

LAW ENFORCEMENT IN THE AMERICAN SECURITY STATE

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This Article documents the evolution of the modern American police state and the symbiotic nature of the relationship between government actors across the three sectors of national security, domestic policing, and immigration enforcement. Policies from one area make their way into the other two, with the net result being that the powers of government actors are increased in all three areas. Critical to this dynamic is the construction of the target in each arena—the terrorist, the criminal, the illegal immigrant—as foreign, whether literally or figuratively. Although these targets are ostensibly limited to those deemed outside the mainstream, the result is a society in which security personnel can monitor and detain the citizenry at ever earlier intervals, often on evidentiary showings that are at best minimal. The relationship between war on terror practices and traditional policing is symbiotic; sometimes a tactic migrates from the foreign arena to the domestic, and in other instances police practices are brought to bear in the context of war. This state of affairs fuels the notion that policing has become more and more of a national security enterprise. Additionally, the operation of a separate system of immigration enforcement at the nation’s borders and points of entry also plays a role in expanding law enforcement powers and creates new areas of enhanced powers less susceptible to outside review. Driving the constant push for greater law enforcement powers across the three zones is the concept that violations of the law can be prevented. In each case, the notion of prevention is rooted in law enforcement’s unshakeable belief that target communities commit more crime, are just a step away from being radicalized into terrorist attackers, or will illegally cross the border to break the law here with impunity. In exploring the practices and theoretical underpinnings of the security state, as well as the legal framework that has broadened police powers and justified its excesses to a great degree, the Article probes how much the United States has come to resemble a police state.

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INTRODUCTION

The notion that the United States is a police state is one that has been addressed in the academic literature and reveals a fundamental tension between the Fourth Amendment’s protection from being unreasonably stopped and searched and the vast discretionary powers of American law enforcement agencies across the federal-state spectrum.¹ While the fear that police powers grow too great is a recurring theme of this discussion, there is a clear distinction between the uneasy and unsettled debates hovering over the constitutionality of American police practices and the arbitrary powers of a totalitarian regime.² On the one hand, the idea that a constitutional system undergirded by the promise of due process could resemble a choking regime of secret police, informers, and arbitrary detention like the former East Germany seems far-fetched. Yet a review of the powers enjoyed by American law enforcement agents demonstrates that the legal architecture of such a security state is present. Decades of deferential Supreme Court decisions in the area of policing power demonstrate this key point.³ And the main structures keeping the United States from developing into such a state are the formal apparatus of the courts, which prevent law enforcement from operating completely unchecked, and the size of the United States itself, which requires police operatives to exercise discretion in how they employ their considerable powers.

This Article documents the evolution of the modern American police state and the symbiotic nature of the relationship between government actors across the three sectors of national security, domestic policing, and immigration enforcement. Policies from one

1. See, e.g., Thomas P. Crocker, *Dystopian Constitutionalism*, 18 U. PA. J. CONST. L. 593 (2016).

2. *Id.* at 597 (“Legal resistance to the prospect of a ‘police state’ established a clear contrast not only between the arbitrary authority associated with totalitarian regimes and the freedom protected by the Fourth Amendment in particular, but by other constitutional provisions as well.”).

3. See, e.g., *United States v. Knotts*, 460 U.S. 276 (1983); *Smith v. Maryland*, 442 U.S. 735 (1979); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967); *Feiner v. New York*, 340 U.S. 315 (1951).

area make their way into the other two, with the net result being that the powers of government actors are increased in all three areas. The national security rationale abets the domestic policing ethos, which influences in turn the border security argument. Although these targets are ostensibly limited to those deemed outside the mainstream, the result is a society in which security personnel can monitor and detain the citizenry at ever earlier intervals, often on evidentiary showings that are at best minimal.⁴

While agents in sunglasses and overcoats are not engaged in spiriting dissidents off the streets or anyone who dissents from the ruling order, legally bestowed law enforcement powers have enabled a diverse set of practices that hover around the edge of what is constitutional. Law enforcement pushes the envelope between what is permitted and what is not and are rarely held accountable except in the most egregious of violations.⁵ The relationship between war on terror practices and traditional policing is symbiotic; sometimes a tactic migrates from the foreign arena to the domestic, and in other instances police practices are brought to bear in the context of war.⁶ This state of affairs fuels the notion that policing has become more and more of a national security enterprise.⁷ Additionally, the operation of a separate system of immigration enforcement at the nation's borders and points of entry also plays a role in expanding law enforcement powers and creates new areas of enhanced powers less susceptible to outside review.⁸

Central to the overlapping tripartite zone of policing, national security, and immigration enforcement is the notion that the threat is somehow foreign or apart from the majority of the population, which is law-abiding.⁹ Specifically, law enforcement views the prototypical criminal as African-American, the prototypical terrorist as Muslim, and the prototypical illegal immigrant as Latino.¹⁰ Such a conclusion is not novel or even that controversial in the view of the general public; yet

4. See, e.g., *infra* pp. 135–36 (explaining the broad "reasonably indicative behavior" threshold under the Nationwide Suspicious Activity Reporting Initiative); See *infra* Part V.B.2 (discussing the over-inclusive watchlists of various government organizations).

5. Crocker, *supra* note 1, at 647 n.224.

6. See *infra* pp. 130–32 (discussing Justice Sotomayor's dissenting opinion in *Utah v. Strieff*, and its implications).

7. See generally *infra* Part III (discussing the overlap between law enforcement and national security).

8. See, e.g., *infra* notes 291, 294–97 and accompanying text (noting that gang databases, which are often used for deportation purposes, are resistant to outside review).

9. See generally discussion *infra* Part I and II (highlighting the theme of otherness or foreignness).

10. See generally discussion *infra* Part II.

time and again, the otherness or foreignness of the object of law enforcement attention fuels the expanded powers of law enforcement more generally.¹¹

Driving the constant push for greater law enforcement powers across the three zones is the concept that violations of the law can be prevented. While terrorism prosecutions have been rooted in a clearly articulated strategy of preventing violence before it can occur since the 9/11 attacks,¹² advances in surveillance-related technology means that police officials can now engage in the same type of surveillance as a crime-prevention strategy.¹³ The techniques for such preventive strategies are multifaceted. In the standard policing context, examples of these techniques include the erection of large-scale surveillance cameras throughout urban areas and the maintenance of gang watch lists.¹⁴ In the national security context, we see the provocative use of informants and the FBI proactively visiting communities to conduct interviews without any legal suspicion that members of those communities are connected to terrorism. And finally, is there any clearer message that prevention is the order of the day when the issue of immigration enforcement is represented by the idea that the country must build a wall? Theoretically, there is nothing more preventive than building a physical boundary to keep noncitizens out, and it is also clear which type of noncitizens need to be deterred from entry when the wall under construction/debate is located at only one of the United States' two major land borders. In each case, the notion of prevention is rooted in law enforcement's unshakeable belief that target communities commit more crime, are just a step away from being radicalized into terrorist attackers, or will illegally cross the border to break the law here with impunity.¹⁵ Even though all sorts of neutral statistics show

11. See *infra* Part I.A.–C. (analyzing the police perception of the "jungle," the "border" region, and the "terrorist zone").

12. See *infra* notes 322–23 and accompanying text.

13. See discussion *infra* Part V.A.

14. See, e.g., Rick Rojas, *In Newark, Police Cameras, and the Internet, Watch You*, N.Y. TIMES (June 9, 2018), <https://www.nytimes.com/2018/06/09/nyregion/newark-surveillance-cameras-police.html> [<https://perma.cc/TEW6-FWKBJ>]; Jake Offenhartz, *The NYPD's Expanding Gang Database Is Latest Form of Stop & Frisk, Advocates Say*, GOTHAMIST (June 13, 2018, 3:00 PM), <https://gothamist.com/news/the-nypds-expanding-gang-database-is-latest-form-of-stop-frisk-advocates-say> [<https://perma.cc/4TT3-3YUT>].

15. Those concerns can certainly overlap as well, as demonstrated by President Trump's recent comments about supposed gang members and terrorists using the cover of the Central American migrant caravan making its way to the Mexico-U.S. border so as to infiltrate and carry out violent activities. Jeremy W. Peters, *Caravan Rhetoric Intersects with Deadly Hatred*, N.Y. TIMES (Oct. 30, 2018) ("Mr. Trump tweeted about the caravan, 'Criminals and unknown Middle Easterners are mixed in,' a claim he later walked back because he said he did not have evidence.").

that crime is going down, that terrorist attacks are far less frequent and deadly than traffic accidents,¹⁶ and that illegal immigration is much less prevalent than in the past, these have no impact on official law enforcement attitudes demanding more and greater prevention.¹⁷ And in these three areas, the accretion of power, rooted in preventive logic, has created or furthered the characteristics of a police state.

This Article examines the symbiotic relationship between national security policies borne of the war on terror, and the practices of domestic police forces developed through the era of mass incarceration and war on drugs. In examining the relationship, we see major hallmarks of a repressive police state solidify both within our discourse and the police practices themselves. Through a discussion of the theoretical underpinnings of the security state and its attendant police practices, as well as the legal framework that has broadened police powers and justified the national security state's excesses to a great degree, the Article probes how much the United States has come to resemble a police state.

I. THEORY AND GEOGRAPHY

In a recent book, Bernard Harcourt situates American law enforcement strategies in a larger governing paradigm he calls “the Counterrevolution,” which is rooted in theories of counterinsurgency strategy adopted by former colonial powers.¹⁸ The chief example and

16. This remains the case, even despite the rising number of mass shootings that have begun to be recognized as domestic terrorism. See Sabrina Tavernise et al., *Fight Turns to Domestic Terror Without a Clear Path to Follow*, N.Y. TIMES, Aug. 6, 2019, at A1 [<https://perma.cc/9BKA-ZFRY>].

17. See, e.g., John Gramlich, *5 Facts About Crime in the U.S.*, Pew Research Center (Jan. 3, 2019), <https://www.pewresearch.org/fact-tank/2019/01/03/5-facts-about-crime-in-the-u-s/> [<https://perma.cc/S9T3-J3ZA>] (discussing the recent decrease in crime rates according to the FBI annual report and the Bureau of Justice Statistics National Crime Victimization Survey). Compare National Consortium for the Study of Terrorism and Responses to Terrorism, *START Fact Sheet on American Deaths in Terrorist Attacks, 1995-2016*, https://www.start.umd.edu/pubs/START_AmericanTerrorismDeaths_FactSheet_Nov2017.pdf [<https://perma.cc/6HKU-8A3B>] (noting sixty-one terrorist attacks in the United States in 2016, resulting in sixty-eight total fatalities), with National Highway Traffic Safety Administration, *Summary of Motor Vehicle Crashes Fact Sheet*, <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812580> [<https://perma.cc/F7XA-GEAK>] (noting 7,277,000 police-reported motor vehicle crashes in 2016, resulting in 37,461 fatalities). See, e.g., Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, Pew Research Center (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/> [<https://perma.cc/C9KX-TYGT>] (noting that “[t]he number of unauthorized immigrants living in the United States has dropped to the level it was in 2004”).

18. BERNARD HARCOURT, *THE COUNTERREVOLUTION: HOW THE GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS* 199 (2018).

inspiration for this uniquely American phenomenon is the French experience in colonial Algeria, replete with heavy-handed and brutal tactics like torture and extrajudicial killings, which in turn inspired the American counterinsurgency doctrine in Afghanistan and Iraq.¹⁹ But in contrast to colonial Algeria, or even post-2003 Iraq or Afghanistan, there is no war of liberation or insurgency to counter in present-day America. In Harcourt's words, in "the absence of any domestic uprising," the Counterrevolution "is aimed not against a rebel minority—since none really exists in the United States—but instead it creates the illusion of an active minority which it can then deploy to target particular groups and communities, and govern the entire American population on the basis of a counterinsurgency warfare model."²⁰

It employs three main strategies. The first is to achieve "[t]otal information awareness of the entire American population" through mass data collection and surveillance.²¹ In reaching this level of information on the population at large, the government can then go about pursuing its second strategy, "extract[ing] an active minority at home."²² But rather than being a well-delineated group of national liberation or insurgent organization, this active minority is "ill-defined", and its "boundaries shift depending on the perceived threat, but that generally includes American Muslims and Mexicans, police protestors, African American and Latino social activists, and other communities of color."²³ The purpose of the first two strategies then serves the third and ultimate aim, to "win the hearts and minds of Americans."²⁴ By encouraging and then monitoring Americans' consumption of social media and digital entertainment, government officials can gather vast amounts of data on the population, as well as effectively disseminate critical messaging about its policy goals.²⁵ The actors who direct and carry out the Counterrevolution, in Harcourt's view, represent a new kind of security apparatus, are housed in various areas of influence along the government-corporate continuum, and include local police officials.²⁶

19. *Id.* at 37–49.

20. *Id.* at 199–200.

21. *Id.* at 200.

22. *Id.*

23. *Id.*

24. *Id.* at 201.

25. *Id.*

26. *Id.* (noting that the Counterrevolution represents "a security apparatus composed of White House, Pentagon, and intelligence officials, high-ranking congressional members, FISC judges, security and Internet leaders, police intelligence divisions, social-media companies, Silicon Valley executives, and multinational corporations").

In articulating his theory, Harcourt offers a powerful vision of a society under surveillance that also acquiesces in the most controversial and hostile of its government's policies. But as impressive and detailed as his theory is, it should be noted that the legal architecture granting more and expanded powers to the police has long existed, well before the war on terror innovations and the expansion of mass digital surveillance.²⁷ The gist of this Article, therefore, is to show how law enforcement actors across the federal-state divide operate on both sides of the legal lines in service of more generalized goals of accumulating power and discretion, outside of any larger organized system of control. Often they seek greater power, even when that can make them less trusted or effective in the communities in which they operate.²⁸ Regardless, the war on terror and war on crime models interact in a fluid manner to influence the development of the most proactive and controversial of police policies.²⁹ That the policies can be cloaked in a veil of preventing crime or terror before they come to fruition only serves to sell the public on the notion that curtailing privacy rights and expanding police power are the only ways to keep us safe.

A. *The Jungle*

Law enforcement has signaled who the quintessential criminal, terrorist, and illegal immigrant are in its view.³⁰ Before examining these constructs—rooted as they are in reductive stereotypes³¹—more explicitly, an examination of the geography of where these threats are located tips law enforcement's hand. In all instances, these locales, even though clearly part of the United States, are considered foreign zones. In a study detailing the police torture scandal that shook Chicago in the 1970s and 1980s, the historian Julilly Kohler-Hausmann describes the use of the metaphor of the “jungle” to characterize the inner city as a part of the home front that was effectively foreign.³²

27. See *supra* note 3 and accompanying text.

28. See, e.g., Malia Wollan and Charlie Savage, *Holder Tells A Muslim Group Sting Operations Are “Essential,”* N.Y. Times (Dec. 12, 2010), <https://www.nytimes.com/2010/12/12/us/politics/12holder-1.html> [<https://perma.cc/94SV-6CGB>] (then-Attorney General arguing to Muslim advocacy group in California that the use of informants in their communities was a terrorism-fighting tool of the highest importance).

29. See, e.g., Su'ad Abdul Khabeer, *Forum Response: Islam on Trial*, BOSTON REV. (Feb. 27, 2017), <http://bostonreview.net/forum/islam-trial/suad-abdul-khabeer-suad-abdul-khabeer-responds-amna-akbar-and-jeanne-theoharis> [<https://perma.cc/ZMW7-J5PU>].

30. See *infra* Part II.

31. See *infra* Part II.

32. Julilly Kohler-Hausmann, *Militarizing the Police: Officer Jon Burge, Torture, and War in the “Urban Jungle,”* in CHALLENGING THE PRISON-INDUSTRIAL

Although the metaphor was not new, and had been employed in both the British colonial context and the American context by the early twentieth century, it drew new life by the 1960s and the association of the Vietnam War with jungle warfare.³³ Police and military officials likened the role of the police officer in urban areas to that of a soldier in the jungle, with all the attendant assumptions such a term entails.³⁴ Politicians and pundits also picked up on the metaphor and employed it in service of enhancing police powers to tackle the American problem of crime, now imbued with a sense of foreignness.³⁵ Interestingly, local organizations in the targeted zone, most notably the Black Panthers, also influenced by the Vietnam experience, referred to their communities as somehow distinct from the larger American polity.³⁶ Instead of the more alienating term “jungle,” they used the term “colony” to describe inner cities in America, and the distinction was clear.³⁷ In Kohler-Hausmann’s words:

Metaphors of colonialism and the jungle conflated domestic and foreign spaces, but whereas the notion of the jungle explained urban conditions as the result of natural processes that were indigenous to that space, the metaphor of colonialism implied a system of exploitation in which white oppressors were directly implicated in the deliberate underdevelopment of inner cities in America and entire nations abroad.³⁸

Popular culture also contributed to the depiction of the urban jungle, by releasing movies in which the Vietnam veteran returns to the United States to clean up the rotted urban areas by dispensing vigilante justice.³⁹ In any event, the point is clear; by depicting an American area as a hostile foreign land, the police allow themselves to operate with

COMPLEX: ACTIVISM, ARTS, AND EDUCATIONAL ALTERNATIVES 43–71 (Stephen J. Hartnett ed., 2011).

33. *Id.* at 47–48.

34. *Id.*

35. *Id.* at 48–52; Jeremy Travis & Bruce Western, *Poverty, Violence, and Black Incarceration*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 299 (Angela J. Davis ed. 2017) (citing the examples of Barry Goldwater, George Wallace, and Richard Nixon as employing the “jungle” metaphor to describe inner-city neighborhoods as specifically violent and overrun by criminals).

36. Kohler-Hausmann, *supra* note 32, at 52–53.

37. *Id.* This metaphor endures. *See also* CHRIS HAYES, *A COLONY IN A NATION* (2017) (employing the same metaphor of the inner-city as a colony, whose occupants enjoy lesser rights than citizens of a nation, in light of the protests against police violence that began in Ferguson, Missouri in the summer of 2014).

38. Kohler-Hausmann, *supra* note 32, at 52.

39. *Id.* at 54–57.

greater force and impunity, as they are engaged in something more akin to armed conflict rather than in serving the communities to which they feel a responsibility to protect.⁴⁰

B. The Border Region

The border region of the United States is one in which a particularized legal regime pertains. Specifically, the Supreme Court has long allowed the maintenance of immigration enforcement checkpoints not simply at any crossing point, but at a “reasonable distance” from the frontier, which has come to be defined as one hundred miles from any land or sea border.⁴¹ Not restricted to the border region itself, this one-hundred-mile zone covers most of the population of the United States, some 200 million people, as international airports come within its confines.⁴² In such an area, immigration enforcement authorities can operate fixed checkpoints and stop motorists to question them as to their immigration status without any legally cognizable suspicion.⁴³ According to the Supreme Court in its 1975 decision authorizing these practices, the Constitution is not offended “even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry.”⁴⁴ An earlier decision, which had rejected the government’s position that it be allowed to stop all Mexican-Americans in the border zone without any particular suspicion, did note that “Mexican appearance” is a relevant and legitimate consideration in determining whether that suspicion exists.⁴⁵ So while the legal regime allows for suspicionless stops and questioning of anyone as to their immigration status throughout the “reasonably” expanded one-hundred-mile zone, which would include all international airports and the Canadian border, the real targeted zone is the southern border.⁴⁶ The explicit recognition of “Mexican appearance” as a

40. Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 612 (2016) (noting how the “[w]arrior ethos . . . has promoted a self-image of officers as soldiers on the front lines in the never-ending battle to preserve order and civilization against the forces of chaos and criminality”).

41. See ACLU, *ACLU Factsheet on Customs and Border Protection’s 100 Mile Zone*, <https://www.aclu.org/other/aclu-factsheet-customs-and-border-protections-100-mile-zone> [https://perma.cc/H5EQ-SXPN]; Elizabeth N. Jones, *Possible Problems at the San Clemente Checkpoint*, 6 VA. J. CRIM. L. 43, 50–51 (2018).

42. *ACLU Factsheet*, *supra* note 41.

43. *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1975).

44. *Id.* at 563.

45. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975).

46. For articles demonstrating the central place *Brignoni-Ponce* and *Martinez-Fuerte* occupy in allowing racial profiling to take hold in law enforcement, see Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land*: United

legitimate factor driving immigration enforcement marks that particular border as a region apart, and leads directly to racial profiling and the fact that an extremely high percentage of those deported are citizens of Mexico and other Latin American countries.⁴⁷ In fact, press coverage of recent immigration stops in New Hampshire and Maine remarked that such activity, while legally unremarkable, took place far from the “ground zero” of immigration enforcement at the U.S.-Mexico border.⁴⁸ Documents released by the Border Patrol as a result of FOIA litigation initiated by the ACLU reveal that its agents operate virtually without restriction in the one-hundred-mile zone, in cities and areas far from the border itself.⁴⁹ The effects of this regime have been stark; rather than lax federal immigration enforcement, the southern border zone has been militarized, many more noncitizens have been detained, and prosecutions for immigration-related crimes have increased exponentially.⁵⁰

C. The Terrorist Zone

Apart from border zones and the inner-city, there is the more recent phenomenon of those areas in which appreciable numbers of

States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering, 98 GEO. L.J. 1005 (2010); Bernard E. Harcourt, United States v. Brignoni-Ponce and United States v. Martinez-Fuerte: *The Road to Racial Profiling*, in CRIMINAL PROCEDURE STORIES 315–49 (Carol Steiker ed., 2006).

47. Johnson, *supra* note 46, at 1025 (“[B]esides the lack of evidence supporting the claims of economic and social costs of undocumented immigrants, there is an unstated assumption in the Court’s—as well as the U.S. government’s briefs’—reference to ‘Mexican appearance.’ Namely, the reference assumes that there such a thing. In fact, people from Mexico run the gamut in terms of phenotypes, with there being persons of both fair and dark complexions of Mexican ancestry. Nevertheless, stereotypes of ‘Mexican appearance’ persist, and the *Brignoni-Ponce* Court ultimately appears to have sanctioned reliance on such stereotypes by the Border Patrol.”).

48. Ray Sanchez, *Border Patrol Agents Are Stopping People on Highways in New England to Check Their Citizenship*, CNN (June 24, 2018), <https://www.cnn.com/2018/06/23/us/maine-new-hampshire-border-patrol-check-points/index.html> [<https://perma.cc/N6R2-LZMU>].

49. Max Rivlin-Nadler, *Newly Released FOIA Documents Shed Light on Border Patrol’s Seemingly Limitless Authority*, THE INTERCEPT (Jan. 7, 2019), <https://theintercept.com/2019/01/07/cbp-border-patrol-enforcement-law-course/> [<https://perma.cc/A5SB-8ZFU>].

50. Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 639 (2012). This does not even take into account the disturbing, yet-not-insignificant, trend of U.S. citizens being detained and deported from the United States by the immigration authorities. See Cassandra Burke Robertson & Irina D. Manta, *A Long Running Immigration Problem: The Government Sometimes Detains and Departs U.S. Citizens*, THE CONVERSATION (July 8, 2019, 7:09 AM), <https://theconversation.com/a-long-running-immigration-problem-the-government-sometimes-detains-and-departs-us-citizens-119702> [<https://perma.cc/U3AK-8259>].

Muslim-Americans live constituting over-surveilled and suspect zones in the eyes of law enforcement authorities. Consider Dearborn, Michigan, a city of around 95,000 people, which boasts the highest percentage of Arab and Muslim-American residents in the country.⁵¹ According to leaked documents, the government maintains a watchlist of “known or suspected terrorists,” and the standards governing how individuals are added or removed from the list are nebulous, as all the authorities have to show is that there is “reasonable suspicion” that someone is affiliated with terrorism.⁵² Out of nearly 700,000 people, over forty percent of those listed have “no recognized terrorist group affiliation.”⁵³ Inclusion on the list exposes an individual to highly intrusive and extensive searches and questioning when traveling, as well as collection of their biometric data, among other inconveniences.⁵⁴ While the city with the highest number of entrants on the list was New York, a city with over eight million residents, second place was occupied by Dearborn, with over eighty times less the population.⁵⁵ Residents of the city have long since complained that they are under government surveillance, and assume that their communications both in public and private are being monitored.⁵⁶ In 2015, when an FBI plane was spotted flying over the area, the fear that the community was being subject to mass surveillance was so great, bureau officials had to publicly assure local residents and their congressional representatives that the flights were related to an ongoing criminal investigation, not general surveillance.⁵⁷ Dearborn is not the only area with a high concentration of Muslim-Americans who are subject to extensive law enforcement monitoring. Young male residents of Somali origin in the Minneapolis-St. Paul area report being approached with some regularity by FBI agents, asking if they are

51. Jeremy Scahill & Ryan Devereaux, *Watch Commander: Barack Obama's Secret Terrorist-Tracking System, By the Numbers*, THE INTERCEPT (Aug. 5, 2014, 11:45 AM), <https://theintercept.com/2014/08/05/watch-commander/> [https://perma.cc/9QW4-7A52].

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Christopher Mathias et al., *The City that Bears the Brunt of the National Terror Watchlist*, HUFFPOST (Oct. 3, 2017 at 5:00 AM), https://www.huffpost.com/entry/dearborn-michigan-terror-watchlist_n_59d27114e4b06791bb122cfe [https://perma.cc/7GVB-Z9EP].

57. Robert Snell, *FBI Says Spy Flights Not Aimed at Racial Groups*, DETROIT NEWS (Aug. 6, 2015, 3:02 PM), <https://www.detroitnews.com/story/news/local/wayne-county/2015/08/05/fbi-denies-targeting-muslims-amid-surveillance-plane-flap/31172399/> [https://perma.cc/5MU9-2P73].

interested in joining an extremist group such as ISIS.⁵⁸ Several of those approached have articulated their suspicions that the FBI wants them to work as confidential informants in the community, leading to a general sense that everyone is being watched.⁵⁹ The overall impression, then, is that residents of Muslim-American communities inhabit zones where the sense of pervasive surveillance and law enforcement contact consistently remind them that the authorities consider them perennially susceptible to transforming into a terrorist threat.⁶⁰

II. ASSOCIATIONS AND LAW ENFORCEMENT ASSUMPTIONS

Once we understand where the “active minority” is located, we then can seek to define what it is about that minority that is a threat. Like the geographic affiliation previously discussed, certain minority groups are identified as having a greater propensity toward a type of dangerous behavior. In this instance, the association of African-Americans with crime and American Muslims with terrorism represent the main examples.⁶¹ While neither of these points is in any way novel, it bears note that each of the examples has had long-lasting and profound effects.

The association of blacks with crime⁶² is rooted in the long and bitter experience that began many centuries ago with slavery, continued through Jim Crow, and now finds expression in the mass incarceration

58. Joseph Sabroski, *How Somali Americans Struggle with Warrantless FBI Visits*, TRT WORLD (May 30, 2018), <https://www.trtworld.com/magazine/how-somali-americans-struggle-with-warrantless-fbi-visits-17857> [https://perma.cc/82A3-TQ7A]; Su'ad Abdul Khabeer, *Forum Response: Islam on Trial*, BOSTON REV. (Feb. 27, 2017), <http://bostonreview.net/forum/islam-trial/suad-abdul-khabeer-suad-abdul-khabeer-responds-amna-akbar-and-jeanne-theoharis> [https://perma.cc/ZMW7-J5PU] (“Counterterrorism programs in Minnesota are not only transforming mosques into sites of surveillance but have sought to turn social service agencies and public institutions . . . into sites of ‘prevention.’”).

59. Sabroski, *supra* note 58; Abdul Khabeer, *supra* note 58.

60. See Abdul Khabeer, *supra* note 58.

61. *Id.*

62. The contributors in a recent volume edited by law professor Angela Davis focus on black men as the most targeted group, and she explains the reasoning behind this focus as rooted in four points: 1) “Black boys are disproportionately arrested and detained;” 2) “Black men are disproportionately arrested;” 3) “Black men are disproportionately likely to be killed or injured during a police encounter;” and 4) “Black men are disproportionately imprisoned and receive longer sentences.” See Angela J. Davis, *Introduction to POLICING THE BLACK MAN*, *supra* note 35, at xiv-xvii. In contrast, Paul Butler cautions against highlighting black men as the primary target of law enforcement. PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 162 (2017) (“The focus on black men only distorts the pervasiveness of white privilege, which harms black women as much as it harms black men. Policies that ignore this fact not only make the plight of African American women invisible, they lead to the wrong kind of solutions for black men.”).

phenomenon.⁶³ As in previous eras of deep racial injustice, where poverty and violence played the central role in cementing the subordinate status of the African American, those two factors have brought us mass incarceration, with its highly disproportionate representation of blacks in the criminal justice system.⁶⁴ The characterization of the black man as criminal, used as a vehicle to the entirety of the other African-American population to render them subordinate, has been well-documented.⁶⁵ A similar position pertains to the Muslim in the terrorist context. As has been pointed out repeatedly, the notion that Muslims are singularly predisposed to commit terrorist acts retains a powerful hold on the collective imagination.⁶⁶ Concomitant with this, Muslims are thought to be uniquely prone to be “radicalized,” a pseudoscientific theory posited by law enforcement that sets out the supposed stages a previously peaceful Muslim goes through on his path toward committing violence in the name or cause of his faith.⁶⁷

Interestingly, both constructs—that of African American as criminal and Muslim as terrorist—have been the subject of executive branch intervention geared to overcome the propensity of its subject for violence and criminality. Paul Butler cites the example of President Obama’s initiative, dubbed My Brother’s Keeper, which “focuses on mentoring, job training, and college prep for young men of color,” and was unveiled in 2014 in the wake of the 2013 Trayvon Martin shooting

63. See, e.g., Bryan Stevenson, *A Presumption of Guilt: The Legacy of America’s History of Racial Injustice*, in *POLICING THE BLACK MAN*, *supra* note 35, at 3–30.

64. Travis & Western, *supra* note 35, at 295 (“[M]ass incarceration grew out of social conditions of poverty and violence, and has created a novel kind of social inequality in which full participation in American life has been foreclosed in poor black communities. Like earlier chapters in African American history—slavery, Jim Crow, and the emergence of the northern ghetto—the racial inequality produced by mass incarceration has been perpetuated by the levers of law and political control.”).

65. See, e.g., KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (exhaustively documenting how linking blacks with a greater propensity toward criminality was a project rooted in affirming white superiority and privilege).

66. See Caroline Mala Corbin, Essay, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 *FORDHAM L. REV.* 455, 458 (2017) (“The idea that terrorists are Muslim is pervasive in the United States.”); WADIE E. SAID, *CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS* 13 (2015) (“[O]ur societal construction of the typical terrorist is Muslim and/or Arab or, even more puzzling, ‘Muslim-looking.’”); Leti Volpp, *The Boston Bombers*, 82 *FORDHAM L. REV.* 2209–11 (2014); JOHN TEHRANIAN, *WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY* 122–23 (2010).

67. SAID, *supra* note 66, at 4–19.

to help minority youth from going down the spiral of criminality.⁶⁸ However, as Butler notes: “It is far from clear what a program premised on black male achievement has to do with the problem of state and private violence against black men. Unless, of course, one thinks that African-American men bear some responsibility for that violence.”⁶⁹ The idea that black youth are somehow preternaturally more susceptible to becoming career criminals resembles the thinking that Muslims are more prone to being “radicalized.”⁷⁰ The executive branch program on terrorism prevention is more direct in its implications that Muslims are the target of its efforts. Entitled Countering Violent Extremism (CVE), it requests that all Americans be vigilant and engage in surveillance of Muslims (as the population most likely to become violent extremists) in all areas of life.⁷¹ Further, it asks Muslim Americans themselves to be watchful in their own communities so as to prevent violent extremism from taking hold there.⁷² The government has tipped its hand here as well; the Trump administration, while backing off its initial proposal to rename CVE as “Countering Radical Islamic Extremism,” has indicated that the focus of the program will be “radical Islam,” presumably to the exclusion of other actors.⁷³

In the American national security state, these categories can converge. Consider that when the New York Police Department issued its 2007 report on the radicalization it felt threatened the city, it identified the groups that represented the greatest propensity for radicalization.⁷⁴ In what the report identified as twenty-eight “ancestries of interest,” nearly all were foreign, the sole exception being the category of “American Black Muslim.”⁷⁵ This is not the sole linkage

68. BUTLER, *supra* note 62, at 163.

69. *Id.*

70. *See* Abdul Khabeer, *supra* note 58.

71. *See* U.S. DEP’T OF HOMELAND SEC., Countering Violent Extremism Task Force, *What is CVE?*, <https://www.dhs.gov/cve/what-is-cve> [<https://perma.cc/JY5K-8S8P>] (“CVE[] refers to proactive actions to counter efforts by extremists to recruit, radicalize, and mobilize followers to violence.”); Wadie Said, *Forum Response: Islam on Trial*, BOSTON REV. (Feb. 27, 2017), <http://bostonreview.net/forum/islam-trial/wadie-said-wadie-said-responds-amna-akbar-and-jeanne-theoharis> [<https://perma.cc/FT5Y-YJNR>].

72. Said, *Forum Response*, *supra* note 71.

73. *Id.*; Corbin, *supra* note 66, at 484.

74. MITCHELL D. SILBER & ARVIN BHATT, NYPD INTELLIGENCE DIV., RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT (2007), https://sethgodin.typepad.com/seths_blog/files/NYPD_Report-Radicalization_in_the_West.pdf [<https://perma.cc/D9WM-FBEP>].

75. *Id.*; *see also* MATT APUZZO & ADAM GOLDMAN, ENEMIES WITHIN: INSIDE THE NYPD’S SECRET SPYING UNIT AND BIN LADEN’S FINAL PLOT AGAINST AMERICA 125 (2013); SAID, *supra* note 66, at 15; Abdul Khabeer, *supra* note 58.

between African American purported criminality and the terrorism lens. In August 2017, *Foreign Policy* magazine revealed that a secret FBI internal counterterrorism report had unveiled a new category of threat: the “Black Identity Extremist (BIE),” someone who turns to violent extremism because “incidents of *alleged police abuse against African Americans . . .* have continued to feed the resurgence in ideologically motivated, violent criminal activity.”⁷⁶ The revelation of the report’s existence was met with immediate and pointed criticism that this was merely a continuation of the FBI’s long-standing hostility to politically active black organizations in general.⁷⁷ According to criminologist Geoff Ward, the BIE formulation constitutes “a legal rationale by which to equate anti-racist activists and White supremacist organizations, and to criminalize and violently repress lawful protests of state violence.”⁷⁸ To date, the sole prosecution of someone as a BIE, for illegal possession of a firearm, was apparently the result of Facebook posts the suspect made criticizing police that the FBI found because of a video posted on the website Infowars.⁷⁹ A judge eventually dropped the charge against the man, Rakem Balogun, as an improper application of the firearm law.⁸⁰

In both categories, black identity serves as a key component of a grouping deemed to be a threat. In the first example, the stereotypical criminal dovetails with the stereotypical terrorist.⁸¹ In the second, being black and active against hostile state policies or practices leads the FBI to attempt to concoct a category of terrorist or extremist that stands up

76. Jana Winter & Sharon Weinberger, *The FBI’s New U.S. Terrorist Threat: ‘Black Identity Extremists,’* FOREIGN POLICY (Oct. 6, 2017, 11:42 AM) (emphasis added), <https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/> [https://perma.cc/AD8F-4X79] (quoting from FBI report).

77. *Id.*; Khaled A. Beydoun & Justin Hansford, Opinion, *The F.B.I.’s Dangerous Crackdown on ‘Black Identity Extremists,’* N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/opinion/black-identity-extremism-fbi-trump.html?searchResultPosition=1> [https://perma.cc/MK5G-P6FS]. More recently, the FBI has disavowed any reliance on the BIE category as a target of its investigations in its entirety. Hannah Allam, *5 Takeaways About the Trump Administration’s Response to Far-Right Extremism,* NPR (June 7, 2019, 5:42 PM), <https://www.npr.org/2019/06/07/730346019/5-takeaways-about-the-trump-administrations-response-to-far-right-extremism> [https://perma.cc/DF5S-XMM5].

78. Geoff Ward, *Living Histories of White Supremacist Policing: Toward Transformative Justice,* 15 DUBOIS REV. 167, 181 (2018).

79. Sam Levin, *Black Activist Jailed for His Facebook Posts Speaks Out About Secret FBI Surveillance,* THE GUARDIAN (May 11, 2018, 3:01 EDT), <https://www.theguardian.com/world/2018/may/11/rakem-balogun-interview-black-identity-extremists-fbi-surveillance> [https://perma.cc/3CGT-5VPW].

80. *Id.*

81. Abdul Khabeer, *supra* note 58.

poorly even to the most superficial scrutiny.⁸² Where Muslims are predisposed to radicalization in the official view, African Americans are presumed to be just a stone's throw from shifting from criminal to extremist via a religious identity or oppositional activism.⁸³ Perhaps none of the previous discussion would be so noteworthy were the authorities and media not so willing to downplay the threat posed by rightwing extremists in the United States, a trend that has only begun to shift as a result of mass shootings driven by extreme right-wing theories.⁸⁴ In an empirical study by *Justice Quarterly* that examined the 136 terrorist attacks in the United States over the period 2006–15, the authors found that attacks by Muslim perpetrators were likely to receive, on average, 357% more media coverage than attacks by other assailants.⁸⁵ This is the case even though, during the period 2008–16, rightwing or white terrorists were responsible for nearly twice as many attacks as Muslims.⁸⁶ Additionally, when the FBI investigated white supremacist infiltration of law enforcement agencies, it did so quietly and was “reluctant to publicly address that threat or point out the movement’s longstanding strategy of infiltrating the law enforcement community,” according to a 2017 article in the *Intercept*.⁸⁷ There were no corresponding CVE or My Brother’s Keeper style programs for what is clearly a population that poses as great—or greater—a threat of politicized violence as any other.

In the Latino context, there is the construct of the “criminal alien,” who represents the archetype of who should be deported, *i.e.*, the non-citizen who has broken the law in some fashion and receives an additional sanction to go with any punishment related to a crime: removal from the United States.⁸⁸ This convergence or melding of the

82. See, *e.g.*, Levin, *supra* note 79.

83. See Abdul Khabeer, *supra* note 58.

84. See Erin M. Kearns et al., *Why Do Some Terrorist Attacks Receive More Media Attention Than Others?*, 36 JUST. Q. 985, 1002 (2019).

85. *Id.* at 985; Mona Chalabi, *Terror Attacks by Muslims Receive 357% More Press Attention, Study Finds*, THE GUARDIAN (July 20, 2018, 7:00 EDT), <https://www.theguardian.com/us-news/2018/jul/20/muslim-terror-attacks-press-coverage-study> [<https://perma.cc/YQL6-NTXR>].

86. Chalabi, *supra* note 85.

87. Alice Speri, *The FBI Has Quietly Investigated White Supremacist Infiltration of Law Enforcement*, THE INTERCEPT (Jan. 31, 2017, 6:10 AM), <https://theintercept.com/2017/01/31/the-fbi-has-quietly-investigated-white-supremacist-infiltration-of-law-enforcement/> [<https://perma.cc/V7SJ-GTZB>]; see also Ward, *supra* note 78.

88. Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a Post-Racial World*, 76 OHIO ST. L.J. 599, 650 (2015) (“Despite its creation through race-neutral laws, crimmigration enforces racial politics as well as organizes and constructs racial identities through the laws and procedures it institutes and uses for detection, arrest, detention, and surveillance. Through the label of the ‘criminal alien,’

immigration sphere with that of criminal justice is referred to as “cimmigration,” and results in the stigmatization of the entire Latino population in the United States as suspect: illegally resident in the United States and a criminal presence.⁸⁹ Relatedly, high percentages of those deported each year are from Latin American nations.⁹⁰ In 2017, citizens of Mexico, Guatemala, Honduras, and El Salvador made up some ninety percent of those deported from the United States.⁹¹ Further, immigration law itself has relied historically on national security considerations, thereby linking the threat of the Latino immigrant with that of the Muslim terrorist.⁹² But let us note the significant factor of American citizenship. Even though African Americans are treated as a kind of other, quasi-foreign community outside the mainstream by law enforcement, they are not subject to deportation. The citizenship status of Muslims targeted by terrorism surveillance and prosecution seems beside the point, as those targeted make up another kind of religiously-determined other, one which can include native-born Muslims and converts. For Latinos, however, their heritage leaves them suspect of being here without status, and there is no special, high-level, executive branch program to reform or rehabilitate them. The goal is simply to remove them from the United States, all the better and quicker if they have a criminal record.

III. LAW ENFORCEMENT POWERS IN THE WAR ON TERROR AT HOME

The construction of who constitutes a threat in law enforcement’s eyes, however incomplete or discriminatory it may be, enhances the dynamic of law enforcement tactics migrating to the war on terror arena, and vice versa.⁹³ The following section considers three examples

the law legitimates the exclusion and exploitation of Latinos, thereby, ensuring their subordination and marginal status.”).

89. César Cuauhtémoc García Hernández, *Creating Cimmigration*, 2013 BYU L. REV. 1457, 1459 (demonstrating the racially charged origins of the convergence of immigration and criminal enforcement that resulted in the cimmigration phenomenon).

90. See U.S. IMMIGRATION & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 15–18 (2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf [<https://perma.cc/LWJ2-SSVE>] (dividing total number of deportations from those four countries by the total number of those removed in 2017).

91. *Id.*

92. See, e.g., Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475–77 (2018); Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669, 671 (2016); Jennifer Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1850–56 (2007).

93. See Abdul Khabeer, *supra* note 58.

of how the security state has in fact drawn from domestic constitutional law in the area of criminal procedure to justify highly controversial and expansive policies serving the war-on-terror agenda. While two of the examples are overt and recognized, the third is not, but the effect is clear. When the government wishes to selectively employ Supreme Court precedent from the domestic policing context to promote or bolster its national security policies abroad (for the most part), it will not hesitate to do so, despite avowals that the war on terror cannot be likened to law enforcement on the home front.⁹⁴

A. *Miranda v. Arizona and Interrogation*

The first example of quasi-illegal policies put in place to further the war-on-terror agenda is that of the interrogation of the terrorism suspect. In the wake of the controversy surrounding the administration of *Miranda* warnings to the individual behind the 2009 attempt to detonate an explosive hidden in his underwear on board a commercial airliner, the FBI eventually issued a memorandum in late 2010 governing when those warnings would be required in a terrorism investigation.⁹⁵ If the agency had reason to believe that suspect had actionable intelligence on an imminent attack, the memo authorized its agents to interrogate the suspect without administering the warnings, in the interests of public safety.⁹⁶ This decision was not subject to judicial review.⁹⁷ Its logic was informed by the Supreme Court's 1984 decision in *New York v. Quarles*,⁹⁸ which ruled that the statements of a suspect taken in violation of *Miranda* could be admitted against him if eliciting those statements was dictated by public safety considerations.⁹⁹ Quarles was a rape suspect who was tracked by police to a grocery store and arrested; upon noticing that he had an empty shoulder holster, the

94. See Charlie Savage, *Delayed Miranda Warning Ordered for Terror Suspects*, N.Y. TIMES (March 24, 2011), <https://www.nytimes.com/2011/03/25/us/25miranda.html> [<https://perma.cc/EX7A-FZNM>] [hereinafter *FBI Public Safety Memo*]; Memorandum from the U.S. Dep't of Justice, Office of Legal Counsel, Memorandum for the Attorney Gen. Re: Applicability of Fed. Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (July 16, 2010), https://www.aclu.org/files/assets/2014-06-23_barron-memorandum.pdf [<https://perma.cc/598Y-LECR>] [hereinafter DOJ Aulaqi Memo].

95. For a discussion of this background, see SAID, *supra* note 66, at 80–83; see also *F.B.I. Public Safety Memo*, *supra* note 94.

96. *FBI Public Safety Memo*, *supra* note 94.

97. See SAID, *supra* note 65, at 81–83.

98. 467 U.S. 649 (1984).

99. *Id.* at 654–59. For a statistical study of the invocation of the public safety exception to *Miranda*, see Joanna Wright, *Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception*, 111 COLUM. L. REV. 1296, 1309–25 (2011).

police asked him where he had hidden his gun before reading him the *Miranda* warnings.¹⁰⁰ He revealed its location and this admission of the gun was allowed by the Supreme Court as in furtherance of general public safety considerations.¹⁰¹

But beyond the pressing matter of an imminent violent attack, the FBI memo also allowed for the interrogation of suspects without *Miranda* warnings for intelligence purposes, with no requirement that the suspect know about future acts of violence.¹⁰² In this, we see the contours of a familiar trend—law enforcement either being granted or granting itself an exceptional power, and then shifting the boundaries of the original exception. Again, this decision is not subject to judicial or other outside review beyond the confines of the FBI’s command structure.¹⁰³ However, the problem that arises in such a scenario is what to do with any confession or incriminatory admission that results from such an interrogation, as it is not subject to the public safety exception.

The answer comes in the form of simply halting the intelligence-driven interrogation, and then administering *Miranda* warnings to the suspect, on the assumption that he will simply repeat the confession so that it can be used against him in a criminal prosecution.¹⁰⁴ This scenario runs headlong into the Supreme Court’s decision in *Missouri v. Seibert*,¹⁰⁵ which ostensibly forbade the use of such “two-step” interrogations as an end-run around *Miranda*’s requirements.¹⁰⁶ *Seibert*, a 5-4 decision, featured a plurality opinion that would have banned the two-step practice as unconstitutional in all instances, and a single-Justice concurrence by Justice Kennedy, which argued that the “deliberate” use of the practice should be considered improper unless law enforcement has taken the proper “curative” measures to ensure the suspect did not feel coerced or unduly pressured to confess.¹⁰⁷ As Justice Kennedy’s vote was the tie-breaking one, his concurrence has effectively become the standard by which two-step interrogations are judged in the majority of circuits.¹⁰⁸

100. *Quarles*, 467 U.S. at 651–52.

101. *Id.* at 652, 654–60.

102. *FBI Public Safety Memo*, *supra* note 93.

103. *See Said*, *supra* note 66, at 81–82.

104. *See id.* at 82.

105. 542 U.S. 600 (2004).

106. *Id.* at 604.

107. *Id.* at 613–14; *id.* at 620–22 (Kennedy, J., concurring).

108. *See United States v. Abu Khatallah*, 275 F. Supp. 3d 32, 62 (D.D.C. 2017) (noting that “[t]he Circuits are somewhat split on which test controls. A large majority [the Third, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits] have applied Justice Kennedy’s test,” while recognizing the Sixth Circuit as the lone court to adopt the plurality’s test, and also that the D.C. Circuit has not taken a position).

Their use in terrorism prosecutions has been upheld in two recent cases involving terrorism-related charges, signaling that the two-step interrogation is an acceptable tactic in terrorism prosecutions, and that curative measures are relatively straightforward to apply.¹⁰⁹ A knowledge or understanding of the import of one's rights under *Miranda* and the consequences of waiving those rights is of no moment, even for foreign nationals who have no knowledge of or exposure to United States and do not speak English.¹¹⁰ Upholding the use of such a two-step process does not necessarily portend a fair process,¹¹¹ but here we see the Supreme Court's open-ended jurisprudence from the criminal procedure realm being applied in the national security context to the government's benefit.

B. Targeted Killing

The second example comes from wider war-on-terror policies as applied in the international arena, which in turn implicate the constitutional rights of American citizens. In 2011, a drone strike killed the American citizen and al-Qaeda figurehead Anwar al-Awlaki in Yemen.¹¹² The legal rationale for his killing came to light a few years

109. See Katherine Kaiser Moy, *Tailoring Seibert's Intent Inquiry to Two-Step Counterterrorism Investigations*, 71 STAN. L. REV. 215, 238-46 (2019) (discussing *United States v. Khweis*, No. 1:16-cr-0143, 2017 WL 2385355 (D.D.C. June 1, 2017) and *Abu Khatallah*, 275 F. Supp. 3d 32 (D.D.C. 2017)); see also Lee Ross Crain, Note, *The Legality of Deliberate Miranda Violations: How Two-Step National Security Interrogations Undermine Miranda and Destabilize Fifth Amendment Protections*, 112 MICH. L. REV. 453, 464-65, 482-86 (2013).

110. *Abu Khatallah*, 275 F. Supp. 3d at 68 ("Abu Khatallah's status as a foreign national is but one relevant factor in evaluating whether his *Miranda* waiver was knowing and intelligent, and courts have found waivers to be valid under similar circumstances. See, e.g., [*United States v. Yunis*, 859 F.2d [953,] 964-66 [(D.C. Cir. 1988)] (valid waiver despite defendant's ninth grade education and 'unfamiliarity with [U.S.] legal culture'); *United States v. Labrada-Bustamante*, 428 F.3d 1252, 1259 (9th Cir. 2005) (valid waiver even though the defendant 'might not be familiar with the United States' form of justice'); *United States v. Hasan*, 747 F. Supp.2d 642, 669 (E.D. Va. 2010) (valid waiver by 'non-English speaking and illiterate Somali nationals, without any connection to the United States'), *aff'd sub nom, United States v. Dire*, 680 F.3d 446 (4th Cir. 2012)").

111. See SAID, *supra* note 66, at 81-82 (criticizing the "inherent unfairness" of the two-step interrogation for intelligence purposes in terrorism prosecutions, and noting "once suspects have been interrogated for [significant periods of time] and then Mirandized, the likelihood that they would recognize the distinction between intelligence and law enforcement-driven questioning and therefore refuse to speak to the FBI is remote, to say the least").

112. Benjamin Weiser, *U.S. Ordered to Release Memo in Awlaki Killing*, N.Y. TIMES (Apr. 22, 2014), <https://www.nytimes.com/2014/04/22/nyregion/panel-orders-release-of-document-in-targeted-killing-of-anwar-al-awlaki.html> [<https://perma.cc/7BZU-SN8N>].

later when, in 2014, the Obama administration released a redacted version of the memo it relied on for authorizing the killing of an American citizen abroad without any due process.¹¹³ The memo was issued in 2010, and a federal court had ordered its release pursuant to a court order in a Freedom of Information Act lawsuit brought by the New York Times and the ACLU in 2014.¹¹⁴ As its author, David Barron, had been nominated for a position on the United States Court of Appeals for the First Circuit, the Obama administration chose to release a redacted version of the memo rather than resist the court order, in light of several senators' threats to block Barron's confirmation to the court were it not released.¹¹⁵

In addition to its central arguments about the laws of war and the ban on murdering U.S. citizens abroad,¹¹⁶ the memo invokes the Fourth Amendment almost as an afterthought on its very last page, briefly noting why killing al-Awlaki in Yemen does not constitute a seizure under the Fourth Amendment.¹¹⁷ Citing the leading case on police use of deadly force, *Tennessee v. Garner*,¹¹⁸ to liken al-Awlaki to a criminal suspect fleeing from the police, the memo makes short work of the Fourth Amendment seizure analysis: “[W]here high-level government officials have determined that a capture operation overseas is infeasible and that the targeted person is part of a dangerous enemy force and is engaged in activities that pose a continued and imminent threat to U.S. persons or interests [redacted section] the use of lethal force would not violate the Fourth Amendment [redacted section] and thus that the intrusion on any Fourth Amendment interests would be outweighed by ‘the importance of the governmental interests [that] justify the intrusion,’ *Garner*, 471 U.S. at 8, based on the facts that

113. Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, N.Y. TIMES (June 24, 2014), <https://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html> [<https://perma.cc/HLB9-7LMZ>].

114. *Id.*; *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 103 (2d Cir. 2014).

115. Savage, *supra* note 113.

116. *Id.* (“Mr. Barron cited and expressed disagreement with the work of Mary Ellen O’Connell, a University of Notre Dame law professor who has argued that Yemen was not an armed conflict zone. On Monday, Ms. O’Connell criticized the brevity with which Mr. Barron addressed her argument as ‘astonishing’ given the issue’s importance as a ‘linchpin’ of his legal rationale.”); *see also* Shirin Sinnar, Essay, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1600–04 (2016) (noting criticisms of the Barron memo); Curtis A. Bradley & Jack L. Goldsmith, *Obama’s AUMF Legacy*, 110 AM. J. INT’L L. 628, 642–43 & corresponding notes (2016) (noting criticism of American position on the existence of armed conflicts in countries where its drone program is operational).

117. DOJ Aulai Memo, *supra* note 94, at 41.

118. 471 U.S. 1 (1985).

have been represented to us.”¹¹⁹ The argument justifying the killing under the Fourth Amendment relies on the same logic as that under international law and the law of armed conflict; namely, that where capture of an operational leader in a war zone is not feasible or safe, a targeted strike is authorized.¹²⁰

The memo’s reliance on *Garner*, while necessary,¹²¹ briefly takes note of the distinct scenario it contemplates: “What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations will be very different from what would be reasonable in a situation like such as that at issue here.”¹²² This is a familiar refrain of the government—that national security is different and *sui generis*. Nevertheless, it draws on the precedent set in *Garner*, a civil case in which the Court defined when the police may use lethal force in the case of a teenager fleeing from the police after committing a burglary was shot in the head and killed.¹²³ Without getting further into a discussion of the merits of the memo, this brief section appears to encapsulate the government’s position on the applicability of domestic precedent from the law enforcement context transposed to the war on terror. Where law enforcement cases are useful (and unavoidable), they will be employed and cited positively. However, to the extent it is necessary to distinguish such domestic precedent so as to not be bound by its strictures, the government will make sure to point that out. The memo is a perfect illustration of this logic.

C. Inadvertence and Good Faith

This example speaks to a recurring theme in the Supreme Court’s Fourth Amendment jurisprudence; namely, the assumption of good faith on the part of the police and the judiciary’s unwillingness to inquire into the subjective motivations on the part of a government actor/law enforcement officer. In 1990, the Court decided *Horton v. California*,¹²⁴ a case where the police sought a search warrant to investigate an armed robbery in San Jose, California.¹²⁵ Although the warrant application sought leave to search for both the weapons used during the robbery and the stolen valuables, the magistrate ultimately approved a search warrant for just the valuables themselves and left out

119. DOJ Aulqi Memo, *supra* note 94, at 41.

120. *Id.* at 19–35.

121. Steve Vladeck, *The al-Aulqi Opinion and Fourth Amendment Seizures*, JUST SECURITY (Apr. 7, 2014), <https://www.justsecurity.org/9087/al-aulqi-opinion-fourth-amendment-seizures/> [<https://perma.cc/A5FA-H6EP>].

122. DOJ Aulqi Memo, *supra* note 94, at 41.

123. *Garner*, 471 U.S. at 3–4.

124. 496 U.S. 128 (1990).

125. *Id.* at 130–31.

the weapons.¹²⁶ In properly executing the search warrant, the police did not find evidence of the stolen objects, but came across weapons matching the description of those used in the robbery in plain view.¹²⁷ As the weapons were expressly not included in the search warrant, prior Supreme Court precedent required that they be discovered “inadvertently,” which was obviously not the case in *Horton*, where the police included them in their warrant application and hoped to find them.¹²⁸ The Court overturned its previous jurisprudence, and held that there was no inadvertence requirement in the plain view context, as “evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”¹²⁹ The Court doubted that officers would game the system or otherwise operate in bad faith.¹³⁰ After all, the Court reasoned, the Fourth Amendment requires particularity in warrant applications, which prevents such warrants from being converted into general warrants to conduct open-ended searches.¹³¹

This rationale rears its head into a context far-removed from everyday policing but is nonetheless connected to the government’s substantial powers in the mass surveillance context. The lack of an inadvertence requirement in the plain view context resembles the framework for electronic eavesdropping currently in operation under the Foreign Intelligence Surveillance Act (FISA).¹³² Pursuant to the FISA Amendments Act of 2008 (FAA), a warrant is not required for surveillance of purely foreign targets, whereas the government must seek a warrant to monitor the electronic communications of American targets, which cover both American citizens abroad and individuals of any nationality present in the United States.¹³³ However, if surveillance of those foreign targets sweeps up communications involving an American target, the government still does not need to seek a warrant.¹³⁴ While the statutory scheme and its interpretative rules are slightly convoluted, the safeguards in place for verifying if an American’s communications have been included are weak and subject

126. *Id.*

127. *Id.* at 131.

128. *Id.* at 134–38 (discussing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).

129. *Id.* at 138–42 (overruling *Coolidge*’s inadvertence requirement).

130. *Id.* at 138 (“If the officer has knowledge approaching certainty that the item will be found, we see no reason why he or she would deliberately omit a particular description of the item to be seized from the application for a search warrant.”).

131. *Id.* at 138–39.

132. 50 U.S.C. §§ 1881a–c (2012).

133. §§ 1881a–c.

134. § 1881a(d).

to an assumption by the National Security Agency that the source is not American unless explicitly established by the evidence.¹³⁵

The effect of this is much like the operation of the plain view doctrine, which allows the seizure of any evidence of contraband as long as the officer was in a place he was otherwise entitled to be.¹³⁶ The officer in *Horton* was executing a valid search warrant when he encountered the weapons, and, assuming there was no inadvertence requirement, could properly seize them even though he almost assuredly knew they were there and that his warrant did not list them as items subject to search.¹³⁷ Once properly seized, those weapons provided probable cause to search the entirety of the house for any and all contraband.¹³⁸ In the electronic surveillance context, when the government intercepts communications involving American sources while monitoring foreign targets, the standards in place to verify whether an intercepted communication involves an American party, which is ordinarily subject to a warrant requirement, are unevenly applied.¹³⁹ As documented exhaustively by Laura Donohue, in passing the FAA, Congress understood that the NSA would “inadvertently” monitor and retain communications involving American parties.¹⁴⁰ However, Donohue argues that given that Congress and the NSA knew that American communications would be monitored, such collection cannot properly be deemed “inadvertent.”¹⁴¹ Even though Congress included clear requirements that communications involving Americans be minimized, and that FAA surveillance not constitute an end-run around the warrant requirement for Americans, the full effects of the NSA’s systematic bulk collection program were not known or understood at the time of the bill’s passage.¹⁴² A different understanding emerged in relatively short order. In 2011, as a result of a rule change

135. For a comprehensive discussion of all matters relevant to the FAA and FISA surveillance more generally, see Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL’Y 117, 165 (2015) (“In other words, the statute only requires that the NSA not know (a) that the target is in the U.S.; or (b) that it is intercepting entirely domestic communications. There is nothing in the targeting requirements requiring intelligence agencies to take certain steps to ascertain whether the target is a U.S. person or what must be done to ascertain the target’s location.”).

136. *Horton*, 496 U.S. at 142.

137. *Id.*

138. *Id.*

139. Donohue, *supra* note 135, at 165.

140. *Id.* at 174–80 (noting that the NSA’s operative phrase is “incidental collection”).

141. *Id.* at 180 (“It seems clear, however, that the NSA and Congress anticipate that the government will obtain U.S. persons’ communications under [FISA]. Calling such interception ‘inadvertent’ does not make it so.”).

142. *Id.* at 174.

approved by the Foreign Intelligence Surveillance Court, data collected on foreign targets can now be searched for information on U.S. persons, without any judicial oversight or warrant requirements.¹⁴³

Further, these communications, once seized without a warrant, are stored by the government and, in an interpretation of the rules that seemingly flouts the FAA's distinction between American and foreign targets, can now be searched by the FBI for evidence of any criminal activity, regardless of whether or not it involves national security.¹⁴⁴ Much like items found in plain view in the ordinary policing context, which provide probable cause for a search of the entire area,¹⁴⁵ being caught by electronic surveillance of a foreign target opens up an American to having their data searched by the FBI for evidence of a crime, with no requirement that it relate in any way to national security or the reason for the warrantless surveillance of the foreign target in the first place.¹⁴⁶ These practices constitute an equivalent measure to eliminating the inadvertence requirement in the plain view context. And with no real inadvertence requirement, much more directed targeting of Americans' communications without a warrant can proceed with hardly any judicial review or outside oversight.¹⁴⁷ The government-appointed Privacy and Civil Liberties Oversight Board (PCLOB) issued a report in July 2014 that found this type of search comes "close to the line of constitutional reasonableness."¹⁴⁸ However, previously secret FISA

143. [Redacted], 2011 WL 10945618, at *5-8 (FISA Ct. Oct. 3, 2011); Donohue, *supra* note 135, at 197-98.

144. [Redacted] opinion, (FISA Ct. Nov. 6, 2015), https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf [<https://perma.cc/2QKU-YTH2>]; Elizabeth Goitein, *The FBI's Warrantless Surveillance Back Door Just Opened a Little Wider*, JUST SECURITY (Apr. 21, 2016), www.justsecurity.org/30699/fbis-warrantless-surveillance-door-opened-wider/ [<https://perma.cc/B6PU-67Y3>]. A recently declassified opinion of the FISA court found that the FBI's procedures for searching without a warrant the repository of seized messages for information on Americans violates the Fourth Amendment rights of those targeted; further, the opinion criticized the FBI's failure to document how often and for what reason the messages of Americans were searched. Charlie Savage, *F.B.I. Practices for Intercepted Emails Violated Fourth Amendment, Judge Rules*, N.Y. Times (Oct. 8, 2019), <https://www.nytimes.com/2019/10/08/us/politics/fbi-fisa-court.html> [<https://perma.cc/VF3A-526F>].

145. *See, e.g., Horton v. California*, 496 U.S. 128 (1990).

146. Goitein, *supra* note 144; Andrew Crocker & David Ruiz, *How Congress's Extension of Section 702 May Expand the NSA's Warrantless Surveillance Authority*, ELECTRONIC FRONTIER FOUNDATION: DEEPLINKS BLOG (Feb. 1, 2018), <https://www.eff.org/deeplinks/2018/02/how-congress-extension-section-702-may-expand-nsas-warrantless-surveillance> [<https://perma.cc/LA9V-KNTZ>].

147. Crocker & Ruiz, *supra* note 146.

148. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 88 (July 2, 2014), <https://www.pclob.gov/library/702-Report-2.pdf> [<https://perma.cc/TAN8-VXS3>]. The

Court opinions that have been released to date demonstrate that it has not in any way stopped the practice of using data intercepted by the NSA for domestic purposes.¹⁴⁹

To date, the situations in which data from NSA surveillance makes its way into criminal prosecutions against Americans have been limited.¹⁵⁰ In the sole court of appeals opinion to take up the matter, the Ninth Circuit held in late 2016 that the practice of using such data did not present a constitutional issue because it has been collected inadvertently or “incidentally.”¹⁵¹ The Court did not take up the matter of FBI searches of NSA databases that contain that incidentally collected data.¹⁵² But rather than confront this issue, Congress has simply acceded to the practice and avoided imposing any type of oversight on the government. In early 2018, Representative Justin Amash proposed a bill to end this interpretation of the FAA’s targeting procedures, and require a warrant based on probable cause before searching the data for evidence of criminal activity by Americans.¹⁵³

Electronic Frontier Foundation has criticized the report as being ineffectual and for not actually condemning the search of NSA databases for domestic criminal purposes as unconstitutional. See Cindy Cohn, *Flawed Oversight Board Report Endorses General Warrants*, ELECTRONIC FRONTIER FOUNDATION DEEPLINKS BLOG (July 1, 2014), <https://www.eff.org/deeplinks/2014/07/flawed-oversight-board-report-endorses-general-warrants> [<https://perma.cc/ND4W-AVME>] (calling the practice unconstitutional and criticizing the report for only offering “an anemic set of recommendations that will do little to stop excessive surveillance”); Crocker & Ruiz, *supra* note 146 (referring to the report as “milquetoast”).

149. See Cohn, *supra* note 148 (noting that “[t]he upshot” of the 2015 FISA Court opinion “is that the government needs a national security or foreign intelligence purpose only for the initial collection and analysis of information. Once it has communications in its custody, those limitations no longer apply and the government can troll through it for whatever law enforcement purpose it wants without having to worry about getting a pesky warrant.”); Donohue, *supra* note 135, at 193 (referring to a 2011 FISA Court opinion as leading “to an extraordinary result. The statute bans the knowing interception of entirely domestic conversations. The NSA said that it knowingly intercepts entirely domestic conversations. Yet the court found its actions consistent with the statute.”).

150. REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT, *supra* note 148, at 159, 162–63.

151. *United States v. Mohamud*, 843 F.3d 420, 438–41 (9th Cir. 2016); see Andrew Crocker, *Supreme Court Won’t Hear Key Surveillance Case*, ELECTRONIC FRONTIER FOUNDATION: DEEPLINKS BLOG (Jan. 8, 2018), <https://www.eff.org/deeplinks/2018/01/supreme-court-wont-hear-key-surveillance-case> [<https://perma.cc/T8X2-79VM>].

152. *Mohamud*, 843 F.3d at 438.

153. Charlie Savage et al., *House Extends Surveillance Law, Rejecting New Privacy Safeguards*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/fisa-surveillance-congress-trump.html> [<https://perma.cc/H5CA-3ZQW>]; Melissa Nann Burke, *House Rejects Amash Measure on Surveillance*, DETROIT NEWS (Jan. 11, 2018, 10:43 AM),

Not only did the proposed law fail, Congress reauthorized FAA for another six years, as it had been scheduled to expire on December 31, 2017.¹⁵⁴ Much like the policing context, gone is any semblance of inadvertence, even when the government eavesdrops on Americans' electronic communications and further investigates them criminally, with no warrant requirement in sight. An inquiry into the subjective motivations of government actors, such as NSA and FBI personnel who engage in these types of end-runs around the warrant requirement, is not something the Foreign Intelligence Surveillance Court, the PCLOB, or the federal courts seem willing or able to undertake.¹⁵⁵ Perpetual good faith is assumed in the fight for national security, even if the result is a curtailment of democratic liberties.¹⁵⁶

D. Parallel Construction

This final example of NSA surveillance data serving as a gateway for law enforcement action is part of a larger phenomenon that has only come to light in recent years, even if in practice it is much older.¹⁵⁷ Dubbed parallel construction, it refers to the practice of using evidence that would normally not be admissible—from warrantless wiretaps, searches, and the like—to lead to admissible evidence.¹⁵⁸ A recent report from Human Rights Watch defines parallel construction as “deliberate efforts by US government bodies, as part of a criminal investigation or prosecution, to conceal the true origins of evidence by creating an alternative explanation for how the authorities discovered it.”¹⁵⁹ In this, it bears a resemblance to the silver platter doctrine, which the Supreme Court disavowed in theory, as it allowed the use of

<https://www.detroitnews.com/story/news/politics/2018/01/11/house-amash-warrantless-surveillance-reform/109357826/> [<https://perma.cc/WC4C-JZM2>].

154. Savage et al., *supra* note 153.

155. See *Mohamud*, 843 F.3d at 439–40, 443; [Redacted] opinion, (FISA Ct. Nov. 6, 2015), https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf [<https://perma.cc/2QKU-YTH2>]; REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT, *supra* note 148.

156. See Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633, 656, 663–71 (2017) (“Broad population-based screening and mass surveillance promote fundamentally undemocratic surveillance norms.”) (collecting sources).

157. See generally Natasha Babazadeh, *Concealing Evidence: “Parallel Construction,” Federal Investigations, and the Constitution*, 22 VA. J.L. & TECH. 1 (2018).

158. *Id.* at 6.

159. HUMAN RIGHTS WATCH, DARK SIDE: SECRET ORIGINS OF EVIDENCE IN US CRIMINAL CASES (Jan. 9, 2018) [hereinafter DARK SIDE REPORT], <https://www.hrw.org/report/2018/01/09/dark-side/secret-origins-evidence-us-criminal-cases> [<https://perma.cc/YA6X-JW77>]; see also Babazadeh, *supra* note 157, at 9–11.

evidence excluded from federal prosecutions in state prosecutions, and vice versa—but has been very difficult to police in practice.¹⁶⁰ An example of parallel construction is when, for example, a federal agent illegally searches a piece of luggage and discovers contraband inside, and then approaches the luggage's owner to persuade him to consent to its search, all the while not revealing that the government has already inspected it.¹⁶¹ Another example is when the government intercepts a communication in which an individual confesses or incriminates herself via electronic surveillance, and then sends an informant to try and get her to repeat the confession, without divulging the existence of the intercepted communication.¹⁶² The point of parallel construction is to sanitize what would otherwise be evidence subject to the exclusionary rule, thereby creating an artificial independent source allowing for its

160. Wayne A. Logan, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 IOWA L. REV. 293, 329 (2013) (concluding, *inter alia*, that judicial oversight of the practice “has long since waned, a problematic development assuming heightened importance amid the ever-expanding growth and sophistication of intergovernmental investigative activity”).

161. See DARK SIDE REPORT, *supra* note 159, at 6 n.1 and accompanying text.

162. *Id.* The latter scenario is similar to the potential repercussion the late Craig Bradley warned about in a law review article commenting on the Supreme Court's 1988 decision in *Murray v. United States*, 487 U.S. 533, in which a federal agent illegally searched a warehouse and found large quantities of marijuana; he then applied for and obtained a search warrant, without revealing any information from, or the existence of, the illegal search, and the Supreme Court refused to suppress the marijuana on account of it being the product of an “independent source,” and not the illegal search:

Consider the position of the rational police officer. Assume that it is true, as the Court avers, that if he has ample probable cause and ample time, he will go ahead and get a warrant in order to avoid the additional explanations that a warrantless search will entail. But suppose, as is frequently the case, that his probable cause is shaky or nonexistent. *Murray* positively encourages him to proceed with an illegal search. If he finds nothing, he simply shrugs his shoulders and walks away. If he finds evidence, he leaves his partner to watch over it, repairs to the magistrate, and reports that “an anonymous reliable informant who has given information on three occasions in the past that has led to convictions called to tell me that he had just seen bales of marijuana stored at a warehouse at 123 Elm Street.” The warrant issues and the marijuana is seized. Before trial (assuming that the defense has found out about the illegal search), the officer admits it, chalks it up to a fear that the evidence would be lost if the warehouse were not immediately secured, apologizes for being wrong in this assessment, and introduces the warrant affidavit to demonstrate an independent source. The Court, in allowing such behavior, has missed the point of the warrant requirement and the exclusionary rule—that it “reduce[s] the Fourth Amendment to a nullity” to allow warrantless searches to go unpunished.

Craig M. Bradley, *Murray v. United States: The Bell Tolls for the Search Warrant Requirement*, 64 IND. L.J. 907, 908, 917 (1989).

admission, while concealing how the government discovered the criminal activity in the first place.¹⁶³

In this vein, perhaps parallel construction is the likely outcome of the Supreme Court's much-criticized 1996 decision in *Whren v. United States*.¹⁶⁴ While that case is more widely known as opening the door to legalizing racial profiling, it allowed for pretextual searches, which represent another example of parallel construction in action.¹⁶⁵ The facts of *Whren* involved the police stopping a driver they suspected of drug dealing on the pretext that he committed a number of moving violations; upon pulling him over the police spotted a large quantity of drugs in the front passenger seat, a stop the Supreme Court found did not offend the Fourth Amendment.¹⁶⁶ The Court was not interested in examining a police officer's motives for stopping someone, and as long as the officer had probable cause to pull someone over, that was enough.¹⁶⁷ The logic employed was similar to that in effect in *Horton*, in that the Supreme Court was not interested in the subjective motivations of the individual officer, just that there existed a neutral, objective reason for the stop.¹⁶⁸

In 2013, Reuters published a series of reports detailing the use of parallel construction by the DEA, but subsequent investigations demonstrate that multiple federal agencies participate in some form of the practice, including the FBI, CIA, NSA, and others.¹⁶⁹ But surely, the emergence of an entire cross-governmental program designed to serve as a deliberate end-run around constitutional protections and the exclusionary rule stretches these precedents too far. Especially as those government agencies seem to be intent on inoculating the program from judicial scrutiny. In a recent article, law professor Elizabeth Jones tells the story of a man stopped at the fixed Border Patrol checkpoint in San Clemente, California, with a large quantity of methamphetamine in his car.¹⁷⁰ Although he repeatedly moved to suppress the evidence against him on the basis that the real purpose of the checkpoint was general

163. Babazadeh, *supra* note 157, at 6, 21.

164. 517 U.S. 806 (1996).

165. *Id.*; Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 884 n.2 (2015) (collecting critical commentary of the *Whren* decision).

166. *Whren*, 517 U.S. at 808–09, 819.

167. *Id.* at 810–13.

168. Compare *id.*, with *Horton v. California*, 496 U.S. 128, 138 (1990).

169. See DARK SIDE REPORT, *supra* note 159; John Shiffman & Kristina Cooke, *Exclusive: U.S. Directs Agents to Cover Up Program Used to Investigate Americans*, REUTERS (Aug. 5, 2013), <https://www.reuters.com/article/us-dea-sod-idUSBRE97409R20130805> [<https://perma.cc/UB6H-2763>].

170. Jones, *supra* note 41, at 77–81 (citing *United States v. Soto-Zuniga*, 837 F.3d 992 (9th Cir. 2016)).

crime control,¹⁷¹ which is unconstitutional,¹⁷² as opposed to immigration control,¹⁷³ which is allowed, his motion was denied and he was convicted on various drug offenses.¹⁷⁴ On appeal, the Ninth Circuit reversed his conviction and ordered the government to produce information regarding the true primary purpose of the San Clemente checkpoint.¹⁷⁵ Rather than comply with the order and attempt to re-prosecute, the government dropped the case.¹⁷⁶ It certainly appeared that the government was prepared to go to extraordinary lengths to avoid revealing information about parallel construction—in this case using constitutionally permitted immigration checkpoints to deter drug trafficking, which is not allowed unless the police have individualized suspicion.¹⁷⁷ Jones’ words on the matter are instructive: “[T]he government chose to release from custody and refrain from prosecuting a man caught with over \$80,000 worth of methamphetamine because it was thought to be a better alternative than complying with the Ninth Circuit’s order.”¹⁷⁸

Law enforcement bodies across the governmental spectrum go to great lengths to keep secret their evidence gathering methods, especially as they cross the line of what the Fourth Amendment should allow.¹⁷⁹ Mass surveillance and parallel construction operate at such a removed distance from the average citizen that their details become known, and their effects are felt, only in rare and infrequent cases. Selectivity and discretion are the only restraints on the operation of such a powerful apparatus from transforming the entire country into a police state in the vein of the former East Germany.¹⁸⁰ This is not simply hyperbole, as the powers the police possess to conduct routine law enforcement investigations are substantial and close to all-

171. *Soto-Zuniga*, 837 F.3d at 996.

172. *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000) (“When law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, however, stops can only be justified by some quantum of individualized suspicion.”).

173. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556, 561–64 (1976) (allowing immigration checkpoint on the balance of interests in order to contain illegal immigration).

174. *Soto-Zuniga*, 837 F.3d at 994–95.

175. *Id.* at 998–1002, 1005.

176. Jones, *supra* note 41, at 80.

177. *Edmond*, 531 U.S. at 47.

178. Jones, *supra* note 41, at 80.

179. *Id.*

180. Thomas Coombes, *Lessons from the Stasi – A Cautionary Tale on Mass Surveillance*, AMNESTY INT’L (Mar. 31, 2015), <https://www.amnesty.org/en/latest/news/2015/03/lessons-from-the-stasi/> [https://perma.cc/M88V-YRZZ].

encompassing.¹⁸¹ Further, even when the police cross the line of what is permissible, the assumption that they operate in good faith serves to inoculate them from any negative consequences of their presumptively unconstitutional actions.¹⁸²

IV. *UTAH V. STRIEFF* AND THE NEW POLICE POWER

The 2016 decision in *Utah v. Strieff* is perhaps the Supreme Court's most startling decision in the Fourth Amendment context, one in which it held that a police officer committed a constitutional violation, yet still did not hold him accountable, as it refused to suppress the evidence yielded by that violation.¹⁸³ Strieff was observed leaving a house under visual surveillance by the officer, who followed him to a convenience store parking lot, asked him about his activities at the residence, and requested his identification, which he duly produced.¹⁸⁴ Using Strieff's driver's license, the officer ran a check to see if he had any outstanding warrants, and discovered the existence of one stemming from a traffic violation.¹⁸⁵ The officer arrested Strieff and conducted a search incident to a lawful arrest, during which he discovered methamphetamine and drug paraphernalia.¹⁸⁶ In its majority opinion reflecting a 5-3 split, the Supreme Court found the illegal stop to be so attenuated from the discovery of the drugs that the exclusionary rule should not apply.¹⁸⁷ The majority considered the officer's actions, even if negligent, to be a kind of straightforward and good faith effort at ordinary police work.¹⁸⁸ While those actions crossed the line of constitutionality, the exclusionary rule was too extreme of a sanction for an admittedly illegal stop that was, in the majority's view, far enough removed from the ultimate discovery of contraband.¹⁸⁹ After all, Justice Thomas—writing for the majority—reasoned, “there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct.”¹⁹⁰

The *Strieff* decision was most notable for its dissent by Justice Sotomayor, who, in a section of her opinion joined by no other Justice,

181. Terry Carney & Judd Epstein, *Police Powers of Criminal Investigation: Principle or Pragmatism*, 11 FED. L. REV. 283, 283 (1980).

182. See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016).

183. *Id.* at 2063.

184. *Id.* at 2059–60.

185. *Id.*

186. *Id.*

187. *Id.* at 2064.

188. *Id.* at 2063 (“Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes.”).

189. *Id.*

190. *Id.* at 2063.

wrote of what the ruling in the case truly portends.¹⁹¹ She noted the vast powers the police have to investigate, stop, and search civilians, even on a mere pretext and with very superficial levels of suspicion, and their virtually limitless discretion to effect a custodial arrest, even if for a non-jailable offense.¹⁹² In addition, once someone is stopped, the police can ask for consent to search without having to inform her of her right to withhold that consent.¹⁹³ In recognizing that Strieff himself was white, she also pointed out that the disproportionate weight of all these police powers falls on people of color, citing Michelle Alexander's *The New Jim Crow*, as well as W.E.B. Du Bois's *The Souls of Black Folk*, James Baldwin's *The Fire Next Time*, and Ta-Nehisi Coates's *Between the World and Me*, in the process.¹⁹⁴ On a more poignant and humanizing note, Justice Sotomayor remarked that this state of affairs has led parents of color to give their children "the talk," *i.e.*, a discussion to essentially remain calm and submissive when confronted by the police, "out of fear of how an officer with a gun will react."¹⁹⁵

The effects of this legal regime are devastating, and her dissent drew dramatic and profound conclusions: "[T]his case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. . . . It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be catalogued."¹⁹⁶ In essence, there is a "risk [of] treating members of our communities as second-class citizens."¹⁹⁷ Scholars have already noted the import of this section of Justice Sotomayor's dissent, issued under the aegis of a court that almost always ignores the racial ramifications of its decisions, particularly in the criminal procedure arena.¹⁹⁸ While it

191. *See id.* at 2069–70 (Sotomayor, J., dissenting).

192. *Id.* (Sotomayor, J., dissenting) (first citing, *inter alia*, *Whren v. United States*, 517 U.S. 806, 813 (1996); then citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968); and then citing *Atwater v. Lago Vista*, 532 U.S. 318, 323–24 (2001)).

193. *Id.* at 2070 (Sotomayor, J., dissenting) (citing *Florida v. Bostick*, 501 U.S. 429, 438 (1991)).

194. *Id.* (Sotomayor, J., dissenting).

195. *See id.* (Sotomayor, J., dissenting).

196. *Id.* at 2070–71 (Sotomayor, J., dissenting).

197. *Id.* at 2069 (Sotomayor, J., dissenting).

198. *See, e.g.*, Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2057–58 (2017); I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 *COLUM. L. REV.* 653–54 (2018) ("[H]er dissent is remarkable" for highlighting that "the Court plays a role in marking who belongs, who does not, who is entitled to be treated as a regular citizen, and who can be treated as second class."); Sudha Setty, *Forum Response: Islam on Trial*, *BOSTON REVIEW* (Feb. 27, 2017), <http://bostonreview.net/forum/islam-trial/sudha-setty-sudha-setty-responds-amna-akbar-and-jeanne-theoharis> [<https://perma.cc/3S7D-ZCRZ>] ("[T]his is an example of how courts have, over many years and decades, given law enforcement too much latitude in stopping and searching people of color for no reason, and the Supreme

is fair and accurate to point out that this legal regime applies to all, its effects essentially emphasize the otherness—or even foreignness—of its victims of color. *Strieff* therefore represents a breakthrough in terms of its implications, based on the very nature of the encounter between the police and the individual. Consider that the enemy of the state in the wars on crime and terror, as well as the perceived struggle against illegal immigration, resides in separate zones that are considered foreign.¹⁹⁹ The metaphors are overt—the inner city as foreign jungle; the border region subject to a legal regime where people can be stopped on the basis of their Mexican ancestry, oftentimes in areas subject to roadblocks that practice parallel construction; and various Muslim communities, where the whole population is subject to surveillance and its youth are one step away from turning into a violent extremist. Overlaying this geography is a permanent system of mass surveillance that can deliver incriminating information on American subjects without a warrant, based on their communications with foreign targets suspected of terrorism links residing abroad.²⁰⁰ Allowing the police to stop someone to verify their legal status—in effect, a command to show your papers—constitutes the quintessential act of the national security state.²⁰¹ To authorize the police to demand that someone justify their status brings to mind the East German Stasi or agents of the DINA in Pinochet’s Chile, grabbing people off the streets on the flimsiest of pretexts to disappear into the grips of the security apparatus. Here we begin to see the intersection of the carceral state—the personnel and institutions that comprise our system of mass incarceration²⁰²—and the

Court has acted as though any problems with this system are simply isolated incidents of abuse.”).

199. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2068 (2005); see also John D. Skrentny & Micah Gell-Redman, *Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment*, 120 YALE L.J. ONLINE 325, 334 (2011).

200. See G. Alex Sinha, *NSA Surveillance since 9/11 and the Human Right to Privacy*, 59 LOY. L. REV. 861, 884 (2013).

201. See generally, Marcus G. Raskin, *Democracy versus the National Security State*, 40 L. & CONTEMP. PROBS. 189 (1976).

202. Marie Gottschalk, *The Carceral State and the Politics of Punishment*, in SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 205–06 (Jonathan Simon & Richard Sparks eds., 2014), <https://www.sas.upenn.edu/polisci/sites/www.sas.upenn.edu/polisci/files/Gottschalk-Handbook.pdf> [https://perma.cc/GU4R-AYSF] (referring to the carceral state as “the phenomenon of mass imprisonment” that results in “the USA [having] the world’s highest incarceration rate and lock[ing] up more people than any other country”); Timothy Shenk, *Booked: The Origins of the Carceral State*, DISSENT (Aug. 30, 2016), <https://www.dissentmagazine.org/blog/booked-origins-carceral-state-elizabeth-hinton> [https://perma.cc/TF7W-QFD8] (discussion with Elizabeth Hinton, author of FROM THE WAR ON POVERTY TO THE WAR ON CRIME (2017), who notes: “The formal definition [of the carceral state] is that it’s the law enforcement officers who police the streets and maintain order—it’s the court marshals,

police state in the political sense of the term, where the authorities can pick up and remove opponents—real or perceived—on a mere whim. The vastness of the United States and the logistically impossible task of enforcing the multifaceted criminal laws by allowing law enforcement to investigate every instance of crime, perceived security threat, or illegal immigration, means that different communities end up bearing the burden of over-policing.²⁰³ Those communities are somehow different, foreign even, like a colony within a nation, to use MSNBC pundit Chris Hayes’ term.²⁰⁴ Where *Strieff* is different, then, is that it effectively authorizes a suspicionless police stop meant to ascertain one’s identity, without any expectation or proof that the person stopped has broken the law in any way, doing away with the fig leaf of pretext that *Whren* requires.²⁰⁵

Those who bear the burden of this new regime are disproportionately suspect in their American-ness, less second-class citizens than perpetual foreigners in the United States, whether they have been here since the foreign settlement of North America began centuries ago or are much more recent immigrants. To underscore this point, consider the section of Justice Sotomayor’s *Strieff* dissent joined by Justice Ginsburg.²⁰⁶ The majority opinion of Justice Thomas remarked that the police officer who stopped *Strieff* was merely negligent, and there was no suggestion that his actions pointed to “systemic or recurrent police misconduct,” and that his mistakes were made in “good faith.”²⁰⁷ But this was a misleading assertion. Justice Sotomayor pointed out that outstanding warrants are very common and large in number all across the country.²⁰⁸ She offered examples of the police stopping people with great regularity and checking to see if they had an outstanding warrant in Ferguson, Missouri, Newark, New Jersey, St. Louis, and New Orleans, among other cities.²⁰⁹ She also noted that while “most officers act in ‘good faith’ and do not set out to break the law,” this state of affairs was anything but inadvertent.²¹⁰ As examples, she highlighted a district court’s finding in a 2013 case that

the lawyers, the probation and parole officers and, of course, correctional officials. So, it’s all the formal institutions of the criminal justice system.”).

203. WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 54–55 (2011) (noting that, as a result of the legal architecture of the criminal procedure, law enforcement efforts are often focused in poorer, minority areas of the inner-city, meaning white Americans are proportionally less often the target of policing).

204. *See id.*; CHRIS HAYES, *A COLONY IN A NATION* (2017).

205. *Utah v. Strieff*, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting).

206. *Id.* at 2064–70 (Sotomayor, J., dissenting).

207. *Id.* at 2063–64.

208. *Id.* at 2068–69 (Sotomayor, J., dissenting).

209. *Id.* (Sotomayor, J., dissenting).

210. *Id.* at 2069 (Sotomayor, J., dissenting).

the NYPD had a policy of “‘stop and question first, develop reasonable suspicion later.’”²¹¹ Perhaps most suspicious was a case from 2003 in which, she noted, “[t]he Utah Supreme Court described as ‘routine procedure’ or ‘common practice’ the decision of Salt Lake City police officers to run warrant checks on pedestrians they detained without reasonable suspicion.”²¹² While the officer in *Strieff* was from the neighboring town of South Salt Lake, to describe his actions as mere negligence not tied to any purposeful wrongdoing seems a bit of a stretch, given that the issue in the case resembled the institutionalized practice of a much larger and immediately neighboring police department.²¹³

Perhaps this type of reasoning reflects the Supreme Court’s more recent jurisprudence characterizing police violations of the Fourth Amendment as reasonable, based in good faith, and therefore not meriting the application of the exclusionary rule.²¹⁴ For example, whether the police were mistaken as to the actual law used to stop a motorist, and whether a police clerk mistakenly reported that an individual had an outstanding warrant when in fact the warrant was invalid did not, in the Supreme Court’s view, warrant suppression of the evidence.²¹⁵ There was no need, the Court reasoned, to exclude evidence of wrongdoing in cases such as these because the police mistakes were all reasonable and made in good faith, much like the reasoning the Court adopted in *Strieff*.²¹⁶ In other words, there was no police misconduct to deter, so the exclusionary rule was inapplicable.²¹⁷

In addition to the presumption of police good faith in the Supreme Court’s recent Fourth Amendment jurisprudence, there is the notion that the police operate on a highly professional level. The Court noted the increasing professionalism of police forces as one reason not to apply the exclusionary rule in a 2006 case where the police violated the Fourth Amendment by not following the knock-and-announce rule in entering a suspect’s home without a warrant; the reasoning was that the

211. *Id.* (Sotomayor, J., dissenting) (citing *Ligon v. New York*, 925 F. Supp. 2d 478, 537–38 (S.D.N.Y. 2012), *stay granted on other grounds*, 736 F.3d 118 (2d Cir. 2013)).

212. *Id.* (Sotomayor, J., dissenting) (citing *State v. Topanotes*, 76 P.3d 1159, 1160 (Utah 2003)).

213. *See Topanotes*, 76 P.3d at 1160.

214. *See Heien v. North Carolina*, 574 U.S. 54, 57 (2014); *Herring v. United States*, 555 U.S. 135, 140–48 (2009).

215. *See Heien*, 574 U.S. at 57; *Herring*, 555 U.S. at 140–48.

216. *See Heien*, 574 U.S. at 57; *Herring*, 555 U.S. at 140–48.

217. *See* Kiel Brennan-Marquez & Stephen E. Henderson, *Fourth Amendment Anxiety*, 55 AM. CRIM. L. REV. 1, 20 (2018) (“[T]oday, deterring police violations is not only a rationale for the exclusionary rule, it is the *exclusive* rationale.” (emphasis in original)).

more professional the police become, the less likely they are to tolerate constitutional violations, and will adopt internal regulations to eliminate such practices, so exclusion is therefore unnecessary.²¹⁸ Among other reasons, this is likely the result of historical trends indicating that courts tend to view the police as experts uniquely situated to understand crime as a phenomenon in our society.²¹⁹ And of perhaps more concern is that the police tend to view themselves as soldiers or “warriors” engaging in a kind of military patrol in carrying out their duties.²²⁰ Whatever the rationale, relying on the professionalism of the police operating in good faith to substitute for the application of the exclusionary rule does not seem to be empirically based, and feels more like an assumption.²²¹ And the results of such an assumption mean that inner-city communities are more likely to suffer from less professional and more biased law enforcement strategies.²²² Writing in the context of *Whren*’s de facto approval of racial profiling, Devon Carbado puts it succinctly: “African-Americans often experience the Fourth Amendment as a system of surveillance, social control, and violence, not as a

218. *Hudson v. Michigan*, 547 U.S. 586, 598 (2006) (“Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline.”); see also Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 861 (2014).

219. See generally Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

220. See Stoughton, *supra* note 40, at 612 (the “[w]arrior ethos . . . has infused modern policing, shaping how officers perceive their role and informing the way they approach and interact with the public. It has promoted a self-image of officers as soldiers on the front lines in a never-ending battle to preserve order and civilization against the forces of chaos and criminality, and it is believed to both ensure effective law enforcement and increase safety.”). See generally RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* (2013).

221. See Aziz Huq, *Fourth Amendment Gloss*, 113 NW. U.L. REV. 701, 737 (2019) (“[T]he Court’s good faith jurisprudence . . . has no stable empirical methodology to evaluate how to establish the veracity of a general descriptive claim about police in general.”); Stoughton, *Policing Facts*, *supra* note 218, at 875–82 (arguing that “[i]f convictions are unimportant to officers, then the exclusion of evidence and the corresponding reduction in the possibility of conviction only serves to take away something that officers do not care about—hardly an effective strategy for deterrence”).

222. Huq, *supra* note 221, at 737 (“[T]he Court has no way to determine how many police departments fall at the lower end of the professionalism spectrum, or to ascertain whether they are concentrated in impoverished or racially segregated communities (as is indeed likely the case). Instead, cases such as *Hudson* and *Herring* manifest at best an indifference to the plight of communities that are still burdened by suboptimal policing.”).

constitutional boundary that protects them from unreasonable searches and seizures.”²²³

V. PREVENTION OF TERROR AND CRIME

Commensurate with the assumption that the police operate in good faith in carrying out investigations of criminal activity is that they are continually looking for ways to keep society safe and crime-free.²²⁴ Even accepting these assumptions as true, they allow law enforcement to press ahead with ever more probing investigatory tools and tactics, as a preventive logic takes hold. The war-on-terror policies of the post-9/11 world provide inspiration, and not a little precedent, in this regard. Following the 9/11 attacks, then-Attorney General John Ashcroft articulated a new preventive posture to terrorism investigations, as opposed to the punishment model previously in use.²²⁵ Rather than wait to prosecute those who had committed terrorist acts after they occurred, the government would actively seek to prevent the next attack by preventively detaining, interrogating, and/or prosecuting those it suspected on plotting attacks or supporting terrorism.²²⁶ Clearly, there is something appealing in announcing that the government wants to stop attacks before they happen. But this posture rests on two assumptions: One, that there lurk terrorist threats that consistently menace the population; and two, that the government has the ability to both detect and thwart those potential attacks. Stating that the government has adopted a preventive posture offers the authorities a kind of strategic benefit. If there are truly no more, or far fewer, attacks, then prevention seems to work. If more attacks materialize, however, then the authorities can claim that more powers and investigatory tools are necessary to keep the public safe. The period since the 9/11 attacks has seen a small number of violent outrages, but overall the risk of death or injury by terrorism in the United States

223. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 130 (2017).

224. See Huq, *supra* note 221, at 742.

225. U.S. Dep’t of Justice, *Prepared Remarks of Attorney General John Ashcroft, Council on Foreign Relations* (Feb. 10, 2003), <https://www.justice.gov/archive/ag/speeches/2003/021003agcouncilonforeignrelation.htm> [<https://perma.cc/Z3PE-6NXL>] (remarking that the government has adopted “a paradigm of prevention” as part of its counterterrorism strategy).

226. *Id.*; see also SUDHA SETTY, NATIONAL SECURITY SECRECY: COMPARATIVE EFFECTS ON DEMOCRACY AND THE RULE OF LAW 5 (2017) (“[T]he post-September 11 focus of law and policy has been to move national security investigations toward a preventive model that is predicated on zero tolerance for terrorism.”).

remains much less than the period preceding the 9/11 attacks.²²⁷ But that has not stopped prevention from taking root in the day-to-day policing context, most notably in the form of large surveillance programs and predictive policing software.²²⁸

A. Predictive Policing

The Los Angeles Police Department (LAPD) has been a leader in enacting preventive and predictive policing strategies, originally instituted when William Bratton served as its commissioner between 2002 and 2009.²²⁹ During that time, Los Angeles “became the first city to implement the Nationwide Suspicious Activity Reporting Initiative, a federal-local partnership program led by Homeland Security and the FBI.”²³⁰ The goal of the program is to have local police collect reports on suspicious activity, which is defined as “observed behavior reasonably indicative of preoperational planning associated with terrorism or other criminal activity.”²³¹ The reports, known as suspicious activity reports (SAR), function as the chief vehicle for memorializing when an individual’s actions meet the incredibly vague standard for “pre-operational planning” that indicates, in law enforcement’s eyes, that terrorism or other criminal activity is afoot.²³² Many SARs involve police confronting individuals taking pictures of public buildings in and around the Los Angeles area, often when the link to illegality is far from obvious.²³³ More troubling is that SARs, initiated under the highly nebulous standard articulated above, can serve as a kind of secret police file that follows a person around for

227. Meagan Smith & Sean M. Zeigler, *Terrorism Before and After 9/11—A More Dangerous World?*, RES. & POL., Oct.–Dec. 2017, at 2, <http://journals.sagepub.com/doi/pdf/10.1177/2053168017739757> [<https://perma.cc/YV9N-USSP>] (study by two RAND Corporation employees looking at data from terrorist attacks between 1989 and 2004) (“Our results suggest that after accounting for the prevalence of terrorism in conflict settings, the post-9/11 era is much less terror-prone than the years preceding it.”); Daniel Byman, Opinion, *The Good News About Terrorism*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/2018/12/28/opinion/sunday/islamic-state-terrorism-europe.html> [<https://perma.cc/J5UQ-PAFH>] (“In terrorism, we may remember 2018 for what didn’t happen: The jihadist threat to the United States has dissipated.”).

228. Petra Bartosiewicz, *Beyond the Broken Window: William Bratton and the New Police State*, HARPER’S MAGAZINE, May 2015, at 50, <https://harpers.org/archive/2015/05/beyond-the-broken-window/> [<https://perma.cc/8PWD-LZ8V>].

229. *Id.*

230. *Id.* at 52.

231. Dep’t of Homeland Sec., *About the NSI*, NATIONWIDE SAR INITIATIVE, https://nsi.ncirc.gov/about_nsi.aspx [<https://perma.cc/BQR7-Y2KZ>].

232. Bartosiewicz, *supra* note 228.

233. *Id.*

many years after, even when the individual was engaged in perfectly legal activities and had no intention to plot violent action.²³⁴ The words of investigative journalist Petra Bartosiewicz, who wrote a report on the LAPD's preventive practices, are worth quoting at some length:

The rules governing the storage of intelligence data are confusing and contradictory. The LAPD, for example, retains all SARs, even those that prove unfounded, for at least one year, and shares them with the local fusion centers, which keeps them for up to five. The FBI can hold on to the same records for as many as thirty years. In contrast to the long-established constitutional standards of "probable cause" and "reasonable suspicion" that have guided investigators in the past, the program allows a lower threshold of "reasonably indicative" behavior. This deliberately broad wording creates a standard of suspicion that enables police to base their investigations on hunches and stereotypes. There is no easy way for a person to challenge a report filed against him or her, because, unlike an FBI file, it is generally not subject to public-records requests. Thus the government can maintain records of a person's alleged suspicious behavior, and the subject of the report has no right to appeal the report or even to know that it exists.²³⁵

In essence, there now exists a certain undefined universe of activities that tip off the authorities that something suspicious is afoot.²³⁶ If an individual engages in such activities, the police can create an investigative file that follows the individual around indefinitely, marking that person off as a potential security threat without providing for a way to challenge or rebut the presumption of dangerousness.²³⁷

Much like in other contexts, technological breakthroughs offer law enforcement more and more ways to engage in intrusive surveillance, all under the preventive rubric. In another example of war-on-terror practices migrating to the domestic sphere, the LAPD also partnered with two UCLA academics, who had previously developed computer programs to monitor local insurgents in Iraq, to create a new type of tracking software entitled PredPol, which purports to rely on multiple data entries to predict where crime might next materialize.²³⁸ Specifically, PredPol

234. *Id.* at 53.

235. *Id.*

236. *Id.* at 52.

237. *Id.* at 53.

238. *Id.* at 52.

looks at the types of crimes that were committed in a given area, the time, and the location, and determines whether and when another crime is likely to occur there. PredPol then spits out maps, which are updated daily, marked with 500-by-500 foot hotspots that officers are strongly encouraged to patrol.²³⁹

Consider the context, then. PredPol was derived from algorithms and programs that were meant to guide military conduct in a foreign war zone strongly identified with the war on terror, rightly or wrongly.²⁴⁰ The essential function of the soldier in occupied Iraq searching for insurgents and the police officer looking for crimes before they happen is the same, that of the patrol.²⁴¹ Residents of areas under patrol in Los Angeles might be surprised to learn that the LAPD, in its crime-fighting guise, relies on tools developed to patrol war zones to look for insurgents, but then again, the idea of the inner-city as war zone has been deployed before, as noted earlier.²⁴² PredPol's use has not been limited to Los Angeles either. The NYPD, which has attempted to keep its predictive policing program secret, was ultimately ordered by a federal court in January 2018 to release details on the program, as a result of a lawsuit brought by the Brennan Center.²⁴³ A key disclosure

239. Issie Lapowsky, *How the LAPD Uses Data to Predict Crime*, WIRED (May 22, 2018, 5:02 PM), <https://www.wired.com/story/los-angeles-police-department-predictive-policing/> [<https://perma.cc/EJ7X-Y8XW>] (documenting other predictive programs used by the LAPD, such as Operation LASER, “which began in 2011, crunches information about past offenders over a two-year period, using technology developed by the shadowy data analysis firm Palantir, and scores individuals based on their rap sheets”); *see also* ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* 64–67 (2017) (discussing the development of PredPol software).

240. *See* Bartosiewicz, *supra* note 228, at 52.

241. Arthur Rizer & Joseph Hartman, *How the War on Terror Has Militarized the Police*, THE ATLANTIC (Nov. 7, 2011), <https://www.theatlantic.com/national/archive/2011/11/how-the-war-on-terror-has-militarized-the-police/248047/> [<https://perma.cc/H3PB-LHV7>].

242. *See* U.S. DEP'T OF JUSTICE, C.R. DIV., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 6, 51 (Dec. 4, 2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [<https://perma.cc/S8F2-5QR6>] (DOJ report on the Cleveland police department making the following remarks: “For example, we observed a large sign hanging in the vehicle bay of a district station identifying it as a ‘forward operating base,’ a military term for a small, secured outpost used to support tactical operations in a war zone,” and “[d]uring an interview with one district commander, he referred to his district as a ‘forward operating base.’”).

243. Rachel Levinson-Waldman & Erica Posey, *Court: Public Deserves to Know How NYPD Uses Predictive Policing Software*, BRENNAN CTR. FOR JUSTICE (Jan. 26, 2018), <https://www.brennancenter.org/blog/court-rejects-nypd-attempts-shield-predictive-policing-disclosure> [<https://perma.cc/XTT2-ET8R>].

from the court order was the NYPD's reliance on PredPol, despite its massive potential for misuse and reliance on faulty assumptions.²⁴⁴

Scholars have already identified those faulty assumptions in greater depth.²⁴⁵ Specifically, if algorithms driving such predictive programs are driven by historical data, they can simply replicate the discriminatory harms policing patterns have generated over time in a given city or location.²⁴⁶ By way of example, PredPol itself asserts that its programs rely on only three forms of data: "type of crime, place of crime and time of crime," and do not take into account personal information such as race of the perpetrator, etc.²⁴⁷ Yet such a limited sample ensures that the historical record of any given police department, which in the modern United States has a fair to strong chance of practicing racially disparate policing, will simply replicate itself, not improve.²⁴⁸ This is true not just in the investigation of crimes, but in other areas of policing as well.²⁴⁹ Aziz Huq succinctly describes how this phenomenon works in practice:

Imagine a jurisdiction where African Americans were targeted for frequent and unjustified police contact, such that the pool of arrestees and convicted criminals may be biased by an underrepresentation of nonblack individuals. Or consider a jurisdiction in which black neighborhoods are underserved by police responses to emergency calls, which might, in contrast, generate data on the distribution of crime with a black (or grey) hole in respect to African American neighborhoods. The two hypotheticals can even be combined: A jurisdiction might underserve black neighborhoods by understaffing responses to 911 calls at the same time as concentrating a disproportionate amount of street policing resources on the same neighborhoods. An algorithm trained on police-generated data

244. *See id.* ("[Predictive policing software programs] rely on historical policing data to generate their predictions; in the absence of meaningful oversight and transparency, the software may instead simply recreate and obscure the origins of racially biased policing."); Ali Winston, *Transparency Advocates Win Release of NYPD "Predictive Policing" Documents*, THE INTERCEPT (Jan. 27, 2018, 10:58 AM), <https://www.theintercept.com/2018/01/27/nypd-predictive-policing-documents-lawsuit-crime-forecasting-brennan/> [<https://perma.cc/2WLW-GLPN>].

245. *See* David O'Connor, *Predictive Policing Is Not as Predictive As You Think*, COUNCIL ON FOREIGN RELATIONS: NET POLITICS BLOG (Jan. 11, 2017), <https://www.cfr.org/blog/predictive-policing-not-predictive-you-think> [<https://perma.cc/9XB8-4LQJ>] (citing PredPol).

246. *Id.*

247. *Id.*

248. *Id.*

249. Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1080 (2019).

from any of these jurisdictions is likely to allocate resources in ways that reflect and perhaps entrench disparities in how policing resources are allocated. But police might adopt the algorithm without considering racial effects or with an honest but erroneous belief that their training data is untainted.²⁵⁰

As troubling as this pattern is in the policing context, consider the implications of algorithm-driven surveillance and vetting over society in its entirety. In a recent article, law professor Margaret Hu explores the process of extreme vetting to which non-citizens are subject if they wish to enter the United States, a process that includes turning over biometric data and social media passwords, among other things.²⁵¹ While these measures are currently in place to govern the implementation and enforcement of the immigration laws, they are driven by a clear national security impulse, one of keeping out foreigners as a presumptive security threat unless their harmless status can be verified and ensured.²⁵² This legal architecture raises several important concerns in and of itself, yet such forms of extreme vetting and “identity management” can easily be applied to cover the entire citizenry of the United States, in a process she dubs “Algorithmic Jim Crow,” as “security threat assessments produced through algorithms and database screening may—similar to historic Jim Crow—also separate populations based upon particular classifications.”²⁵³ The process by which these measures migrate from the immigration context to the population writ large is already underway, in the form of, *e.g.*, (1) a No-Fly-List, which prevents people from flying regardless of their citizenship status; (2) requiring applicants to disclose large amounts of personal and biometric data to work as contractors in certain federal agencies, like NASA; and (3) bringing states in to implement federally mandated vetting and identifying programs, such as E-Verify.²⁵⁴ Viewing these efforts as limited to the immigration context is misleading, as the government seeks to classify and identify the entire population, using citizenship status as the touchstone.²⁵⁵ Immigration reform efforts in the post-9/11 world have centered on using biometric

250. *Id.* at 1090–91 (citations omitted).

251. Hu, *supra* note 156, at 639–41.

252. *Id.* at 647–50.

253. *Id.* at 643.

254. *Id.* at 672–79, 689–94 (discussing, *inter alia*, *NASA v. Nelson*, 562 U.S. 134, 142 (2011), in which the Supreme Court approved a background check process for applicants for work as contractors at NASA that included questions about an individual’s personal financial history, drug and alcohol use, sexual activity, and personality traits to determine whether someone was “suitable” to receive a biometric data-laden card that reflected contractor status).

255. *Id.* at 689.

data markers to vet and determine the citizenship status of the entire population, not merely noncitizens.²⁵⁶ Government population registries and national identity card systems are a recipe for further surveillance, control, and potential harassment of Americans that threaten civil rights and civil liberties, all the while doing nothing to deal with the supposed foreign threat of terrorism.²⁵⁷

The concerns over the erosion of privacy rights and the creation of a surveillance state at home may seem more abstract than actually felt, but consider the trend to blanket cities with cameras put up and monitored by local police forces.²⁵⁸ In New Orleans, for example, a newly instituted program of using and installing surveillance cameras and license plate readers all across the city has generated fears that such tools will only enable and exacerbate the racially skewed treatment the police mete out to the city's black residents.²⁵⁹ Despite the New Orleans police force being subject to a federal consent decree, which includes an independent monitor, for widespread violations of the Fourth Amendment, the surveillance program seems to fall outside the monitor's purview.²⁶⁰ As the program is only subject to internal police oversight and also from the Department of Homeland Security, there is the additional concern that the surveillance network will be used by ICE to discover and apprehend undocumented immigrants.²⁶¹ Technological advances also raise newer concerns about the advent of a mass informer culture in the already developed modern American police state. In Newark, New Jersey, live images from the city's surveillance cameras are available to anyone with an internet connection.²⁶² Dubbed the

256. *Id.* at 642.

257. See Am. Civ. Liberties Union, *5 Problems with National ID Cards*, <https://www.aclu.org/other/5-problems-national-id-cards> [<https://perma.cc/ZYJ7-4VJP>].

258. Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 214 (2002).

259. Michael Isaac Stein, *New Orleans Surveillance Program Gives Powerful Tools To a Police Department With a History of Racism and Abuse*, THE INTERCEPT (Mar. 6, 2018), <https://theintercept.com/2018/03/06/new-orleans-surveillance-cameras-nopd-police/> ("But in the most incarcerated city in the most incarcerated state in the country, where black communities endure the brunt of police power, the most salient concern is how this powerful tool could exacerbate the city's already racially disparate law enforcement.").

260. *Id.*; see Amended & Restated Consent Decree Regarding the New Orleans Police Dep't at 111, *United States v. City of New Orleans*, No. 2:12-cv-01924 (E.D. La. Mar. 15, 2018), <https://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/2018-03-15-Amended-and-Restated-NOPD-Consent-Decree-CLEAN.pdf/> [<https://perma.cc/3VKC-6D8P>].

261. Stein, *supra* note 259.

262. Rick Rojas, *In Newark, Police Cameras, and the Internet, Watch You*, N.Y. TIMES (June 10, 2018), <https://www.nytimes.com/2018/06/09/nyregion/newark-surveillance-cameras-police.html> [<https://perma.cc/7DPV-UWH2>].

Citizen Virtual Patrol, anyone out in public in the city can be viewed online as they go about their daily affairs.²⁶³ Going beyond the usual justifications of fighting crime and terrorism, the Newark program also aims to urge the city's population to report on anything suspicious they see or know.²⁶⁴ While the city has long struggled with high crime rates, and may seem willing to take far-ranging measures such as a public surveillance programs, it is doubtful that encouraging residents to act as police informers and spies on each other is the correct approach to fighting crime. The tendency is to focus such technologies on areas that are already the target of police surveillance and suspicion, thereby reinforcing and entrenching discriminatory patterns that have heretofore defied reform efforts for many decades.²⁶⁵

In the end, preventive and predictive policing is evidence of a mindset that judges complex societal and even geopolitical phenomena, like crime and terrorism, as plainly evil and simple forces to be eradicated.²⁶⁶ William Bratton, the former police commissioner of Boston, New York, and Los Angeles, and the main architect of the modern predictive policing program, has likened crime to a disease with police playing the role of a treating doctor, working to eradicate the ailment.²⁶⁷ In Bratton's view, as doctors sometimes inflict some suffering on the patient to gain a larger recovery, so too might the police engage in questionable practices if the goal is preventing greater harm to the community.²⁶⁸ In the judicial realm, the First Circuit began its 2013 opinion upholding the terrorism-related convictions of Tarek Mehanna by noting that "[t]errorism is the modern-day equivalent of the bubonic plague: it is an existential threat."²⁶⁹ Because terrorism is like a mass outbreak of disease, the government is authorized to go right up to the "fine line" between constitutional protections and national security concerns through aggressive policing, the court

263. *Id.*; Newark Dep't of Pub. Safety, *Citizen Virtual Patrol*, <https://cvp.newarkpublicsafety.org/>.

264. Rojas, *supra* note 262.

265. For a thorough discussion of the negative effects of an informant-driven culture on a neighborhood or community, see ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 101–20 (2009).

266. Bartosiewicz, *supra* note 228, at 57.

267. *Id.* at 52 (quoting Bratton: "I don't think the public is too concerned with us using technology to prevent crime. People don't get upset when doctors use technology to prevent Alzheimer's or cancer.").

268. *Id.* at 57 ("Once again he drew an analogy between crime and disease. 'Both can be deadly,' he said. 'The question is how to prevent them while doing minimal harm. Of course, doctors say, 'First, do no harm.' There is always a risk of doing some greater harm.'").

269. *United States v. Mehanna*, 735 F.3d 32, 40 (1st Cir. 2013).

reasoned.²⁷⁰ The problem with such thinking is that it assumes that problems like crime and terrorism, which have many causes—societal, political, economic, etc.—are easily reduced to threats that must be destroyed or eradicated, full stop, all the while freeing the government from addressing any of those other causes in a non-confrontational manner. In a sense, referring to these phenomena as diseases is similar to declaring war on them, with all the attendant problems that come along with going to war against abstract concepts.²⁷¹

B. Excesses and Innovations

Taking the mindset of fighting an unalloyed evil or sickness at face value, it demonstrates how convinced law enforcement is of the righteousness of all its actions in fighting crime, terrorism, undocumented immigrants, or whatever negative phenomenon plagues society.²⁷² The following examples indicate that the police believe in a sense that the end justifies the means, even where the tactics are those of the secret police in a repressive regime.

1. INCOMMUNICADO DETENTION

In 2015, the *Guardian* broke the story of the Chicago police department's operation of a secret facility where individuals were detained and interrogated for informational purposes, with the vast majority of those arrests not recorded or made known to the public.²⁷³ Once in custody, those detained would not be allowed access to an attorney or anyone outside the facility, as there was no public record of the arrest.²⁷⁴ The goal of the incommunicado detention program was purely to extract information on guns and drugs in Chicago, with the

270. *Id.* (“Predictably, then, the government’s efforts to combat terrorism through the enforcement of the criminal laws will be fierce. Sometimes, those efforts require a court to patrol the fine line between vital national security concerns and forbidden encroachments on constitutionally protected freedoms of speech and association. This is such a case.”).

271. See Wadie E. Said, *Limitless Discretion in the Wars on Drugs and Terror*, 89 U. COLO. L. REV. 93, 94–95 (2018).

272. *Id.* at 97.

273. Spencer Ackerman, *The Disappeared: Chicago Police Detain Americans at Abuse-Laden ‘Black Site’*, THE GUARDIAN (Feb. 24, 2015, 16:43 EDT), <https://www.theguardian.com/us-news/2015/feb/24/chicago-police-detain-americans-black-site> [https://perma.cc/8VZJ-25R3].

274. Spencer Ackerman, *The Hidden: How Chicago Police Kept Thousands Isolated at Homan Square*, THE GUARDIAN (Apr. 13, 2016, 07:31 EDT), <https://www.theguardian.com/us-news/2016/apr/13/homan-square-chicago-police-records-secret-interrogation-facility-new-documents-lawsuit> [https://perma.cc/6HYP-SX65].

police leveraging the fact that an individual's family and attorney had no idea where he was, in order to pressure him to divulge information.²⁷⁵ In the period between 2004 and 2015, the police made 7,185 arrests at the facility, known as Homan Square, but only sixty-eight, or .94%, of those individuals arrested were allowed access to an attorney or were afforded public notice of their whereabouts.²⁷⁶ The detention program had a clear racial bent, as some 6,000—representing 82.2% of those detained—of the total number of detainees were black, even though the city's African-American population was 32.9% during the time period in question.²⁷⁷ While several individuals detained in secret at Homan Square have sued the city for their treatment, the lawsuits remain pending.²⁷⁸

Consider the implications of this action. The police in Chicago administered a program of incommunicado detention to drum up information on street crime in the city. The interrogations involved took place in secret and did not ostensibly lead to any criminal charges against the detainees, who were disproportionately African-American. Normally, special needs investigative measures like roadblocks may sidestep the Fourth Amendment's reasonable suspicion and probable cause requirements only when narrowly tailored, and cannot be used to combat the "general interest in crime control," as was the case with the Homan Square detentions.²⁷⁹ So such interrogations, if the allegations prove true, would constitute a clear violation of the Fourth Amendment, and moreover begin to resemble the practice of a totalitarian secret police regime.

The Chicago police must have clearly understood that rounding people up to detain and question them about their knowledge of criminal activity in the city stood on shaky legal ground. One police official admitted as such in a sworn deposition when asked if people

275. *Id.*

276. Spencer Ackerman, *Homan Square Revealed: How Chicago Police 'Disappeared' 7,000 People*, THE GUARDIAN (Oct. 19, 2015, 08:30 EDT), <https://www.theguardian.com/us-news/2015/oct/19/homan-square-chicago-police-disappeared-thousands> [<https://perma.cc/V8N4-AQ74>].

277. *Id.*

278. *See, e.g., Mann v. City of Chicago*, No. 15 CV 9197, 2017 WL 3970592 (N.D. Ill. Sept. 8, 2017) (partially granting and partially dismissing plaintiffs' discovery motion in consolidated class actions against the city for harms suffered at Homan Square).

279. *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42 (2000) (citing *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979)) ("We suggested in *Prouse* that we would not credit the 'general interest in crime control' as justification for a regime of suspicionless stops. . . . Because the primary purpose of the Indianapolis narcotics checkpoint is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.").

held at Homan Square could be found by outsiders, stating, “I don’t know that you can contemporaneously.”²⁸⁰ Yet still thousands were arrested and questioned over an eleven-year period.²⁸¹

The brazen nature of this most repressive tactic brings to mind New York City’s post-9/11 experiment with surveilling the city’s Muslim community in its entirety, across geography and cultures.²⁸² Although the program was disbanded as part of the settlement of several lawsuits brought by victims of widespread spying, its goal seemed much more in line with politically motivated spying on dissident communities.²⁸³ Unlike Chicago’s Homan Square, which was tied to uncovering evidence of criminal law violations, the NYPD spying program was much more of an exercise in mapping and keeping a close eye on those communities viewed with deep suspicion.²⁸⁴ After all, a high-ranking police official testified, again in a sworn deposition, that the NYPD had produced no criminal cases as a result of the spying program.²⁸⁵ Regardless, in essence, the country’s largest and third-largest police departments had engaged in conduct much more like a secret police force or domestic intelligence apparatus, with the greatest consequence being cessation of the practice and paying damages. Were the programs more effective in counterterrorism or policing terms, there is a real question as to whether these unconstitutional tactics would have stopped upon mere exposure.

2. WATCHLISTS

Then there is the concept of the blacklist, much in evidence in the terrorism context, where the State Department maintains a list of Foreign Terrorist Organizations (FTOs), the provision of material support to which is criminalized.²⁸⁶ Since the 9/11 attacks, material support charges are the most common and main vehicle in the prosecution of those suspected of terrorism links.²⁸⁷ But while the FTO list only contains foreign groups—there is no concomitant list of

280. Ackerman, *supra* note 276.

281. *Id.*

282. See generally APUZZO & GOLDMAN, *supra* note 75.

283. Colin Moynihan, *Last Suit Accusing N.Y.P.D. of Spying on Muslims Is Settled*, N.Y. TIMES (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/nyregion/last-suit-accusing-nypd-of-spying-on-muslims-is-settled.html> [<https://perma.cc/6BQK-NA7Q>].

284. *Id.*; Ackerman, *supra* note 276.

285. SAID, *supra* note 66, at 28.

286. U.S. Dep’t of State, Bureau of Counterterrorism, *Foreign Terrorist Organizations*, <http://www.state.gov/j/ct/rls/other/des/123085.htm> [<https://perma.cc/JD5W-Q7AN>].

287. See Said, *supra* note 271, at 105.

domestic terrorist organizations—there is a noted rise in the use of gang member lists by domestic police forces.²⁸⁸ Creating lists of perceived criminal actors in the domestic context therefore serves as a kind of shorthanded proxy for criminality.²⁸⁹ In New York City, recent data demonstrate that there are over 42,000 names listed as members in the NYPD database on street gangs.²⁹⁰ Ninety-nine percent of those added to the list in the last four years were black or Latino.²⁹¹ Critics have pointed out that the gang member list is being used as a substitute for New York’s previously widespread stop-and-frisk program, which a federal judge declared unconstitutional in 2013.²⁹² The maintenance of such a list is strange in an era where crime has diminished greatly in recent years, and has taken on a sinister air, as individuals so listed—under murky standards such as what someone was wearing, having tattoos, living in a certain area, race, etc.—are subject to more extensive monitoring, especially on social media and online.²⁹³

New York is not alone in maintaining a gang database of dubious provenance. Records uncovered by ProPublica reveal that Chicago maintains a gang member database of over 128,000 names, with the criteria for being listed as a gang member being murky at best, and the avenues for being removed from the database to be non-existent.²⁹⁴ The list is filled with individuals falsely defined as gang members or sympathizers, often on the basis of faulty or outdated data; for example, 163 of those on the list are either in their 70s or 80s, and many people have been added based solely on their race or where they live.²⁹⁵ While reforms of the procedures for getting on and off the database are in the offing following ProPublica’s report, the racial implications are clear; African-Americans make up seventy percent of

288. Alice Speri, *New York Gang Database Expanded by 70 Percent Under Mayor Bill de Blasio*, THE INTERCEPT (June 11, 2018, 9:49 a.m.), <https://theintercept.com/2018/06/11/new-york-gang-database-expanded-by-70-percent-under-mayor-bill-de-blasio/> [https://perma.cc/PJD5-69FC]; Mick Dumke, *Chicago’s Gang Database Is Full of Errors—and Records We Have Prove It*, PROPUBLICA ILL. (Apr. 19, 2018, 4:00 AM CDT), <https://propublica.org/article/politic-il-insider-chicago-gang-database> [https://perma.cc/3L8G-J3BH].

289. Speri, *supra* note 288.

290. *Id.*

291. *Id.*

292. *Id.*; Jake Offenhartz, *The NYPD’s Expanding Gang Database Is Latest Form of Stop & Frisk, Advocates Say*, GOTHAMIST (June 13, 2018, 3:00 PM), http://gothamist.com/2018/06/13/nypd_gang_database_nyc.php [https://perma.cc/A93Q-9WQ5].

293. *See* sources cited *supra* note 292.

294. Dumke, *supra* note 288.

295. *Id.*

those listed, and Latinos comprise twenty-five percent.²⁹⁶ The state-funded gang member database maintained by law enforcement agencies in California exhibits similar shortcomings, as a 2016 state audit revealed that it contained the names of forty-two individuals who were one year of age or younger at the time they were entered into the database; of those forty-two, twenty-eight were entered as “admitting to being gang members.”²⁹⁷ Many individuals whose names should have been deleted years earlier were still on the database in 2016, and there were numerous instances of juveniles being entered into the database without the authorities notifying their parents, as required by state law.²⁹⁸ With a structure resistant to outside review, the gang database also featured a disproportionate racial makeup, as 64.9% of those listed were Latino, and 20.5% African-American.²⁹⁹ The state audit led to nearly immediate reforms, such as providing notice to adults listed in the database so they could effectively challenge theirs or their children’s designation, but overall several of the state audit’s criticisms and/or recommendations were not enacted.³⁰⁰ In all instances, the criteria for being named on the various lists were murky and in certain instances, biased—place of residence, race, marks or tattoos, affiliations or friendships.³⁰¹

Reflecting the symbiotic nature of federal and state law enforcement, the FBI consolidates law enforcement intelligence determinations about gang activity through the National Gang Intelligence Center.³⁰² Immigration and Customs Enforcement (ICE) officials are making increasing use of these combined databases to target immigrant youth for deportation on the basis of gang affiliation, in addition to employing their own—often questionable—determinations about an immigrant’s ties to a gang.³⁰³ In August 2016, ICE claimed to have conducted some 40,000 gang related deportations, but that number

296. *Id.*

297. Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries, State Auditor Finds*, L.A. TIMES (Aug. 11, 2016, 9:10 PM), <http://www.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-snap-story.html> [<https://perma.cc/SWF7-DKMN>].

298. *Id.*

299. *Id.*

300. Ali Winston, *California’s Gang Database Gets Less Secretive, but Problems Linger*, REVEAL FROM THE CENTER FOR INVESTIGATIVE REPORTING (Sept. 30, 2016), <https://revealnews.org/blog/californias-gang-database-gets-less-secretive-but-problems-linger/> [<https://perma.cc/XBT4-9DLF>].

301. Speri, *supra* note 288; Dumke, *supra* note 294; Winton, *supra* note 297.

302. See Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 718 (2018).

303. *Id.* at 729–35.

could not be independently confirmed.³⁰⁴ More recent reporting has shed light on ICE's gang-related deportations, noting that in many instances the agency is erroneously designating immigrants as gang members for the purpose of deporting them.³⁰⁵ Finally, the FBI, ICE, and the Bureau of Alcohol, Tobacco, and Firearms, along with several other states, the District of Columbia, and numerous municipalities use GangNet, a private database offering the ability to access thousands of gang-related records nationwide, compiled from law enforcement records at the local, state, and federal levels.³⁰⁶ Based on the numbers, it is of note that the prototypical gang member, in law enforcement's view, is either African-American or Latino, even though white American youth join gangs.³⁰⁷ As with most assumptions, this perception is not necessarily accurate. A 2012 law review article by law professor Jordan Blair Woods examines how racialized sentiment about the makeup of criminal gangs has driven prosecutions of gang members under the Racketeering Influenced and Corrupt Organizations (RICO) Act, leaving the impression that most street gangs are made up of racial minorities.³⁰⁸ Woods offers numerous examples and empirical data to demonstrate that law enforcement and prosecutors view groupings of nonimmigrant whites engaging in criminal activity as not constituting a criminal gang; the result is that the white youth are not prosecuted under RICO to the same degree, as minorities believed to be in a gang have been.³⁰⁹ When we consider the fact that an estimated fifty-three percent of gang members in Mississippi are white, and around forty percent of white youth nationwide are gang members, these perceptions fuel discriminatory outcomes with serious consequences.³¹⁰

Finally, the use of a key watchlist drawn from the counterterrorism context is now accessible to all law enforcement agencies across the federal-state spectrum. The FBI maintains a terrorist watchlist

304. Ali Winston, *Obama's Use of Unreliable Gang Databases for Deportations Could Be a Model for Trump*, THE INTERCEPT (Nov. 28, 2016, 11:24 AM), <https://theintercept.com/2016/11/28/obamas-use-of-unreliable-gang-databases-for-deportations-could-be-a-model-for-trump/> [https://perma.cc/N9RJ-AEJY].

305. Dina Radtke, *ICE Is Wrongly Designating Immigrants as Gang Members to Deport Them*, SALON (May 7, 2018, 10:30 AM), https://www.salon.com/2018/05/07/ice-is-wrongly-designating-immigrants-as-gang-members-to-deport-them_partner/ [https://perma.cc/4VM3-TVYZ].

306. Hlass, *supra* note 302, at 718.

307. *Id.* at 721, 730.

308. Jordan Blair Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 306–11 (2012).

309. *Id.* at 322–35.

310. Donna Ladd, *Dangerous, Growing, Yet Unnoticed: The Rise of America's White Gangs*, THE GUARDIAN (Apr. 5, 2018, 06:00 EDT), <https://www.theguardian.com/society/2018/apr/05/white-gangs-rise-simon-city-royals-mississippi-chicago> [https://perma.cc/4P2Z-EB9J].

consisting of files on its Known or Suspected Terrorists (KST).³¹¹ Documents released to the ACLU and Yale Law School’s Civil Liberties Clinic and National Security pursuant to a FOIA request reveal that these KST files number in the hundreds of thousands, and—much like the above mentioned gang member lists—that the standards for inclusion are low and not easily verifiable,³¹² leading to the likelihood that many individuals are listed as known or suspected terrorists in error.³¹³ Individuals given a KST file are not informed of their inclusion on the list, and the FBI has not instituted any procedures for a person to appeal or challenge that inclusion.³¹⁴ These files are made available by the FBI to state and local law enforcement so as to track an individual’s encounter with the police, such as via a traffic stop, but as their primary purpose is surveillance of the listed individual, not arrest or prosecution, the police must not divulge to the subjects of a KST file that they are on the watchlist.³¹⁵ The example of this particular watchlist encapsulates the merger of the modern police state with the national security state. Over and above their ordinary policing functions, state and local law enforcement work together with the FBI to track surreptitiously the hundreds of thousands suspected of being terrorists.³¹⁶ Given that the standards for being put on this list are loose and undefined, and frequently incorrect, the message is that the police all across the federal/state spectrum is watching, and anyone could be a target.³¹⁷ Any encounter with the police, no matter how innocuous or trivial, could in fact be another link in the chain that ties someone to terrorist activity, and strengthens the web of surveillance

311. CIVIL LIBERTIES & NAT’L SEC. CLINIC, TRAPPED IN A BLACK BOX: GROWING TERRORISM WATCHLISTING IN EVERYDAY POLICING 2–3 (2016) [hereinafter TRAPPED IN A BLACK BOX REPORT], https://www.aclu.org/sites/default/files/field_document/wirac_9-11_clinic_trapped_in_a_black_box.pdf [https://perma.cc/2PSS-NEFF].

312. Diala Shamas, *A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants*, 83 BROOK. L. REV. 1175, 1195–96 (2018) (“The U.S. government has adopted a ‘reasonable suspicion’ standard that the individual is ‘engaged in conduct constituting, in preparation for, in aid of or related to, terrorism or terrorist activities.’ The term ‘related to,’ a catch-all, is even broader than the already low threshold of reasonable suspicion applied in other contexts, including that of stop-and-frisk encounters, which requires law enforcement to have reasonable suspicion of criminal activity, as opposed to conduct that is *related to* terrorist activities. This lower suspicion standard is rendered even less meaningful because it is so unlikely to be reviewed by a court.”) (citations omitted); *see also* Sinnar, *supra* note 116, at 1581–1600.

313. TRAPPED IN A BLACK BOX REPORT, *supra* note 311, at 1–3.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 2–3.

surrounding the target.³¹⁸ That there is no way to find out you are being tracked or challenge your status as a KST only strengthens the sense that we are all being watched, whether that is true or not.

CONCLUSION

Writing in the context of the privacy harms inflicted by the war on crime and attendant police practices, Kimberly Bailey notes two critical effects of the modern police state. First, “[t]he constant monitoring of poor people of color by the state at minimum has a chilling effect on their willingness to engage in self-determination, self-expression, and freedom of association.”³¹⁹ Further, she also notes the expressive nature of the state respecting an individual’s privacy, as when it does, “it sends the implicit message that the individual is ‘worthy’ of and can be trusted with engaging in essential traits of personhood.”³²⁰ With the expansion of the national security state, the shrinking of the zone of privacy has focused generally on three groups located in three distinct locations; the African-American criminal located in the inner city, the terrorist located in Muslim communities, and the Latino residents of the southern U.S. border region.³²¹ These are the groups currently deemed “unworthy,” to draw on Bailey’s phrasing, of enjoying the “essential traits of personhood.”³²² The symbiotic process by which war on terror policies make their way into local law enforcement practices and vice versa give credence to the idea that law enforcement officers in the United States enjoy the powers of secret police agents in a dictatorship.³²³ Those over-policed and surveilled communities are the main victims of these curtailed privacy rights, but technological advances offer law enforcement the opportunity to extend the web of surveillance to nearly all of society much more easily than ever before.³²⁴ The chief distinction between the United States and a police state is popular participation in a democratic system of government, which offers the ability to resist law enforcement overreach openly, but we must consider whether the narrowing zone of privacy and expanded policing powers are setting us too far down the path of unaccountable police forces harassing a disoriented and overly surveilled citizenry. When coupled with a mindset that all police forces—federal, state, or

318. *Id.*

319. Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539, 1553 (2014).

320. *Id.*

321. Kohler-Hausmann, *supra* note 32, at 64; TRAPPED IN A BLACK BOX REPORT, *supra* note 311, at 3; Woods, *supra* note 308, at 309–10.

322. Bailey, *supra* note 319.

323. Bartosiewicz, *supra* note 228.

324. *Id.*

local—should prevent terrorism, crime, or illegal immigration before they occur, the authorities may have already gone too far.