perelman & Olbrechts-Tyteca: *The New Rhetoric*, *supra* note 9.
[476] Center for Human Rights and Global Justice, *Targeted and Entrapped: Manufacturing the "Homegrown Threat" in the United States* (New York: NYU School of Law, 2011), online: New York University Center for Human Rights and Global Justice <http://www.chrgj.org/projects/docs/targetedandentrapped.pdf> (this report addresses more recent changes to so-called "homegrown" terrorism investigations in the U.S., which utilize concepts of the Other as terrorist that emerged in the early days after 9/11).

outward on the perceived perpetrators of the attacks and on those who would undertake such attacks in the future. As the attacks were unusual in their enormity and level of destruction, so, too, were the responses. The Other had been explicitly identified as members of identified terrorist groups, but, which, President Bush bluntly stated, could include anybody who did not join the U.S. in its fight against terror.

With President Bush's speech to the Joint Sessions of Congress, war terminology began to dominate the post-9/11 discourse, particularly in the U.S. A debate began, which continues to the present, as to whether the fight against terrorism was one that could be pursued under a traditional criminal-justice model, or whether wartime standards were more appropriate.[477] There are numerous underpinnings to this dichotomy, which will be addressed in Chapter 4 of this thesis.

For the purpose of this chapter, however, the issue is raised more because the declaration of a War on Terror has another underpinning, which draws again on the theoretical concept of the Other. By definition, war involves an "us" against "them" scenario, and calling the post-9/11 initiatives a war meant that certain actions, by their nature, focused on non-nationals and did so under an aura of justification that would not likely have succeeded but for the wartime dynamic. The "War on Terror" was arguably different from previously seen conflicts, in that it was an asserted declaration of war against an ideology, and the proposed enemy could be from a wide range of national jurisdictions, regardless of the official stance of the national jurisdiction of their origin.[478] In practice, this meant that those targeted in this War on

[477] For a discussion of the dichotomy between the use of the criminal-justice system and the controversy surrounding the use of a wartime model, see Chapter 4, below.

[478] One of the controversial aspects of detentions undertaken under this paradigm is that the U.S. has detained a number of people who are nationals, not of an enemy nation, but of their allies in its military operations. While Guantanamo Bay is not the only place where the U.S. Government undertook controversial detentions, it is the most widely known and studied, for a variety of reasons. Moreover, while this thesis is referring to Bush's speech as a declaration of war, that is true in discourse terms only. The U.S. Constitution provides the mechanism for a formal declaration of war, a power that rests, not with the President, but with Congress. United States Const. Article I, Section 8, Clause 11 ("[Congress shall have

Terror, and particularly through revised detention practices, were from a wide range of national jurisdictions, but were overwhelmingly Muslim and male.

The U.S. pursuit of the war paradigm was unique among responses of other national jurisdictions, and, although few jurisdictions specifically followed all of the U.S. war measures undertaken after 9/11, most who responded to the attacks were, in some respects, influenced by them. This influence did not generally extend to enacting similar wartime measures, but did have an apparent influence on how certain domestic detentions were handled. While some countries did join the U.S. in its military actions in Afghanistan and Iraq – i.e. the "coalition of the willing" - the sometimes elaborate structures the U.S. put in place for detaining people caught in its "War on Terror," accompanied by the controversial "enhanced interrogation techniques" that the U.S. undertook, represented a revised version of a traditional war-dominated approach that, ultimately, was primarily American.[479]

Power...] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); The U.S. Congress never issued such a declaration, although it did issue an "Authorization for Use of Military Force," which has been interpreted as giving the President broad authority in relation to the War on Terror. *See Authorization for Use of Military Force*, , PL 107-40, September 18, 2001, 115 Stat 224).

[479] In his book, *The 9/11 Effect*, Kent Roach explains that much of the U.S. response to 9/11 involved what he calls "Executive Power and Extra-Legalism." Indeed, in classifying its post-9/11 responses as "war" measures, it is apparent that the U.S. Government was undertaking a shift in power in favour of the Executive. Under the U.S. Constitution, the President is Commander in Chief of the military, and thus when acting through this authority can claim more extensive powers than typically claimed under ordinary circumstances. Roach combines this factor with the notion of "extra-legalism," which is an effective combination, as, even under the rather extraordinary war powers that a U.S. President could assert, the measures were evidently deemed inadequate to address the risk of terrorism, and the U.S. Government arguably went farther than it had previously in asserting special and extraordinary wartime presidential powers, as evidenced by such tools as the designation of "unlawful enemy combatants." Again, the wartime approach is discussed in more depth in Chapter 4. See *Roach: The 9/11 Effect*, *supra* note 82, at 161-235; U.S. Const. Art. II, sec. 2, cl. 1 (noting "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States …"). While the President is granted authority as Commander in Chief of the military, only the U.S. Congress has the authority to declare war, and, in many respects, the *AUMF* has been treated as a declaration of war. See U.S. Const. Art. I, sec. 8. Detentions and judicial review are generally within the purview of the judiciary under the U.S. Constitution. U.S. Const. Art. III.

The fact that places like Guantanamo Bay can only be used for detaining people who are not U.S. citizens suggests that conduct, on its own, does not trigger the use of some of these revised detention standards, but that, instead, the form of detention and proceeding can vary significantly depending on where the person accused falls on the continuum of the terrorist Other. In seeking to legitimate its wartime detention structures, the U.S. employed discourse that came to be characteristic of its "War on Terror" and tended to present a discursive basis for justifying the treatment of some people as the Other. A U.S. citizen suspected of terrorism, for instance, will never face potentially indefinite detention at Guantanamo Bay, even if that citizen has undertaken identical conduct to those who are held there.[480]

E.1.A. "Unlawful Enemy Combatants" and the Military Commissions for "Certain Non-Citizens" [481]

The controversy over the designation of certain people as "unlawful enemy combatants" largely emanated from the U.S., as other national jurisdictions generally did not follow suit in attempting to make such special designations under enhanced war powers brought about through the War on Terror.[482] The U.S. has never asserted that U.S. citizens can be detained at

[480] The narrative in relation to these detentions is further fractured by the fact that at least some of those held at Guantanamo Bay were not captured on or near a battlefield. One example includes the so-called Algerian Six, discussed earlier in this thesis, who were detained in Sarajevo and publicly accused by the U.S. of plotting to bomb the U.S. Embassy in Sarajevo. See Maureen T. Duffy, "Justice Delayed as Justice Denied: The Ongoing Plight of the Algerian Group," Pulse of Democracy (17 February 2009), online: <http://www.pulsdemokratije.net/index.php?id=1364&l=en> (including Lakhdar Boumediene, the named party in the U.S. Supreme Court decision by the same name).

[481] Quoting the *Military Order*, supra note 238.

[482] As will be discussed further in Chapter 4, the use of this designation to authorize military detentions under extraordinary circumstances appears, in some respects, to have been loosely modeled after the process for detaining enemy combatants long undertaken in Israel. For a comprehensive analysis on Israeli Supreme Court jurisprudence regarding these detentions, see Shiri Krebs, "Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court" (2012) 45 Vand. J.Int'l. L 639-703 (written by a former advisor on legal matters to Chief-Justice Dorit Beinisch, President of the Israeli Supreme Court, and a current doctoral candidate at Stanford University. The article includes interviews with various people, including members of the court and notes that, in 322 cases

extraordinary detention centres like Guantanamo Bay, but the U.S. Government did initially attempt to assert that U.S. citizens could be classified as "unlawful enemy combatants," and thus be detained in military custody in the U.S., again without traditional criminal judicial review, even though the people involved were not part of the military. Those attempts were ultimately largely rejected by the courts.[483]

The U.S. President has been argued to have the authority to declare certain detainees as unlawful enemy combatants in large part because of a joint Congressional enactment, undertaken shortly after the attacks. This joint resolution, known as the *Authorization for Use of Military Force* ("*AUMF*"), was passed by Congress on September 14, 2001 – the same day on which memorial services relating to the attacks were ongoing in the U.S. and around the world. President Bush signed the resolution on September 18, 2001.[484]

Drawing on the language of the attacks having been unprecedented, as well as delineating the attacks as against U.S. citizens, and the need to protect citizens being a priority, the *AUMF* contained the following introduction:

> Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and
>
> Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

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decided by the Israeli Supreme Court between 2000 and 2010, not a single release order was issued, nor were any orders issued in favour of the detainees on the issue of secret evidence.) [*Krebs*].

[483] See discussions of Hamdi and Padilla, Chapters 3 and 2, respectively.

[484] The *Authorization for Use of Military Force* was a joint resolution, passed by the U.S. Congress a few days after the attacks and signed by then-U.S. President George W. Bush. *Authorization for Use of Military Force*, *Joint Resolution*, Public Law 107–40, 115 STAT. 224 (Sep. 18, 2001), online: U.S. Government Printing Office <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>.

> Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and
>
> Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and
>
> Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States …[485]

The resolution itself includes rather broad authorization language:

> The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[486]

This authorization, while brief, continues to be cited as authority for a number of exceptional measures regarding terrorism detentions and other matters.[487] Two examples of such claims were evaluated by the U.S.

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[485] *Ibid.*
[486] *Ibid.*
[487] In fact, in voicing his opposition to the *National Defense Authorization Act 2012 (NDAA 2012*), U.S. President Obama cited its provisions allowing for extraordinary detention powers in terrorism-related matters, arguing that the U.S. Government already had that authority under the *Authorization for Use of Military Force* (*AUMF*), Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001), and that codifying this authority in the *NDAA* 2012 arguably presented an admission by the U.S. Government that the extraordinary measures already taken under the AUMF were not already legally permitted. Rather than expanding detention authority, as many had argued it would, President Obama argued that it would, in fact, limit detention authority. See Executive Office of the President, "Statement of Administration Policy: S. 1867 – National Defense Authorization Act for FY 2012" (17 November 2011), online: Office of Management and Budget <http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf>; Ateqah Khaki, "Senate Rejects Amendment Banning Indefinite Detention" (11 November 2011), online: American Civil Liberties Union < http://www.aclu.org/blog/national-security/senate-rejects-amendment-banning-indefinite-detention>.

Supreme Court on the same day. The first involved the case of Jose Padilla, discussed at length in Chapter 2.[488] After years of judicial rulings relating to the U.S. Government's assertion that Padilla was an unlawful enemy combatant, the U.S. Government voluntarily withdrew this designation and, instead, simply prosecuted Padilla in an Article III criminal proceeding.[489]

A second case involved Yaser Hamdi. Hamdi was born in the U.S. to parents from Saudi Arabia, so he held dual citizenship, as the U.S. Constitution confers citizenship on those born within the U.S.[490] Hamdi was captured in Afghanistan and held briefly at Guantanamo Bay before the U.S. Government determined that he was a citizen and transferred him to military detention within the U.S. In the pleadings filed before the U.S. Supreme Court, which included numerous *amicus* briefs, there was much discussion of his citizenship status, including arguments that he had renounced his citizenship by taking up arms against the U.S., and one party arguing that he was never a citizen, based on disagreements over the interpretation of the relevant provision in the U.S. Constitution.[491]

The U.S. Supreme Court accepted Hamdi's status as a citizen in its ruling, with the ruling addressing the question of governmental powers regarding the detention of a citizen under such circumstances. Lower court rulings had previously raised numerous concerns about the quality of the evidence against Hamdi, who was ultimately held for three years, and, after the U.S. Supreme Court ruling, the government brokered a deal with him.[492]

The Supreme Court ruling, however, was a plurality decision containing much disagreement among members of the Court as to the

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[488] Chapter 2, above.
[489] Article III refers to the U.S. Constitution, which contains a provision establishing the U.S. judicial system. U.S. Const. Art. III. Kent Roach refers to such approaches as the designation of detainees as unlawful enemy combatants as "extralegal activities." Roach, *The 9/11 Effect*, *supra* note 82, at 161.
[490] *Hamdi v Rumsfeld*, 542 U.S. 507 (2004)(plurality); see also U.S. Const. amend. XIV ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").
[491] *Ibid.*
[492] *Ibid.*

underlying reasons, but in which a majority ruled that Hamdi was entitled to some form of due process. A majority found that the designation and military detention of Hamdi was permitted under the *Authorization for Use of Military Force*, previously passed by Congress, but, because he was a citizen, he was entitled to certain procedural protections.[493] As a general matter, the Court did not question the use of a wartime paradigm, and, indeed, as Hamdi was purportedly arrested on a battlefield in Afghanistan, this issue presented less controversy in his case than in others. The decision is known for, among other things, reasserting the importance of the separation of government in the U.S., with Justice Sandra Day O'Connor famously writing, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[494]

Justice Scalia's dissenting opinion is noteworthy when looking at some of these detentions in terms of the non-citizen Other, as he drew a strong and unyielding line between the rights that must be accorded under the U.S. Constitution to U.S. citizens, in contrast to his thoughts, on the same day, in relation to a companion case, *Rasul v Bush*, involving non-citizen detainees at Guantanamo Bay.[495] Part of the distinction was based on Hamdi's status as a U.S. citizen, and part based on the fact that he was being held within the U.S., so his concerns regarding territorial jurisdiction outside of the U.S., prominent in his *Rasul* dissent, were not evident in his *Hamdi* dissent.

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[493] *Ibid.*
[494] *Ibid* at 29.
[495] See *Rasul v Bush*, 542 US 466 (2004) (Scalia, J., dissenting)(the first in a series of three rulings relating to the parameters of *habeas corpus* rights for those held at Guantanamo Bay. Mr. Rasul had been released before the U.S. Supreme Court decided his case. Justice Scalia, in a dissenting opinion, argued that the court had no jurisdiction to hear a claim by a non-citizen held outside of the territorial jurisdiction of the U.S.). The U.S. Supreme Court ultimately decided that detainees there did have a right to *habeas corpus* review of their detentions under the U.S. Constitution in *Boumediene v Bush*, 553 U.S. 723 (2008), which resulted in a large number of *habeas* petitions being heard in U.S. federal courts, as well as a number of detainees being ordered released from Guantanamo Bay.

Regarding Hamdi, Justice Scalia cited Blackstone to write, "[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."[496] Justice Scalia conceded the legitimacy of the wartime paradigm, but went to great lengths to distinguish between enemy aliens and enemy citizens, noting, in response to Justice O'Connor's comments that detention of enemy combatants until the end of hostilities was common practice, "[t]hat is probably an accurate description of wartime practice with respect to enemy aliens. The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process."[497]

While Justice Scalia's critique of the detention was limited solely to Hamdi's status as a citizen and to his presence within the U.S., he addressed the arguments that the U.S. Constitution did not apply to times of crisis, noting:

> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.[498]

What level of due process somebody in Hamdi's situation would face, however, remains undecided, because the U.S. Government chose not to pursue further action against him, instead entering a deal in exchange for his release. The deal that the U.S. Government worked out with Hamdi, in exchange for his release, demonstrated the importance of the citizen/non-citizen divide. He was required to renounce his American citizenship, agree

[496] *Hamdi, supra* note 490.
[497] *Ibid.*
[498] *Ibid* at 27.

not to return to the U.S. for ten years, and refrain from traveling to a number of listed countries. With that agreement, Hamdi was sent to Saudi Arabia.[499]

E.2. Use of National Immigration Systems Outside of Criminal Justice Systems -- The Securitization of Immigration[500]

Although the war paradigm in many ways was a quirk of the U.S. response, a more prominent and widespread reaction involved a number of jurisdictions using their national immigration systems as primary tools in the fight against terrorism. The securitization of immigration is a process that has been discussed at great length in various academic writings.[501] The othering aspect of using a non-criminal process, which by definition only includes non-citizens as its subjects, seems apparent.[502]

As an example, immigration detentions were publicly presented in some places as equivalent to the detentions of terrorists. In the early days

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[499] See Abigail D. Lauer, "Note: The Easy Way Out? The Yaser Hamdi Release Agreement and the United States' Treatment of the Citizen Enemy Combatant Dilemma," (2006) 91 Cornell L. Rev. 927 (arguing that the Hamdi agreement was an arguably easy solution in his case, but presented problems for other cases in which the U.S. Government might wish to designate a citizen as an unlawful enemy combatant). A question arises as to whether, should Hamdi challenge the renunciation of his citizenship in the future, he would be successful. A U.S. citizen may renounce citizenship, but must do so voluntarily, and it is unclear how circumstances like this might be viewed by a U.S. court in the future. See generally *Ibid*; Afroyim *v Rusk*, 387 U.S. 253 (1967)(holding that U.S. citizens may not be deprived of their citizenship involuntarily); *Vance v Terrazas*, 444 U.S. 252 (1980)(holding that a U.S. citizen must have acted with an evidenced intent to relinquish citizenship to have it revoked). An open question at the time of Hamdi's deal was also whether the U.S. Government would try to detain him again, as a non-citizen, but that has not happened to date.

[500] As noted earlier, while this is not a manuscript-based thesis, some sections of this thesis were published previously in an earlier iteration. For this section, some material is loosely drawn from two publications, Maureen T. Duffy & René Provost, "Constitutional Canaries and the Elusive Quest to Legitimize Security Detentions in Canada" (2009) 40 Case Western Reserve J Int'l L 531 and Maureen T. Duffy, "'The Slow Creep of: Complacency:" Ongoing Challenges for Democracies Seeking to Detain Terrorism Suspects," (2010) Pace Int'l L. Rev. OC 42.

[501] See e.g. Philippe Bourbeau, *The securitization of migration: a study of movement and order* (New York: Routledge, 2011); Dace Schlenz, *Did 9/11 matter?: securitization of asylum and immigration in the European Union in the period from 1992 to 2008* (Oxford: Refugees Study Center, 2010).

[502] See generally Delphine Nakache, *The "Othering" Process: Exploring the Instrumentalization of Law in Migration Policy* (DCL Thesis, McGill University Faculty of Law, 2008) [unpublished] (considering in depth the "othering" of migrants).

after 9/11, the U.S. undertook a number of initiatives to designate certain immigration detainees as "special interest" detainees and publicly announced the arrest of "terrorists," even though none of the "special interest" detainees was ever successfully prosecuted for a terrorism-related offense and most were simply deported after often-secret detention hearings.[503] The following statement from then-U.S. Attorney General John Ashcroft, referring to these special-interest detainees, demonstrates this connection:

> Within days of the September 11 attacks, we launched this anti-terrorism offensive to prevent new attacks on our homeland. To date, our anti-terrorism offensive has arrested or detained nearly 1,000 individuals as part of the September 11 terrorism investigation. Those who violated the law remain in custody. Taking suspected terrorists in violation of the law off the streets and keeping them locked up is our clear strategy to prevent terrorism within our borders. [504]

What Ashcroft does not note in his comments is that the suspicion of law violations usually involved some form of immigration violation. The implication, however, is that the violations relate to terrorism. The "suspected terrorists," were, in fact, immigrants, designated for "special" status, not based on suspicions relating to their conduct, but on the basis of their age, national origin, and gender.[505] Immigrants, it seemed, were presumptive terrorists, or at least, in relation to the special-interest detainees, immigrants

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[503] See Cole, *Enemy Aliens*, *supra* note 228.

[504] *Duffy, Master's Thesis*, *supra* note 262 *(quoting* John Ashcroft, "Prepared Remarks for the US Mayors Conference" (25 October 2001), online: United States Department of Justice <http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm>).

[505] United States Department of Justice Office of the Inspector General, *The September I I Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September I I Attacks* (June 2003) c. 4, online: U.S. Department of Justice Office of the Inspector General <http://www.usdoj.gov/oig/special/0306/index.htm> [*Special OIG Report*]**.** The U.S. post-9/11 immigration detentions were somewhat unique in that the government openly admitted that it was targeting males over the age of 16 from a list of designated countries, most of which were in the Middle East (Cuba and North Korea were also included). While most of the 9/11 terrorists allegedly came from Saudi Arabia, that country was not one of those listed in the U.S. Federal Register as being subject to "special interest" screening. *Ibid.*

of specific, explicitly designated national origins were presumptive terrorists.[506] It has been estimated that 5,000 men, whose national origin overwhelmingly represented countries in the Middle East, were detained under the various iterations of the special-interest detentions. Most were ultimately deported. While the immigration detentions in the U.S. were arguably more widespread than those in other countries, they garnered considerably less attention, no doubt eclipsed by the simultaneous war measures the U.S. was undertaking. Unlike places such as the UK, Canada, and Australia, these detentions also generated considerably less litigation.[507]

Also in the U.S., the former Immigration and Naturalization Service was collapsed under the authority of the new Department of Homeland Security, with the obvious inference being that immigration was a matter of homeland security.[508] The much-discussed and highly controversial *USA Patriot Act* also contained revisions to detention requirements for immigration cases, but the provisions, while controversial, provided more protections for detainees than the procedures actually followed by the U.S. Government in the early days after 9/11.[509] In spite of the heavy use of its national

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[506] See David Cole, *Enemy Aliens, supra* note 228 at 25*; Duffy, Master's Thesis*, *supra* note 262 (describing the special interest detentions in detail); *Roach: The 9/11 Effect*, *supra note* 82.

[507] Presumably because those involved were largely deported, the litigation that has arisen from the post 9/11 special-interest detentions has been largely civil in nature, distinguishing it from comparable litigation in places like Canada, the UK and Australia. See e.g. *Ashcroft v Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009)(holding that high-level U.S. Government officials were not responsible for the actions of subordinates that were allegedly discriminatory, absent proof that they ordered the practices to be pursued. The discrimination alleged was that Iqbal had been designated as being of special interest solely based on race, national origin, and religion); see also *Turkmen v Ashcroft,* Case 1:02-cv-02307-JG-SMG (pending litigation)(a class action case originally filed in 2002 on behalf of class members who were males who were Muslim, South Asian or Arab, who were detained as part of the post-9/11 special-interest program.). The last court proceeding on the *Turkmen* case appears to have been in March 2011, when arguments on a motion to dismiss were heard, according to the website of the Center for Constitutional Rights, which brought the action. Center for Constitutional Rights, "Turkmen v. Ashcroft," (Timeline), online: CCR <http://ccrjustice.org/Turkmen-v-Ashcroft>.

[508] See *Homeland Security Act*, (2002) Public Law 107–296, 116 Stat. 2135.

[509] See *Duffy, Master's Thesis*, *supra* note 262 (for a detailed discussion of the circumstances surrounding the signing of the USA Patriot Act).

immigration system, the lack of litigation and recent developments have meant that much of this area has gone unnoticed, even within the U.S.

Much more prominent national discussions occurred in jurisdictions like Canada and the UK about use of their national immigration systems to detain people, potentially indefinitely, on a suspicion of being terrorists.[510] In the years after 9/11, national high courts in Canada and the UK addressed almost identical provisions and practices for the use of national immigration systems, but, when assessing whether such practices were discriminatory, came to very different outcomes. A look at the different reasoning they employed, therefore, is instructive.

E.2.1. The UK and The Belmarsh Detainees [511]

As was the case for most aspects of extraordinary detentions after 9/11, national high courts played a significant role in determining whether immigration status could serve as a primary basis for determining whether a person could be detained indefinitely as a suspected terrorist. An interesting comparative opportunity arose in relation to two decisions, one from the UK and one from Canada, as they were called on to decide virtually identical issues. The UK decision was issued first, and, while the Supreme Court of Canada referred to that decision with approval in its own ruling, it did not adopt the position of the UK House of Lords, that singling people out for extraordinary detention was discriminatory when presumptively only applied to non-citizens. In a larger sense, the disparity in the ways the Courts viewed this specific issue illustrates the extent to which each deemed othering, based on citizenship, to be acceptable.

The UK House of Lords addressed this issue in its *Belmarsh Detainees* case. The detainees in the U.K. were being held under

[510] See *Charkaoui I, supra* note 12; *Belmarsh Detainees, supra* note 13.
[511] As described by the UK House of Lords in a 2004 decision. *Belmarsh Detainees, supra* note 13.

immigration legislation, purportedly pending deportation for a suspicion of affiliation with terrorism-related activities. None of them had been charged with any criminal activities. The deportation could not be effected because there was a credible risk that the detainees would be tortured on return to their home countries. At the same time, the British Government argued that they could not be released, as this would pose a risk to national security.[512]

The House of Lords rejected the position of the UK Government, often through the use of forceful language. One basis for the ruling was that, to apply these detention standards to non-citizens but not to citizens, was both discriminatory, and, according to one Law Lord, simply illogical. Lord Bingham noted that, by definition, the immigration system created a distinction between nationals and non-nationals, but that it did not necessarily follow that this distinction could be applied when the immigration system was being used for what was primarily a security matter.[513]

Lord Scott noted that the European Convention on Human Rights

> does not justify a discriminatory distinction between different groups of people all of whom are suspected terrorists who together present the threat of terrorism and to all of whom the measures, if they really were "strictly necessary," would logically be applicable. If those who are suspected terrorists include some non-Muslims as well as Muslims, it would, in my opinion, be irrational and discriminatory to restrict the application of the measures to Muslims even though the bulk of those suspected are likely to profess to be Muslims. Some might well not be professed Muslims. Similarly, it would be irrational and discriminatory to restrict the application of the measures to men although the

[512] *Ibid at paras. 1-3.*

[513] *Ibid.* at paras. 67-68. In an exposition of his view of the Rule of Law, published after the *Belmarsh Detainees* case and shortly before his death, Lord Bingham identifies a number of factors that are necessary for an action to be arguably compliant with the rule of law, including "equality before the law," in which he quotes U.S. Supreme Court Jackson as saying "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principle of law which officials would impose upon a minority must be imposed generally." Tom Bingham, *The Rule of Law* (London: The Penguin Group 2010) at 59 (quoting *Railway Express Agency Inc. v New York*, 336 U.S. 106 (1949)).

> bulk of those suspected are likely to be male. Some might well be women. Similarly, in my opinion, it is irrational and discriminatory to restrict the application of the measures to suspected terrorists who have no right of residence in this country. Some suspected terrorists may well be home-grown.[514]

Lord Scott's last comment relating to "home-grown" terrorists appeared to have been prophetic, when, several months later, three of four men who carried out suicide bombings in London in July 2005 turned out to be British nationals.[515]

Lord Nicholls further noted that the discriminatory nature of these detentions was sufficiently compelling to provide a basis for judicial intervention on a national security measure, because normally Parliament would enjoy greater leeway. In fact, Parliament's failure to enact corresponding provisions allowing for the detention of nationals presenting a similar threat undermined the entire scheme:

> The difficulty with according to Parliament the substantial latitude normally to be given to decisions on national security is the weakness already mentioned: security considerations have not prompted a similar negation of the right to personal liberty in the case of nationals who pose a similar security risk. The government, indeed, has expressed the view that a 'draconian' power to detain British citizens who may be involved in international terrorism 'would be difficult to justify.' But, in practical terms, power to detain indefinitely is no more draconian in the case of a British citizen than in the case of a non-national. There is no significant difference in the potential adverse impact of such a power on (1) a national and

[514] *Ibid* at para 158.

[515] See Dominic McGoldrick, "Security Detention – U.K. Practice," 40 Case W. Res. J. Int'l L. 507, 513 (noting, additionally, that by the end of 2007 eight U.K. nationals were subject to control orders)[*McGoldrick: Security Detention*]; see also Dominic McGoldrick, "Terrorism and Human Rights Paradigms: The United Kingdom after 11 September 2001," in Alexis Keller & Andrea Bianchi, *Counterterrorism: Democracy's Challenge: v. 20 (Studies in International Law)* (Portland, OR: Hart Publishing 2008), at 111.

(2) a non-national who in practice cannot leave the country for fear of torture abroad.[516]

Although the UK Government was not bound by the ruling of the House of Lords, the decision received considerable attention, both within the UK and internationally, and the Government did enact new legislation in response to the ruling.[517] After the decision, a system of control orders was implemented in the UK, which, themselves were subject to considerable critique. Unlike the detention scenario under which the Belmarsh Detainees were held, control orders could be applied to citizens and non-citizens and involve varying forms of limitations on actions, which are often similar to house arrest.[518] Special Advocates could be appointed to represent the interests of the detainees where secrecy of evidence is asserted, but were limited in that they were allowed to view secret evidence under certain circumstances, but could not disclose to the person who is subject to the control order what the evidence includes.[519]

E.2.2 Canada and the Charkaoui Security Certificate Problem

The Supreme Court of Canada (SCC) dealt with similar detentions under the security certificate scheme in two cases in which the named plaintiff was Adil Charkaoui.[520] In the first case, the Court was called on to rule as to the validity of the security certificate process overall. The Court ruled differently on the discrimination issue than the House of Lords had in the *Belmarsh Detainee* case, distinguishing the House of Lords' decision on

[516] *Belmarsh Detainees, supra* note 13 at para 83.
[517] Anderson Control Order Report, *supra* note 86.
[518] *McGoldrick*, *supra* note 515; *Bingham: The Rule of Law*, *supra* note 513 (quoting Chief Justice Chaskalson of South Africa, who expressed concern about control orders, which can involve significant restrictions on personal liberty and can be so onerous that people find it impossible to comply and are then prosecuted for non-compliance).
[519] See generally *Three Control Order Cases*, *supra* note 318; see also the discussion of the more recent regime of TPIMs, *supra* note 85.
[520] *Charkaoui I, supra* note 12; *Charkaoui v Canada (Citizenship and Immigration)*, [2008] 2 S.C.R. 326, 2008 SCC 38.

the basis that British law explicitly entertained the possibility of indefinite detention for non-nationals only. In fact, the Law Lords seem to have based their finding of discrimination on the application of detentions only to terrorism suspects who were non-nationals, and on the overarching inappropriateness of using the immigration system to further national security objectives. It was that disparity more than the potential length of the detention that seemed pivotal.[521] This distinction is important because the House of Lords found the entire scheme invalid, largely based on this part of its ruling. The SCC, however, in failing to find the scheme discriminatory, left the overarching system in place, choosing to address some of the underlying procedural problems rather than acknowledging that the entire system was flawed.

The SCC invited a Government response focused on procedural mechanisms rather than on the more fundamental human rights implications of this detention scheme. The Court's suggestion that the security detention had not become disconnected from the deportation process seems to unquestionably accept a legislative scheme that was almost identical to that considered by the House of Lords, and which they found had become unhinged from the deportation process.

For context, it is possible that the SCC's ruling as to the Section 15 *Charter* issue differed from that of the UK House of Lords in the *Belmarsh Detainees* case because of another undercurrent that is not necessarily related to national security. The *Charkaoui* case was decided in the midst of a series of rulings by the SCC, which significantly altered the test to be met

[521] In addition, while the language being considered by the *Charkaoui* court in the IRPA did not expressly mention indefinite detention, the factual scenarios before it clearly suggested that was a possibility. The Court itself noted the plight of Hasan Almrei, still detained, and who did not know "when, if ever, he would be released." *Ibid* at 13; see Duffy & Provost, *supra* note 316 for a critique of this ruling.

to establish a Section 15 claim, and which have narrowed Section 15 to such an extent that some have argued that it is, essentially, meaningless.[522]

Regardless of why the SCC ruled as it did, its failure to find the detention scheme in *Charkaoui* to be discriminatory meant that the system continued. The SCC did find problems under Section 7 of the *Charter* and gave Parliament one year to remedy the problem. The result was a system of special advocates, modeled on that employed in the UK, and the subject of ongoing controversy.[523]

In the years following the first *Charkaoui* decision, two of the named parties, Adil Charkaoui and Hassan Almrei, have ultimately been granted rulings that their security certificates were not reasonable, and the certificates were therefore quashed. Both men remain in Canada and are now free from the restrictions under which they were placed on their release from detention.[524] The third named party, Mohamad Harkat, was initially arrested on a security certificate in 2002, and he has been either detained or on restrictive house arrest conditions since then. Harkat has been fighting deportation to Algeria, where, he fears that he faces a risk of torture or death.[525] His security certificate was deemed to be reasonable, and he was

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[522] See e.g. Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16:1 Review of Constitutional Studies 205 (arguing that the SCC, in a series of Section 15 cases, has significantly narrowed the circumstances under which a claim of discrimination may succeed and has left a great deal of confusion as to the proper standards to be applied); see *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143, *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, *R. v Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, *Withler v Canada* (Attorney General), 2011 SCC 12; *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37; see generally Colleen Sheppard, *Inclusive Equality The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press 2010). In *Charkaoui*, the SCC never expressly applied the Section 15 analysis, determining, instead, that the matter did not fall within the purview of Section 15. See *Charkaoui I, supra* note 12.

[523] See *IRPA, supra* note 7, ss. 85-85.1.

[524] Adil Charkaoui has been trying, so far without success, to obtain an apology from the Government of Canada. Coalition Justice for Adil Charkaoui, "Road to Justice," online: Coalition Justice for Adil Charkaoui <http://www.adilinfo.org/en/node/661>.

[525] The issue of deportation to Algeria and the risk of torture has been controversial elsewhere and also came up in relation to some of the Guantanamo Bay detainees ordered released there. One detainee asked to remain at Guantanamo Bay rather than being

ordered deported, but a ruling by the Federal Court of Appeal in April 2012 reversed that finding and ordered a new hearing for him.[526] The Federal Court of Appeal, however, rejected Harkat's argument that the special advocate process violated Section 7 of the *Charter* as being inconsistent with the principles of fundamental justice.[527]

While court proceedings are pending, Harkat remains under house arrest. He must wear a GPS device at all times. He is not allowed to use the Internet or a cell phone, and he cannot leave Ottawa without permission. He is also required to report weekly to the Canada Border Services Agency.[528] Harkat has expressed considerable distress, both at the restrictive terms under which he is living, and at the ongoing risk that he will be deported to Algeria. Before the April 2012 decision was issued, he said ""My eyes started tearing down and my heart started pounding hard … I was actually worried that the decision was coming today, because my life's on the line."[529] Although the Government of Canada has repeatedly asserted, over the past ten years, that Harkat is a "sleeper agent" for Al Qaeda, it has never charged him with a criminal offense.[530]

E.2.3. Incongruities from "Other"-Based Detention Paradigms

Aside from the discrimination issues that appear to arise from applying differential detention and judicial process paradigms to non-citizens, questions of logic, echoing some of the concerns raised in the *Belmarsh*

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repatriated to Algeria. Center for Constitutional Rights, *Profiles of Guantanamo Detainees in Need of Safe Haven* online: Center for Constitutional Rights < http://ccrjustice.org/learn-more/reports/profiles-guantanamo-detainees-need-safe-haven>.

[526] *Harkat v Canada (Citizenship and Immigration)*, 2012 FCA 122.

[527] *Ibid* at para 117. The Supreme Court of Canada has agreed to hear Harkat's appeal, which will include the issue of the constitutionality of the special advocate regime. *Minister of Citizenship and Immigration et al v Mohamed Harkat et al* (F.C.) (Civil) (By Leave) (34884).

[528] Andrew Duffy, "Mohamed Harkat deserves new hearing, appeal court rules" (2012), online: PostMedia News <http://www.canada.com/news/Mohamed+Harkat+deserves+hearing+appeal+court+rules/6517200/story.html>.

[529] *Ibid*

[530] *Ibid.*

Detainees case, arise. One of the more famous post-9/11 terrorism detention cases in Canada has related to Omar Khadr. Khadr is a Canadian citizen, as well as one of the few to be convicted before the Guantanamo Bay Military Commission. It was been reported that, as part of his plea agreement, he was to be moved to Canada, and, indeed, Khadr was transferred to Canada in September 2012, where controversy continues as to the disposition of his case.[531]

Khadr has never been prosecuted in a traditional criminal court, and he was convicted after a guilty plea before the Military Commission that was entered under controversial conditions.[532] The U.S. Government has long asserted that Khadr cannot be tried before a traditional court, because, as a designated "unlawful enemy combatant," it would be too dangerous, and too much confidential information would be disclosed.[533]

As a Canadian citizen, Khadr is exempt from Canada's extraordinary detention practices implemented through its security certificates regime. Unlike Charkaoui, Almrei, or Harkat, Khadr cannot be subjected to the dominant extraordinary detention processes in Canada, even though he has famously been subjected to extraordinary detention practices by the United States at Guantanamo Bay.[534] His case demonstrates, on some level, that some post-9/11 terrorism detention standards have less to do with focused attempts to address alleged conduct than to do with immutable characteristics. Simply put, in the U.S., Khadr is "the Other." In Canada, he is not, at least as far as the citizen/non-citizen divide goes, although clearly he

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[531] See note 222, sources and accompanying text; Anna Mehler Paperny, "Khadr 'relieved' as return to Canada puts his fate in prison system's hands" (29 Sep 2012), online: The Globe and Mail <http://www.theglobeandmail.com/news/national/khadr-relieved-as-return-to-canada-puts-his-fate-in-prison-systems-hands/article4576945/>.
[532] *Ibid.*
[533] *Ibid.*
[534] One might argue, however, that Khadr's case involves a potentially new form of extraordinary detention in Canada. If Canada honours the plea agreement entered into at Guantanamo Bay, in spite of concerns raised about its legitimacy, and detains Khadr in Canada for the remainder of his sentence, then he may, in fact, follow an indirect route to an extraordinary detention scenario that would not have been possible had he initially been in Canadian, rather than U.S., custody.

is “the Other” in terms of gender, national origin, and religion, as illustrated by Canada’s refusal to advocate on his behalf while he was at Guantanamo Bay, and its continued detention of Khadr in spite of serious concerns about the Military Commissions and legitimacy.[535] The designations of “the Other” as based on immutable characteristics (including citizenship for this purpose) appear to have had more to do with detaining people in certain, apparently undesirable, groups, and less to do with actually stopping terrorism.

F. Conclusion: Future Directions for the Terrorist Other

Terrorism, particularly when it is focused against one identified group, frequently involves othering, and that seems to have been the case with Al Qaeda’s attack on the U.S. on 9/11. While the public, governmental discourse after 9/11 was dominated by a denial of othering in regards to national responses, it is obvious that a male who was Muslim, or whose national origin was from a predominantly Muslim country, was more likely to be subject to extraordinary detention than somebody from any other group. If that person was a non-citizen of the country undertaking the measures, that likelihood increased, at least in the early years. All of the detainees at Guantanamo Bay, for instance, have been male, non-citizens of the U.S., and from countries that are primarily Muslim.[536]

Some might argue that this focus had to do with the fact that Al Qaeda purported to act on behalf of Islam, or at least that they represented a threat related to associations with Islamic fundamentalist terrorism, thus explaining

[535] This argument relates only to the issue of citizenship and not to the characteristics of gender, religion, race, and national origin, which purportedly factor into decisions made regarding who is the Other.

[536] Among other governmental documents that have been declassified over the past several years is a complete listing, and information such as national origin and reasons for detention, of all of the Guantanamo Bay detainees. See Simon Rogers, “Guantánamo Bay Detainees - The Full List” (2011) The Guardian, online: guardian.co.uk <http://www.guardian.co.uk/world/datablog/2011/apr/25/guantanamo-bay-detainees-full-list> (containing a link to a spreadsheet they created from the raw data that was declassified, relating to approximately 800 detainees).

the disproportionate impact on males with Muslim backgrounds. A question arises, however, as to whether such logic would be accepted if the alleged perpetrators purported to act on behalf of a majority group.

On August 5, 2012, Wade Michael Page, a self-proclaimed "White Supremacist," walked into a Sikh temple in Wisconsin, in the U.S., and began shooting people. When it was over, six people at the temple had died, with others wounded. Page himself was killed by a police officer during the shooting rampage.[537] Early reports, which were still emerging as this thesis was submitted, suggested that Page had spoken of a "racial holy war," and had been a long-time believer in White supremacy.[538]

Shortly after the Wisconsin attacks on the temple, news reports carried statements from representatives of the Federal Bureau of Investigation that the attacks were being treated as "domestic terrorism."[539] Several questions arise in this instance. The first is whether it is an act of terrorism because of the racial motivation behind the attacks, or, whether, alternatively, such an action would more accurately be characterized as a criminal matter, albeit with hate-related elements. Another mass shooting, earlier in the summer, 2012, at a movie theater in the U.S., was not characterized as terrorism, and the alleged perpetrator is facing trial in a criminal court. In that case, there was, however, no asserted race-related motivation.[540]

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[537] Associated Press, "Sikh temple gunman's online activity probed" (7 Aug 2012), CBCNews, online: CBC.Ca <http://www.cbc.ca/news/world/story/2012/08/06/sikh-temple-shooting-son.html>.

[538] See *ibid*. Preliminary information on Page is still emerging, so no definitive conclusion as to his motive is presented here. Nonetheless, information has emerged that he was active on White supremacist online fora and played in a White supremacist band. *Ibid*; see also CNN Wire Staff, "Police identify Army veteran as Wisconsin temple shooting gunman" (7 Aug 2012), CNN, online: CNN.com <http://www.cnn.com/2012/08/06/us/wisconsin-temple-shooting/index.html>.

[539] CBC News, "U.S. Sikh temple shooting an act of 'domestic terrorism'" (5 Aug 2012), CBCNews, online: CBC.ca <http://www.cbc.ca/news/world/story/2012/08/05/sikh-temple-shooting.html>.

[540] See generally Chris Francescani and Keith Coffman, Reuters, "Report: Batman shooting suspect mailed notebook" (25 July 2012), online: CNews <http://cnews.canoe.ca/CNEWS/World/2012/07/25/20026286-reuters.html>.

In any event, if the shooting at the Sikh temple is, indeed, classified as an act of terrorism, the terminology of "domestic terrorism" raises an inference that this is a different type of situation from that relating to Al Qaeda and "international terrorism." While there are practical differences, no doubt, between domestic and international terrorism, there is a question as to whether different detention standards are required, or even presumptively required, in the two instances. Page was killed by a police officer in the temple attack, so there will be no question of whether he should face a criminal trial. It is unlikely, however, that, had he survived, there would have been a push to detain him at Guantanamo Bay, or even that a conversation similar to that regarding the arrest of the Underwear Bomber would occur in relation to whether he is entitled to a *Miranda* admonition.[541] Of course, any question regarding Guantanamo Bay would be impossible if Page was a U.S. citizen. Moreover, it is highly unlikely that Caucasian males will be singled out for disparate treatment in terms of detention standards, or even investigation standards, even though those are the immutable characteristics of the attacker, and even if it is established that he acted in furtherance of White supremacy. It is unclear if Page was actually associated with any group, but it would appear that any further investigation would reasonably be based on conduct, not gender, national origin, or religion.[542]

Questions continue as to the distinction between "domestic" and "international" terrorism in the context of underscoring extraordinary

[541] See discussion of the "conversation" concerning the Underwear Bomber in the Introduction to this thesis.

[542] These attacks occurred less than two weeks before submission of this thesis, too early for scholarly commentary to be extensive, so commentary on the issue is certain to expand. Already, however, in the popular media, comparisons are being made to terrorism in the name of White supremacy, or another right-wing cause, and that of international terrorism carried out by Al Qaeda. See e.g. Peter Bergen, National Security Analyst, "Right-wing Extremist Terrorism as Deadly a Threat as al Qaeda?" (7 Aug 2012), CNN, online: Cnn.com <http://www.cnn.com/2012/08/07/opinion/bergen-terrorism-wisconsin/index.html?hpt=hp_t2> (commentary from the Executive Director of the New American Foundation, noting, among other things, on the fact that Al Qaeda attacks within the U.S. have resulted in 17 deaths, 13 of which were from the shooting incident at Fort Hood in November 2009. By contrast, what he refers to as "right-wing terrorism" has, if the temple shooting will be included, been involved in 15 deaths in the same time period, involving more attacks).

detention standards, and those questions are particularly compelling when the detainee is treated differently because of being the Other, however the Other is constructed in a given instance. Earlier in this chapter, it was argued that removing the discriminatory factors regarding some of these detentions would not necessarily lend them greater legitimacy. If the detention standards are otherwise lacking legitimacy, then applying them to more people could arguably aggravate, rather than alleviate, problems with the standards, simply because, if improper, they would be improper in relation to more people. Moreover, in relation to post-9/11 terrorism detentions, removing the citizen/non-citizen distinctions, such as what the UK initially did when the House of Lords found the use of the immigration system discriminatory, only eliminates one level of othering. Because Muslim males are disproportionately singled out for these extraordinary practices, eliminating the citizenship distinction actually just means that Muslim males who are citizens of that country are also made vulnerable to these extraordinary practices, and they would likely be so at much higher rates than any other groups, raising questions as to whether eliminating one indicator of discrimination simply enhances other ones.

The distinctions between domestic and international terrorism are not expounded upon in this thesis, and it is acknowledged that there are differences, particularly in terms of things like intelligence gathering. It is not as readily apparent, however, that this distinction justifies many of the differences in detentions that have emerged since 9/11, so much as to provide terminology that raises an inference that “international terrorism” comes from outside, and thus that the perpetrators are the Others.

As some countries moved to eliminate a citizen/non-citizen distinction in these detentions, and thus faced additional questions, rather than fewer, in terms of the legitimacy of these practices, a second layer of analysis arises from the use of othering as a foundational structure for terrorism detentions. Even where no significant move has been made to remove the citizen/non-

citizen distinction because of a concern about discrimination, some of these extraordinary practices are being expanded to include citizens for different reasons. In the U.S., for instance, one of several recent controversies concerning extraordinary detentions has to do with the National Defense Authorization Act 2012 ("NDAA").[543]

The legislation allows for "(1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force."[544] This section lists activities that would allow for detention of somebody under its provisions, including

> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.[545]

The legislation also has a section that applies to "foreign Al Qaeda terrorists" and specifically exempting U.S. citizens and lawful resident aliens from its provisions.[546] While this exemption is included in the section relating to "foreign Al Qaeda terrorists," it is not included in the previous section, quoted above.[547] This failure to include U.S. citizens from those particular provisions led to a court action, in which the plaintiffs sought an injunction from enforcement.[548]

The plaintiffs included reporters, who feared that their activities in pursuing stories might be viewed as an activity supporting Al Qaeda and the

[543] NDAA, supra note 387.
[544] See *ibid* sec. 1021 (c)(1).
[545] *Ibid* at sec 1021.
[546] *Ibid* at sec. 1022.
[547] *Ibid* at sec. 1022, sec. 1021
[548] *Hedges v Obama*, 12 Civ. 331 (KBF) (S.D.N.Y. 2012).

Taliban, pursuant to Section 1021 of the NDAA, as well as activists who expressed concern that their expressive activity might be deemed to fall under this provision. Noam Chomsky and Daniel Ellsberg were among the plaintiffs. Those pursuing the action were U.S. citizens.

The federal judge who heard the case quoted U.S. President Obama's signing statement, when he signed the legislation into law, after threatening a veto. He said:

> Section 1021 affirms the executive branch's authority to detain persons covered by the [AUMF]. This section breaks no new ground and is unnecessary. The authority it describes was included in the 2001 AUMF, as recognized by the Supreme Court and confirmed through lower court decisions since then . . . . Moreover, I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens . . . . My Administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the law.[549]

In spite of repeated questioning by the judge during the hearing on the motion, the lawyers for the U.S. Government were unwilling to say that the types of activities undertaken by the plaintiffs would not fall under the ambit of Section 1021. Because they would not do so, the judge indicated that she had to find that they had standing to pursue the action.[550] The judge did not focus on the issue of citizenship, instead finding the provision unconstitutional and enjoining its enforcement, in large part because it was sufficiently broad so there was the potential that the writing and associational activities undertaken by the plaintiff might be covered.[551]

In so deciding, the judge put much emphasis on the Government's unwillingness or inability to definitively state what type of conduct would be included in the provisions. She discussed at length exchanges she had with

[549] *Ibid* (citing to Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978 (Dec. 31, 2011) at 1-2).
[550] *Ibid* at 46.
[551] *Ibid.*

the Government's attorney during the hearing, and it is unclear whether the attorney was unable to answer the question because the Government was unwilling to so specifically delineate the conduct, or if it was something more basic, such as the artfulness of the particular lawyer's handling of the case. The U.S. Government has appealed the ruling, so perhaps the answer to that question is forthcoming.[552] As the statute is written, however, it is not at all clear that U.S. citizens would be excluded, and, as they are expressly excluded from the following section, but not Section 1021, it could well be argued that they are included in the provision. This is relevant in terms of the issue of "the Other," because it could represent another opportunity by the U.S. Government to expand extraordinary detention measures to citizens. A question, of course, exists as to a citizen/non-citizen divide would be appropriate in this instance, as it is difficult to justify if conduct is the issue. This, this legislation may well be an example of being problematic either way.

It is thus not entirely clear what the future holds in regard to extraordinary detentions that have a starting presumption of the terrorist as Other. While the extension of the NDAA to U.S. citizens remains questionable, and will require further clarification, what is known is that targeted killings have involved U.S. citizens. Again, while this does not involve detention, it has been included in this study as a more extreme sort of governmental repression, with the same underlying problems as those evidenced by many of the extraordinary detention scenarios. As stated at the outset of this Chapter, this presumption of the terrorist Other is arguably the most obvious and widespread of those underpinning post-9/11 terrorism detentions. To the extent that this notion did underscore alterations to detention practices after 9/11, questioning of that underscoring is critical.

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[552] See Reuters, "Indefinite Detention Ruling Appealed By Federal Prosecutors" (6 Aug 2012), Huffington Post, online: Huffingtonpost.com <http://www.huffingtonpost.com/2012/08/07/indefinite-detention-ruling_n_1749566.html?utm_hp_ref=politics>.

"In the face of contemporary dangers from terrorism, it is essential that this Court should insist on the steady observance of settled constitutional principles. It should demand adherence to the established rules governing the validity of federal laws and the deployment of federal courts in applying such laws. It should reject legal and constitutional exceptionalism. Unless this Court does so, it abdicates the vital role assigned to it by the Constitution and expected of it by the people. That truly would deliver to terrorists successes that their own acts could never secure in Australia.

...

The wellspring of constitutional wisdom lies in legal principle. Its source is found in the lessons of constitutional history. When these elements are forgotten or neglected by a court such as this, under the passing pressures of a given time, the result is serious error. The consequences for the constitutional design, as for individual liberty, can be grave. It must then be left to a future time to return to that wisdom and to rediscover its source when the mistakes of the present eventually send this Court back to the wise perceptions of the past."[553]

[553] *Thomas v Mowbray, [2007] HCA 33,* at paras. 388-389 (Australia: Kirby, J. Dissenting, quotation).

CHAPTER 4: False Dichotomies in the Narrative: The "Either/Or" Dilemma[554]

Advanced as Presumption/Point of Departure: The 9/11 attacks demonstrated that the pre-existing criminal-justice paradigm is not adequate to address the threat of terrorism, and it must, in some cases, be replaced with another paradigm such as the wartime paradigm, although the pre-existing wartime paradigm is also not adequate against this "new" enemy, so a new hybrid must be created and legitimated by necessity.

A. Stark Assertions of Binaries

This chapter undertakes a different form of discourse deconstruction, focusing on a methodology of argumentation that manifested itself in different ways after the 9/11 attacks, rather than on a specific statement as presumption. One useful aspect of the kaleidoscope metaphor is that it can be used to demonstrate that the post-9/11 presumptions are not linear, but that, rather, different elements can be considered on different levels to produce new ways of looking at the whole. The post-9/11 extraordinary detention presumptions often involved a mingling of different ideas, or portions of different ideas that are not necessarily, if disconnected from the 9/11 discourse, obviously analogous to each other.

Much of the public and legal discourse used to support an asserted need for extraordinary detention practices had commonalities in terms of

[554] A "false dichotomy" is a statement that presents two options in an either/or scenario, which falsely suggests that those two options are the only two available. Trudy Govier, *A Practical Study of Argument* (Belmont, CA: Wadsworth Inc. 1988), at 330; see also Esther D. Reed, ed., *Civil Liberties, National Security and Prospects for Consensus: Legal, Philosophical and Religious Perspectives* (Cambridge: Cambridge University Press 2012)(containing a collection of essays, from a philosophy perspective, dealing with the "false dichotomy" of the notion that civil liberties must be traded off to enhance security. This formulation is a variation of the first dichotomy presented in this chapter, relating to a "balance" between these elements, and, while this Chapter focuses on the "balance" language, which is more commonly used, variations such as that presented in this book are acknowledged herein).

underlying structure, even when different specific statements were being made. In a number of respects, and particularly as explained in Chapter 3 above, the language used after 9/11 tended to present complex issues in simplistic terms, using a form of binary, suggesting that the proper approaches to detention practices, by necessity, involved a choice between one of only two options, with little room for nuance. The Point of Departure laid out at the beginning of this chapter is an example of one practice that arose from this peculiar form of discourse, but it does not necessarily represent the specific assertions that were made to undertake war-based detention paradigms, so much as a way of characterizing the actions taken in response to the asserted crime-versus-war binary.

In Chapter 2, a form of presumption that was explicitly stated was deconstructed. In Chapter 3, an implied presumption – evidenced by actions if not entirely acknowledged through statement – was analyzed. In this chapter, a third form of discursive analysis is undertaken. Rather than deconstructing a particular statement, this chapter looks to a methodology of argumentation used in several different contexts. The binary form of argument, in which options are presented as an "either/or" scenario, with little room for nuance, was a dominant form of persuasion used in the early days after the attacks. It was commonly seen in examples like the idea that changes had to happen to "balance" liberty and security. The ongoing argument about the choice between the war and the crime paradigms for detention and process present another example. And, drawing to an extent on the analysis in Chapter 2, much tension has been seen between the "old" way of doing things and the "new" way as represented by a "new" world after 9/11.

In fact, as discussed in the following sections of this chapter, it is not necessarily so obvious that liberty and security are commensurable elements to be balanced, or that it is necessary to reject or undermine one to enhance the other. Similarly, the war-versus-crime binary debate, peculiar to the U.S.,

has played out extensively since the attacks, but the reality has reflected that the U.S. is not, in practice, really choosing between these paradigms in an either/or manner. Rather, as will be discussed in the following sections, the U.S. appears to have developed a third paradigm, rejecting on some level both the crime and the war paradigms, and instead drawing elements from each that best support this third paradigm, as reflected in the point of departure presented at the outset of this chapter. Finally, after 9/11, there has been much talk about having to choose between old approaches and new ones. In Chapter 2, that talk was presented in terms of whether the nature of the threat necessitated new initiatives. Here, it is examined in a different manner. This distinction between old and new in terms of the detention changes is important, because calling something "new" suggests that it is untested, and that thus success of these new initiatives can only be assumed from the arguments used to support them. If, in fact, the initiatives are not "new" at all, but draw from "old" practices undertaken elsewhere, the structure of the argument changes considerably, as the experiences elsewhere can enrich the debate and give some indication as to the soundness of the arguments used to support the undertaking.

This chapter thus uses these three forms of "binary" discourse, which have been used to justify extraordinary detention standards, and analyzes them as examples to illustrate the problem with using such non-nuanced binaries as a foundation for changes to detention. Section B questions the liberty-versus-security binary. In Section C, the war-versus-crime debate is deconstructed, in part to demonstrate that this presentation of the issue is not only a false dichotomy, but also may not capture the reality, in practice, of what actually happened. Finally, in Section D, the question of whether the post-9/11 paradigms really are "new" initiatives, created out of a response to a new threat, or "old" practices, borrowed from other jurisdictions, is analyzed.

B. Incommensurability and Binary-Based Discourse: Balancing Liberty and Security

A common feature in the post-9/11 discourse in many places is the suggestion that governments must strive to achieve the proper "balance" between liberty and security.[555] For this purpose, the terms "liberty" and "security" are chosen simply because they are most commonly used, but variations are also common, in which security is more broadly articulated as a factor to balance against individual rights. As an example, in 2008, British Home Secretary Jacqui Smith commented that "[t]he *Prevention of Terrorism Act 2005* strikes the right balance between safeguarding society and safeguarding the rights of the individual."[556] Smith also referred to a "terrorist narrative" in the context of a form of "new terrorism," noting that terrorists have a narrative that calls for the killing of civilians, as well as the means of disseminating this narrative electronically.[557] The *Prevention of Terrorism Act 2005*, to which Smith referred, provided the authority for control orders, a form of extraordinary detention that was introduced after the House of Lords issued the Belmarsh Detainee ruling in 2004, and which, as explained previously, have since been abolished.[558] This balance language echoes language employed in other places, such as in the Supreme Court of Israel, which noted, regarding legislation allowing for extraordinary detention in terrorism cases, "[s]uch legislation must reflect the necessary balance between security needs and the liberty of the individual in the territory."[559]

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[555] See e.g. Paul Reynolds, "Balancing Liberty with Security" (23 October 2008), *BBC* online: BBCNews <http://news.bbc.co.uk/2/hi/7687091.stm> (quoting various government officials and others on this issue) [Reynolds, Balancing Liberty with Security].

[556] *Ibid.* This author points out that the-then U.S. President, George W. Bush, tended to use the word "balance" in a different way, such as saying "This war is more than a clash of arms -- it is a decisive ideological struggle, and the security of our nation is in the balance." *Ibid.*

[557] *Ibid*

[558] *Ibid; Prevention of Terrorism Act 2005* c. 2 (United Kingdom).

[559] *Marab v IDF Commander*, The Supreme Court Sitting as the High Court of Justice (April 18 2002, July 28 2002) at para. 21 (citing to the Fourth Geneva Convention for the proposition that certain individual rights can be set aside on the basis of necessity to enhance security in times of war).

A competing argument regarding the "balance" between liberty and security suggests that this manner of presenting this ideal might be misleading. Kenneth Roth, on behalf of Human Rights Watch, has said that the best way to ensure security is to safeguard human rights – that the two are not contrary values, but, rather, that both objectives that can be enhanced without sacrificing one for the other. As an example of his point, Roth has pointed to Spain's response to terrorism, not just in relation to 9/11, but also as to other attacks, including the Madrid bombing in 2004. Unlike countries like the U.S., Canada, the UK, and Australia, Spain addresses terrorism-related detentions through a criminal-justice, prosecution approach.[560] The Human Rights Commissioner for the Council of Europe, Thomas Hammarberg, echoed Roth's sentiments relating to the balancing of these values, saying, "[a]s for the 'balance' concept, I avoid the word. Human rights and civil liberties should apply in all situations. Rights are most relevant when there is a threat or a crisis."[561]

The formulation of this binary is not necessarily concrete in the sense that it can be demonstrated as leading directly to certain normative changes. Rather, it characterizes an approach, and where one falls on the issue of whether this is a binary can be predictive of how willing one might be to undertake incursions on individual liberties in the name of enhanced security. The aforementioned examples give a small illustration of this point as the two statements supporting the proper balance were being made in support of some government initiative limiting some freedom in the name of security. The statements suggesting that, in fact, individual rights and security are consistent values, both of which should be enhanced, are presented in the context of not limiting certain traditional rights in the interest of enhancing security. Thus, while this binary may appear academic on some levels, it does say something about the true nature of the interaction between these

[560] Reynolds, *Balancing Liberty with Security*, *supra* note 555.
[561] *Ibid.*

interests, and it is often used in rather generalized terms to justify some of the changes seen in post-9/11 extraordinary detention.

Before elaborating on the use of such binaries to support extraordinary detentions, some beginning definitions are necessary. A "binary" can be defined in mathematical terms, but, for this purpose, it is used in the sense of a "binary opposition," which can be described as

> the system by which, in language and thought, two theoretical opposites are strictly defined and set off against one another but simultaneously arranged, somewhat paradoxically, in pairs. These pairs are not unlike those which might be generated by a psychoanalytical word-association test and are manifest in obvious combinations:
>
> Life/Death
> Day/Night
> Sun/Moon
> Apollonian/Dionysian
> Culture/Nature
> Reason/Passion[562]

Some scholars suggest that the sequence of placement in the binary gives an indication as to which element is deemed dominant over the other.[563] In a balancing scenario, however, if equal measure, or balance, is sought for each element, then, by definition, the items should be equal in value, or, if not inherently equal, have some equalizing factor applied in order to achieve balance.

The manner in which liberty and security are played off of each other in the public discourse suggests that they are being treated as binaries, although it is not at all established that this is, indeed, the case. It is also unclear what it means to "balance" these two ideals. The literal idea of balance evokes an image of a scale, in which the weights of each must be

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[562] Greg Smith, "Binary Opposition and Sexual Power in 'Paradise Lost'" (1996), 27:4 Midwest Quarterly 383 [*Smith: Binary Opposition*].

[563] *Smith: Binary Opposition*, *supra* note 562 (citing to Helene Cixous for the proposition that, in binary opposition of two terms, one "enjoys a privileged, or power, position.").

the same to achieve an outcome in which the two elements are at an equal level with each other on the scale, much like the image of the scales of justice in law. Whether this is the sense of balance that is intended in this discourse is not generally explained, although it is consistent with the word's common meaning. An alternative explanation could be, not so much that the two elements being balanced are themselves equivalent, but that an equivalent outside emphasis is being placed on them, or perhaps an unequal emphasis that has an equalizing effect between the two elements, suggesting a larger concept that each is being given due weight in a fair manner between them – perhaps comparable to the impartiality represented by blind justice in the law.

In Chapter 3, a specific binary that underscored many post-9/11 changes to detention practices – that of the terrorist "Other" versus "us" – was deconstructed in relation to the way it affected legal structures instituted after the attacks. In describing some of the unyielding discourse that was employed by national governments after the attacks, this sort of "either/or" language was described, such as the "with us or with the terrorists" language that President Bush used after 9/11.[564] In that chapter, the emphasis was on identifying the Other as a theoretical underpinning of normative changes that occurred after the attacks, and it was the notion of the constructed Other that was deconstructed. It is nonetheless noted that implicit in that construction is a binary involving "us" versus "them."

In that respect, the "us" versus "them" binary is more patently problematic – and thus more straightforward to challenge -- than other binaries that arose during the post-9/11 discourse surrounding extraordinary detentions. It is also different in the sense of being presented as an either/or situation, whereas, in the case of liberty versus security, the presentation tends to be more through the lens of this asserted need for balance, which suggests that, to some extent, both are of value and should be treated as

[564] See *Bush: 9/20 Speech*, *supra* note 28.

such, rather than suggesting that one must be chosen to the entire exclusion of the other one.

The "balance" binary, therefore, is somewhat distinct from much of the other discourse after 9/11 that was also couched in terms of binaries. One apparent characteristic of much of this discourse was a tendency, through political speech that often made its way into normative legal structures, for matters to be presented in highly generalized language, with a polarized binary option presented, in which choosing one option, by definition, required rejecting the other, or at least conceding that the other must be undermined to support the first.[565] Some examples of such binaries include the ongoing arguments over whether post-9/11 detention practices are new or a variation on older themes, whether a person who opposes anti-terrorism initiatives thus supports terrorism, whether terrorism is a crime or an act of war, or whether those outside any given Border are presumptive terrorists while those inside the Border are presumptive victims.

Deconstructing each of these individual presumptions, presented in binary form, might serve as further support for the underpinning of this thesis, but it is apparent that they all have a common characteristic of being presented in rather broad terms, and in being presumed to be commensurable factors on some level. Thus, to deconstruct some of the post-9/11 binaries, the theoretical lens of incommensurability provides some useful tools.

[565] This characterization of the discourse loosely borrows from the deconstruction methodology proposed by Derrida in relation to binaries that are not just opposites, but in which one is deemed to be dominant over the other. Part of Derrida's methodology involves first eliminating what he considers to be a form of violence in which one of the elements of the binary is superior to the other. See Derrid*a, Of Grammatology*, *supra* note 133. Under Derrida's methodology, however, the binaries are reduced to equal in consideration, but it is maintained herein that this reduction can only occur if they are, in fact, commensurable factors to begin with. It is posited herein that, in relation to the post-9/11 discourse that led to various normative changes, this was not always the case.

The concept of "incommensurability" suggests the lack of a common measure.[566] Thus, if one option is presented as, by definition, ruling out the other, there is an assumption that the two options have an indicia of commonality that allows for reduction to some form of common denominator. Some suggest that this concept relates more to comparability, such as that found in the well-known metaphor of comparing apples to oranges. Incommensurability, however, suggests more than a comparison, but suggests that the two concepts considered have been placed on a form of metaphoric scale, with one element on one side, and the other element on the other, and that any change made to the first, by definition, affects the weight of the second. This goes beyond comparison and suggests a level of inter-relatedness that makes the two not just comparable but somehow inextricably linked and to some extent mutually exclusive, or, conversely, mutually constitutive.[567]

There are different lines of thought in relation to the notion of incommensurability. Ruth Chang draws a distinction between comparability and incommensurability, arguing "[l]et us henceforth reserve the term 'incommensurable' for items that cannot be precisely measured by some common scale of units of value," which, she argues, is not the same thing as simply not being subject to comparison.[568] Items might be compared to each other even if they cannot necessarily be reduced to a common denominator. James Griffin has written that commensurability does not, in fact, suggest that the two items asserted to be commensurable are equal, but that one of

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[566] Clint Shinn, "Difference, Incommensurability, Decision" (2009) 2:1 Emergent Australian Philosophers 1, online: Emergent Australian Philosophers <http://eap.philosophy-australia.com/index.php/eap/article/view/10/7> (arguing that it is possible, within the political sphere, to understand difference without those differences becoming incommensurable) [*Shinn: Difference*]

[567] This distinction between comparability and commensurability is similar to that espoused by Ruth Chang. See Ruth Chang, ed*., Incommensurability, Incomparability, and Practical Reason*, (Cambridge: Harvard University Press 1997) [*Chang, Incommensurability*]; see also Ruth Chang, *Against Constitutive Incommensurability or Buying and Selling Friends* (17 Dec. 2002) 11:2 Social, Political, and Legal Philosophy 33.

[568] *Ibid*; Chang at 2.

the items asserted to be commensurable must, by definition, be formulated in a way that requires that one actually dominates over the other. This notion, which he refers to as "trumping" suggests that realizing one concept means, by definition, that the other cannot be realized, suggesting that the second value is less important.[569]

B.1. "Balancing" Security Against a Range of Individual Rights

It is this notion of commensurability that raises questions when assertions are made that a proper balance must be struck between liberty and security.[570] In the U.S., Benjamin Franklin has often been quoted in the debates as having said "[t]hey who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[571] A question arises, in the context of commensurability, as to whether the two factors, liberty and security, are indeed subject to a balance against each other, or whether one factor actually "trumps" the other, which would make an actual balance illusory, even if such a balance were desirable. An additional question, of course, is whether the two factors are commensurable at all, or,

[569] See James Griffin, *Well-Being: Its Meaning, Measurement and Importance* (Oxford: Clarendon Press,1986) at 83.

[570] For various permutations on this binary, see e.g. David Cole & Jules Lobel, *Less Safe, Less Free: Why America Is Losing the War on Terror* (New York: New Press 2007); *Dyzenhaus: Rights and Security*, *supra* note 405; Kent Roach, "Must We Trade Rights for Security? The Choice Between Smart, Harsh or Proportionate Security Strategies in Canada and Britain" (2006) 27 Cardozo L Rev 2157; Joseph Nye, "Balancing Liberty and Security," (2005), online: The Huffington Post <http://www.huffingtonpost.com/joseph-nye/balancing-liberty-and-sec_b_12896.html>; John Kleinig et al, *Security and Privacy: Global Standards for Ethical Identity Management in Contemporary Liberal Democratic States* (Canberra: ANU E Press 2011).

[571] After 9/11, variations on this quote, widely attributed to Benjamin Franklin, circulated to criticize the dominant aspects of the post-9/11 paradigm. The version quoted here is widely believed to be the original, published in Franklin's memoirs. See Benjamin Franklin & William Temple Franklin, *Memoirs of the Life and Writing of Benjamin Franklin, LL.D.* (London: William Coburn 1818), at 270, online: Google Books <https://play.google.com/books/reader?id=W2MFAAAAQAAJ&printsec=frontcover&output=reader&authuser=0&hl=en&pg=GBS.PR1> (containing this quotation). Such a statement, by Franklin, had particular significance in the U.S., as Franklin is frequently included among those called the "Founding Fathers," as one of the signers of the Declaration of Independence.

in other words, whether they can be reduced to some common denominator, which would be necessary to place them on the metaphoric scale. Alternatively, is there a possibility that they are consistent factors, and that there is, indeed, no need to reduce the value of one to enhance the value of the other? The answer to this question might depend on whether incursions on individual liberty are being undertaken on a case-specific basis, such as what happens in traditional criminal prosecutions, or whether they are, alternatively, being undertaken in a more generalized manner, such as what has happened after 9/11 through the use of various extraordinary detention measures implemented in a more systematic manner.

The idea of "balancing" competing values is not a new notion in constitutional law and theory. It is a concept that has been subject to considerable critique.[572] This critique plays out differently in different places. Canada's *Constitution Act, 1982*, for example, requires such balancing, protecting certain rights under the *Charter* "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[573] The need for proportionality, however, is intended to still give proper deference to individual rights under the Constitution.[574] Such balancing is not explicit necessarily in all national constitutions, as in the U.S., for instance, there is no provision that is comparable to Section 1 of Canada's *Constitution Act, 1982*. Nonetheless, the concept of balance is implicit in widespread assertions, particularly in the wake of the 9/11 attacks, that democracy requires achievement of the proper balance between liberty

[572] See Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003), 16:2 Ratio Juris 131, at 134-140 (containing critiques of balancing in regard in individual rights under national constitutions, with a particular focus on the German Constitution) [Alexy, *Constitutional Rights*]; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Boston: The MIT Press1996)(arguing that allowing for balancing in relation to constitutionally mandated individual rights undermines the structure of those rights).

[573] See *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 1.

[574] C.f. *Alexy: Constitutional Rights*, *supra* note 572 (discussing the view that the German Constitution addresses the issue of balancing with a proportionality requirement, which is intended to still give a certain dominance to individual rights).

and security, or between other asserted commensurable values. Where balancing is undertaken, however, under instruments like Canada's *Charter*, it is rarely done in wide-sweeping terms, but is more determined by the particular facts of a given case.[575]

Thus, the presumption remains in favour of the claimant who has established a violation of a *Charter* right, and, in order to establish the necessity of such balancing, the Crown assumes the burden of proving that the violation is justified under Section 1. The test for so proving involves various elements that require due deference to the claimant's rights. Among other components of the test, Section 1 justification requires that the means chosen be rationally connected to the objective, that impairment must be minimal, proportionality between the deleterious impact and the objective of the action, and that the salutary effects must outweigh the deleterious effects.[576] In requiring the Crown to show an explicit connection between the objective of the action taken and the infringement, a balancing test like Section 1 involves more of a working of commensurable factors, where the common value is arguably the factual justification that supported the infringement, if such justification is established.

Such balancing is not so obvious when it is applied to concepts that are rather broad, and then further applied across a vast spectrum of situations, without an individualized analysis. Under Section 1 of the *Charter*, once a plaintiff has established a breach, the plaintiff continues to enjoy a

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[575] See e.g. *R. v Oakes*, [1986] 1 S.C.R. 103; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567; *R. v Keegstra*, [1990] 3 S.C.R. 697. Debates sometimes arise where two rights are seen to be competing with each other, as to whether one dominates over the others, as the extent of rights is generally limited where it intrudes on the rights of another. A recent case, for instance, in which such a competition had been asserted has been the so-called "niqab case," in Canada, in which the alleged victim of a sexual assault had asserted a right to wear the face-covering niqab while testifying, based on her right to freedom of religion, and the accused has asserted that allowing her to do so violated his right to confront witnesses against him and undermines the judge's ability to assess credibility. See *R v N.S.*, 2012 SCC 7 (outlining a series of steps to be followed in addressing such an assertion of competing rights).

[576] See e.g. *ibid, Oakes*, *supra* note 575; *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835.

presumption in his or her favour, which the Crown must overcome through its own burden of proof to justify a rights violation in that particular case or in relation to that particular law or action.[577]

Presumptions in post-9/11 balancing scenarios, however, tend to work rather differently. Where the asserted need to "balance" security and liberty underscores extraordinary detention scenarios such as that presented at Guantanamo Bay, the detainees do not so readily appear to have a presumption in favour of their individual rights. Indeed, one of the primary critiques of that detention center has been the extreme difficulty detainees have faced trying to have their cases heard at all before U.S. courts, as evidenced by the sequence of events leading to the *Boumediene* decision.[578] On a broad, and not publicly thoroughly articulated, assertion of a need relating to security, the U.S. Government recently announced that it will be limiting access of counsel to Guantanamo Bay detainees in some cases.[579] Such an abridgement of rights, taken in relation to more than just one particular detainee, and based on broader assertions of liberty, is different in nature to those balancing considerations undertaken in situations such as through the use of Section 1 of the *Charter* in Canada. With no pending charges, but no convictions either, detainees in this situation, who must fight a governmental assertion that there is a presumption against some access to counsel, cannot be said to enjoy a presumption in favour of liberty, or of innocence. That is especially so in the case of detainees who have been held for many years. This situation is different from one in which the government

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[577] *Ibid.*

[578] See note 238 (explaining the sequence of judicial rulings and legislative enactments leading up to the ruling of the U.S. Supreme Court in *Boumediene*).

[579] See Bill Mears, "Military limiting Guantanamo detainee access to lawyers" (7 August 2012), *CNN: Security Clearance*, online: CNN.com <http://security.blogs.cnn.com/2012/08/07/military-limiting-guantanamo-detainee-access-to-lawyers/> (describing oral arguments made by the U.S. Government in a federal court, suggesting that the Government should have discretion to determine the extent to which certain detainees should have access to counsel. The issue relates to the 168 males currently detained there, many of whom have no formal charges pending even in a Military Commission and do not have active *habeas corpus* cases in U.S. federal court).

asserts, for instance, that a particular detainee must be deprived of the presumptive right to counsel because of specific circumstances, and maintains a particularized burden of establishing this against a presumption to the contrary.

In the case of security certificates in Canada, as another example, the detainees had been held, sometimes for years, without being told of the evidence against them or sometimes even what the factual bases for the allegations were.[580] In such a situation, it is rather difficult to argue that the detainees enjoy a presumption in favour of their individual rights.[581] In the types of binaries deconstructed in this chapter, such as the examples quoted above, the idea of balance is not necessarily asserted in relation to a particular case, but involves more generalized ideas in regard to these interests, as evidenced by more systematic use of extraordinary detention measures. Thus this broad-based assertion of a need for "balance" between values that may or may not be subject to a true balance represents a significant crack in the foundation of the narrative relating to individual rights.

In the post-9/11 context, there has been a range of variations on this larger "balance" assertion, with the one fairly consistent factor being that "security" is "balanced" against some individual right ideal, whether it is liberty, privacy, governmental transparency, or perhaps the right to a fair hearing.[582] Security in this context tends to refer to "national security," which, in turn, does not necessarily refer to all things deemed necessary for public safety, but has been used more narrowly since 9/11 to refer to anti-terrorism

[580] See *Charkaoui I*, *supra* note 12.
[581] Much of this conclusion is based on the analysis undertaken by the SCC in *Charkaoui I*. Those held on security certificates have had numerous judicial reviews of their cases, as described to an extent in *Charkaoui I*, but with the aforementioned limitations, complicating any attempt to have a review that is deferential to their liberty interests. The SCC, in *Charkaoui* I, in fact, found that the security certificates infringed on the claimants' Section 7 rights, and were not justified under Section 1. See *ibid.*
[582] See e.g. Nicola McGarrity & Edward Santow, "Anti-terrorism laws: balancing national security and a fair hearing," in *Ramraj: Global Anti-Terrorism Law and Policy*, *supra* note 243 [*McGarrity & Santow*].

or counter-terrorism.[583] In fact, "security" can refer to many things outside the terrorism context, such as military security, economic security, environmental security, food security, or the success of anti-criminal initiatives, with one example being the fight being undertaken in Mexico relating to drug cartels.[584] Extraordinary detentions of the sort described in this thesis, however, are not generally legitimized by liberal democracies, at least as of the writing of this thesis, in relation to these other "security" issues.

This broader assertion of balance has been used as a sweeping theoretical underpinning through which states seek to legitimize extraordinary detentions specifically where they have asserted that the detainee has some connection to terrorism. A specific manifestation arises in the asserted need for secrecy, which is a dominant justification used to explain the need for extraordinary detention and judicial process in cases in which there is an asserted relationship to terrorism. A hallmark of the extraordinary detentions used since 9/11 has been a governmental assertion that it has the right to detain people, but to simultaneously withhold evidence from them with which to fight the detention, based on assertions of national security.[585] This differs from past scenarios, where liberal democracies tended to use secret

[583] The expression "national security" has been dominantly used, since 9/11, to refer to anti-terrorism, but, of course, terrorism is not the only potential threat to a particular jurisdiction's security. Immanuel Kant argued that national security was a fallacious concept, putting the needs of an individual state above those of the international community. For a discussion of the parameters of security, and specifically "national security," see Helga Haftendorn, "The Security Puzzle: Theory-Building and Discipline-Building in International Security," (1991) 35 *International Studies Quarterly* 3-17.

[584] See e.g. President Barack Obama, *National Security Strategy* (May 2010), online: The White House <http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf> (describing the "war" against Al Qaeda as only one of many areas in which national security is an issue). In the U.S., the expression "Homeland Security" has been used to refer to the fight against terrorism, an expression coined by President George W. Bush in his 9/20/11 speech, in which, among other things, he announced the creation of a new Department of Homeland Security. See Bush, 9/20 Speech, *supra* note 28.

[585] In a criminal context, such an assertion is more problematic. In Canada, for instance, the Supreme Court has suggested that, if the asserted national security need for secrecy is sufficiently compelling, the evidence must be withheld, but if the outcome is unfairness in the proceeding, the proceeding should be stayed and the detainee freed. That was not the case in relation to Ahmad, however. *R v Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110.

information within the intelligence community, but did not characterize it as evidence to justify detaining people.[586]

McGarrity and Santow describe this "tension" between the need for secrecy to protect national security and the right to a fair hearing, saying it could be characterized as the tension that exists between liberty and security.[587] On the one hand, it may well be that national governments seek to detain people who are suspected of terrorism offenses, and that national security concerns may make it difficult to release all evidence collected. Such individualized situations, for instance, are addressed in most existing criminal justice paradigms through evidence rules. In Canada, Section 38 of the *Canada Evidence Act* provides for judicial review rules in cases in which there is a concern that evidence must be released that could be "sensitive" or otherwise of concern to national security.[588] Such rules, calling for individualized assessments in particular cases, do not remove the burden of proof from the Crown, or the favourable presumption, from the defendant, and involve an individualized assessment of evidence in a particular case.

That scenario, however, differs considerably from those in which revised detention structures are asserted, with presumptions of secrecy of the evidence, in non-individualized cases, but more systematically. In so basing extraordinary detentions on such generalized assertions, national governments have frequently done so without the kind of individualized

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[586] Kent Roach, "When Secret Intelligence Becomes Evidence: Some Implications of *Khadr* and *Charkaoui II*" (2009), 47 Sup. Ct. Law. Rev. 147, at 147-150 (discussing the increased emphasis on requiring security agencies to treat intelligence as potential evidence, as exemplified in a number of recent cases including *Canada (Justice) v Khadr*, [2008] S.C.J. No. 28, [2008] 2 S.C.R. 125 [*Khadr I*]; Charkaoui v Canada (Citizenship and Immigration) [2008] S.C.J. No. 39, [2008] 2 S.C.R. 326 [*Charkaoui II*]; and evidence issues that arose regarding intelligence in the *Air India* and *Khawaja* prosecutions).

[587] *McGarrity & Santow*, *supra* note 582 (citing to, among others, Daniel Farber, ed., *Security v. Liberty: Conflicts Between Civil Liberties and National Security in American History* (New York: Russell Sage, 2008).

[588] "International Relations and National Defence and National Security," in *Canada Evidence Act*, s. 38 R.S.C., 1985, c. C-5.

showings and proportionality analysis that would be typically applied in individual criminal cases.[589]

As an example, the use of special advocates in Canada, and to a different extent in the UK, has been seen as a way to address simultaneous concerns about liberty and security. In Canada, special advocates were created after the Supreme Court of Canada struck down the existing security-certificate procedures. Under the revised provisions, the special advocate, one of several selected security-cleared attorneys, can see secret evidence, but cannot disclose the evidence to the detainee unless it is approved by the officer presiding over the hearing.[590] In Canada, unlike the UK, special advocates are only used in immigration proceedings, in which the government is seeking to deport a person based on an assertion that the person is a threat to national security.[591] In the case of the security certificates in Canada, a number of people were detained for years under these certificates, because they could not be deported, usually because of a risk of torture on return, and they were deemed too dangerous to be released.[592] As noted in Chapter 3, a selling point used for the Canadian people was that these special advocates would only be used in cases involving non-citizens, and citizens would not be subject to these proceedings.[593] Where a presumption exists that anybody, citizen or not, can be detained for years and deprived of the right to view evidence used to justify the detention, no "balance" is being struck between liberty and security. Rather, security, asserted, but not established, is being used to trump and eliminate rights relating to liberty. Even with the addition of special advocates, the presumption is still against the detainee – the inverse of the

[589] But see *R v Ahmad,* supra note 585 (commenting that where the need to keep evidence secret for national security reasons results in unfairness to the detainee, the trial must be stopped and the detainee released).
[590] IRPA, *supra* note 785-85.1.
[591] In the United Kingdom, special advocates have been used in control orders, which are being eliminated. See Three Control Orders Cases, *supra* note 318
[592] *Charkaoui I*, *supra* note 12.
[593] Chapter 3, above.

scenario involved in actual criminal proceedings – and the addition of more procedural safeguards than existed before the special advocates were instituted does not change this inverse presumption.

Thus, assessments under provisions like Canada's Section 1 of the *Charter*, or evidentiary considerations under provisions like Canada's *Evidence Act*, may well involve an individualized attempt to "balance" competing interests. Detention structures that stand entirely outside of the criminal-justice paradigm, however, which involve a presumption in favour of, for example, the withholding of secret evidence from a detainee, create a presumption of guilt, which the detainee must overcome, while hobbled by a lack of ability to review the factual bases being asserted for that guilt. Such a scenario does not "balance" liberty and security, but involves a domination of asserted security. Even if the security concern were, in fact, established in such cases, it would be apparent that it "trumps" the right to a fair hearing, and thus, that no "balance" is being struck between equal, commensurable factors.

C. The Paradigm Fractures: Criminal Justice or War Detentions?

The war-versus-crime binary has been addressed previously in this thesis in relation to the fracturing of the narrative, and the apparent supposition that a State can choose, in a particular case, whether to send a detainee to a criminal proceeding or through a military proceeding, based on expedience and in an entirely discretionary manner. An example of this binary in practice was presented in the Introduction, in relation to the conversation concerning the Underwear Bomber, and various other examples have been presented throughout this thesis in relation to detainees sent to one or the other system by the U.S.

The issue is raised again here for a different reason, because, although much of the discourse surrounding these issues suggests that

governments choose one system or the other, the reality is that is not exactly what is happening in practice. As evidenced by the U.S. Supreme Court ruling in *Hamdan*, the U.S. has, while asserting that certain detainees are unlawful enemy combatants and sending them to Guantanamo Bay and Military Commissions, simultaneously asserted that the wartime detention paradigm does not quite work either. The entire structure of the Military Commissions is based on a U.S. assertion that those detained at Guantanamo Bay are "unlawful" combatants, and, thus, that the laws of war do not apply to them.[594] While using language that has many of the hallmarks of being relevant to wartime, the U.S. appears, in fact, to have laid out a new detention paradigm, which does not quite fit either the criminal justice or the wartime detention regimes. For instance, the U.S. asserts the right to hold detainees in its War on Terror, potentially indefinitely, as related to the idea of prisoners of war, who are held until the end of hostilities. At the same time, the U.S. has established the Military Commission, which tries the detainees in a way that is similar to, but by no means identical to, that undertaken in criminal proceedings.

An overlap between wartime detentions and criminal detentions is not completely unprecedented, as evidenced in criminal prosecutions, for instance, of those accused of war crimes.[595] The model under which two similarly situated detainees could go through different systems based largely on executive decision, however, is a new fracturing of these paradigms that has continued with some modifications since the early days after 9/11. In the U.S., an additional layer of discourse has been added in that, once the choice is made that a detainee is subject to wartime, rather than criminal, procedures, arguments have then been raised for deviating from the pre-existing wartime paradigm as well, resulting in a second layer of fracturing of detention narratives regarding those suspected of terrorism. The result, in the

[594] See *Hamdan*, *supra* note 238 (clarifying that the Geneva Conventions do apply to the detainees at Guantanamo Bay).
[595] Tribunals such as the International Criminal Court operate in this purview.

U.S., as described below, has been a third, new line of detention scenario in regard to terrorism detentions, built on select fragments of the two existing paradigms – criminal justice and war – but not identical to either of those paradigms. The existence of this third line of paradigm in many ways distinguishes U.S. anti-terrorism detentions from those undertaken by other liberal democracies, thus resulting in a transnational fracturing of detention narratives in this respect. At least in relation to detentions such as those at Guantanamo Bay, the U.S. has pursued a *sui generis* form of detentions for terrorists. Although purportedly built upon components of the two pre-existing paradigms, it is arguable that those paradigms do not, in fact, support this third line. The presentation of the issue as a binary, an option undertaken between two-pre-existing systems, infuses it with a sense of legitimacy, suggesting that the U.S. is acting under previously accepted paradigm structures, when that is not exactly the case.

Other jurisdictions have not adopted this wartime approach at all, continuing in some ways to present the issue as a war-versus-crime binary, but, within that context, suggesting that the criminal-justice paradigm is dominant. Arguably, the UK has responded differently to the risk of terrorism after 9/11 because of its prior experiences with the IRA, which suggests, not so much a fracturing within the UK, as an evolution of its policies. The fracturing of the terrorism-detention narrative is evidenced, for example, by some of the public response in the UK to the July 2005 attacks in London, which suggested that, faced with a domestic Al Qaeda attack, the UK's reaction was different from that of the U.S. For example, Sir Ken McDonald, QC, the Director of Public Prosecutions and Head of the Crown Prosecution Service, said:

> London is not a battlefield. Those innocents who were murdered on July 7, 2005 were not victims of war. And the men who killed them were not, as in their vanity they claimed on their ludicrous videos, 'soldiers'. They were deluded, narcissistic

> inadequates. They were criminals. They were fantasists. We need to be very clear about this. On the streets of London, there is no such thing as a 'war on terror', just as there can be no such thing as a 'war on drugs'.
>
> The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement.[596]

Indonesia, as well, responded to the 2002 Bali attacks through criminal-justice measures relating to detentions. They did not declare a war on terror, although they did use the military at times to respond to regional terrorism.[597] Umar Patek, captured in late 2011, was convicted by an Indonesian court for his role in carrying out the Bali attacks and sentenced, in June 2012, to 20 years in prison.[598] Again, perhaps because of its past experiences with authoritarian rule, Indonesia pursued a more moderate approach than that espoused by the U.S. – enacting new anti-terrorism legislation in 2002, but through a democratic process and resisting the war model espoused by the U.S.[599]

The outcome for Patek is in contrast to that for Khalid Sheikh Mohammed, long claimed by the U.S. to have been the "mastermind" behind the 9/11 attacks, who has never faced a criminal court, was waterboarded numerous times, and who has a case pending before a Guantanamo Bay Military Commission that has not reached a final disposition.[600] The

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[596] Clare Dyer, "There Is No War on Terror: Outspoken DPP takes on Blair and Reid over fear-driven legal response to threat" (24 Jan. 2007), *The Guardian*, online: The Guardian <http://www.guardian.co.uk/politics/2007/jan/24/uk.terrorism> (speech to the Criminal Bar Association).

[597] See *Roach, The 9/11 Effect*, *supra* note 82 at 143-158 (describing and giving context to Indonesia's more moderate response after 9/11 and to the Bali attacks).

[598] Rudy Madanir & Hilary Whiteman, "Indonesian court sentences Bali bomber to 20 years in jail" (21 June 2012) *CNN*, online: CNN.com <http://www.cnn.com/2012/06/21/world/asia/patek-bali-bombing-verdict/index.html>.

[599] *Roach, The 9/11 Effect*, *supra note 82* at 143-158.

[600] Mohammed's lawyer is accusing the U.S. of torture, alleging that Mohammed was waterboarded 183 times. See "Lawyer for 9/11 mastermind accuses U.S. of torturing Khalid Sheikh Mohammed by waterboarding him 183 times" (15 August 2012), online: The Daily

controversy over legitimacy of the actions undertaken by the U.S. aside, there appear to be differences in terms of efficacy of approaches. Like the 9/11 attacks, the Bali attacks were claimed to have been undertaken by Al Qaeda, and apparently a criminal prosecution was, in that case, deemed possible. Moreover, while Mohammed is alleged to be proceeding under a wartime detention paradigm, the use of waterboarding as an interrogation tactic, the presentation of quasi-criminal charges before a specially created Military Commission, and the many years of detention before even that abridged judicial proceeding is made available, are not generally elements typically seen under previously established wartime models.

The presumption that is presented at the beginning of this chapter captures much of the post-9/11 U.S. practice in this context, while demonstrating the somewhat confusing nature of some of the justifications expounded for certain "revised" detention practices. In particular regarding the Military Commission, there are elements of criminal justice, and elements of wartime paradigms, but no entire conformity to either.

What, exactly, are the detentions at Guantanamo Bay? Deconstructing some of the practices undertaken after 9/11 presents challenges because the discourse used often contained a mix of concepts that had previously not necessarily been mingled, and to assess those concepts, a certain disentangling is required. Even the over-arching terminology used to describe these detentions has been, at times, confusing.[601] For example, in North America – most particularly the U.S and Canada -- terrorism detentions outside of the purview of the criminal-justice system are often referred to as "preventive detentions."[602] This terminology

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Mail <http://www.dailymail.co.uk/news/article-2188557/Lawyer-9-11-mastermind-accuses-U-S-government-torturing-Khalid-Sheikh-Mohammed-waterboarding-183-times.html>.

[601] See *Krebs*, *supra* note 482 (explaining that, in Israel, such detentions are referred to as "administrative detentions," while elsewhere they are called "executive detentions," or "preventive detentions" or "security detentions").

[602] See e.g. Craig Forcese, "Catch and Release: A Role for Preventive Detention without Charge in Canadian Anti-terrorism Law," (July 2010), IRPP Study, online: IRPP <http://www.irpp.org/pubs/irppstudy/irpp_study_no7.pdf> (advocating for a limited form of

has been used to describe some of the extraordinary detentions undertaken under the immigration system, as well as those pursued under the U.S. war paradigm. That terminology is misleading in some ways, though, because those subject to the "preventive detention" tend to be those who the government suspects to have had some involvement in past terrorism actions, often under an assertion that they cannot be criminally charged because of the need to keep certain evidence secret. The Guantanamo detainees, for instance, are all suspected, although not often charged, with some form of past action that involved either terrorism or taking up arms against the U.S. This belief is manifest in the entire structure of the Military Commissions, which are pseudo-criminal bodies before which detainees are charged with some form of past action, tried, and, if convicted, given some form of sentence.[603] Thus, the objective is based on a notion of punishment for a past action, and implicit in that is prevention of future offenses – ideals that are actually more consistent with traditional criminal-justice systems than with a notion of purely preventive detention.

Wartime language emerged early after the attacks on a number of fronts. For example, on September 12, 2001, the U.N., in Security Council Resolution 1368 (2001), strongly condemned the terrorist attacks and used terminology relating to the right of self-defense, describing the terrorists as a

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"preventive detention" for a particular hypothetical situation, under which, the author argues, the criminal-justice system has a gap) [Forces*e, Catch and Release*].

[603] See e.g. *United States of America v Khadr: Charge Sheet*, (2007) online: Department of Defense <http://www.defense.gov/news/Apr2007/Khadrreferral.pdf> (containing list of charges against Canadian citizen Omar Khadr, described as an "alien unlawful combatant," all stemming from Khadr's alleged actions in Afghanistan in 2002); U.S. Department of Defense, "Military Commissions: Fairness, Transparency, Justice: About Us, online: Military Commissions <http://www.mc.mil/> (describing the military commissions and noting "An alien unprivileged enemy belligerent who has engaged in hostilities, or who has purposefully and materially supported hostilities against the United States, its coalition partners or was a part of al Qaeda, is subject to trial by military commission under the Military Commissions Act of 2009."); see also Kent Roach, "Guest Blog: Omar Khadr, KSM and Military Commissions," International & Transnational Criminal Law, online: Rob Currie Blog, School of Law, Dalhousie University <http://rjcurrie.typepad.com/international-and-transna/2012/05/guest-blog-omar-khadr-ksm-and-military-commissions.html> (noting that "Military commissions as conducted at Guantanamo represent a new paradigm that fall outside the traditional laws of war and crime.").

"threat to international peace and security."[604] While calling for accountability for those responsible for the attacks, the Resolution also reiterates the right of "individual and collective self-defense."[605]

Much of the scholarship since 9/11 has focused on whether the 9/11 attacks and the resulting responses demonstrate that the war paradigm itself has shifted.[606] Much scholarship has also been presented as to whether the emergence of new forms of enemies suggests that traditional battlefields – and thus accepted laws of war – simply no longer exist.[607]

Moreover, almost since the attacks occurred, a debate has ensued over whether the pre-existing criminal-justice paradigms are, in fact, adequate to address the threat of terrorism, and whether that system should be replaced with a war model.[608] In fact, it does not appear as if this stated binary reflects the reality of the situation. As mentioned previously, the criminal-justice system continues to be the dominant paradigm for handling terrorism-related detentions, so it has not been replaced by the wartime model. Rather, a model derived from the wartime model appears to be used more for those cases for which the U.S. is reluctant to proceed before its

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[604] United Nations Security Council, Resolution 1368 (2001), online: United Nations: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>.

[605] *Ibid.*

[606] See e.g. *Dyzenhaus: Rights and Security*, *supra* note 499; Kent Roach, "Must We Trade Rights for Security? The Choice Between Smart, Harsh or Proportionate Security Strategies in Canada and Britain" (2006) 27 Cardozo L Rev 2157.

[607] See e.g. Frédéric Mégret, "War and the Vanishing Battlefield," (2012) 9:1 Loy U Chicago Int'l L Rev, (arguing that some of the deconstruction of the concept of the "battlefield," dominant since 9/11, is eroding the normative force of laws relating to warfare); Keith Spicer, "Sitting on Bayonets: America's Endless War on Terror and the Paths to Peace" (Createspace 2012); Ali Khan, *A Theory of International Terrorism: Understanding Islamic Militancy* (The Hague: Martinus Nijhoff Publishers 2006)(arguing that the ontology after 9/11 regarding Islamic militancy is being used to justify a number of human-rights violations, including the "War on Terror").

[608] See e.g. *Forcese: Catch and Release*, *supra* note 602 (using hypotheticals to argue for a limited-circumstance use of preventive detention in Canada, arguing that there is a "gap" in the criminal-justice system, which legitimates the use of preventive detention in these limited circumstances).

national court system, and, in those cases, the U.S. does not follow a strict wartime model of detention either.[609]

On some levels, it appears that the crime-versus-war binary is more a matter of public presentation than a reflection of the reality. In fact, this appears to represent, to an extent, a false narrative, as the most controversial detention structures under the U.S. "war" paradigm do not represent wartime detentions, even under the U.S.'s own representations. Rather, the Military Commissions, and detentions such as those at Guantanamo Bay, appear to represent a third line of detention structure, drawing some elements from the criminal-justice paradigm, some from the wartime paradigm, and not entirely fitting into either category.[610]

It is notable, however, that, while extraordinary detention regimes have gained widespread publicity and critique, the majority of anti-terrorism cases handled by most national jurisdictions – the U.S. included – continue to be handled under the criminal-justice system.[611] Moreover, if successful convictions are an indicator of success of that system – and that is by no means assumed, particularly in jurisdictions with a presumption of innocence – it is apparent that the fight against terrorism has encountered considerably more success in traditional criminal courtrooms than it has under the various forms of extraordinary detentions.[612] The U.S. Department of Justice, for instance, noted, in 2011, that the criminal-justice system had been successful in the years since 9/11, and various sources reported, as the 9/11

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[609] See e.g. the Military Commissions Table and accompanying discussion, below.
[610] See *Roach: The 9/11 Effect*, *supra* note 82; see also Military Commission Table, below.
[611] See *supra* note 70 (listing sources that discuss the criminal-justice-versus-war debate, including studies by *Zabel & Benjamin*, *supra* note 70 (studying, then updating in 2009, a comprehensive review of anti-terrorism cases prosecuted in U.S. courts). As part of a project unrelated to this thesis, I have undertaken a review of all terrorism prosecutions in Canada, both before and after 9/11. While the number is not nearly as extensive as the number of prosecutions identified in the U.S., Canada has had a significant number of criminal prosecutions relating to terrorism, including the Toronto 18, relating to the plotting of a terrorist attack that never happened, thus supporting an argument, on some level at least, that the criminal-justice system can be used in traditional criminal prosecutions in Canada as well.
[612] See Kent Roach, "The Criminal Law and Its Less Restrained Alternatives," in *Ramraj: Global Anti-Terrorism Law and Policy*, *supra* note 243.

ten-year anniversary approached, that between 35,000 and 38,000 terrorism suspects had been convicted worldwide through criminal-justice systems. Their report indicated:

> Over the past decade, the department has successfully and securely used the criminal justice system to convict and incarcerate hundreds of defendants for terrorism and terrorism-related offenses that occurred both in the United States and overseas, including plots targeting both civilian and military targets. These post-9/11 terror prosecutions have proceeded without any terror defendant escaping federal custody or terrorist retaliation against a judicial district.[613]

However post-9/11 terrorism detentions are playing out, it is evident that the crime-versus-war binary is not an accurate representation of the different detention streams that have emerged, even in the U.S.

C.1. Declaration of a War, Abandonment of War Rhetoric, and Resurrecting the War Rhetoric

Confusion over the U.S.'s past assertion of wartime authority has been exacerbated by inconsistency as to whether the U.S. is even actually characterizing its struggle against terrorism as a "war." The narrative relating to the "war on terror" fractured in a number of ways, internally as well as in relation to the other part of the binary involving criminal law. The war-focused language described in Chapter 2, beginning with the speech made by then-President Bush on September 20, 2001, served as a foundational component for many of the revised detention structures undertaken, especially by the

[613] United States Department of Justice, *Ten Years Later: The DOJ after 9/11: Protecting America Through Investigation & Criminal Prosecution*, online: United States Department of Justice <http://www.justice.gov/911/protect.html> (listing examples of successful prosecutions both in relation to international and "homegrown" terrorism); see also Martha Mendoza, "Since 9/11, at least 35,000 terrorism convictions worldwide" (2011), online: The Denver Post <http://www.denverpost.com/nationworld/ci_18822690> (noting controversy over some of those convictions worldwide, relating to suggestions that some governments were using terrorism as a pretext to stifle legitimate dissent).

U.S., after 9/11.[614] Much has been written questioning the wisdom of characterizing the fight against terrorism as a war. Conflicts undertaken in Afghanistan and Iraq bear more of the hallmarks of a traditional war scenario than does the over-arching "war on terror," which could be invoked to detain people as unlawful enemy combatants even when those people were not apprehended on a battlefield.[615] Moreover, the discourse shows a certain inconsistency of the U.S. use of this rhetoric, which suggests its importance in legitimating certain actions.

The "War on Terror" or "Global War on Terror" were terms used consistently during the administration of then-President Bush. Shortly after President Obama's election, his administration signalled that it would abandon the war discourse and war approaches that had been employed by the prior administration. On his first day in office, President Obama issued an executive order, instituting a study of Guantanamo Bay, with the objective of closing the prison camp within a year.[616] Commentary from that time suggests a belief that this phase of U.S. policy was about to end.[617] As this was ongoing, high-level governmental officials, most notably Secretary of State Hillary Clinton, indicated that the use of the expression "war on terror" was going to be abandoned. Reporters in Europe had noted, early in the Obama Administration, that the U.S. Government had stopped using the

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[614] See Chapter 2, above.
[615] See e.g. the discussion of Jose Padilla's case, Chapter 2, above, who was arrested in Chicago and the cases of the Algerian Six, arrested in Bosnia. See Maureen T. Duffy, "Justice Delayed as Justice Denied: The Ongoing Plight of the Algerian Group," Pulse of Democracy (17 February 2009), online: <http://www.pulsdemokratije.net/index.php?id=1364&l=en>.
[616] Barak Obama, "Closure Of Guantanamo Detention Facilities" (22 January 2009), online: The White House <http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities>.
[617] See e.g. Greg Miller, "Obama Preserves Renditions as Counter-Terrorism Tool" (1 February 2009), online: The Los Angeles Times <http://articles.latimes.com/2009/feb/01/nation/na-rendition1> (noting "[t]he CIA's secret prisons are being shuttered. Harsh interrogation techniques are off-limits. And Guantanamo Bay will eventually go back to being a wind-swept naval base on the southeastern corner of Cuba.").

term, and when Clinton was asked about it, she said "[t]he administration has stopped using the phrase and I think that speaks for itself."[618]

In November 2009, the U.S. Government announced that some detainees from Guantanamo Bay would be tried in U.S. federal courts, while others would be held potentially permanently at the detention centre, creating some confusion over the status of those remaining detainees. The most prominent of the announced trials in the U.S. did not, in fact, ultimately take place there, most notably that of Khalid Sheikh Mohammed (commonly referred to simply as KSM), accused of being the mastermind behind 9/11. Mohammed, in fact, is currently facing a proceeding before a Military Commission at Guantanamo Bay, after a significant backlash erupted to the possibility of him being sent to the U.S. to stand trial.

In spite of early signals that the Government would abandon the war rhetoric espoused shortly after the attacks, it is increasingly apparent that much of that rhetoric, and this third line of approach at Guantanamo Bay, will continue. There have been no recent detainees sent to Guantanamo Bay, so in that sense the policy has not continued, but those unfortunate enough to have been captured earlier on continue, in many cases, to face potentially indefinite detention without the hallmarks of what has long been deemed to be fair judicial proceeding. In 2010, for example, a highly controversial Military Commission proceeding went forward against Omar Khadr, a Canadian citizen who was captured by U.S. forces in Afghanistan when he was 15 years old, seeming to nullify Obama Administration's early promises that the Military Commission and Guantanamo Bay detentions would cease.[619]

Perhaps the strongest sign that the war discourse is again serving as a basis for legitimizing some U.S. actions has come in relation, again, to the issue of targeted killings. Controversy erupted when the U.S. reportedly used

[618] "Clinton: New team not using 'war on terror' term" (2009) USA Today, online: USA Today <http://www.usatoday.com/news/washington/2009-03-30-global-war_N.htm>.
[619] See note 222 and accompanying discussion.

a targeted killing mission to kill U.S. citizen, Anwar Al-Aulaki, in Yemen in late 2011.[620] In March 2012, U.S. Attorney General Eric Holder gave a speech, in which he defended the U.S. Government's targeted killing program. He said:

> I'm grateful for the opportunity to join with you in discussing a defining issue of our time – and a most critical responsibility that we share: how we will stay true to America's founding – and enduring – promises of security, justice and liberty.
>
> Since this country's earliest days, the American people have risen to this challenge – and all that it demands. But, as we have seen – and as President John F. Kennedy may have described best – "In the long history of the world, only a few generations have been granted the role of defending freedom in its hour of maximum danger."
>
> Half a century has passed since those words were spoken, but our nation today confronts grave national security threats that demand our constant attention and steadfast commitment. It is clear that, once again, we have reached an "hour of danger."
>
> We are a nation at war. And, in this war, we face a nimble and determined enemy that cannot be underestimated.[621]

This war rhetoric was echoed the next month, when a U.S. official acknowledged that the U.S. was undertaking a program of targeted killing against suspected terrorists, justified, he argued, by the *Authorization for Use of Military Force* issued shortly after the attacks.[622] Increasingly, at least for

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[620] It is notable that there was considerably less controversy over the killing of Osama Bin Laden, although there are insufficient facts to determine whether that was an incident of targeted killing.

[621] U.S. Dep't of Justice, "Attorney General Eric Holder Speech on Targeted Killing of U.S. Citizens Full Transcript (6 Mar 2012), online: Public Intelligence <http://publicintelligence.net/attorney-general-eric-holder-speech-on-targeted-killing-of-u-s-citizens-full-transcript/ >.

[622] John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, "The Ethics and Efficacy of the President's Counterterrorism Strategy" (April 2012), speech at the Woodrow Wilson International Centre, video online: Mark Mardell, "White House in First Detailed Comments on Drone Strikes" (1 May 2012) BBC <http://www.bbc.co.uk/news/world-us-canada-17901400> (explaining that the U.S. is in a

the U.S., the war discourse is showing signs of becoming a permanent feature of its anti-terrorism initiatives.

C.2. War versus Crime or a Third, Hybrid, Paradigm? [623]

As the war rhetoric has become dominant in the discourse again, the question continues as to whether detentions such as those at Guantanamo Bay actually fit under a wartime paradigm as suggested in much of the discourse. Some effort has been made by the U.S. Government to suggest that the Military Commissions are not terribly different from either the criminal law or wartime paradigms, and it appears that the detention scenario at Guantanamo Bay borrows elements from each paradigm. As an example, the U.S. Office of Military Commissions has issued a table, purporting to compare the three "legal systems," consisting of the criminal-justice system, traditional court martials (referred to on the table as "courts martial"), and the Military Commissions undertaken at Guantanamo Bay, and advancing the notion that the three are quite similar. This acknowledgment that the Military Commissions exist outside of the pre-existing paradigms is thus infused with an aura of familiarity, as similarities to these pre-existing paradigms are emphasized.

An introduction to the table mixes some of the language of the old and of the new, noting that the Military Commissions were born of "military

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"war" with the Taliban and Al Qaeda, and explaining the U.S.'s reasons for arguing that targeted killings are lawful under the laws of war).

[623] Again, this thesis presents this particular binary as the most commonly stated relating to which system should be used to address terrorism, argued herein to not only be a false dichotomy but to also not be an accurate reflection of the way the "war" paradigm actually progressed. The binary is presented in its most simple form, but there are acknowledged, additional layers of binaries that could be discussed as well. See e.g. René Provost, "Asymmetrical Reciprocity and Compliance with the Laws of War," in Benjamin Perrin, ed., *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* (Vancouver: UBC Press 2012), at 17 (discussing dangers of current arguments about reciprocity in warfare relating to compliance with international humanitarian law and suggesting a legal pluralistic approach as a means of enhancing compliance with these laws, particularly in more recent, irregular, forms of warfare).

necessity," and that they are a form of military tribunal, then noting that the history of military commissions goes back, in varying forms, to the days of the Revolutionary War. This presentation of the Military Commissions as part of a long tradition dating back to the early days of the U.S. strongly communicates a position that these structures are not new. The same introduction, though, implies that there is something new about them by noting that they were created out of military necessity, described as the underpinning of the commissions. The following portion of the table illustrates this attempt to show that the Military Commissions are really not all that new in relation to pre-existing criminal proceedings and military hearings and illustrates some of the factors used to compare these entities:[624]

RULE OR PROCEDURE	Military Commissions	Courts-Martial	Article III Court
Basic Procedural Protections			
Accused is presumed innocent until proven guilty	✔	✔	✔
Prosecution bears the burden of proof	✔	✔	✔
Guilt must be proved beyond a reasonable doubt	✔	✔	✔
Trial must take place without undue delay	✔	✔	✔

[624] Reproduced portion of the full table, which can be found at Office of Military Commissions, "About Us: Legal System Comparison" (2012), online: Military Commissions: Fairness, Transparency, Justice <http://www.mc.mil/ABOUTUS/LegalSystemComparison.aspx > [*Military Commission Table*].

Where the Military Commissions differ, most notably in terms of evidence rules, from criminal proceedings or traditional court martials, the presentation still suggests that they are not significantly different. The table is too long to reproduce here in its entirety, but it compares certain procedural issues, such as the right to counsel or the admissibility of hearsay evidence, again suggesting that the three systems are comparable, and, in some cases, such as in the allowance of free legal counsel regardless of ability to pay, even going to far as to suggest that the Military Commission provides better protection:[625]

RULE OR PROCEDURE	Military Commissions	Courts-Martial	Article III Court
Defense counsel at no cost, regardless of ability to pay more info	✔	✔	
Defense counsel at no cost for indigent accused	✔	✔	✔
May hire counsel at no cost to the government more info	Subject to certain limitations ✔	✔	✔
Attorney client privilege is honored	✔	✔	✔

This table, and the presentation of much of the post-9/11 discourse, suggests that, in some cases, at least, the U.S. is not really undertaking a binary decisional process between the criminal-justice and wartime

[625] *Ibid.*

paradigms. Rather, it has established a third line of proceedings, which draws some elements from court martials used in the military – but varies from those – and draws some elements from the criminal-justice system – but varies from those as well. The fractured narrative, apparent on a number of levels in this particular discourse, appears to have given rise to an entirely new system of justice for some people in some cases.

D. New Versus Old: The UK, Israel and the U.S. -- Everything Old Is New Again [626]

In this section, the question of whether the post-9/11 detention paradigms really are "new" initiatives, created out of a response to a new threat, or "old" practices, actually borrowed from other jurisdictions, is analyzed. Many of the extraordinary detention measures taken after 9/11 were, in some respects, "new" to the jurisdictions implementing them, but they were not necessarily new practices in relation to other jurisdictions. Suggesting that the changes were "new," in response to a "new" threat, intuitively raises a suggestion that justification for those changes must be supported entirely by the arguments put forth by the proffering government to support them. If, however, the changes are not "new" in the sense that other jurisdictions have some something similar, then there is an additional pool of information from which to draw in order to consider the validity of those practices. Thus, the choice of particular discourse in advocating for these changes can have a significant impact on the manner in which comparisons might be undertaken.[627]

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[626] "Everything Old Is New Again" is a song, which has been recorded in various covers, including in the musical *All That Jazz.* The lyrics include an admonition saying "Don't throw the past away, You might need it some rainy day, Dreams can come true again, When everything old is new again." An alternative way of presenting the same idea is in the adage "those who do not learn history are doomed to repeat it," communicating the idea that things tend to be recycled in history.

[627] See Chapter 2, above, for an exposition of the discourse suggesting that the "new" threat exposed by 9/11 required a "new" response, and explaining some hallmarks of those "new" responses.

In terms of a binary, it is not suggested that national jurisdictions explicitly used the words "new" versus "old" in this respect. That wording is chosen by this author. Rather, the second half of the binary was, by necessity, implicit, if not explicit, in the discourse that was used, which heavily emphasized the new nature of the threat and the need for new responses, with the implication that past detention paradigms, primarily the criminal-justice system, were not adequate.[628] As discussed in Chapter 2, it is probable that this terminology, suggesting that new changes were needed, was used in relation to the "old" criminal-justice paradigm, as the discourse and changes all point to a suggestion that, after 9/11, many national jurisdictions enunciated a policy that incorporated the conclusion that the criminal-justice system -- previously the dominant venue for handling terrorism detentions -- was not adequate in all cases.

It is less clear whether there was an additional intention, in describing these detention paradigms as new, of distancing the practices implemented after 9/11 from similar undertakings in other places before 9/11 – most notably, for the purpose of this section, Israel and the UK during the Troubles with Northern Ireland. If the practices were, indeed, entirely new, then they might also be viewed as developing without reference to undertakings elsewhere, and the discourse used to support them would be dominant in supporting or discrediting them. If, however, the same detention paradigms were pursued elsewhere, then a different frame of reference emerges, in which a comparison can be made between the post-9/11 initiatives and those undertaken elsewhere, and a new line of potential critique emerges. Thus, whether this was the intention of this new language is not necessarily important, as it appears to have been the effect, and, at least in regard to some of the quasi-wartime detention paradigms pursued by the U.S., arguments have suggested that these are new, and public discourse supporting them has not tended to point to those other jurisdictions to

[628] See Chapter 2, above.

support the practices. Nonetheless, drawing parallels between similar practices elsewhere should be undertaken, and, to the extent that the characterization of the practices as "new" has been pursued, it should be rejected in this context. Regardless of whether it was expressly stated, what was called new was often, in fact, old, if a global perspective is applied.

It was argued earlier in this thesis that the U.S. was a dominant influence on the post-9/11 responses of many jurisdictions, even where those jurisdictions ultimately did not follow the particular form of many U.S. responses. The wartime paradigm, as discussed in Section C of this chapter, above, is an area in which the U.S. has tended to stand alone, at least in terms of the extent to which it has claimed wartime authority to undertake extraordinary detentions. Examples include specific U.S. initiatives, such as the "unlawful enemy combatant" designation, even for those arrested far from the site of any battlefield; its claim of the right to undertake indefinite detention in places like Guantanamo Bay and Bagram; its asserted right to use "enhanced interrogation" techniques; its creation of an entirely new "court" system in the Military Commissions, as well as its talk of special National Security courts; and even the more recent, and more extreme, assertion that it is justified in undertaking targeted killings in some cases, even of U.S. citizens.

In a number of legal disputes surrounding its extraordinary detention measures for suspected terrorists, especially early on, the U.S. Government has asserted, in the public discourse, an internalizing of legal structure, often insisting that international law did not apply to its actions, for instance, and minimizing the use of comparative law from other jurisdictions.[629] Looking to the early Guantanamo Bay decisions from the U.S. Supreme Court, for instance, specifically the 2004 decisions in *Hamdi* and *Rasul*, reveals a

[629] Much of this argument, most particularly in relation to international law, was rejected by the U.S. Supreme Court, which determined, in the *Hamdan* decision that the Geneva Conventions, and, most particularly Common Article 3, did apply to the U.S. detentions at Guantanamo Bay. See *Hamdan*, *supra* note 238.

heavy reliance by the Government, and even by the Court in its rulings against the Government, on primarily prior precedent in the U.S., notably that from World War II.[630] This is in contrast to the approach taken by jurisdictions, such as Canada and the UK, where high courts often expressly referred to rulings in other jurisdictions in enunciating their own domestic rulings relating to post-9/11 terrorism detention practices.[631] In some instances, the Supreme Court, or particular judges, in the U.S. have been strongly critiqued for relying on either international or so-called "foreign" law in interpreting the U.S. Constitution.[632]

Absent any direct precedent in the U.S., eliminating comparisons to other jurisdictions relating to many of these practices strengthens the assertion of the U.S. Government that these changes are new and that they are necessary. If the changes cannot be successfully disputed under the U.S. Constitution – and in some instances they have been – then recourse must be taken to the nature of the terrorist threat, and often to simple assertions by the Government that the new threats require new measures.[633] The reluctance by some to apply international and foreign law has often been justified on a claim that those sources of law cannot legitimately be employed in determining U.S. Constitutional Law, and there is a certain irony to this assertion, since the U.S. has also asserted, since 9/11, that its Constitutional Law does not apply to detainees held under many of these extraordinary detention regimes, especially those detained outside of the U.S.[634] The result, whether intended or not, has been an assertion of a certain "no law"

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[630] See *Hamdi* and *Rasul*, discussed in Chapter 2, above.
[631] See e.g. *Charkaoui I*, *supra* note 12 (discussing the *Belmarsh Detainees* case in the UK, as well as the system of special advocates developed there, in determining the domestic approach to be undertaken in similar detentions in Canada).
[632] See e.g. Robert J. Delahunty & John Yoo, "Against Foreign Law" (2005) 29 Harvard J L & Public Policy 291 (arguing that international and foreign law cannot be used to interpret U.S. Constitutional Law and speculating as to why some judges use these resources) [Delahunty & Yoo].
[633] See e.g. *Hamdi* and *Boumediene* for successful arguments under the U.S. Constitution against elements of post-9/11 extraordinary detention measures.
[634] See e.g. Delahunty & Yoo, *supra* note 632.

zone, in which U.S. Constitutional Law is argued not to apply, but the use of foreign or international law and practice is critiqued on the basis that it cannot apply to U.S. Constitutional Law – at the same time asserting that these "new" paradigms are necessary to prevent terrorism. The result is to leave the detainees with no legal regime to which they can turn, and a tension against the idea that people will die if they are not thus detained. That has, indeed, been a significant critique in relation especially to detainees held at Guantanamo Bay and Bagram, as well as in regard to those subjected to the U.S. "extraordinary rendition" practices, sent to so-called "black hole" interrogation sites. Thus, it is important to clarify whether, indeed, the post-9/11 detention paradigms are new initiatives, or whether they are "old" practices, undertaken elsewhere, which considerably strengthens the argument for looking to international and foreign law and practice.

If it can be demonstrated that another jurisdiction has undertaken the same, or a similar, practice, comparison to that jurisdiction can provide a rich resource for determining strengths and flaws of the system applied by the U.S. In the case of some of the specific post-9/11 detention measures taken by the U.S. under its asserted wartime paradigm, strong parallels can, indeed, be drawn to other jurisdictions, and it appears that much of what has been asserted to be "new" is, indeed, "old." Comparing U.S. actions to these "old" practices reveals a new layer of critique, again similar to undertaking a turn of the kaleidoscope, to reveal a new picture or analytical basis for many of these practices by reconfiguring the constituent part and layering the issues in a different way.

In Chapter 2, it was argued that the majority of post-9/11 changes in terrorism detention emanated out of the U.S., although the form of the responses often varied from place to place. In this chapter, a look back before 9/11 is necessary to determine the possible influences on the U.S. in its specific post-9/11 detention practices, especially those undertaken

through its war paradigm. Similarities can be identified in terms of particular practices, as well as relating to the manner in which those practices evolved.

While there can be little question that the attacks of 9/11 were a flashpoint and used as a justification for many responses, emanating out of the U.S. to other parts of the world, terrorism itself is not new, and many of the more controversial U.S. "war" approaches were not created in a vacuum and seem to have lines of influence from other national jurisdictions. While the UK has been argued, herein and elsewhere, to have had a more moderate approach to the detention of terrorism suspects since 9/11, that has not always been the case, and one might argue that its more moderate approach to Al Qaeda – at least in relation to places like the U.S. or Canada -- is connected with a considerably less moderate approach historically. It may be that experience that has caused the UK's response to be, in many ways, more restrained than that undertaken by the U.S., in spite of the July 7, 2005, attacks in London. Similarly, Spain responded to the 2004 Madrid attacks without implementing extraordinary detention practices, instead employing a criminal-justice approach, which may be related to its past experiences with Basque separatists, where extraordinary measures were used to subsequent rebuke, such as allegations of State torture, which actually led to some subsequent criminal prosecutions.[635]

While the declaration of a War on Terror is arguably idiosyncratic to the U.S., the use of wartime or emergency powers to undertake extraordinary detention actions is not merely a post-9/11 phenomenon, but has been used before. Turning the kaleidoscope another way, the "new" response to the "new" threat exposed by the 9/11 attacks is not necessarily new, but is, in many ways, a reconfiguration of approaches taken in other jurisdictions with past experiences in fighting terrorism.

[635] See Roach, *The 9/11 Effect, supra* note 82.

D.1. Extraordinary Detentions

This thesis does not purport to address all variations on historical administrative detentions. A number of examples could be considered, such as the aforementioned detentions of those of Japanese descent by the U.S. and Canada during World War II, the "emergency" detentions undertaken by Canada during the October crisis, or during the G-20 protests in 2010, or possibly the protest laws enacted during the more-recent student demonstrations in Montreal in the summer of 2012. For the purpose of this section, though, the focus is more on particular practices that appear to have been echoed in the U.S.'s "new" wartime paradigm. Examples follow.

D.1.1. The UK: Extraordinary Detentions During "the Troubles"

Rather than the loss of life experienced in one incident on 9/11, an estimated 3,300 people were killed and 40,000 injured in terrorist attacks relating to Northern Ireland, over a number of years.[636] In the early 1970s, approximately 2,500 people were detained under emergency regulations.[637] In his comparative analysis of anti-terrorism measures around the world, Roach notes the similarities between the measures taken in the UK during the Troubles with Northern Ireland and measures employed in former British colonies, such as Singapore, Malaysia and Palestine.[638] While this thesis argued, in Chapter 2, that it was the US, and not places like the UK, that most heavily influenced anti-terrorism initiatives after the 9/11 attacks, there appears to be a reasonable argument that it was the UK's earlier approaches to anti-terrorism – those employed before 9/11 rather than what it did after 9/11 -- that caused a ripple effect on the U.S., and thus elsewhere, after 9/11. A separate stream of anti-terrorism initiatives developed in former British

[636] *Ibid* at 244 (citing to *Countering International Terrorism: The United Kingdom's Strategy*, Cmnd. 6888, July 2006).
[637] *Ibid.*
[638] *Ibid.* at 244-245.

colonies in the years before 9/11, as Roach argues, and it is additionally notable that India's policies appear to be part of this stream of influence.[639] This is a rather ironic development, as the UK's own approach after 9/11 appeared to be less influenced by what it did during the Troubles with Northern Ireland than the response implemented by the U.S. was.[640]

The situation in the UK regarding Northern Ireland differed from the 9/11 attacks, in that the UK situation involved an ongoing pattern of violence over a sustained period of time.[641] As the violence continued, the pattern of extraordinary detentions evolved in response. Examples that evoke the responses, especially in the U.S., after 9/11 are included below.

[639] *Ibid*; see also Derek P. Jinks, The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India, 22 Mich. J. Int'l L. 311, 313 (2000); Ujjwal Kumar Singh, "Mapping Anti-Terror Legal Regimes in India," in *Ramraj: Global Anti-Terrorism Law and Policy*, *supra* note 243; Sudha Setty, "Comparative Perspectives on Specialized Trials for Terrorism" (2010), 63 Maine Law Rev. 131 (addressing the then-current controversy about special terrorism courts in the U.S. by discussing such bodies in the UK, Israel and India) [*Setty: Specialized Trials*] (describing India's 60-year history with terrorism, and the provision in the Indian Constitution allowing for preventive detention).

[640] See Helen Fenwick & Gavin Phillipson, "UK Counter-Terror Law Post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms," in *Ramraj: Global Anti-Terrorism Law and Policy*, *supra* note 243 (arguing that the UK chose a different route in fighting terrorism after 9/11 than the political route espoused earlier relating to Northern Ireland)[*Fenwick & Phillipson*]; cf Jessie Blackbourn, "International Terrorism and Counterterrorist Legislation: The Case Study of Post-9/11 Northern Ireland" (2009) 21 Terrorism and Political Violence 133–154 (arguing that UK Prime Minister Tony Blair distinguished counterterrorism in relation to Northern Ireland from that involving international terrorism after 9/11, following an "accommodation" model regarding Northern Ireland, and a "suppression" model relating to international terrorism).

[641] See Stephen J. Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences" (2004)102:8 Mich. L. Rev. 1906, at 1931-1933 (providing a detailed account of the pattern of violence relating to the IRA, as well as the development of the UK Government responses) [Schulhofer].

D.1.2. Administrative Detentions in Israel Before 9/11 [642]

Commonalities can also be found with some of the approaches in Israel relating to terrorism detentions. Israel is well known for having faced a long-standing problem with terrorism and its anti-terrorism initiatives date back to the days of the British Mandate.[643] Terrorist attacks resulted in more than 300 deaths during the 1990s and over 1,000 deaths since 2000.[644]

Early on, a variety of factors led to a perceived need to enact legislation to address what was perceived as an ongoing emergency situation regarding terrorism.[645] Israel's Defence (Emergency) Regulation 1945 allowed for a number of extraordinary measures, including the power "to demolish houses, decide on administrative detentions and deportations, and administer criminal justice before a military rather than an ordinary civilian court."[646] Anti-terrorism provisions evolved over time.

Daphne Barak-Erez, formerly Dean of the Faculty of Law at Tel Aviv University, and now a member of the Israeli Supreme Court, suggests that a criminal-justice-versus-prevention binary is critical to understanding Israel's

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[642] It would be beyond the scope of this thesis to attempt to exhaustively describe Israel's anti-terrorism structure, as it is long-standing and complex. Rather, elements of that scheme that provide examples comparing those endeavours with those undertaken by the U.S. after 9/11 are used. For a more comprehensive discussion of Israel's anti-terrorism regime, see e.g. David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press 2002).

[643] See *Roach: The 9/11 Effect*, *supra* note 82, at 244-258 (discussing the UK's anti-terrorism initiatives before 9/11); 100-129 (describing pre-9/11 anti-terrorism initiatives in Israel); Daphne Barak-Erez, "Israel's Anti-Terrorism Law: Past, Present, and Future," in *Ramraj: Global Anti-Terrorism Law and Polic*y, supra note 181, at 597-620 (shortly after publication of this book, Professor Barak-Erez was appointed to the Israeli Supreme Court) [Barak-Erez*, Israel's Antiterrorism Law*].

[644] Roach, *The 9/11 Effect*, *supra* note 82 at 100 (citing statistics from the Israeli Ministry of Foreign Affairs); see also Claude Klein, On the Three Floors of a Legislative Building: Israel's Legal Arsenal in Its Struggle Against Terrorism," (2006) 25:5 Cardozo L Rev 2223 (for a detailed discussion of the evolution of Israel's anti-terrorism initiatives) [Klein].

[645] See Barak-Erez, *Israel's Antiterrorism Law*, *supra* note 643; Stephanie Cooper Blum, Preventive Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects, Homeland Security Aff., Oct. 2008, at 1, 3, 8–11; Yigal Mersel, Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era, 38 N.Y.U. J. Int'l L. & Pol. 67 (2006).

[646] Barak-Erez*, Israel's Antiterrorism Law*, *supra* note 643 at 598; for a comprehensive discussion of the history, see *Klein*, *supra* note 644.

anti-terrorism mechanisms.[647] Like all of the national jurisdictions discussed herein, Israel has criminal penalties for various acts related to terrorism, but prevention is a significant factor in its overall anti-terrorism legal regime. Administrative detentions are used in Israel as preventive measures to detain people who the government fears may engage in acts of terrorism in the future.[648] In 1979, Israel enacted the Emergency Powers Detention Law, which replaced the administrative detention provisions in the Defence (Emergency) Regulation and allows for preventive detention where the Minister of Defence has "reasonable cause" to believe the person should be detained for reasons of "state security or public security."[649] The detention must be reviewed by a President of a District Court within 48 hours, with subsequent reviews every three months.[650] The evidence that forms the basis for the detention may be withheld from the detainee, but heard by the President of the District Court outside of the presence of the detainee if the President finds that disclosure would be detrimental to "state security or public security."[651] The law is only in effect when a state of emergency has been declared, but a state of emergency has been renewed continuously since 1948.[652]

The Basic Law: Dignity and Liberty, enacted in 1992, allows for judicial review of statutes, but does not apply retroactively, so it cannot be used in relation to the Emergency Powers Detention Law of 1979.[653] It can, however, be applied to the Internment of Unlawful Combatants Law, which was

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[647] Barak-Erez*, Israel's Antiterrorism Law*, *supra* note 643, at 601.
[648] *Ibid.*
[649] *Ibid*; *Roach: The 9/11 Effect*, *supra* note 82, at 117 (36 LSI 89; An English translation of this law is available at (1990) 21 Columbia Human Rights Law Review 510).
[650] *Ibid,* Barak-Erez*, Israel's Antiterrorism Law* at 602 (quoting s.6 (c) of the Detentions Law).
[651] Roach, *The 9/11 Effect*, *supra* note 82 at 119.
[652] Amnesty International, *Starved of Justice: Palestinians Detained Without Trial by Israel* (2012), online: Amnesty International; <http://www.amnesty.org/en/library/asset/MDE15/026/2012/en/d33da4e1-b8d2-41fe-a072-ced579ba45c7/mde150262012en.pdf>; Roach, *The 9/11 Effect*, *supra* note 82, at 117.
[653] *Barak-Erez: Israel's Antiterrorism Law*, *supra* note 643, at 600-601 (discussing 1992, S.H. 1391).

enacted in 2002.[654] That law, unlike many of its predecessors, does not require the issuance of an emergency for the law to apply, suggesting greater permanence in more recent legislation in this area.[655] Unlawful combatants are non-citizens "who have directly or indirectly participated in hostilities against Israel or are members of forces that do so and who are not, as regular soldiers, entitled to prisoner of war status."[656] Roach points out that this third category resembles that followed by the U.S. at Guantanamo Bay, suggesting that neither the laws of war or the criminal-justice paradigm apply completely to anti-terrorism.[657] Between 2000 and 2010, the Supreme Court of Israel considered 322 cases of administrative detention. None of those cases resulted in a release order, and the Court did not repudiate the use of secret evidence in any of them.[658]

In addition to the general use of administrative detentions, again under varying terminology, which may have influenced a number of national jurisdictions, it appears as if the U.S. may have been further influenced by Israel and the UK's experience with Northern Ireland in terms of some of its specific initiatives as well. Examples are presented in the following sections.

D.2. Special Tribunals for Terrorism Cases

The evolution of the U.S. model for the Military Commission has not quelled critiques of the Commission based on questions of legitimacy. Talk of specialized terrorism courts seems to have lessened within the U.S., but the Military Commission, although it has been used for a very small number of the cases of detainees being held at Guantanamo Bay, continues, and the

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[654] *Ibid* (also noting that in the Unlawful Combatants Decision, Crim. A. 6659/06 A v Israel (not published 2008), the Supreme Court reviewed the Internments of Unlawful Combatants Law under the Basic Law and found it to be constitutional).
[655] *Ibid* at 600, n. 10.
[656] Roach, *The 9/11 Effect*, *supra* note 82, at 119.
[657] *Ibid.*
[658] *Krebs*, *supra* note 482 at 639.

U.S. Government has indicated that they will continue, under what it suggests are more fair proceedings set forth in the *Military Commissions Act of 2009.*[659]

D.2.1. Diplock Courts in the UK

The UK has also used specialized courts for terrorism in the past. Roach describes an evolution of these detentions in the UK, noting that regulations relating to Northern Ireland initially allowed for indefinite detention of those suspected of acting in a way adverse to peace. Lord Diplock, after whom the Diplock Courts were named, conceded that many held under this structure were held under evidence that was not sufficient. Diplock commented, though, that it was not possible to proceed under the criminal-justice system because of the continuing threat of terrorist attacks.[660] Although the UK did not declare a "war" on terrorism, it appears that similar binaries regarding the criminal-justice system were used, and that, there, the criminal-justice system was presumptively deemed to be inadequate. Roach describes an evolution, under which initial objections to the manner of proceeding on detentions led to some additional procedural safeguards, and linked the detentions more explicitly to the threat of terrorism. People could be detained if suspected of involvement in terrorism – even with procedural safeguards added, however, Roach notes that people could still be detained based on secret evidence and hearsay.[661] He explains:

> Even under the improved procedures, however, the commissioners and detention appeal tribunal relied on secret evidence and hearsay testimony. The hearsay was often provided by testimony from Special Branch officers about allegations from unnamed and perhaps unreliable informers or

[659] See MCA 2009, *supra* note 60.
[660] Roach, *The 9/11 Effect*, *supra* note 82, at 245 (citing to Lord Diplock, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland*, Cmnd. 5185, 1972, at paras. 32 and 33).
[661] *Ibid.*

> statements extracted from the detainee. Because so much secret evidence was considered, detainees often did not know the details of the allegations against them.[662]

Many of the controversies that surrounded the Diplock Courts can be analogized to those surrounding the Military Commission, both in relation to the over-arching need and legitimacy of such bodies and in relation to the asserted need to proceed with abridged rules in regard to procedure.

D.2.2. Military Courts in Israel

Looking to Israel, the process by which special courts were created to address the threat of terrorism can, again, be analogized to the approach taken by the U.S. after 9/11. Like the U.S., Israel created military courts to address terrorism detentions, specifically after the 1967 Six Day War to try Palestinians suspected of terrorist attacks against Israel.[663] Israeli citizens, by contrast, are tried in the civil system for matters relating to terrorism.[664] The military courts have some vestiges of criminal proceedings, such as the right to *habeas corpus* review, but they involve limitations in other procedural respects. The Israeli Defense Forces have discretion to determine whether a Palestinian suspected of a terrorism-related matter is tried before a civilian court or a military court.[665]

Again, this system has some generalized analogies to the U.S. Military Commission at Guantanamo Bay. The dichotomy in terms of process relating to citizens and non-citizens suggests, first, that terrorists are more likely to be non-citizens, and, second, that it is acceptable to deprive non-citizens of

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[662] Roach, *The 9/11 Effect*, *supra* note 82, at 245.
[663] *Setty: Specialized Trials*, *supra* note 639, at 158; see also Kathleen Cavanaugh, "The Israeli Military Court System in the West Bank and Gaza," (2007) 12 J. Conflict & Security L 197; Amos Guiora, *Global Perspectives on Counterterrorism* (US: Aspen, 2007).
[664] *Setty: Specialized Trials*, *supra* note 639, at 158.
[665] *Ibid* (explaining in depth the procedural differences between a military court and a civilian proceeding, as well as the various critiques of the use of these special courts).

procedural protections, while not doing the same in regard to citizens. Israel has also followed, with some differences, a quasi-military model in its procedural approaches to terrorism detentions, but only in some cases, with a parallel system of criminal justice ongoing for other cases.

The use of special courts, a military model in the case of Israel, and a presumptive rejection of the criminal-justice model in relation to the Diplock Courts as well, suggest that there are some parallels between the approaches taken in both jurisdictions and some of the wartime models followed by the U.S. after 9/11. If nothing else, an assessment of the legitimacy of special terrorism courts would be more complete by looking to the experiences of jurisdictions that have implemented them before.

D.3. Targeted Killings

Targeted killings have been discussed previously in this thesis, particularly in relation to recent assertions by the U.S. Government that this practice is legitimate and necessary.[666] As explained earlier, while targeted killing is not specifically a detention practice, it is a more extreme form of action that the U.S. has asserted to be legal, specifically since 9/11, so it has been included in the analysis undertaken throughout this thesis. This tactic to deal with alleged terrorists, however, has been used, rather controversially, by Israel for some time, and it appears that the U.S. may have borrowed this tactic from the Israeli legal arsenal. Thus, assessing this practice, not just within the U.S. legal context, but also in relation to Israel's experience, can prove instructive.

Targeted killings have been used by Israel against those considered to be active terrorists, and where the Government involved argues that less harmful measures cannot be taken. Generally, the latter condition relates to

[666] See Chapter 2, above.

the fact that the target is not physically present in Israel or within reach of the Israeli military through other means.[667] The normative structures surrounding this practice are considerably more advanced than in the U.S., and the Israeli Supreme Court has ruled that, provided certain conditions are met, targeted killings may be permissible.[668] In laying out the issue, the Court placed the issue of terrorism in context, noting:

> In February 2000, the second *intifada* began. A massive assault of terrorism was directed against the State of Israel, and against Israelis, merely because they are Israelis. This assault of terrorism differentiates neither between combatants and civilians, nor between women, men, and children. The terrorist attacks take place both in the territory of Judea, Samaria, and the Gaza Strip, and within the borders of the State of Israel. They are directed against civilian centers, shopping centers and markets, coffee houses and restaurants. Over the last five years, thousands of acts of terrorism have been committed against Israel. In the attacks, more than one thousand Israeli citizens have been killed. Thousands of Israeli citizens have been wounded. Thousands of Palestinians have been killed and wounded during this period as well.[669]

The Court then discussed the arguments of the parties, including the argument that innocent civilians are frequently killed in these strikes.[670] It concluded that targeted killings could nonetheless be permissible if the military established a number of things, and a rather heavy burden of proof is placed on the military, and, rather than determining that targeted killing, in

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[667] *Barak-Erez: Israel's Antiterrorism Law*, *supra* note 643, at 610.
[668] *Ibid*; HCJ 769/02 *The Public Committee Against Torture in Israel v The Government of Israel* (not published, 2006), online (in English): Supreme Court of Israel <http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf> [*Targeted Killings Decision*].
[669] *Targeted Killings Decision*, *supra* note 668, at para. 1.
[670] *Ibid.*

the larger sense, is justified, the Court indicated that cases needed to be assessed on their individual merits.[671]

While the admission by the U.S. Government that it espouses targeted killings in certain cases, and the publicity over the killings of Anwar al-Aulaki, and, arguably, Osama Bin Laden, may represent a new public phase in the U.S. fight against terrorism, the concept is not new at all. It appears, in this respect, the U.S. has been influenced by Israel, where targeted killings have been more prominent and are arguably more engrained in the normative scheme. Israel's experience, beyond giving some indicators as to the usefulness of these strikes, as well as some underpinning arguments as to their legitimacy, also addresses an emerging debate arising from the U.S. practice, as to whether judicial oversight would serve to legitimate these strikes. While not definitively answering that question, it is propounded herein that many of the extraordinary detention measures employed after 9/11 have structural similarities to undertakings elsewhere, and that turning to the experiences of these other jurisdictions has arguably influenced many of the decisions made after 9/11 in relation to appropriate responses.

E. Conclusion: Forward-Looking Trends

Much of this thesis has focused on looking back in order to understand better the way forward in regard to anti-terrorism. It is becoming increasingly apparent that the narrative is continuing to fracture among the countries discussed in this thesis, and sometimes within a given jurisdiction.

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[671] *Ibid*; for an additional discussion of the legal framework of the Israeli targeted killing policy, see Orna Ben-Naftalit & Keren R. Michaeli, "'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings" (2003-2004) 36 Cornell Int'l L.J. 233. *The Public Committee Against Torture in Israel v The Government of Israel* (not published, 2006), online (in English): Supreme Court of Israel <http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf> [*Targeted Killings Decision*]. For a discussion of the legal framework being developed in the U.S., see William C. Banks, "Targeted Killing and Assassination: The US Legal Framework," (2003) 37.3 University of Richmond L Rev 667-749.

While the UK, Canada, and Australia have arguably scaled back, to an extent, some of their extraordinary detention provisions in the years since 9/11,[672] other countries, such as the U.S., appear to be expanding them, or at the very least moving extraordinary measures towards the new normal. In Israel, controversies about various aspects of its complex anti-terrorism regime continue. In June 2012, a Knesset Committee approved an amendment that would lower the standard of proof in certain anti-terrorism cases.[673]

In many ways, the techniques employed by Perelman and Olbrechts-Tyteca in identifying the elements of a successful argument can be used in relation to the argumentation techniques employed in this chapter to raise questions as to the success of arguments about terrorism detention practices that are supported by the use of overly simplistic binaries. Where governments seek to change long-standing constitutional protections for detainees, in terrorism or in any other context, a simple assertion that they are balancing security and liberty is, at best, a structurally questionable foundation for the claim. It cannot, in fact, be an accepted presumption that liberty and security are contradictory and opposing values, such that one must be diminished to enhance the other. Moreover, such a presumption of balance, while arguably valid when applied to individual facts of individual cases, with appropriate burdens and presumptions in favour of individual rights, the balance structure is considerably less stable where such

[672] For instance, in early 2012, the UK eliminated its control order regime and replaced it with Terrorism Prevention and Investigation Measures (TPIMs), which involve less restriction on liberty and more surveillance of those subject to the TPIMs. The control orders themselves were implemented after the 2004 House of Lords *Belmarsh Detainees* case ruled that the pre-existing system of immigration detentions, was incompatible with the European Convention on Human Rights. Anderson Control Order Report, *supra* note 86.

[673] Ido Rosenzweig &Yuval Shany, "Knesset Committee Approves Amendment to Decrease Proof Required for Terror Designations" (2012) *The Terrorism and Democracy Newsletter*, online: The Israel Democracy Institute <http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/42/4/4.aspx>.

assertions are made on a more generalized basis to support structural changes.

Similarly, it appears that the war-versus-crime binary, often asserted in the wake of the 9/11 attacks as the dilemma to be resolved in addressing the treatment of terrorism detainees, is, in fact, somewhat misleading. The point of departure identified at the very beginning of this chapter appears to support the reality, and the discursive binary used does not reflect the practice actually undertaken. In reality, it appears that the U.S. has not chosen a pure war paradigm in many of these cases, but, rather, has developed a third paradigm that is s sort of hybrid between the two structures. Such a hybrid must be supported in its own right, as it does not fall squarely within the criminal-justice or the wartime detention paradigms.

Finally, the binary between “old” and “new” detention mechanisms after 9/11 is, in some ways, misleading. While many of the wartime structures employed by the U.S. in particular are, indeed, new to the U.S., they are not new in the sense that many have been used in other jurisdictions, and it is apparent that the U.S. has been specifically influenced by some of the practices taken by the UK in relation to the Troubles in Northern Ireland and by Israel. Given such apparent influence, it is structurally unsound for the U.S. to assert that its practices are new, and that reference to other jurisdictions in assessing the validity of these practices is impermissible. By abandoning this binary, and acknowledging the influence of other jurisdictions, the U.S. can add a texture to the debates over these practices that tends to be minimized under the present discourse.

Overall, the issue of how to address terrorism detentions is a complex matter, influenced by particular facts, constitutional provisions, politics, history, and existing approaches to legal regimes, among other things. Such complicated questions cannot be answered through the use of simplistic binary discourse, such as the type illustrated throughout this chapter. A multi-textured issue requires a multi-textured analysis, and, while binaries may be

easy for the public to understand, and may have intuitive persuasive appeal, a more nuanced form of discourse is required to address the foundational firmness of detention changes built on this form of discourse.

"The consequences of a successful terrorist attack are likely to be so appalling that there is an understandable wish to support the system that keeps those who are considered to be most dangerous out of circulation for as long as possible. But the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him." [674]

[674] *Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other* action, [2009] UKHL 28, at para. 84 (Lord Hope of Craigshead).

CONCLUSION: Turning the Kaleidoscope

A. The Conversation Continues: Can, or Should, the Fracturing in the Narrative Be Repaired?

This thesis began with a conversation, and this conclusion relates back to that conversation in light of the argumentation structure described and applied herein. Abdulmutallab, or the Underwear Bomber, was ultimately convicted in a criminal proceeding, but the discourse surrounding his arrest demonstrated that a fractured narrative had arisen, at least in the arguments of some, giving the government discretion to choose a third detention paradigm, which, as argued in Chapter 4, above, appears to be a hybrid of the criminal justice and war detention paradigms. It must be emphasized that this was a conversation between individuals on behalf of branches of only one government, not an enunciation of government policies even in that one place. Nonetheless, the obvious assumptions underpinning the conversation, even by Holder, who was defending the use of the criminal-justice paradigm, suggest some acceptance of a fracturing of the narrative relating to terrorism detentions, even within the U.S.[675]

Moreover, had Abdulmutallab tried to ignite his clothes on a plane bound for Canada, or for the UK, or for Australia, any resulting conversation as to his disposition would have played out differently. Perhaps in those places, a criminal-justice approach would have dominated, as it ultimately did even in the U.S., but each of those jurisdictions has employed a differing form of extraordinary detention in terrorism cases since 9/11, outside of the criminal-justice system, so it is not entirely clear that those alternative options would not have been chosen. What is clear, however, is there would not have been a discussion of a wartime detention, or the use of enhanced

[675] See Introduction, Section C, above.

interrogations, as that part of the conversation has not been embraced outside of the U.S.[676]

The question, then, is how did this fracturing happen, and is it symptomatic of an underlying structural crack in the foundation on which post-9/11 extraordinary detention regimes developed in some places? As across jurisdictions, of course, it is not necessarily unreasonable that different laws and practices might apply. Still, it is a significant difference if one jurisdiction would view the same person as a potentially war-related detainee, while another might view him as an immigration detainee, and a third might view him as a criminal-justice detainee – all based on the same conduct and surrounding facts. At the very least, given the international nature of terrorism, it seems practical to suggest that there be some level of harmonization across jurisdictions in how to handle these cases, instead of the fracturing that appears greater than in other traditionally criminal contexts.

Moreover, the post-9/11 national detention practices appear to be rather insulated, developed somewhat in silos, more in some places than others, but overall without a significant deference to international law, or an expressed will to seek an international law approach to addressing these detentions. In the U.S., the government initially fought even acknowledging the applicability of international law instruments to which it is a party, such as the Geneva Conventions or the Convention Against Torture.[677] Given the stark "us" against "them" binary that was discussed in Chapter 3, above, and the obvious suggestion that terrorism, as an international phenomenon, is not always readily amenable to national criminal-justice systems, this failure to actively pursue an international law solution to appropriate detention practices is puzzling, and the actual resistance to applying international law is difficult to justify. Similarly, it seems strange that, in addressing what has

[676] See Chapter 4, above, for a discussion of the war-versus-crime binary.
[677] See the discussion by the Supreme Court of the United States in *Hamdan*, *supra* note 238.

been widely acknowledged, at least in the context of international terrorism, to be a systematic problem involving all "civilized nations," as President Bush put it, countries have not pulled together more in developing consistent internal responses to terrorism detentions.[678] On a practical level, this lack of harmonization across detention practices has arguably created roadblocks for some places.

The case of Abdullah Khadr, sought for extradition by the U.S. on terrorism charges, illustrates such a roadblock. If, indeed, the U.S. is seeking Khadr because his detention is necessary for its national security, it has not found a sympathetic audience in the courts of Canada, where Khadr lives, and that lack of sympathy is directly related to U.S. detention and interrogation policies. Last year, a federal court in Canada denied the U.S.'s extradition request for Khadr, a ruling that was upheld on the appellate level, and denied hearing by the Supreme Court of Canada. Although extradition to the U.S. is frequently granted, in Khadr's case, it was denied after Khadr was detained in Pakistan, in response to a bounty offered by the U.S. Government.[679] The Ontario Court of Appeal put it rather bluntly, saying "[t]he United States of America paid the Pakistani intelligence agency, the Inter-Services Intelligence Directorate (the "ISI"), half a million dollars to abduct Abdullah Khadr in Islamabad, Pakistan in 2004."[680] The Court then described Khadr's treatment after his arrest:

> Following his abduction, Khadr was secretly held in detention for fourteen months. He was beaten until he cooperated with the ISI, who interrogated him for intelligence purposes. The ISI refused to deal with the Canadian government but did have contact with a CSIS official. The American authorities discouraged the CSIS official's request that Khadr be granted consular access, and the ISI denied access for three

[678] See Bush, 9/20 Speech, *supra* note 28.
[679] See *United States of America v Khadr,* 2011 ONCA 358 (upholding a lower court ruling staying extradition proceedings against Abdullah Khadr, in large part because of human-rights violations during Khadr's detention in Pakistan).
[680] *Ibid* at para 1.

> months. The ISI refused to bring Khadr before the Pakistani courts. After the ISI had exhausted Khadr as a source of antiterrorism intelligence, it was prepared to release him. The Americans insisted that the ISI hold Khadr for a further six months in secret detention, to permit the United States to conduct a criminal investigation and start the process for Khadr's possible rendition to the United States. When Khadr was finally repatriated to Canada, the United States sought to have him extradited on terrorism charges.[681]

The Ontario Court of Appeal quoted the Superior Court Judge's finding that "the sum of the human rights violations suffered by Khadr is both shocking and unjustifiable".[682] Khadr was released after the Superior Court stayed his extradition, and was recently reported to be engaged to be married.[683] His case raises a number of obvious human-rights concerns, but it also illustrates, not just the fracturing of the anti-terrorism detention narrative, but the pragmatic harm that can result from that fracturing. The fact that the U.S. paid so much money to have Khadr arrested in Pakistan, and has so vigorously sought to have him returned to the U.S., suggests that its position is that detention of Khadr is essential for its national security. And yet, on the other side of the U.S. Border, Khadr is free, backed by court rulings that have lambasted the U.S. for its conduct. If detaining Khadr were, indeed, critical to the security of the U.S., it appears that its own actions have sabotaged that detention.

The fracturing even within the U.S. narrative is also illustrated by this case, as mentioned previously. Abdullah Khadr has been criminally charged in Boston, charges that cannot proceed unless he is extradited.[684] It is unclear whether the U.S. pursued the criminal paradigm because it was

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[681] *Ibid.*
[682] *Ibid* at para 2 (quoting *United States of America v Khadr*, (2010), 258 C.C.C. (3d) 231, staying extradition proceedings).
[683] See Linda Nguyen, "Abdullah Khadr released as extradition request denied" (4 August 2010), *Global News,* online: Global News <http://www.globalnews.ca/abdullah+khadr+released+as+extradition+request+denied/81237/story.html>.
[684] See *United States of American v Khadr*, *supra* note 679 at para 16.

seeking extradition – a criminal-procedural mechanism. Had the U.S. chosen to send Khadr to Guantanamo Bay and try him before a Military Commission, it is unclear whether they would have had any basis for seeking extradition, as the Military Commission is not a criminal proceeding, and it is equally unclear how they could have sought transfer under a wartime detention paradigm that Canada has not adopted.

The allegations against Khadr have similarities to those against his younger brother, Omar, and likely involve some of the same underlying facts, given their family history. Omar's case, though, because the U.S. had physical custody of him, did proceed in a Military Commission, as discussed earlier, to ongoing critiques of a lack of legitimacy and two opinions of the Supreme Court of Canada, again lambasting the U.S., albeit more indirectly through the cooperation of Canadian officials, for its detention and interrogation policies. This kind of sharp fracturing seems hardly designed to promote international cooperation for the international problem of terrorism detentions.

Again, as asked above, the question is how did this fracturing happen, and is it symptomatic of a structural crack in the foundation of some of these extraordinary detentions? This thesis has argued that it might be, and that the argumentation approaches used to develop many of these practices can be deconstructed to identify and, at least to an extent, remedy, the underlying cracks in these systems.

In so arguing, it is recognized that anti-terrorism detention practices after 9/11 developed differently from place to place, if they changed at all, and this presents some challenges in extrapolating common themes. Nonetheless, as argued throughout this thesis, it is apparent that some governments that implemented extraordinary detention measures in the wake of the 9/11 attacks did so, at least initially, based on certain concepts, which were treated as presumptions, even though they had not been established as fact. It further argued that those presumptions were each

potentially unsound, for different discursive reasons. The implication, if the presumptions could be unsound, is not a definitive disproof of the resulting practices, but a call to question those practices, to test the soundness of the structures built around them, and to look back to determine if national jurisdictions want to follow the same types of paths going forward.

This debate notwithstanding, Abdulmutallab's ultimate conviction under the U.S. criminal-justice system resembled the likely way it would have played out in the days before 9/11. The most significant difference was the delay before he was read his *Miranda* rights. In a typical criminal proceeding in the U.S., statements made during that time would potentially be inadmissible against him at trial. In this case, as described in the Introduction, the trial judge found that national security concerns in that particular instance justified the delay and ruled his pre-*Miranda* statements to be admissible.[685] While one must exercise caution extrapolating from one case, this raises the question as to whether a presumption in favour of the criminal-justice system would have been a more appropriate point of departure. Under such a dynamic, this would not mean that no derogations from such a system would be permitted, but, rather, that the State, in seeking to derogate, would have the burden of showing that an exceptional circumstance existed to support it, and the least intrusive derogation should be sought, if one is to be permitted. This is similar to the Section 1 analysis undertaken in Canada, which, among other things, requires that any permitted *Charter* infringement be minimally impairing.

B. A Different Type of Conversation for Future Crises

Thus, rather than necessarily attempting a solution to the problem of terrorism detentions, this work suggests a methodology. Generally speaking, this methodology has been applied to extraordinary terrorism detentions, but

[685] See the "conversation" in the Introduction, above.

it could apply to a number of situations in which a perceived crisis triggers changes to legal norms. Law, as described in the Introduction to this thesis, is evolution, and the processes that underscore the development of law are critical to our understanding of changing norms. Through an approach similar to Kahn's *Cultural Study of Law*, looking to the mechanisms under which certain norms have developed is critical to understanding law itself, and engagement with that process beyond normative compliance is essential.

As René Provost points out in a different context:

> Law is not handed down but rather continuously constructed by all who are involved in its creation and application. Whereas positivism may countenance a responsibility to the law, commanding obedience under certain conditions, legal pluralism speaks to a responsibility for the law, demanding engagement with legal norms over and above compliance.[686]

As demonstrated early in this thesis through the use of Kafka's Parable, the same constituent facts can often be reconfigured, turning the kaleidoscope to reveal a previously unseen picture. This thesis has sought to contribute to the understanding of this phenomenon by deconstructing some of the discourse that appeared to serve as foundational structures for many of the extraordinary practices that developed, and then to consider these deconstructed elements through particular theoretical approaches, as described at length in Chapter 1.

Drawing, for instance, from some of the terminology laid out by Perelman and Olbrechts-Tyteca, it in fact appears in some cases as if statements were treated as presumptions – in other words, meaning premises that were established truths – when they were, at best, assumptions, or premises based, not on proof, but on an appeal to

[686] René Provost, "Asymmetrical Reciprocity and Compliance with the Laws of War," in Benjamin Perrin, ed., *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* (Vancouver: UBC Press, 2012) at 31-32.

surrounding values. Whatever they were based on, it is apparent that they were not proven before serving as points of departure to support changes to existing detention paradigms. As those extraordinary detention paradigms continue to evolve, questions of foundational soundness and legitimacy must be addressed, and a closer examination of some of those threshold presumptions is necessary to determine, not just the validity of measures already taken, but the soundness of approaches to detention to be undertaken going forward. If those presumptions are, indeed, the foundation for these changes, and are, indeed, more structurally unsound than originally believed, they must be challenged, and structures built upon them deconstructed to determine the appropriate way of going forward.

This thesis has turned the proverbial kaleidoscope to consider the possibility that new perspectives were possible based on the same constituent parts, based on a recalibrating of the underlying presumptions that may have shaped extraordinary detention changes since 9/11. First, in Chapter 2, the idea that the attacks were not just unprecedented, but unprecedented in a way that mandated the construction of new detention paradigms, was deconstructed, with a suggestion that the first component of this presumption is inextricably linked to the second, and that, taken together, this conclusion has not been supported, in spite of sometimes significant incursions into detention paradigms.[687]

Sometimes, as discussed in Chapter 3, baseline presumptions were not explicitly stated, but it was obvious that the presumptions existed from the actual measures undertaken. Especially in the U.S., but to some extent in the West more generally, a sense of internal identity had as a necessary corollary an othering of the external, as often overly simplistic, and sometimes even racist, images of the constitution of this Other were used as a baseline when determining where altered detention and process regimes were going to be applied. The existence of the Terrorist Other was

[687] See Chapter 2, above.

undeniable and explicit throughout the discourse, but the particular characteristics of this Terrorist Other, in terms of religion, gender, age, and national origin, was less acknowledged, but nonetheless apparent. While unstated as a presumption, this concept, not a true presumption at all, was arguably the most dominant and recognized underpinning to many of the changes in these structures.[688]

Finally, Chapter 4 purported to consider a methodology of argumentation, rather than a particular starting statement, looking to the use of binary oppositions in presenting complex issues. As a larger matter, the chapter stepped back to consider the methodology of such arguments, looking to the peculiar way in which significant fracturing of traditional detention paradigms was undertaken after 9/11, often supported, at least in part, by simplistic binaries that left little room for nuance. No one binary, on its own, supported these changes, but their cumulative effect was to provide a ready response for any objections to these changes.

Indeed, it is highly questionable whether long-standing criminal-justice paradigms for detention should be altered on broad assertions that liberty must be balanced with security. It is not at all clear that, even within the unique changes undertaken by the U.S., the dominant underpinning was, as is often stated, an either/or scenario involving war versus criminal-justice structures. Rather, it is apparent that the U.S. has continued to develop a third paradigm, a sort of hybrid between those two dominant regimes, electing to incorporate elements from each but not necessarily supporting the legitimacy of this third paradigm, or sufficiently supporting the manner in which particular elements were incorporated. Thus, the public use of a binary to support a significant structural change may not, in fact, reflect the reality of the practice.

That chapter concludes by examining a binary less often stated in a single discursive component, but laced throughout the discourse, that the

[688] See Chapter 3, above.

extraordinary detention measures undertaken by the U.S. in particular relating to its wartime approaches, are new, coupled with an asserted tendency not to look to the practices of other jurisdictions. By definition, an assertion that something is new suggests that it is not old, and thus may have no direct precedent from which to draw. Indeed, it appears, as relating to some of the more controversial aspects of the U.S. wartime detention scenarios, the structures are not new at all, but are heavily influenced by the experiences of jurisdictions such as the UK and Israel, and that a meaningful critique of those structures thus demands that the experiences of jurisdictions outside of the U.S. be considered.

In the end, this thesis relates back to the words of Geertz, quoted in the Introduction, which suggested that, at long last, he realized that he was only beginning, not concluding, a thought process.[689] The intention herein was most certainly not to offer a solution to terrorism, or even to offer a definitive and absolute answer to the question of how to deal with people detained on suspicion of terrorism. Moreover, although critiques of various extraordinary detention structures are presented, the intention was not, either, to definitively discredit those approaches. Rather, the intention and hoped contribution of this study has been to present a new perspective on some of the constituent parts that went into building detention paradigms that were specifically originated in response to the 9/11 attacks. Much historical commentary has been undertaken in relation to these attacks, and this thesis fills a niche by offering a differing theoretical view, overall, on some of the process that underscored the building of these paradigms, with the primary suggestion that adequate structural questioning of the processes that went into building these regimes has not happened, notwithstanding the growing reality that many of these structures are becoming normalized, and are even serving as foundations for practices going forward. Because of the continuing relevance of these underlying presumptions from the very beginning after

[689] See Geertz, *Local Knowledge, supra* note 21.

9/11, and continuing to the present day, and because those presumptions continue to loom as significant elements in the building of ongoing extraordinary detention practices, they remain relevant. Ultimately, what is argued here is that, in order to seek legitimacy in these paradigms going forward, it is necessary to look back to assess the structural soundness of the constituent elements that have now become so familiar.

Although the 9/11 attacks, and the resulting responses, were, in some respects, exceptional, the manner in which the responses were constructed can be extrapolated to other settings. These processes raise questions about the processes under which law is created, and what legal constructions mean in terms of their normativity. Much of the discourse that arose from the 9/11 attacks has crystallized over time into normative standards, but that does not necessarily mean that those standards are legitimate or structurally sound. The kaleidoscope can be turned to break down the constituent parts and to look at those undertakings a new way, not in a positivist sense but in a larger sense, similar to that of Kahn's *Cultural Study of Law*, looking at the process of law from the outside, rather than merely from the inside as one bound by its terms.

C. The Way Forward?

This thesis has expended considerable space identifying a problem. It seems appropriate to thus suggest a solution, but to do so is not so straightforward. Rather than suggesting a proper paradigm under which to place anti-terrorism detentions, the suggestion is a bit more abstract, relating back to the theoretical approaches enunciated throughout this thesis. One way to identify some of the structural cracks has been to go back and deconstruct the argumentation used to underscore those alterations to detention paradigms, turning the kaleidoscope to produce a new image. As explained earlier in this thesis, this is not a definitive or mathematical process

and, at best, can provide one of many indicators as to the strength of the undertakings supported by argumentation.

Nonetheless, in identifying the problems described most particularly in Chapters 2 through 4 herein, a potential future approach is also suggested. That approach has to do with the use of presumptions and inertia.[690] The suggestion is to alter the presumptions to revert back to the pre-9/11 dominance of the criminal-justice system in these detentions. This would not be such a significant shift, as the majority of terrorism detentions continue to proceed through the criminal-justice system. The inertia should favour the criminal-justice paradigm, not meaning that no case could ever vary from it, but suggesting that a government seeking to sidestep the criminal-justice system has the burden of proof in supporting such a derogation in an individual case, with the presumption in favour of the detainee, as it is now in criminal matters. It also seems reasonable that national jurisdictions could and should work more to harmonize their approaches to these detentions, and in that sense international law could provide a critical component.

For detainees actually captured in battle, where the laws of war are argued to apply, the presumption would favour the use of wartime detentions, although that would be a reversion most directly applied to the U.S., but not to the hybrid format used by the U.S. in its War on Terror. This does not mean that the criminal or wartime paradigms would be uniformly applied in all cases, as a government would still have an opportunity of making an individualized showing in a particular case that some derogation is required. That showing, however, would proceed with a presumption in favour of the detainee, and the burden of proof to support the individual derogation on the government.

In identifying problems in the process under which many of these structures developed, support has been suggested for a reconsideration of the existing structures, dismantling them to the extent that they are founded

[690] See Perelman & Olbrechts-Tyteca, *The New Rhetoric*, *supra* note 9.

upon these faulty bases, and then considering a better way forward. These different levels are well illustrated by the kaleidoscope metaphor, as alterations in how the picture is viewed necessarily depend on the reconfiguration of multiple internal component, which, themselves, are not necessarily cognitive analogues. Moreover, even if the critique of one component element fails, enough can still be changed to turn the kaleidoscope and reveal a different picture.

As expanded upon throughout this thesis, the pragmatic outcomes on some of these extraordinary detention regimes support this idea that the structure of these regimes has not been sound. In the years since 9/11, the criminal-justice system has been more successful in securing convictions for terrorism-related defenses, while extraordinary detention scenarios have resulted in a tangled web of controversy and fewer dispositions. Not only have criminal prosecutions led to a significant number of convictions in places that have also implemented extraordinary detention structures, but they have been used as an exclusive detention approach in a number of jurisdictions that did not adopt these structures. While deviations from the criminal-justice system might be arguably supportable in an individual case, the burden of proof should support that pre-existing paradigm and a high burden should be place on a government, or anybody else, seeking to derogate from that system.

Also as demonstrated throughout this thesis, discourse and assumptions, which were treated as presumptions when they were not necessarily sufficiently structurally sound for such a treatment, arose quite quickly after the 9/11 attacks. Such a form of discourse is reasonable in the face of a catastrophic attack and in the face of a perception of ongoing risk of such attacks continuing. Moreover, it is arguable that some of the initiatives undertaken after 9/11 in relation to detention might, indeed, have been appropriate as short-term emergency responses. A question arises, though, based on developments in the past ten-plus years, as to whether a similar

justification can be asserted for what are becoming, in some places, increasingly normalized and even sometimes expanded extraordinary detention structures. To draw from Foucault's notion of normalization, it is highly questionable whether many of the current and developing extraordinary measures relating to detention can still be supported by the original justification asserted, as they have evolved over time, as have the surrounding factual circumstances.[691]

It is tempting to suggest that most national governments are retreating from some of the more extreme positions espoused early after the attacks, and that the relevance of some of these issues is diminishing. The U.S. wartime model, for instance, is likely to diminish, as it has been some time since new detainees have been brought to Guantanamo Bay, and the conflicts giving rise to those detentions are diminishing, at least in terms of U.S. involvement. Still, with legislation allowing for potentially indefinite detention within the U.S. and with the recent use of targeted killings, it appears that a contraction in one place may mean an expansion in another. Moreover, although the U.S. is not as actively advancing detentions such as those at Guantanamo Bay, it has not entirely retreated from them either, as people continue to be detained, and Military Commissions continue. The infrastructure is certainly present, as it is in all jurisdictions that espoused extraordinary detention standards. Detention regimes have not reverted back to where they were before 9/11 in these cases, and it is not clear if they will. Moreover, another crisis raises the question of what the impact would be on many of these normative structures. Lessons learned from the mechanisms of altering detentions in these cases can be invaluable. Thus, it seems apposite that looking back can provide a valuable way of looking forward.

[691] See Foucault, *The History of Sexuality*, *supra* note 10.

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