The Authoritarianization of U.S. Counterterrorism

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Sahar F. Aziz*

[We] will not hesitate to take decisive action. We will always do so legally, discriminately, proportionally, and bound by strict accountability and strong oversight. The United States—not our adversaries—will define the nature and scope of this struggle, lest it define us.¹

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I. Introduction

More than seventeen years since the “War on Terror” began, the United States has failed to recognize how its authoritarian allies, rather than its adversaries, have defined its counterterrorism practices. Western democracies have adopted signature practices of authoritarian regimes. Torture, secret renditions to black sites, indefinite detention, mass surveillance, targeted killings, selective anti-terrorism enforcement against dissidents and minorities, criminalization of political beliefs, and decreased due process rights are among the counterterrorism practices found in both the United States and their Middle East allies, albeit in varying degrees.

Human rights are de-coupled from security, or worse, treated as an impediment to preserving national security. Although the balance between security and liberty has been the topic of lively


debate since 9/11, I proffer that the impetus behind rights violations is not limited to perennial tensions between security and liberty in times of war. Increased international coordination in counterterrorism between authoritarian regimes and liberal democracies also adversely affects human rights.

As terrorism crosses borders with ease, transnational counterterrorism has become a necessity. International organizations and states coordinate preventing terrorism, identifying and apprehending known terrorists, and prosecuting terrorism suspects between nations. One consequence of such coordination is the normalization of illiberal counterterrorism norms and practices common among democratic nations.

While coordinated counterterrorism is warranted to combat transnational terrorists, the current rights-subordinating approach is counterproductive. Western governments that engage in or directly support rights-infringing practices ultimately aid terrorists as they proclaim themselves legitimate defenders against transnational state violence. Aggressive state measures trigger backlash attacks as new grievances arise, thereby feeding a cycle of state and non-state violence at the expense of civilian lives. The challenge for Western democratic nations is to avoid a

4. See, e.g., Ayaz R. Shaikh, A Theoretic Approach to Transnational Terrorism, 80 GEO. L.J. 2131, 2157 (1992) ("[T]ransnational terrorism, by definition, involves the participation of more than one nation."). But see TODD SANDLER ET AL., TRANSNATIONAL TERRORISM 2 (2008) (noting that Western nations’ view that transnational terrorism is a major threat is contradicted by the fact that approximately 1,249 people are killed from transnational terrorist attacks in comparison to 30,000 from annual highway accidents in the United States).

5. See Shaikh, supra note 4, at 2158–59 (stating the goals of international cooperation). The role of non-state actors in transnational terrorism further facilitates international cooperation. See Monika Heupel, Adapting to Transnational Terrorism: The UN Security Council’s Evolving Approach to Terrorism, 38 SECURITY DIALOGUE 477, 494–95 (2007) (emphasizing contemporary terrorism’s fluid territorial affiliation).

6. See infra Part IV (detailing the impact of counterterrorism coordination).

7. See Wolfendale, supra note 2, at 760 (noting the inadvertent consequences of Western counterterrorism).


9. See SANDLER ET AL, supra note 4, at 2 (describing competing
race to the bottom in their counterterrorism coordination with authoritarian regimes.

To be sure, the deplorable techniques used in the “War on Terror” did not originate solely in the authoritarian regimes of the Middle East and Central Asia. Such practices originated from colonial powers in Algeria, Palestine, and Afghanistan, and were subsequently adopted by new ruling elites post-independence. The United States innovated other practices, such as rendition and targeted killings with drones. This Article, thus, explores the narrow issue of the impact on democratic states’ conformity with human rights arising from working with authoritarian states in the Middle East. Specifically, I proffer that counterterrorism coordination with dictatorships normalizes the use of violence and dehumanization of suspects by the U.S. government. As more agents work with foreign agents who operate in a legal and political context where rights are subordinate to authoritarian security practices, the toleration, aiding and abetting, or direct violations of human rights may rise as the institutional culture of an agency shifts towards a more authoritarian mentality.

The adverse consequences of this drift away from liberal principles are not limited to the subordination of individual rights. Security interests are also compromised. Terrorists astutely exploit state violence and rights violations to legitimize their

considerations for liberal democracies responding to transnational terrorism).

10. See KHALILI, supra note 3, at 7–10 (showing the historical roots of the post-9/11 detention and torture of terrorism suspect in the racialized manipulation of law by European and American governments to repress colonized people).

11. See id. at 7 (describing mass slaughter as a routine colonial warfare technique).


claims as defenders of justice against state oppression. Terrorist recruiters point to the wide net of suspicion and prosecution cast upon Muslim minorities as evidence of the state’s illegitimacy. Such trends are consistent with some scholars’ findings that human rights abuses may correlate with terrorism.

Prescriptively, I recommend that financial and legal restrictions should be imposed on U.S. intelligence and security agencies’ collaboration with authoritarian regimes with a track record of rights violations in their counterterrorism practices. Existing legal restrictions on the delivery of U.S. foreign aid to countries that violate human rights should be expanded to encompass financial support and coordination in counterterrorism. Put simply, U.S. security agencies should be


15. See, e.g., Wolfendale, supra note 2, at 763 (noting that the majority of people arrested for terrorism in Britain are Muslim although the majority actually convicted are non-Muslim). But see James A. Piazza & James Igoe Walsh, Transnational Terror and Human Rights, 53 INT’L STUD. Q. 125, 129 (2009) (challenging the normative claim that “transnational terrorist attacks lead governments to restrict rights with the objective of improving security”).


Section 620M of the Foreign Assistance Act of 1961...prohibits the furnishing of assistance authorized by the FAA and the Arms Export Control Act...to any foreign security force unit that is credibly believed to have committed a gross violation of human rights. The other provision, inserted annually in DOD appropriations legislation, for years prohibited the use of DOD funds to support any training program (as defined by DOD) involving members of a unit of foreign security or police force if the unit had committed a gross violation of human rights. For FY2014, the prohibition has been expanded to also include “equipment, or other assistance.”

See also Kristina Daugirdas & Julian Davis Mortensen, United States Adjusts Aid
restrained in the degree to which they can cooperate with countries that violate human rights in counterterrorism.

This Article looks to the authoritarian practices of Egypt, one of the United States’ major allies, as a case study. Having long practiced torture, indefinite detention, trial of civilians in military courts, and other human rights violations, Egypt was a destination, among other nations, of terrorism suspects in the U.S. extraordinary rendition program.18

In comparing the United States’ counterterrorism practices with Egypt’s, the authoritarianization effect of coordination is brought to the forefront. Specifically, American national security policies and practices post-9/11 have become rights-infringing in ways that mirror those of Middle Eastern authoritarian regimes, and their predecessor colonial powers.19 Hawkish U.S. government national security rhetoric and fear mongering translates into fewer civil liberties and more human rights violations—first for Muslims and eventually for the American public at large.20 Ranging from the extreme practices of torture, indefinite detention, and targeted assassinations to prosecutions that deny defendants’ due process, habeas corpus, and confrontation rights, America’s counterterrorism practices in the “War on Terror” are troublingly similar to those of their authoritarian partners.21

II. Theorizing the Causes of Terrorism

For centuries, people have fought asymmetrical wars against sovereign nations in pursuit of political, social, economic, and religious goals.22 The conflicts are often grounded in local

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19. See Khalili, supra note 3, at 14–16 (describing repressive colonial practices).
20. See, e.g., Wolfendale, supra note 2, at 754 (“[T]he fear of terrorism is as much a product of counterterrorism rhetoric as it is of terrorism itself.”).
grievances against the ruler, ruling elites, and external powerful actors. The surge in international travel, trade, and migration has expanded the reach of terrorist groups. Access to the internet, social media, and other technological advancements provides ample opportunity for non-state actors to recruit and perpetuate violence transnationally. As a result, the constrictive effects of state borders are dissipating while asymmetrical conflicts between state and non-state actors surge.

To effectively counter transnational terrorism, policy makers look to what causes individuals to use violence in pursuit of their aims. This central question has triggered lively debates among scholars and policy makers. Among the cacophony of competing

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23. See Richard Jackson et al., Terrorism: A Critical Introduction 18 (2011) (noting that violent Islamist groups in the contemporary era pursue grievances in their local and national contexts); François Burgat, Islamism in the Shadow of Al-Qaeda 40–41 (Patrick Hutchison trans., 2008) (noting that the Arab governing elite are devoid of public support).

24. See Sandler et al., supra note 4, at 1 (listing the high-profile transnational terrorist attacks in the three decades prior to 9/11).


26. See Piazza & Walsh, supra note 15, at 127 (explaining that terrorist groups adopt strategies to compensate for controlling fewer material resources than governments); Ronald Crenstien, Counterterrorism 3 (2009) (noting that terrorist groups require less infrastructure than government actors). But see Alex Braithwaite & Quan Li, Transnational Terrorism Hot Spots: Identification and Impact Evaluation, 24 Conflict Mgmt. & Peace Sci. 281, 289 (2007) (“[A]ll else being equal, if a country is located within a hot-spot neighborhood, it is likely to experience more future terrorist incidents than another country that does not currently belong to such a neighborhood.”).

27. See, e.g., Katerina Dalacoura, Democracy as Counter-Terrorism in the Middle East: A Red Herring?, 8 Uluslararası İlişkiler 101, 103–06 (2012) (describing political and socioeconomic factors driving Islamist terrorism); Crenstien, supra note 26, at 2 (examining how terrorist groups choose victims of violent attacks).
theories, two schools of thought have emerged that inform counterterrorism policies and practices. The first argues that political and socioeconomic factors such as poverty, authoritarianism, human rights violations, political repression, an absence of the rule of law, and inequality contribute to political violence by non-state actors. The second argues ideological factors such as religious fundamentalism, anti-capitalism, Marxism, xenophobia, hyper-nationalism, or racism drive political violence. The school of thought followed by a particular country influences its counterterrorism strategy. The first school of thought leads to a development and rights-based approach and the second leads to a militarized approach. Although the United States pays lip service to the political and socioeconomic factors that contribute to terrorism, its counterterrorism strategies and practices follow the militarized approach.

The development-focused approach connects violence and militancy to poor development indicators such as illiteracy, poverty, rootlessness, poor governance, and rights abuses by the state. Grievances arising from such conditions fester to push


29. See Li & Schaub, supra note 25, at 237 (posing multiple critiques of Krueger and Malečková’s 2002 study that found no correlation between poverty and terrorism at the individual level in Hezbollah suicide missions); Dalacoura, supra note 27, at 103 (arguing that materialist or structural factors drive Islamic terrorism because ideas are epiphenomenal to the underlying reasons).

30. See CRELINSTEN, supra note 26, at 196–97 (listing the ideological influences); see also ALAN KRUEGER, WHAT MAKES A TERRORIST: ECONOMICS AND THE ROOTS OF TERRORISM (2007) (arguing that the rich are as likely as the poor to participate in terrorist acts); Quan Li, Does Democracy Promote or Reduce Transnational Terrorist Incidents?, 49 J. CONFLICT RESOL. 278, 294 (2005) (“[D]emocratic participation reduces transnational terrorist incidents in a country. Government constraints, subsuming the effect of press freedom, increase the number of terrorist incidents in a country.”).

31. See infra Part III (discussing the authoritarianism present in United States counterterrorism).

32. See, e.g., Dalacoura, supra note 27, at 103 (discussing political effects of an authoritarian regime); see also Owen Frazer & Christian Nünlist, The Concept of Countering Violent Extremism, 183 CSS ANALYSIS IN SECURITY POL’Y 1, 3 (2015) (arguing that countering violent extremism programs should also address structural causes of terrorism, such as intolerance and political, economic, or social marginalization); Edward Newman, Exploring the “Root Causes” of
indigenous groups into violently opposing the state and becoming recruits for foreign terrorist groups. Although the majority of poor people are not terrorists, poverty combined with structural inequalities may facilitate terrorism recruitment. Relatedly, rapid urbanization coupled with bulges of educated youth unable to find employment commensurate with their education may explain why middle and upper middle class individuals join terrorist groups. When democratic processes are not equally accessible to all residents or rule of law is selectively enforced to the detriment of marginalized groups, violence becomes an attractive means to effectuate change.

A study of sixty-one “Islamic extremist terrorists” in the United States, for example, found most of the suspects were at the margins of society. Many were friendless, petty criminals, drug addicts, from broken homes, or suffering a personal identity crisis. Few of the would-be terrorists sought to spread Islam or establish a caliphate. Instead, they saw themselves as defenders of their religion against what they perceived as America’s war on Islam. The American citizen who attempted to bomb Times

*Terrorism, 29 STUD. CONFLICT & TERRORISM 749, 750 (2006) (explaining tactics used by terrorists to recruit new members to support their cause).*

33. *See Kaye et al.,* supra note 8, at 45–46 (discussing socioeconomic factors that make individuals susceptible to terrorist group recruitment); Bassam Tibi, *Religious Extremism or Religionization of Politics: The Ideological Foundations of Political Islam,* in *Radical Islam and International Security: Challenges and Responses* 93–94 (Efraim Inbar & Hillel Frisch eds., 2007) (arguing that high unemployment rates and social marginalization among North African Muslim youth in France have made them more sympathetic to violent Islamist groups).

34. *See Crelinsten,* supra note 26, at 198 (noting economic factors driving terrorism). For an analysis examining how counterterrorism programming also disparately impacts poor and working-class communities in the United States, see generally Khaled A. Beydoun, *Between Indigence, Islamophobia, and Erasure: Poor and Muslim in “War on Terror” America,* 104 CALIF. L. REV. 1463 (2016).

35. *See Dalacoura,* supra note 28, at 34 (describing how recruitment spans across various socioeconomic classes).

36. *See Byman,* supra note 18, at 191 (noting the impact of a lack of democratic process).


38. *See id.* (noting that many in the study could not keep employment).

39. *See id.* (describing that potential terrorists are motivated by revenge).
Square in 2010 admitted to being motivated by the United States terrorizing Muslim people and Muslim countries through drone strikes, among other practices.\textsuperscript{40} Ironically, the more the U.S. government imputes a criminal connotation to the term “Islamist,” the more members of terrorist organizations believe their violent acts are a form of legitimate revolt against state oppression.\textsuperscript{41} That is, calling terrorism “Islamist jihad” validates terrorist groups’ propaganda that America is at war with Islam.\textsuperscript{42}

Armed conflict also correlates with terrorism. The Global Terrorism Index found that state violence and the presence of an armed conflict are closely associated with terrorist activity.\textsuperscript{43} Over a twenty-five year span, 92\% of terrorist attacks occurred where state violence was prevalent.\textsuperscript{44} In contrast, fewer than 0.6\% of terrorist attacks occurred in states without conflict or state violence.\textsuperscript{45} Predictably, failed states are a magnet for terrorist groups to set up bases from which to launch domestic and transnational attacks.\textsuperscript{46} Indeed, the Middle Eastern countries of Iraq, Syria, and Libya with governments who lack a monopoly over the use of force are now hosts to branches of Al Qaeda, ISIS, and other transnational terrorist groups.\textsuperscript{47}

Taking stock of this data, the Bush Administration made democracy promotion the defining component of its post-9/11

\begin{itemize}
  \item \textsuperscript{40} See id. at 178 (detailing a desire to be part of the solution to U.S. attacks).
  \item \textsuperscript{41} See Burgat, supra note 23, at 8 (discussing the impact of the American narrative on terror).
  \item \textsuperscript{42} See Aziz, supra note 14, at 261 (describing the recruiting narrative of violent American military intervention and support of dictators).
  \item \textsuperscript{43} See Inst. for Econ. & Peace, Global Terrorism Index 2015 68 (2015) (describing contributing factors such as armed conflict, conflict within the country, and corruption).
  \item \textsuperscript{44} See id. at 70 (“92 percent of all terrorist attacks occurred in countries where the Political Terror Scale was very high.”).
  \item \textsuperscript{45} See id. at 68 (emphasizing the link between terrorism and state security); see also Li & Schaub, supra note 25, at 242 (finding that countries with a history of terrorist activities have more terrorist incidents than those without a history of terrorism).
  \item \textsuperscript{46} See Kave et al., supra note 8, at 25 (arguing that a lack of state legitimacy bolsters support for terrorists as defenders against state injustice).
  \item \textsuperscript{47} See Heupel, supra note 5, at 481 (stating that terrorist groups turned to failing states instead of relying on state-provided safe havens); Walsh & Piazza, supra note 16, at 533 (discussing terrorist groups’ strategy for growth).
\end{itemize}
Freedom Agenda, thereby continuing America’s long history of spreading democracy as a mainstay of its foreign policy.\(^{48}\) The U.S. National Security Strategy in 2006, 2010, and 2015 all acknowledge that for democracy to exist, civil liberties, minority rights, and equality of all citizens must be preserved.\(^{49}\) The U.S. strategy rhetorically commits to using “economic assistance, development aid, trade, and good governance” to support new democracies.\(^{50}\) By promoting democracy in Muslim majority countries, the U.S. government believed Western security also would be improved.\(^{51}\) But contrary to its rhetoric, the United States’ counterterrorism practices bred violence.

The second school of thought attributes ideology as the cause of terrorism, ranging from ethno-nationalism, separatism, anarchism, anti-capitalism, neoliberalism, and religious fundamentalism.\(^{52}\) During the end of the Cold War, non-state actors using religion to justify political violence emerged.\(^{53}\) The Middle East and Central Asia became the center of fundamentalist, extremist groups seeking to overthrow

\(^{48}\) See Daniel Byman & Sara Bjergand Moller, The United States and the Middle East: Interests, Risks, and Costs, in SUSTAINABLE SECURITY: RETHINKING AMERICAN NATIONAL SECURITY STRATEGY 291 (Jeremi Suri & Benjamin Valentino eds., 2016) (discussing that the spread of democracy was essential to the Administration’s counterterrorism strategy); see also MUSLIMS IN THE WEST AFTER 9/11: RELIGIONS, POLITICS AND LAW 93–97 (Jocelyne Cesari ed., 2010).


\(^{51}\) See, e.g., Dalacoura, supra note 27, at 102 (“[T]he assumption on which the Bush counter-terrorism policy was based . . . was that authoritarianism in the Middle East was at least one important cause of Islamist terrorism.”).


\(^{53}\) See, e.g., Walter Enders & Todd Sandler, After 9/11: Is it All Different Now?, 49 J. CONFLICT RESOL. 259, 263 (2005) (noting the rising influence of fundamentalist terrorism even though state sponsored terrorism was decreasing).
authoritarian regimes beholden to American interests. These terrorists began by targeting Middle East regimes deemed the “Near Enemy” and eventually spread to their Western backers—the “Far Enemy.”

Al Qaeda and its progeny, ISIS, reject the Westphalian nation-state European model and seek to replace it with an Islamic caliphate order. Attributing the Middle East’s delayed development and moral corrosion to Western political and economic models and American imperialism, these transnational terrorists call for a pan-Islamic caliphate ruling all states with Muslim-majority populations. To them, the Middle East’s problems are a direct result of European colonialism that continues to the present day through lackey dictators. Muslims, therefore, have a religious duty to revolt against Western hegemony through an Islamic awakening that will return Islamic civilization as a dominant actor in world politics. For these reasons, some scholars argue that political reforms, economic development, or democracy promotion in Muslim majority countries will not affect the behavior of transnational terrorists.

54. See Burgat, supra note 23, at 32–33 (noting the geographical concentration of fundamentalist views).


56. See Jackson et al., supra note 23, at 46–47 (noting that counterterrorism aims to preserve the legitimacy of the existing order and maintaining political authority).

57. See id. at 17 (noting that modern pan-Islamism has roots in the anti-colonial movement by Muslim intellectuals).

58. See Burgat, supra note 23, at 40–41 (describing the lingering effects of colonialism).

59. See, e.g., Stern & Berger, supra note 25, at 117 (detailing ISIS propaganda disclaiming democracy, secularism, nationalism, and other Western ideals); Dalacoura, supra note 28, at 15, 21 (critiquing terrorism studies for engaging in Islamic “exceptionalism”).

This reasoning, however, incorrectly assumes the rise of Islamic political movements in the Middle East take both violent and nonviolent forms—and overlooks that most political Islamists are nonviolent.61

A nation’s position on the causes of terrorism shapes its counterterrorism practices. Those who believe terrorism is ideologically driven are more likely to adopt militaristic, rights-infringing practices based on essentialized perceptions of the target group’s identity.62 In contrast, a more nuanced understanding of the social and economic causes of terrorism recognizes the importance of civil and human rights in preventing terrorism, thereby leaning towards a development-based approach.63

While international legal instruments acknowledge the importance of human rights, civil liberties, and development, it is up to each individual nation to determine the extent to which its counterterrorism practices comport with domestic and international rights norms.

III. The Legal and Policy Framework for Transnational Counterterrorism

The old adage that one person’s terrorist is another person’s freedom fighter is no less true today than it has been throughout

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61. See DALACOURA, supra note 28, at 15, 21 (noting an assumption of an inherent association between terrorism and Islam); Krueger & Malečková, supra note 60, at 121 (noting that majority of Islamist groups in the Middle East are nonviolent and integrated in their respective political systems); see also Jacob Poushter, In Nations With Significant Muslim Populations, Much Disdain for ISIS, P E W R ES. C TR. (Nov. 17, 2015), http://www.pewresearch.org/fact-tank/2015/11/17/in-nations-with-significant-muslim-populations-much-disdain-for-isis/ (last visited Sept. 10, 2018) (finding that data collected in eleven Muslim-majority countries demonstrated overwhelmingly negative views of ISIS) (on file with the Washington and Lee Law Review).


63. See generally id.
Motivated by political, social, and economic goals, transnational terrorists proclaim their violence is necessary to defend against state injustice and oppression. Followers accept skewed interpretations of religious and secular ideologies because they believe their cause is just. Because terrorism is what one scholar characterizes as a “gray-area phenomenon, something between crime and war, state violence and insurgent violence, conflict and violence, and propaganda and direct action,” the international community cannot agree on a universal definition. Indeed, there is no universal definition of terrorism. Nonetheless, most competing definitions of terrorism include four essential components: (1) a violent act; (2) civilian victims; (3) the...
perpetrators have a political, religious, or social motive; and (4) terrorists seek to provoke a political reaction and spread fear. Notably, terrorism is not war, guerilla warfare, or insurgency even though terrorist acts may be deployed in those contexts. Historically, terrorism was domestic insofar as its effect on the citizens, institutions, property, and policies of a defined geography. The perpetrators and the victims were from the same host country, and the terrorist act occurred within the host country’s jurisdiction. Transnational terrorism, in contrast, occurs when individuals or entities from two or more states directly participate in a terrorist act. Attacks by perpetrators in one country against targets in another country, as well as against multilateral organizations, emerged during the late 1960s when left wing anti-capitalist terrorist groups and Palestinian liberation groups attacked foreign corporations, multilateral organizations, and foreign military targets. In the years following the September 11th attacks against the World Trade Center in New York City, U.S. property and citizens were targeted more frequently than other nations in large part because the U.S. military had a large contingency in Iraq and surrounding countries.

As transnational terrorism grew, so too did the need for cooperation between states to counter it. In contrast to nationalist groups, Al Qaeda and ISIS target Middle Eastern governments in

69. See Stern & Berger, supra note 25, at 142–43 (describing terrorist groups’ tactics and motivations); Crelinsten, supra note 26, at 78 (describing common characteristics of terrorism).

70. See generally Bruce Hoffman, Inside Terrorism (2006); Sandler et al., supra note 4; Stern & Berger, supra note 25.

71. See Sandler et al., supra note 4, at 7–8 (describing the internal impacts of terrorism).

72. See Shaikh, supra note 4, at 2133 (including incidents originating in one country and ending in another).

73. See Sandler et al., supra note 4, at 8 (discussing the various models of transnational terrorist attacks).

74. See id. at 12; Dalacoura, supra note 28.

75. See Sandler et al., supra note 4, at 8 (citing data showing that in 2006, 40% of transnational terrorism was directed at U.S. interests); David P. Oakley & Patrick Proctor, Ten Years of GWOT: the Failure of Democratization and the Fallacy of “Ungoverned Spaces”; 5 J. Strategic Security 8, 8 (2012) (noting the United States spent eight years and approximately $806 billion in Iraq since 2003).
their quest to replace the Westphalian nation-state model with a pre-modern pan-Islamic caliphate. The rise in transnational terrorism has made states' counterterrorism policies interdependent, and generated multiple international counterterrorism instruments. Even before the September 11th attacks triggered a flurry of interstate coordination, the United Nations was coordinating counterterrorism among states.

A. Prioritizing Terrorism Prevention

In 1994, the UN General Assembly issued the Declaration on Measures to Eliminate International Terrorism. The UN urged states “to take all appropriate measures at the national and international levels to eliminate terrorism” and emphasized “the need further to strengthen international cooperation between States.” The Security Council invoked its authority under Article 39 of Chapter VII of the UN Charter to demand that states actively root out terrorists within their territories. Security Council Resolution 1373 (drafted primarily by the United States) was issued on September 28, 2001 and declared that terrorism is a per se threat to international peace and security. Similarly, Security

76. See, e.g., DALACOURA, supra note 28, at 12 (explaining that terrorist groups oppose Western forms of government). But see JACKSON ET AL., supra note 23, at 22–23 (noting that Western military interventions or civil war situations allow Islamist extremist groups to fight alongside resistance groups and to impose their politico-religious narrative on the national struggle).

77. See G.A. Res. 60/1, ¶ 71 (Oct. 24, 2005) (“We acknowledge that we are living in an interdependent and global world and that many of today’s threats recognize no national boundaries, are interlinked and must be tackled at the global, regional and national levels in accordance with the Charter and international law.”).

78. See Graham, supra note 64, at 45–49 (discussing modern counterterrorism coordination before 2001).

79. See G.A. Res. 49/60, ¶ 1 (Dec. 9, 1994) (calling for international cooperation and development of international law).

80. Id. ¶ 4.


82. See U.N. Charter art. 43 (authorizing investigation into any dispute or situation which might threaten international security).

83. See S.C. Res. 1373, ¶ 1 (Sept. 28, 2001) (calling for states to complement all international counterterrorism efforts).
Council Resolutions 1377 (2001), 1540 (2004), 1566 (2004), and 1624 (2006) situated international terrorism as the most serious threat to international peace and called on states to participate in a "sustained, comprehensive approach involving the active participation and collaboration of Member States of the United Nations . . . to combat the scourge of international terrorism." 84

The Security Council called on all states to impose anti-terrorism criminal sanctions in domestic laws and prosecute any person who finances, plans, prepares, or perpetrates terrorists acts or supports such acts. 85 States were obliged to prevent individuals and groups from using their territory for transnational terrorism, prohibit terrorists from moving through their territory, strengthen security of international borders, combat fraudulent travel documents, and share relevant counterterrorism information with other states. 86

To monitor states’ compliance with counterterrorism obligations and facilitate technical assistance with limited implementation capacities, Resolution 1373 established the Counter-Terrorism Committee (CTC)—which notably left out the importance of compliance with human rights law. 87 Instead, the

84. S.C. Res. 1377, ¶ 2 (Nov. 12, 2001).
85. See S.C. Res. 1373, supra note 83, ¶ 1 (criminalizing direct or indirect funding); Kim Lane Scheppele, The International Standardization of National Security Law, 4 J. NAT’L SECURITY L. & POL’Y 437, 449 (2010) (arguing the UN’s demands for states to change their domestic laws were unprecedented).
86. See Heupel, supra note 5, at 489 (noting that the strategy addresses the distinct features of transnational terrorism); see also U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 2001 viii (2002) (noting the coordination of intelligence sharing between the United States and its Middle East allies in global war on terror).
87. See Duffy, supra note 13, at 546 (linking the resolution to human rights violations). Like other international obligations, counterterrorism implementation is not consistent across countries. To address compliance problems, policy makers adopt one of two methodologies. The Enforcement School deters non-compliance by “controlling the cost-benefit calculation of states through monitoring and the threat or use of sanctions in the cases of norms violation.” Heupel, supra note 5, at 483. The Management School assumes that states intend to comply with international rules but fail to do so due to insufficient economic or political capacity. As such, proponents of this school recommend problem-solving and capacity building strategies rather than enforcement strategies. Id.; see also Schepple, supra note 85, at 443 ("[W]idespread compliance with the Resolution 1373 framework makes the anti-terrorism
CTC focuses on UN member states’ compliance with counterterrorism practices through periodic reports.88

By 2005, there were at least thirteen international instruments related to the prevention and suppression of terrorism and the Security Council had issued five resolutions.89 In 2006, the United Nations issued its first Global Counter-Terrorism Strategy based on four pillars: (1) addressing the conditions conducive to the spread of terrorism; (2) preventing and combatting terrorism; (3) building states’ capacity and strengthening the role of the United Nations; and (4) ensuring human rights and the rule of law.90 In the years following 9/11, the second pillar of the UN’s counterterrorism strategy—preventing and combatting terrorism—dominated international efforts, at the expense of human rights, rule of law, and civil liberties.91

B. Unfulfilled Commitments to Human Rights

Shortly after the September 11th terrorist attacks, the General Assembly emphasized the importance of “promot[ing] and protect[ing] human rights and fundamental freedoms, as well as due process and the rule of law, while countering terrorism” in its multiple resolutions calling for the protection of human rights and fundamental freedoms while countering terrorism.92 The Security Council also recognized that counterterrorism measures should comply with international human rights, refugee, and

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88. See PLESSIS, supra note 3, at 45 (noting that the CTC identifies priority areas by reviewing states’ reports).

89. See, e.g., Heupel, supra note 5, at 488–90 (describing resolutions prohibiting the movement of terrorists, implementing sanctions, and suppressing weapons proliferation).

90. See G.A. Res. 60/288, at 1–2 (Sept. 20, 2006) (reaffirming the need for cooperation among states).

91. See DUFFY, supra note 13, at 554 (highlighting the emphasis on security over individual rights).

The 2005 General Assembly World Summit Outcome Resolution declared “[s]tates must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.” As egregious human rights violations came to light, the UN Commission on Human Rights appointed a special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. That same year, the United Nations developed a Global Counter-Terrorism Strategy.

The UN emphasized human rights as an integral part of effective counterterrorism, and reiterated its commitment to sponsor programs that “promote dialogue, tolerance and understanding among civilizations, cultures, peoples and religions, and to promote mutual respect for and prevent the defamation of religions, religious values, beliefs, and cultures.” In rejecting the clash of civilizations narrative, the Secretary General launched the Alliance of Civilizations. This initiative brought together governments and civil society to “improve understanding and cooperative relations among nations and peoples across cultures and religions—in particular, between the so called Western and Muslim societies—and in the process, to help counter the forces that fuel polarization and extremism.”


94. G.A. Res. 60/1, ¶ 85 (Oct. 24, 2005).


96. G.A. Res. 60/288, supra note 90, at 4.

97. See id. (promoting dialogue, tolerance and understanding); History, United Nations Alliance of Civilizations, https://www.unaoc.org/who-we-are/history/ (last visited Sept. 23, 2018) (noting the Alliance’s formation against the backdrop of the global war on terror) (on file with the Washington and Lee Law Review).

98. History, supra note 97.
In direct contradiction to these commitments, the U.S. military and intelligence agencies bombed suspected terrorist training camps, kidnapped suspected terrorists into secret rendition programs, tortured terrorism suspects, and placed suspects in indefinite detention in Guantanamo and other military bases in Central Asia and the Middle East.99 Law enforcement agencies created travel screening watchlists and No Fly Lists, spied on Muslim and Arab communities based on racial and ethnic profiling, designated Muslim civil society groups as terrorists, prosecuted Muslims for material support to terrorism, froze assets of Islamic charities, and deported Muslims suspected of holding anti-Western political views or religious associations.100 Counterterrorism practices treated Muslim, Arab, and South Asian individuals and communities as potential terrorists.101 Security discourse grounded in fear and stereotypes equating terrorism with Islam, thereby propagating the narrative that Islam and the West are engaged in a clash of civilizations.102 Islam and Muslims replaced Communism and Russians, respectively, as the civilizational threat to Western democracy.103


100. See DUFFY, supra note 13, at 550 (arguing that counterterrorism efforts lead to marginalization of individual rights); JACKSON ET AL., supra note 23, at 66 (discussing how the “evil international terrorist” became associated with “Eastern” otherness, thereby resulting in increased insecurity for Muslim communities due to intensified counterterrorism focused on them); see also G.A. Res. 54/109, ¶ 1 (Feb. 25, 2000) (adopting the International Convention for the Suppression of the Financing of Terrorism to criminalize and punish terrorist financing acts).

101. See HERMAN, supra note 3, at 197 (describing targeted surveillance tactics).

102. See JACKSON ET AL., supra note 23, at 23 (detailing the impact of divisive rhetoric); President George W. Bush, Address to Congress (Sept. 20, 2001) (“This is the world’s fight. This is civilization’s fight. This is the fight of all who believe in progress and pluralism, tolerance, and freedom.”).

103. See LISA STIMPITZKY, DISCIPLINING TERROR: HOW EXPERTS INVENTED “TERRORISM” 49–83 (2013) (arguing that political discourse crafted Islam as a threat to Western ideals); Sahar F. Aziz, Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America, 47 GONZ. L. REV. 429, 475 (2012) (noting that the United States disproportionately focuses on terrorist acts committed by Muslims); Dalia F. Fahmy, The Green Scare is Not McCarthyism 2.0: How Islamophobia is Redefining the Use of Propaganda in Foreign and
terrorists leveraged this apocalyptic narrative to recruit disaffected, impoverished, and oppressed young men in Muslim majority and Western countries to join their proclaimed just cause.104 And human rights groups added the United States to their list of nations who violated human rights.105

IV. The Authoritarianization Effect of Transnational Counterterrorism

The commitment to cooperate with Middle Eastern nations to stop transnational terrorism has been a consistent message from the White House since 2001.106 President Bush pledged “to strengthen our partnership with every nation that joins in the fight against terror. We deepened our security cooperation with allies like Jordan and Egypt, and with our friends in the Gulf.”107 President Obama proclaimed in his 2011 National Strategy for Counterterrorism that the “United States alone cannot eliminate every terrorist or terrorist organization that threatens our safety, security, or interests . . . we must join with key partners and allies to share the burdens of common security.”108 While the Obama Administration admitted these partners do not share America’s values, it believed through cooperation the United States would “demonstrat[e] through our example the value of upholding human rights and responsible governance [and] these partners will ultimately be more stable and successful if they move toward these principles.”109

104. See Stern & Berger, supra note 25, at 194–95 (discussing the deployment of identity-based extremism in the Middle East and use of narratives of battles between good and evil).


106. See Byman & Moller, supra note 48, at 288–99 (noting that Egypt, Jordan, Saudi Arabia, and Yemen were especially valued for their cooperation).


109. Id.
What appears to have occurred, however, is the opposite. The United States violated human rights abroad and expanded executive power at the expense of civil liberties at home. All the while, Middle East partners have become more authoritarian in their practices using national security as pretext. Human rights are not advancing as a result of transnational counterterrorism coordination. Instead, authoritarian practices are spreading to Western nations.110

To be sure, I am not arguing the United States has become an authoritarian state. Rather, I posit that formal and informal transnational counterterrorism coordination facilitates Middle East authoritarian practices influencing the United States in ways that erode civil liberties at home and human rights abroad.111 The shift from a criminal law enforcement paradigm to an open-ended war model, for example, places the United States in an unofficial state of emergency.112 With that comes deference to rights-infringing national security practices. Fewer rights and liberties become the new normal.

Expansions in executive authority under the auspices of national security coupled with legislative changes have circumscribed the oversight role of the courts.113 Politicians’ rhetoric inflates fears of terrorists waiting to strike at any moment.114 The media exacerbates the public’s fears through extensive coverage of terrorism while leaving out data showing the likelihood of being killed by a terrorist attack is miniscule; not to mention the overwhelming majority of terrorist attacks are directed at non-U.S. targets.115 Nevertheless, Congress passes laws

110. See infra Part IV.C (detailing the normalization of torture and surveillance by the United States government).

111. See Hafner-Burton & Shapiro, supra note 16, at 415 (arguing that the United States must protect human rights to effectively fight the war on terror).


113. See Setty, supra note 2, at 671–72 (arguing that the judiciary has acquiesced to the aggressive counterterrorism methods); DUFFY, supra note 13, at 593–94 (noting the shift in power from the judiciary to the political branches).

114. See generally President George W. Bush, State of the Union Address (Jan. 29, 2002).

115. See LaFree et al., supra note 55, at 468 (“[B]etween 1970 and 2004, more
granting the president expansive authorities and judges defer to executive action. Over time, such trends have led to abuses of authority arising from the concentration of power in the executive branch.

By comparing the national security practices of a dominant Middle East country and longtime U.S. ally, Egypt, with those of the United States, I demonstrate how transnational counterterrorism may be contributing to the normalization of human rights and civil liberties violations in Western democracies. Although counterterrorism coordination is not the sole cause of U.S. rights violations, it is an overlooked factor that warrants further scrutiny by government officials and citizens seeking to reverse the misguided subordination of rights to security. My comparison focuses on five practices: (1) torture; (2) indefinite detention; (3) inhumane conditions of detention; (4) mass surveillance; and (5) selective enforcement of anti-terrorism laws against Muslims and dissidents.

A common theme permeating these rights-infringing practices is the reduced levels of due process afforded targets as a result of judicial inaction, legislative mandate, or executive fiat in a secretive counterterrorism regime. Moreover, these practices occurred despite ratification of international human rights agreements that prohibit both Egypt and the United States from engaging in such practices. That the United States is than 96% of more than 16,000 terrorist attacks were in fact directed at non-U.S. targets.


117. See Setty, supra note 2, at 644 (emphasizing the lack of accountability and oversight of the executive branch); Joanna Baltes et al., Convicted Terrorists: Sentencing Considerations and Their Policy Implications, 8 J. Nat'l Security L. & Pol'y 347, 348 (2016) (noting the lack of transparency surrounding the executive’s discretion on whether or not to seek execution).


119. See Duffy, supra note 13, at 902 (describing the loss of individual rights).

120. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (obligating states to protect the right to life; right to be free from torture, cruel, inhuman or degrading treatment; right to a fair trial by an independent and impartial court; and right to humane conditions of detention).
systemically violating these commitments with impunity evinces a troubling transnational race to the bottom.\textsuperscript{121}

**A. Coordination in Counterterrorism Between the United States and Middle East Countries**

While international coordination predated the September 11th terrorist attacks, the frequency and scope of counterterrorism coordination afterward expanded dramatically.\textsuperscript{122} United States national security strategy documents emphasized working with foreign partners as essential to counterterrorism efforts.\textsuperscript{123} Law enforcement agencies share intelligence, conduct joint trainings and operations, and collaborate on countering radicalization.\textsuperscript{124} Coordinated intelligence gathering is also an essential component of transnational counterterrorism.\textsuperscript{125} For instance, thousands of FBI agents work with their foreign counterparts to prevent terrorist attacks from Al Qaeda, ISIS, and other organizations.\textsuperscript{126} Egyptian officials tout their intelligence sharing and participation

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\textsuperscript{122.} See, e.g., PLESSIS, supra note 3, at 43 (describing 9/11 as the catalyst for new areas of cooperation to combat terrorism).

\textsuperscript{123.} See, e.g., EXEC. OFFICE OF THE PRESIDENT, supra note 108, at 9 (stating the necessity of partnering with states that face terrorist threats).

\textsuperscript{124.} See id. at 7 (stating that partnering leads to increased stability); PLESSIS, supra note 3, at 37–38 (describing efforts to gather evidence across borders). But see WADIE E. SAID, CRIMES OF TERROR 14–16 (2015) (critiquing counter-radicalization as using religious orthodoxy as a proxy for terrorism).

\textsuperscript{125.} See generally Letter from Donald J. Trump, President of the U.S., to Congressional Leaders (June 6, 2017) (on file with the Washington and Lee Law Review); Byman & Moller, supra note 48.

in coalition meetings aimed at coordinating counterterrorism strategy and operations. But the disparate legal regimes governing U.S. and Middle Eastern security officers result in U.S. officials having access to intelligence obtained through torture and other human rights violations.

Separate from questions about the veracity of the information, intelligence sharing incentivizes outsourcing intelligence collection to Middle East officials unrestrained by laws and norms that protect human rights and civil liberties. Moreover, joint intelligence gathering operations provide opportunities for American counterterrorism officers to participate in rights-infringing methods of intelligence gathering, as is the case in the extraordinary rendition program.

Military cooperation with Middle Eastern countries has also increased. Since 9/11, the United States military has expanded its basing and access rights; bolstered defense cooperation; and sold military equipment to Jordan, Egypt, the United Arab Emirates, and Saudi Arabia. U.S. military bases in Kuwait, Bahrain, Saudi Arabia, Qatar, Oman, the UAE, Turkey, and Afghanistan facilitate counterterrorism coordination among military personnel. Additionally, a secret unmanned aerial


128. See U.S. DEP’T OF STATE, supra note 86, at viii (describing U.S. law enforcement’s ability to investigate potential terrorists).

129. See HUMAN RIGHTS WATCH, “WORK ON HIM UNTIL HE CONFOSES” 21–26 (2011) (detailing regular torture by Egypt’s federal law enforcement). An additional concern is the abuse of shared intelligence by a foreign agency to persecute a citizen rather than prevent a crime or terrorist act. See Petra Bartosiewicz, Deploying Informants, the FBI Stings Muslims, NATION (June 14, 2012), https://www.thenation.com/article/deploying-informants-fbi-stings-muslims/ (last visited Sept. 10, 2018) (reporting on the arrest and torture of Yonas Fikre, a Muslim American from Portland, Oregon, while he was in the United Arab Emirates on the instruction of the U.S. intelligence services) (on file with the Washington and Lee Law Review).

130. See HUMAN RIGHTS WATCH, DANGEROUS DEALINGS 2 (2002) (citing increased international presence).

131. See Byman & Moller, supra note 48, at 263–64 (documenting personnel and equipment expansion).

132. See id. at 265–66 (describing operations of U.S. military bases in the
vehicle base is reportedly operating out of Saudi Arabia that is used for drone attacks against targets in Yemen.133

As transnational terrorism spread across the Middle East, U.S. military arms sales soared. In 2011, the United States finalized a $29 billion arms deal with Saudi Arabia and a $10 billion deal with the UAE.134 In 2017, the Trump Administration signed a $110 billion multi-year arms sale to Saudi Arabia, the largest in history between the two countries, and sold $12 billion of U.S. arms to Qatar.135 Cooperation also comes in the form of training programs aimed at enhancing transnational counterterrorism. Through the Antiterrorism Assistance Program, for example, the United States trains law enforcement and security services of foreign allies.136 Similarly, “the U.S. Central Command (USCENTCOM), which covers the Middle East, North Africa, and Asia, conducted forty-five multilateral and bilateral training exercises” with Middle Eastern, North African, and Asian countries137 and hosts a biennial multinational training exercise hosted by Egypt and the United States.138

The Combatting Terrorism Fellowship Program (CTFP) trains foreign mid-level and senior level security and military officials. The Department of Defense (DOD) manages the CTFP to build

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134. See Byman & Moller, supra note 48, at 267 (outlining the weapons deal).


136. See U.S. DEP’T OF STATE, supra note 86, at xiii (noting training areas including airport security and hostage rescue).


partnerships with foreign allies. According to the DOD, “[t]he CTFP provides unique relationship and capacity-building opportunities that enable partner nations to address threats of terrorism within their borders and regions and strengthens collaboration with and support for U.S. and partner efforts to defeat terrorism.” Over 250 foreign officials have participated in the program. In 2015, a CTFP alumni event was held in Amman, Jordan where more than forty alumni from twenty countries discussed strategies on how to respond to ISIS, Boko Haram, Al-Shabaab, and Al Qaeda.

Additionally, American police and intelligence officers are sent to foreign countries through bilateral arrangements where they build relationships and a network for international cooperation. Through these interactions, information, skills, and norms are exchanged at the institutional and individual level.

Contrary to commonly held assumptions that Western liberal democratic norms are transferred to foreign allies, the exchange is two-way. Western officials learn from their Middle East counterparts that the only way to eradicate terrorism is with an iron-fisted, militarized approach. As a result, rights infringing practices and norms have infected how the United States counters terrorism both at home and abroad.

140. Id. at 3.
141. See id. at 1 (reporting a budget of $4,767,190 for the 256 participants).
142. See id. at 11 (describing alumni panels on combatting radical extremism).
144. See id. (describing the exchange of training information).
146. See Scheppele, supra note 85, at 451 (“The problem with the rights-violating aspects of the Security Council framework, then, is not with the
B. Rights-Infringing Counterterrorism in the Middle East: The Case of Egypt

Middle Eastern regimes have long invoked national security as a ruse to eliminate political opposition, silence dissenters, and to quash civil society. The mantra of counterterrorism grants the state unfettered discretion to kill, torture, indefinitely detain, surveil, and prosecute those deemed a threat to the regime. These practices pre-dated 9/11, and in fact have been the basis of international calls for democratization of the region.

Egypt—a longtime ally and counterterrorism partner of the United States—illustrates how a Middle Eastern state uses counterterrorism to violate human rights and civil liberties. Some of these authoritarian practices have shaped U.S. counterterrorism practices, albeit not to the same degree. Egregious forms of physical abuse have been a mainstay of Egyptian counterterrorism strategies for decades. By making the cost of dissent prohibitively costly, torture is a strategy that deters citizens from challenging the state’s authority. Causing the population to cower in fear, the regime proclaims harsh counterterrorism practices are necessary to preserve the security of the state. The regime’s autocratic grip on political power, not the people’s security, is the real objective.

intentions of the Security Council, but with the terrible quality of governance in many states in the world . . . . ”.

147. See Jason Brownlee, A New Generation of Autocracy in Egypt, 14 BROWN J. WORLD AFF. 73, 77 (2008) (“This political elite still employs national security rhetoric to justify draconian assaults on civilian activists.”).

148. See id. at 78 (describing violent assaults on protestors).

149. See id. at 83 (noting that parties calling for democratization included the United States).


151. See HUMAN RIGHTS WATCH, BEHIND CLOSED DOORS: TORTURE AND DETENTION IN EGYPT 72 (1992) (reporting torture as deterrence and punishment).

152. See id. (discussing the regimen’s motivation for torture).

153. See id. (“[T]he policy of the political security apparatus is to keep things under control.”).
The Mubarak regime engaged in widespread and systematic torture.\textsuperscript{154} A new counterterrorism law passed in 1992 granted police and security forces extensive powers to arrest, detain, and torture hundreds of people accused of belonging to political Islamist organizations.\textsuperscript{155} Terrorist detainees first disappeared into secret prisons outside the purview of law in order to be subjected to torture to extract information and coerce false confessions.\textsuperscript{156} Police also tortured detainees to pressure them to be informants on their friends, family, and co-workers upon release.\textsuperscript{157} Employing thousands of informants expanded the reach of intelligence services’ extensive monitoring and mass surveillance of the population—a feature of the post-9/11 national security regime in the United States.\textsuperscript{158} Although dissidents of various political stripes have been victims of torture by the state, political Islamists have borne the brunt of the abuse.\textsuperscript{159} Detainees are forcibly disappeared and tortured by the state in locations unknown to their families or lawyers.\textsuperscript{160} Human rights reports document cases of torture by Egyptian security forces as far back as the 1980s. For instance, Amnesty International’s report “Ten Years of Torture” documents myriad forms of torture of Egyptian prisoners including being:

\begin{footnotes}
\footnotetext{155}{See Human Rights Watch, Egypt: Human Rights Background, 2001 1 (2001) (stating that hundreds of civilians were sent to military court).}
\footnotetext{156}{See Human Rights Watch, supra note 129, at 4 (stating that security court trials relied on coerced confessions).}
\footnotetext{157}{See Amnesty Int’l, Egypt: Ten Years of Torture 2 (1991) (reporting that citizens were forced to collect information on friends or colleagues).}
\footnotetext{158}{See David Smith, Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment, 11 UCLA J. ISLAMIC & NEAR EASTERN L. 85, 94–95 (2011–2012) (outlining the FBI’s post-9/11 counterterrorism strategy).}
\footnotetext{159}{See Amnesty Int’l, supra note 157, at 1 (describing wide-scale political arrests); Human Rights Watch, Police, Military Torture and Abuses 530 (2013) (reporting at least eleven custodial deaths caused by police torture and several cases of torture by the military).}
\end{footnotes}
[B]lindfolded, stripped of their clothes and suspended from their wrists, bound or handcuffed together, sometimes in contorted positions, from the tops of doors or from barred windows. Victims have described how they have been forced to lie on their backs, their hands and feet bound together, a chair forced up under their armpits, another keeping their knees apart to restrict the body's involuntary spasms as electric shocks were applied repeatedly to their nipples and genitals. Between torture sessions they were forced to stand in unnatural positions, often with arms and legs outstretched, for hours on end and beaten if they moved. Some were sexually abused.161

These same torture tactics were unleashed on post-9/11 terrorism suspects held in Guantanamo, Abu Ghraib, and multiple extraordinary rendition sites.

Detainees in Egyptian jails also frequently died from torture in what amounted to extrajudicial killings.162 The lucky ones survived only after they confessed to the state's accusations.163 Similar to the U.S. military round ups in Afghanistan and Pakistan after 9/11, most victims were innocent civilians rounded up arbitrarily after a terrorist attack.164 Confessions extracted under torture were then used as evidence in political trials without question to their veracity.165

Because of legal and political impunity for security forces, very few torture victims obtain a remedy for their abuse, including in the United States.166 Calls for prosecution of high-level U.S.

161. AMNESTY INT’L, supra note 157, at 1.
162. See HUMAN RIGHTS WATCH, supra note 129, at 60–71 (detailing various torture-related deaths).
163. See Egypt: 7,400 Civilians Tried in Military Court, supra note 150 (documenting cases of systemic torture by the Egyptian security service).
165. See SAID, supra note 124, at 84–85 (discussing the case of Ahmed Omar Abu Ali wherein a confession extracted by Saudi officials allegedly during torture was used to prosecute Abu Ali in U.S. court).
166. See HUMAN RIGHTS WATCH, supra note 129, at 84 (noting the government's failure to investigate and prosecute perpetrators of torture); TRUDY BOND ET AL., SHADOW REPORT TO THE UNITED NATIONS COMMITTEE AGAINST
intelligence officials for torture of terrorism suspects have fallen on deaf ears. This system of impunity signals to officials that although torture may be illegal under international and domestic law, abusing detainees can continue without fear of prosecution.

In addition to being tortured, detainees are subjected to inhumane prison conditions in violation of human rights law. According to a 1993 Human Rights Watch report, detainees were crammed in cells without toilets or running water. They were forced to sleep on filthy floors without mattresses or blankets. Breaks were insufficiently afforded to detainees, and those granted ranged from merely five minutes to thirty minutes. Beatings and solitary confinement for weeks were common disciplinary tools imposed by abusive guards beyond external oversight or accountability. Similar allegations surfaced in Guantanamo, Bagram, and Abu Ghraib prisons managed by U.S. officials and their contractors. More than ten years later, another Human Rights Watch report found torture in Egypt remained pervasive. Interviews in 2015 with nineteen torture victims found that


167. See Bond et al., supra note 166, at 6–10 (arguing that the U.S. has neither investigated nor prosecuted torture claims).


170. See id. at 48 (describing that facilities were inadequate or inoperative).

171. See id. at 54 (detailing prisoners’ sleeping accommodations).

172. See id. at 78 (noting that daily breaks were short and infrequent).

173. See id. at 66 (documenting periods of solitary confinement up to four months).


Egyptian security officers electrocuted, beat, and hung detainees by their limbs to force suspects to read prewritten confessions.\footnote{176. See id. at 1–6 (noting that these individuals could not contact relatives or an attorney).}


Emergency law grants the president broad authority to detain persons deemed a threat to security and public order, leaving it to prosecutors and security forces to define “threat,” “security,” and “public order” when conducting investigations.\footnote{179. See Moustafa, supra note 178, at 154 (noting arbitrary execution of the laws).} With the legal authority to hold detainees for up to forty-five days renewable indefinitely, the Interior Ministry has free reign to indefinitely detain and torture these disappeared detainees.\footnote{180. See Amnesty Int’l, supra note 157, at 2 (stating that the government could hold detainees without charge or trial); Moustafa, supra note 178, at 154 (discussing reports by the Egyptian Organization for Human Rights documenting over 7,800 cases of recurrent detention).} For those charged with a crime, the prosecution delays the trial for years, denying them due process rights.\footnote{181. See Damian Cullen, Trial of Ibrahim Halawa in Egypt Delayed for 13th Time, IRISH TIMES (Mar. 6, 2016, 1:05 PM), http://www.irishtimes.com/news/ireland/irish-news/trial-of-ibrahim-halawa-in-egypt-delayed-for-13th-time-1.2562118 (last updated Mar. 6, 2016) (last visited Sept. 10, 2018) (reporting that one detainee was imprisoned for 942 days) (on file with the Washington and Lee Law Review); Marwa Al-Asar, Egyptian Rights Group Accuses Justice System of Double Standards, MIDDLE EAST EYE, http://www.middleeasteye.net/}
Although the Egyptian government claims stringent anti-terrorism laws are necessary to deter and prosecute terrorists, the laws are frequently applied to civil society organizations and leaders who report on the state's human rights violations. In the 1990s, the president of the Egyptian Organization for Human Rights (EOHR), Hafez Abu Saada, was arrested and interrogated in retaliation for EOHR's report documenting torture, deaths in custody, disappearances and horrible prison conditions. The case of Professor Sa'ad Eddin Ibrahim in 2001 further proved how far the government would go to quash nonviolent challenges to corruption, election irregularities, and abuse of power. Ibrahim, who held dual Egyptian and American citizenship, investigated election fraud and requested that the United States link foreign aid to Egypt's human rights performance. In retaliation, the Egyptian government prosecuted Ibrahim in the Supreme State Security Court where he was charged with conspiring to bribe public officials, disseminating false information harmful to Egypt's interest, and embezzling foreign funds.

Prosecutions of civil society leaders soared after the 2011 mass uprisings as the regime sought to regain its authoritarian grip on power. Journalists, lawyers, and human rights advocates were arrested and charged with threatening national security in

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182. See Benjamin Stachursky, The Promise and Perils of Transnationalization 97 (2013) (describing that the government used military decrees to criminalize human rights activists).


184. See id. (describing Ibrahim's election rights work).

185. See id. (detailing the various politically motivated charges against Ibrahim).

186. See id. (noting an uptick in arrests against anyone opposing the regime).
ordinary and military courts. In detention, many were subjected to abuse and torture.

Egypt’s human rights violations are no secret. Much has been written about authoritarianism in the Middle East and failed attempts both by domestic and international actors to democratize the region and hold Middle Eastern regimes to their human rights commitments. These failures are partly due to Western nations’ continuation of foreign aid to dictators notwithstanding stated human rights conditions on aid, including $41 billion to Egypt in security-related assistance since 1979.

Rather than focus on how the U.S. facilitates human rights violations abroad, I now turn to America’s counterterrorism laws, policies and practices to demonstrate how counterterrorism coordination may have contributed to authoritarian norms and practices in the Middle East infecting U.S. counterterrorism practices. The systematic use of torture in secret black sites and at Guantanamo prison, inhumane conditions of detention, mass surveillance, and selective enforcement of counterterrorism against Muslim political dissidents are troublingly similar to Egypt’s authoritarian practices, as is the justification for rights violations—national security.

187. See id. (detailing that charges were brought in the interest of national security).
188. See supra notes 159–173 and accompanying text (detailing the Egyptian regime’s torture of prisoners).
189. See supra notes 150–165 (providing an overview of various human rights abuses).
191. See HERMAN, supra note 3, at 177 (depicting U.S. counterterrorism
C. The Authoritarianization Effect on United States Counterterrorism

Although much ink has been spilled critiquing the United States’ human rights violations abroad and civil liberties infringements at home since 9/11, little is written on the relationship between United States-Middle East counterterrorism coordination and rights infringements in the United States. In the years immediately following the September 11th terrorist attacks, two themes predominated U.S. rhetoric on national security. First, the United States would do whatever was necessary to bring to justice the perpetrators of the September 11th attacks in the “Global War on Terror.” This entailed working with dictators in the Middle East as partners to fight a war on terrorism. Second, the United States would promote democracy in the Middle East and South Asia to eliminate the repressive political conditions that some believed spawned terrorism. This neoconservative agenda was a remnant of the United States’ Cold War global politics. The contradiction methods noting that the United States conducts detention and surveillance in the interest of national security).

192. Some readers may mistakenly interpret my thesis as perpetuating Orientalism by implying that the Middle East is hopelessly authoritarian and thereby inferior to the West. To the contrary, I have written on the pivotal role that Western nations have played in propping up dictatorships in the Middle East to serve their geopolitical and economic interests. See generally SAHAR AZIZ & ABDULLAH MUSALEM, CITIZENS, NOT SUBJECTS: DEBUNKING THE SECTARIAN NARRATIVE OF BAHRAIN’S PRO-DEMOCRACY MOVEMENT (2011). Hence, in some ways my thesis here argues there is a boomerang effect wherein dictatorial practices arising from Western imperialism is now infiltrating Western democracies in part as a result of counterterrorism coordination and international efforts to fight the so-called “War on Terror.”

193. See U.S. DEPT OF STATE, supra note 86, at iii (noting that the United States must be prepared for a long campaign against terrorism).

194. See EXEC. OFFICE OF THE PRESIDENT, supra note 108, at 4 (“U.S. efforts with partners are central to achieving our [counterterrorism] goals, and we are committed to building security partnerships even as we recognize and work to improve shortfalls in our cooperation with partner nations.”).

195. See EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 4 (2002) (“We will speak out honestly about violations of the nonnegotiable demands of human dignity using our voice and vote in international institutions to advance freedom.”).

196. See generally CONDOLEEZZA RICE, DEMOCRACY: STORIES FROM THE LONG
between a war model and democracy promotion for countering terrorism was glaring.

On the one hand, President Bush wanted unfettered discretion to do whatever he deemed necessary, including torture and assassination, to fight an open-ended war against an ambiguously defined enemy. On the other hand, he wanted to promote democracy and strengthen civil society in Muslim majority countries where international terrorists recruited and set up bases. Obama continued his predecessor’s militarized counterterrorism practices but paid more rhetorical homage to human rights as he dropped the use of “War on Terror” in official U.S. documents. While the importance of democratic and representative governance was recognized in multiple U.S. National Security Strategy documents under Obama, his Administration deprioritized democracy promotion programs. The result was a schizophrenic flip-flopping between the development and ideological schools of thought in counterterrorism.

1. Rights Promoting Rhetoric

Both the Bush and Obama Administrations rhetorically promoted human rights, civil rights, and civil liberties in counterterrorism strategy. On multiple occasions, Bush stated America was not at war with Islam. Bush’s 2006 National

ROAD TO FREEDOM (2017).

197. See supra Part III.B (discussing the U.S. democracy promotion agenda post-9/11).


199. See EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 35–36 (2010) (stating that America would not impose any system of government on another country); Byman & Moller, supra note 48, at 281–82 (listing the reasons for the failure of the U.S. democracy promotion agenda).

Security Strategy states “[n]ot only do we fight our terrorist enemies on the battlefield, we promote freedom and human dignity as alternatives to the terrorists’ perverse vision of oppression and totalitarian rule.”\textsuperscript{201} The ultimate goal of the War on Terror is “to help create a world of democratic, well-governed states that can meet the needs of their citizens . . . this is the best way to provide enduring security for the American people . . . for the misrule of tyrants at home leads to instability abroad.”\textsuperscript{202} Likewise, Obama began his first term with a historic speech in Cairo where he declared that the war on terrorism is not a war on Islam and “no system of government can or should be imposed on one nation by another.”\textsuperscript{203}

To fight the War on Terror, however, the United States needed cooperation from Middle Eastern governments—all of which were authoritarian to varying degrees.\textsuperscript{204} Both the Bush and Obama Administrations sought to expand international partnerships in U.S. counterterrorism efforts. In its priority to defeat Al Qaeda and then ISIS, the United States committed to “underwrite global security—through our commitments to allies, partners, and institutions.”\textsuperscript{205} But the U.S. government knew that an authoritarian regime would not share intelligence, provide sites for extraordinary rendition, torture U.S. terrorist suspects, accept U.S. military bases, and otherwise assist in the War on Terror if its existence was threatened by democratization programs.\textsuperscript{206} The

\begin{footnotesize}
\begin{enumerate}
\item EXECS. OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR COMBATTING TERRORISM 1 (2006).
\item Id. In furtherance of this policy, the Bush Administration committed funds for economic assistance, development aid, trade, and good governance in the Millennium Challenge that rewards countries with demonstrated democratic reforms. \textit{EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY} 21–22 (2002).
\item See President Barack Obama, Speech at Cairo University: A New Beginning (June 4, 2009) (“In Ankara, I made clear that America is not—and never will be—at war with Islam.”).
\item See \textit{EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY} 24 (2010) (noting the need for cooperation with Israel, Iraq, and the Palestinian people).
\item Id. at 1.
\item See \textit{BYMAN}, supra note 18, at 53–54 (noting that the U.S. depended on these regimes for critical counterterrorism operations).
\end{enumerate}
\end{footnotesize}
regimes gladly took the military and economic aid without making serious efforts to liberalize their political systems. By the end of Obama’s Administration, the United States’ promotion of democracy was no longer taken seriously.

At the same time the United States stated its adherence to “respecting human rights, fostering good governance, respecting privacy and civil liberties, committing to security and transparency, and upholding the rule of law,” its Middle East partners received billions of dollars in military weapons, sometimes used against their own citizens. The 2015 National Security Strategy admitted that despite America’s vision for a peaceful and prosperous Middle East, “nowhere is the violence more tragic and destabilizing than in the sectarian conflict from Beirut to Baghdad, which has given rise to new terrorist groups such as ISIL.” Many of the laws and practices authorized under Bush continued under Obama. The increased coordination between nations resulted in direct U.S. involvement in human rights violations, including against its own citizens.

The contradictions between rights infringing practices and rhetorical commitments to democracy and human rights discredited the United States both internationally and domestically. The United States had compromised its fidelity to international human rights norms.

207. See id. (noting that providing aid did not bring regimes in line with human rights norms).


211. See Said, supra note 124, at 24–26 (discussing the NYPD’s mapping and mass surveillance of Muslims in the tri-state area).

212. See Plessis, supra note 3, at 31–32 (noting that cooperation practices ignored due process protections).

213. See Exec. Office of the President, National Security Strategy 10
2. The Normalization of Torture and Indefinite Detention

The divergence between rights-supporting rhetoric and rights-infringing practices is due in large part to the adoption of the war model to counterterrorism—the same template historically adopted by authoritarian Middle East regimes. One Department of Justice (DOJ) official forthrightly stated, “The United States cannot afford to retreat to a pre-September 11 mindset that treats terrorism solely as a domestic law enforcement problem.” Consequently, terrorism is treated as an act of war rather than a criminal act. By claiming the nation is facing an existential threat, the government justifies military and police actions that systemically violate human rights. It also accepts theories that terrorism is caused by ideology as opposed to socioeconomic underdevelopment and material deprivation.

The counterterrorism war model blurs the line between police and military functions. Targets are unlawful combatants instead of criminal suspects. Due process rights afforded in ordinary criminal procedures do not apply. Executive authorities resist judicial review of surveillance, investigative techniques, and interrogation. Selective targeting of suspects is infected by

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216. See CRELINSTEN, supra note 26, at 72–73 (explaining that terrorism receives unique treatment); JENNIFER ELSEA, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 10 (Dec. 2001) (“A terrorist act is not seen as an act of war unless it is part of a broader campaign of violence directed at the state.”).

217. See CRELINSTEN, supra note 26, at 79 (explaining the prioritization of national security).

218. See id. (detailing the government’s explanation for terrorism).

219. See supra note 3 and accompanying text (outlining the targeting of terrorist suspects).

220. See CRELINSTEN, supra note 26, at 86 (distinguishing terrorists’ prosecution from criminal prosecution).
stereotypes and prejudice against groups deemed collectively
dangerous merely because they share the same religion or ideology
as suspected terrorists.221

The war model also grants the executive branch an
open-ended mandate to fight whomever is deemed an enemy of the
state.222 If left unchecked, such powers can be unleashed against
political dissidents and opposition under the guise of national
security.223 Torture is legalized and systemic, civilians are tried in
military courts, ordinary criminal offenses are prosecuted as
terrorism, and infringements on civil liberties become the
norm—as is the case in Egypt and other authoritarian allies.224
Ultimately, the rule of law is undermined.

The proliferation of black site detention centers and rampant
torture are among the gravest consequences of U.S.
counterterrorism. In violation of the Convention on Enforced
Disappearances, the Convention Against Torture, the universal
human right to personal liberty, and the prohibition of arbitrary
arrest and detention, the Central Intelligence Agency (CIA) and its
foreign counterparts covertly abducted individuals to secret
locations in the Middle East, North Africa, and other countries
where torture has long been a standard practice.225 Hundreds of

221. See Nicolas Brooklier, Islamophobia: The Stereotyping and Prejudice
Towards Muslims Since 9/11, WASH. ST. U (Dec. 17, 2015),
https://hub.wsu.edu/law-justice-realtime/2015/12/17/islamophobia-the-stereotyping-
and-prejudice-towards-muslims-since-911/ (last visited Sept. 10, 2018)
(discussing that since 9/11, Muslims have been stereotyped and have been feared
as a group merely due to their religion and culture) (on file with the Washington
and Lee Law Review).

222. See Jack R. Greene & Sergio Herzog, The Implications of Terrorism on
the Formal and Social Organization of Policing in the US and Israel: Some
Concerns and Opportunities, in TO PROTECT AND TO SERVE: POLICING IN AN AGE OF
TERRORISM 146 (David Weisburd et al. eds., 2009) (discussing how the War Model
allows for more extreme force normally not permitted by the government due to
the increasing strength, danger, and level of violence applied by terrorists).

223. See John W. Whitehead & Steven H. Aden, Forfeiting “Enduring
Freedom” for “Homeland Security”: A Constitutional Analysis of the USA Patriot
Act and the Justice System’s Anti-Terrorism Initiatives, 51 AM. U. L. REV. 1081,
1093 (2002) (arguing that amendments to the Patriot Act may sweep too broadly).

224. See PLESSIS, supra note 3, at 35–36 (arguing for a criminal justice
approach to terrorism). See generally HUMAN RIGHTS WATCH, “NO BLOOD, NO
FOUL”: SOLDIERS’ ACCOUNTS OF DETAINEE ABUSE IN IRAQ (2006).

225. See Setty, supra note 2, at 653 (detailing that post 9/11, the CIA set up a
individuals, predominantly of Arab and Central Asian origin, were extra-judicially delivered to interrogators in Egypt, Jordan, Syria, and other countries where detainees were systematically abused and tortured.226

The extraordinary rendition program was a complex and coordinated program between the United States and its foreign allies, authorized at the highest level of the Bush Administration.227 According to UK parliamentary reports, over twenty countries participated in the rendition program.228 Some directly participated in torture while others provided airports, airspace, and military bases for staging and stopover flights carrying detainees.229 Victims of extraordinary rendition were not limited to citizens of Middle Eastern countries, but also included Canadian, German, and American citizens, most of whom were Muslim.230 Children as young as thirteen and adults as old as eighty-four were among those detained and tortured.231

After years of denial, investigative journalism forced the Bush Administration to confirm extraordinary rendition was occurring. But instead of stopping the program, the Administration legalized torture by renaming it “enhanced interrogation,” and proclaiming national security justified the practice.232 Government officials

network of black sites abroad to capture, detain, and interrogate suspected terrorists).


228. See generally Intelligence and Security Committee, Rendition (2007).

229. Countries involved in extraordinary rendition in various ways included Afghanistan, Lithuania, Morocco, Poland, Romania, Thailand, Egypt, Jordan, and Syria. See DUFFY, supra note 13, at 786–87.

230. See DUFFY, supra note 13, at 670–71 (detailing the wide reach of the rendition program).

231. See generally id.

232. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S.
pointed to legal memos issued in 2002 and 2003 by the Office of Legal Counsel at the U.S. Department of Justice advising that individuals suspected of membership in Al Qaeda are not protected by international law, including prohibitions against torture. Even if they were protected, the DOJ argued, only treatment that caused “injury so severe that death, organ failure, or permanent damage resulting in a loss of significant bodily function” met the U.S. legal threshold for torture.

As a result, approved interrogation techniques included [W]hipping by the neck into concrete walls; chaining to a chair for a period of weeks; the use of the ‘box’, including forcing into a small box for up to eighteen hours; stripping and hanging naked from the ceiling; sleep deprivation, including keeping detainees awake for eleven consecutive days; exposure to extreme noise; exposure to cold until the victim turned blue; denial of pain medication for injuries; waterboarding or simulated drowning; and threats of imminent death. Conditions of detention were equally severe. Detainees were hooded to disorient them and to keep them from learning their location or the layout of the detention facility; shackled to chairs; placed in solitary confinement for years; and subjected to continuous noise and light. Detainees were cramped in small unsanitary rooms and subjected to extreme heat. Such treatment was legally justified by necessity and self-defense.

233. See Setty, supra note 2, at 668 (“Those memos were subsequently rescinded, and several members of the military were convicted at courts-martial for detainee abuse.”).


235. DUFFY, supra note 13, at 784.

236. See generally Joint Study on Global Practices in Relation to Secret Detention, supra note 226.

237. DUFFY, supra note 13, at 673.

238. See Memorandum from Steve G. Bradbury, Principal Deputy Assistant Attorney Gen., Dep’t of Justice, to John A. Rizzo, Acting General Counsel, Cent. Intelligence Agency 3 (July 20, 2007) (discussing the President’s ability to
The torture and abuse of detainees in the United States’ extraordinary rendition program was systemic and unprecedented. Some individuals were detained in secret locations for three or more years incommunicado. Many were subjected to waterboarding, including as frequently as a hundred times in a single month. Others were interrogated for eighteen to twenty hours a day for more than fifty consecutive days. One Ethiopian citizen was detained for over a year and a half during which his interrogators repeatedly sliced his genitals with razor blades and poured stinging hot liquid on his open wounds. A Canadian citizen of Syrian origin, Maher Arar, was mistakenly suspected of ties with terrorists, arrested by U.S. officials in transit home to Canada, and sent to Syria where he endured prolonged torture and other brutal forms of interrogation.

After weeks, months, or years of secret coercive interrogation, when interrogators determined there was no intelligence value in a detainee, he was sent to Guantanamo Bay, Abu Ghraib, and other prisons where torture was commonplace. In Abu Ghraib, U.S. military and intelligence officials systematically subjected detainees to physical and sexual abuse, torture, rape, sodomy, and interpretation of the Geneva Convention by executive order) (on file with the Washington and Lee Law Review).

239. See Duffy, supra note 13, at 807–08 (describing how detainees were not able to call family or attorneys).


241. See Duffy, supra note 13, at 598–99 (noting that interrogation techniques were meant to exhaust detainees).

242. See R (on the application of Binyam Mohamed) v. Sec’y of State for Foreign and Commonwealth Affairs [2010], EWCA Civ 65 [124] (UK) (noting that the prisoner was also deprived of sleep and food).


244. See Khalili, supra note 3, at 80–81 (arguing the racialized manipulation of law in the war on terror resulted in the Supreme Courts’ denial of relief to Maher Arar notwithstanding the U.S.’s direct role in sending him to be tortured based on false intelligence).
murder. The few detainees set free were denied reparation or a public apology.

When news broke in 2004 of widespread torture at the hands of U.S. intelligence and military officials, Americans were surprised to learn that the White House and DOJ authorized the torture. Pressure mounted on Congress to pass the Detainee Treatment Act of 2005 that prohibited abuse and torture of detainees. In 2009, President Obama issued an executive order banning “enhanced interrogation techniques” and limited interrogation techniques to those authorized under the Army Field Memo. The Military Commissions Act of 2009 and Defense Authorization Bill of 2015 legislated the order into law.

In contrast to Middle East authoritarian countries, the United States has a vibrant civil society and cadre of independent investigative journalists. As a result, the nation’s drift toward authoritarianism was structurally constrained by a group of courageous lawyers, activists, and journalists. Nevertheless, the U.S. War on Terror contributed to the normalization of torture. Indeed, lawyers from the most elite law schools manipulated interpretations of the law to legalize torture.

246. See HERMAN, supra note 3, at 203–04 (discussing the case of Khaled el-Masri).
247. See Mayer, supra note 99 (reporting torture practices leading up to 2005).
248. See generally COLE, supra note 232 (providing a thorough assessment of the legal analysis underlying the six memos authorizing torture by U.S. officials).
250. See generally AM. CIVIL LIBERTIES UNION, ACLU STATEMENT ON TEN YEARS OF GUANTANAMO (2018); CTR. FOR CONSTITUTIONAL RIGHTS, REPORT ON TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT OF PRISONERS AT GUANTANAMO BAY (2006).
official involved in the torture program has been prosecuted is further proof that torture is an acceptable national security practice under certain circumstances.\textsuperscript{252} Indeed, should there be another major terrorist attack on U.S. soil, the Trump Administration admitted that torture is an option it would consider.\textsuperscript{253}

Along with torture came indefinite detention. Hundreds of detainees from black sites were transferred to Guantanamo Bay, Abu Ghraib, and Bagram Air Base where they were denied basic due process rights in violation of the 1949 Geneva Convention, among other laws.\textsuperscript{254} In Guantanamo Bay, where most detainees suspected of being associated with Al Qaeda were sent, the Bush Administration intentionally sought to evade legal protections afforded by U.S. and international human rights laws by labeling them “unlawful enemy combatants.”\textsuperscript{255}

A Presidential Military Order authorizing indefinite detention declared that

\begin{quote}
\texttt{[T]he individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.}\textsuperscript{256}
\end{quote}

Labeled “enemy combatants” based on secret evidence, the detainees were denied access to lawyers or their families, and could

\begin{itemize}
\item \textsuperscript{252} See \textit{Human Rights Watch, No More Excuses: A Roadmap to Justice for CIA Torture} 23 (2016) (noting that the highest-ranking officer prosecuted was a lieutenant colonel).
\item \textsuperscript{254} See \textit{Geneva Convention Relative to the Treatment of Prisoners of War} art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (outlining minimum requirements for treatment of prisoners); \textit{CRELINSTEN, supra} note 26, at 48–49 (documenting various rights violations of detainees abroad).
\item \textsuperscript{255} See Setty, \textit{supra} note 2, at 660 (describing that this strategy provided a way to send detainees to military court).
\end{itemize}
not petition for independent review of their detention.\textsuperscript{257} To protest their indefinite detention, prisoners attempted to commit suicide and undertook in months-long hunger strikes.\textsuperscript{258}

Without investigative reporting followed by years of contentious litigation that reached the U.S. Supreme Court, this system of indefinite detention in a lawless zone could have remained secret and unchecked.\textsuperscript{259} In a series of cases starting in 2004, the Supreme Court held that U.S. citizens designated as unlawful enemy combatants by the executive branch still had a right for their detention to be challenged before a neutral arbiter.\textsuperscript{260} Justice O'Connor warned the executive branch that “[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”\textsuperscript{261} The Court also held that non-U.S. citizens held in Guantanamo Bay had a right to habeas corpus where they could challenge their detention before regular Article III courts.\textsuperscript{262} In response, the United States sent captured detainees to Bagram Air Force Base outside of U.S. courts’ jurisdiction.\textsuperscript{263}

The limited due process afforded by habeas petitions revealed many detainees were innocent victims of local bounty hunters.\textsuperscript{264}

\textsuperscript{257} See Whitehead & Aden, supra note 223, 1117–18 (noting that detainees were discouraged or blocked from seeking counsel). The United States used the same legal arguments in the early 1990s when it refused Haitian asylum seekers access to the press or lawyers and due process rights, and disavowed U.S. sovereignty over Guantanamo. Khalili, supra note 3, at 76–77.


\textsuperscript{259} See Herman, supra note 3, at 203–04 (noting the impact of the litigation).


\textsuperscript{261} Hamdi, 542 U.S. at 536.

\textsuperscript{262} See Boumediene, 553 U.S. at 771 (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.”).

\textsuperscript{263} See Setty, supra note 2, at 664 (noting that detainees have no habeas rights at the base).

\textsuperscript{264} See, e.g., David Cole, Where Liberty Lies: Civil Society and Individual Rights After 9/11, 57 WAYNE L. REV. 1203, 1267 (2011) (arguing that civil society groups served reinforced the checking function of constitutional and international
Contrary to U.S. government claims, many detainees were civilians kidnapped by local warlords in Afghanistan, Pakistan, and Iraq to be delivered to the U.S. military in exchange for a bounty. Never having posed a threat to the United States, they lost years of their lives and suffered severe mental and physical health problems due to torture and prolonged detention. Those who filed human rights claims in U.S. courts were impeded by the state secret privilege, which granted the executive immunity for violating international law.

After years of advocacy and revelations of a pattern of human rights violations, the Obama Administration finally announced it would close the Guantanamo Bay prison and prosecute detainees in U.S. federal courts. But congressional leaders obstructed these efforts by passing a law prohibiting any detainee transfers to U.S. soil, in part, because defendants’ access to due process might result in their acquittal. Over seventeen years after September 11th, Guantanamo Bay remains a destination for suspected terrorists captured abroad by U.S. officials seeking to evade international human rights law and U.S. domestic law. A practice that used to be considered within the realm of law through litigation and advocacy).

265. See, e.g., Egypt: 7,400 Civilians Tried in Military Court, supra note 150 (documenting cases of systemic torture by the Egyptian security services).


268. See President Barack Obama, Remarks by the President on Plan to Close the Prison at Guantánamo Bay (Feb. 23, 2016) (stating that the detention facility undermines, not promotes, national security). But see Said, supra note 124, at 113–14 (arguing that U.S. federal courts are highly deferential to prosecutors and go out of their way to ensure convictions of terrorism suspects).

269. See Crelinsten, supra note 26, at 49 (detailing the law as part of the National Defense Authorization Act).

270. See Human Rights First, Guantánamo by the Numbers 1 (2018) (providing an overview of the number of detainees over the last three administrations).
authoritarian regimes has now become an openly American practice.\textsuperscript{271}

The authoritarianization of U.S. counterterrorism did not end with torture and indefinite detention abroad.\textsuperscript{272} At home, Americans’ civil liberties fall prey to the prying eyes of a burgeoning surveillance state.\textsuperscript{273}

3. Establishing a Surveillance State and Selective Counterterrorism Enforcement

Technological advancements, the rise of international terrorism, and normalization of authoritarian practices prove ominous for domestic civil liberties.\textsuperscript{274} Gathering intelligence and mass surveillance to justify \textit{ex ante}, pre-crime objectives became bureaucratized in what Jack Balkin and Sanford Levinson call the “National Surveillance State.”\textsuperscript{275} Multiple covert programs collect information from a wide range of government and private databases to produce mammoth amounts of personal data at the fingertips of law enforcement.\textsuperscript{276}

Soon after the 9/11 attacks, the Bush Administration secretly authorized a program known as Total Information Awareness (TIA).\textsuperscript{277} The program collected information from government and

\begin{itemize}
  \item \textsuperscript{271} See \textit{id.} (reporting that the United States has held 780 detainees at Guantanamo).
  \item \textsuperscript{272} See \textit{Duffy, supra} note 13, at 636–37 (describing U.S. surveillance techniques).
  \item \textsuperscript{273} See \textit{id.} (discussing that surveillance sacrifices citizens’ privacy).
  \item \textsuperscript{274} See generally \textit{I N T’L CAMPAIGN AGAINST MASS SURVEILLANCE, THE EMERGENCE OF A GLOBAL INFRASTRUCTURE FOR MASS REGISTRATION AND SURVEILLANCE} (2005); \textit{Whitehead & Aden, supra} note 223.
  \item \textsuperscript{275} Jack M. Balkin & Sanford Levinson, \textit{The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State}, 75 \textit{FORDHAM L. REV.} 489, 520–21 (2006).
  \item \textsuperscript{276} See Margaret Hu, \textit{Taxonomy of the Snowden Disclosures}, 72 \textit{WASH. & LEE L. REV.} 1679, 1689–91 (2015) (providing a comprehensive list of the various big data and small data programs that buttress the national security state); Steven R. Morrison, \textit{The System of Domestic Counterterrorism Law}, 25 \textit{STAN. L. & POL’Y REV.} 341, 345 (2014) (listing the Total Information Awareness system, Multistate Anti-Terrorism Information Exchange, and Disposition Matrix as a few of the aggregators of mass surveillance).
  \item \textsuperscript{277} See Morrison, \textit{supra} note 276, at 345 (describing the use of TIA in New
private databases about Americans’ transactions, and then applied algorithms to the data as a means of identifying terrorist patterns. This form of predictive policing looked at financial, educational, travel, medical, housing, and other transactions to target individuals as potential terrorists. Rather than focusing on individualized suspicion or predicate acts of terrorism, the government adopted a risk-assessment model. People deemed to be of higher risk levels would then be targeted for investigation and prosecution. Applying the ideological causation theory, the risk criteria were closely associated with religious beliefs, associations, and political activities of Muslims and Arabs.

Traveling to the Middle East, transferring money to family abroad, donating to Muslim charities, associating with people from the Middle East, studying Arabic, doing business with other Muslims, and regularly attending mosques also triggered government suspicion and surveillance. As these minority groups become increasingly scrutinized by the state, stereotypes of the Muslim terrorist that animate government surveillance are reinforced and intensified against Muslim communities. The predictive, risk-assessment model facilitates racial and religious profiling of Muslims and Arabs based on an interpretation of ordinary activities as ideologically associated with Islam.

Although public and congressional pushback ultimately ended the TIA, the Bush Administration secretly authorized another

278. See id. (detailing that law enforcement uses the program to find patterns of terrorist planning).
279. See id. (stating that the data comes from informants, undercover agents, and wiretaps).
280. See id. (noting that the data often provides enough to make an arrest).
281. See AM. CIVIL LIBERTIES UNION, supra note 13, at 5–8 (discussing how biometric data is used to target individuals).
282. See Aziz, supra note 103, at 482 (arguing that the focus on religion led to misinterpretation of Islamic practices as indicia of terrorism).
283. See SAID, supra note 124, at 102–04 (detailing activity that was captured in surveillance methods).
284. See Morrison, supra note 276, at 344 (explaining the disparate impact on Muslims of the feedback loop created by social network surveillance programs).
285. See Aziz, supra note 103, at 488 (arguing that Muslims are perceived as terrorists in waiting instead of ordinary citizens).
version of the program wherein the National Security Agency spied on people in the United States, including American citizens, who communicated with persons outside the country. Without a court order, the NSA secretly intercepted tens of millions of telephone calls and emails and stored them in massive databases.

Breaking from the standard law enforcement practice of long term monitoring of select individuals based on individualized suspicion, the U.S. government was now collecting massive amounts of data on hundreds of thousands of individuals that could be mined at any time. Although the contents of the conversations were not retained, the metadata collected—e.g., time, location, duration, to and from phone numbers and emails—gave the government a window into a person’s activities and associations.

Another program, PRISM, gathered contents of communications from non-U.S. persons reasonably believed to be abroad even if the communication includes a U.S. citizen. Although these searches require a warrant from the secret Foreign Intelligence Surveillance Court, these broad warrants do not identify the people or places searched or impose meaningful restrictions on the collection, retention, or dissemination of the foreign intelligence obtained.

When the New York Times broke the story about these mass surveillance programs, the Bush Administration pointed to the

286. See HERMAN, supra note 3, at 166 (noting surveillance on U.S. citizens); see also Katherine L. Wong, The NSA Terrorist Surveillance Program, 43 HARV. J. ON LEGIS. 517, 519 (2006) (stating that the NSA harvested large quantities of data searching for terrorist patterns).

287. See generally Peter Margulies, Surveillance by Algorithm: The NSA, Computerized Intelligence Collection, and Human Rights, 68 FLA. L. REV. 1045 (2016) (examining whether such surveillance violated the International Covenant on Civil and Political Rights to which the U.S is a party).

288. See Wong, supra note 286, at 518–19 (“Surveillance activity . . . has encompassed the communications of potentially thousands of Americans . . . .”).

289. See Setty, supra note 2, at 653 (discussing how the NSA defends the collection under the Patriot Act).


291. See HERMAN, supra note 3, at 172–73 (noting the ease of obtaining a warrant).
Patriot Act as authorizing its secret collection programs. A 300-page law hurriedly passed within forty-five days of the September 11th attacks, the Patriot Act legalized expansive government surveillance and investigative powers. Legal standards restricting searches of email and telephone communications were relaxed, as was government access to medical, financial, and other personal records. For example, the legal standard for obtaining a wiretap related to foreign intelligence was loosened from probable cause of a crime to mere relevancy to terrorism prevention. FISA warrants no longer had to show that the primary purpose of the pertinent investigation was to collect foreign intelligence, merely a significant purpose. Meanwhile, courts regularly deferred to FBI agents’ lax definitions of significant purpose and relevancy.

The relaxed standards likely contributed to the increased number of FISA orders from 934 in 2001 to 2,370 in 2007. The Patriot Act also authorized law enforcement officials to apply for roving wiretaps on any communication service provider without geographical limitations or naming the target. Pen registers and
trap and trace orders applied anywhere in the United States rather than within the jurisdiction of the ordering court.\textsuperscript{300} Sneak and peak searches allowed law enforcement to conduct searches without notice to the target.\textsuperscript{301}

Secret warrants from a secret court permit federal authorities to investigate U.S. citizens and residents based on factors tangentially related to national security. Thus, warrants authorized under Section 215 of the Patriot Act were especially problematic.\textsuperscript{302} The type of information that could be obtained expanded to “any tangible thing” on persons who were not necessarily under suspicion for involvement in terrorism or espionage.\textsuperscript{303} Information sought included library records, which resulted in librarians across the country being served with Section 215 warrants and national security letters seeking the internet and reading lists of patrons.\textsuperscript{304} Gag orders barred the librarians from challenging or disclosing the requests for facially First Amendment protected activity.\textsuperscript{305} Enlisting librarians in counterterrorism was part of a broader system of delegating intelligence collection to private and public local actors.

Deputizing citizens to spy on each other is another powerful tool of authoritarian regimes for instilling fear and paranoia among their citizens.\textsuperscript{306} In the United States, state and local police

\textsuperscript{300} See USA Patriot Act of 2001 § 206 (amending the geographic limits of surveillance).

\textsuperscript{301} See Whitehead & Aden, supra note 223, at 1083–84, 1111 (2002) (outlining impositions on Americans’ freedoms).

\textsuperscript{302} See id. at 1111 (arguing that the law led to warrants served against innocent individuals).

\textsuperscript{303} See AM. CIVIL LIBERTIES UNION, supra note 297, at 14 (noting the significant expansion of government authority).

\textsuperscript{304} See id. (describing Section 215 as the “library provision”).

\textsuperscript{305} See id. (“Section 215 orders come with compulsory non-disclosure orders, or ‘gags,’ which contributed to the secrecy surrounding how they were being used.”); HERMAN, supra note 3, at 122, 126 (noting that 137 librarians had been asked by federal, state, and local law enforcement for information about their patrons between October 2001 and June 2005).

manage state fusion centers that produce suspicious activity reports with minimal oversight. The private sector assists government intelligence collection through suspicious activity reporting. In 2002, the Bush Administration initiated the Terrorism Information and Prevention System (TIPS) wherein truck drivers, utility workers, cable guys, banks, and other businesses would report suspicious activity. TIPS invited racial and ethnic profiling as citizens reported Muslims praying, wearing headscarves, donning bears, and engaging in other religious activities as suspicious terrorist activity. Consequently, the number of suspicious activity reports skyrocketed from approximately 163,000 in 2000 to 1.25 million in 2007. Banks were also required to collect more information about their customers, share it with the government, and err on the side of inclusivity in submitting reports of suspicious transactions. Predictably, customers with family and businesses in the Middle East and North Africa found themselves targets of heightened bank scrutiny that led to sudden bank account closures, refusal of service, and surprise visits by law enforcement.

The most widely used method of government surveillance has become the National Security Letter (NSL), an administrative subpoena issued by the FBI to private entities for information about their customers. No longer must the FBI show specific and

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307. See Setty, supra note 2, at 652 (stating that the centers are meant to help law enforcement synthesize information from communities).


309. See HERMAN, supra note 3, at 90–91 (describing TIPS usage in the United States).

310. See AM. CIVIL LIBERTIES UNION, supra note 297, at 12 (reporting that the Patriot Act increased the number of financial institutions required to file reports).

311. See id. ("These reports include detailed personal and account information and are turned over to the Treasury Department and the FBI.").

312. See Bank Account Closures, ADC, http://www.adc.org/bank-account-closures/ (last visited Sept. 10, 2018) ("The financial institution often cites the Patriot Act generally as the reason for the account closure.").

313. See National Security Letters, ELEC. PRIVACY INFO. CTR.,
articulable facts that the target was a foreign power or agent of a
foreign power. Instead, the Patriot Act relaxes the standard to
mere relevance to a national security investigation. Because
NSLs are subpoenas, no court order is required prior to issuing
them.

Unsurprisingly, issuance of NSLs surged. By 2006, the FBI
issued nearly 50,000 NSL requests to car rental companies, banks,
casinos, internet service providers, Google, Facebook, financial
institutions, libraries, and other businesses as compared to 8,500
in 2000. The DOJ Inspector General found that over 60% of
NSLs reviewed violated FBI internal controls and 22% violated
internal reporting requirements resulting in at least 3,000
violations.

Most troublingly, the line between the FBI’s domestic
surveillance powers and the CIA’s international surveillance
powers is blurred. The CIA has had access to vast amounts
of personal information gathered by the FBI. Under the guise
of information sharing, the U.S. regressed back to an era when the
FBI and CIA engaged in egregious rights violations under the
infamous COINTELPRO of the 1960s and 1970s. During this
era, civil rights leaders, anti-war activists, and persons suspected
of being Communists were spied on, investigated, and in some

https://epic.org/privacy/nsl/#stats (last visited Sept. 10, 2018) (documenting a
drastic increase in National Security Letters following the Patriot Act) (on file
with the Washington and Lee Law Review).

314. See Andrew E. Nieland, National Security Letters and the Amended
Patriot Act, 92 CORNELL L. REV. 1201, 1211 (2007) (noting that an agent can issue
an NSL if the information is relevant to an investigation).

315. See id. (stating that the Patriot Act eliminated the requirement of a
foreign connection).

316. See id. at 1209 (describing the NSL exception to court orders).

317. See AM. CIVIL LIBERTIES UNION, supra note 297, at 32 (noting that many
recipients are two or three times removed from a suspected terrorist).

318. See U.S. DEP’T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF
INVESTIGATION’S USE OF NATIONAL SECURITY LETTERS 16–25 (2014) (providing
recommendations for compliance with internal regulations).

319. See Whitehead & Aden, supra note 223, at 1091–92, 1109 (noting
unprecedented CIA access to intelligence on U.S. citizens).

320. See id. at 1090–92 (detailing inter-agency information sharing).

321. See id. at 1109 (stating that Section 203(b) of the Patriot Act authorizes
agencies to share any communication intercepted under the Wiretap Act).
cases, prosecuted. Tellingly, the FBI and CIA primarily targeted African Americans, Jews, or leftists whose ideology and race were deemed a threat to the state.

The same is happening in the post-9/11 era as Muslim students, businesses, mosques, and homes are subjected to intensive surveillance for no other reason than their religion or ethnic origin. Muslims are disproportionately on multiple watch lists containing hundreds of thousands of names. Ranging from No Fly Lists that preclude them from traveling by air altogether to Terrorist Screening Lists that subject them to secondary screening every time they travel, Muslims do not receive notice of their selection nor are they offered meaningful opportunity to be removed from these secret lists. Consequently, a large percentage of names are false positives due to incorrect or outdated information and mistaken identities. Over time, selective enforcement of counterterrorism laws produces a palpable chilling effect in Muslim American communities.

As authoritarian norms seep into governance, government scrutiny eventually shifts from politically vulnerable minorities that serve as convenient scapegoats to political dissidents and opposition groups. In a 2010 report, the Inspector General for

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322. See id. at 1090–92 (discussing that the government reserved the right to surveil religious groups and charitable organizations).

323. See id. at 1091–92 (noting the chilling effect on First Amendment freedoms).


325. See, e.g., Duffy, supra note 13, at 88 (detailing that Muslim names account for the majority of names on counterterrorism watch lists).

326. See Herman, supra note 3, at 71, 73 (discussing the secrecy behind adding individuals to the watch lists).


328. See generally Tufyal Choudhury & Helen Fenwick, The Impact of Counter-Terrorism Measures on Muslim Communities (2011).

the United States Department of Justice found that the FBI had improperly targeted domestic advocacy groups for investigation solely on account of their First Amendment protected activities.\textsuperscript{330} FBI agents secretly attended meetings, took pictures, and gathered intelligence about anti-war, animal rights, and anti-globalization meetings without a legitimate law enforcement purpose.\textsuperscript{331} Confidential informants infiltrated the organizations reporting back to the FBI on the organizations’ First Amendment protected activities.\textsuperscript{332}

\textbf{V. Reversing the Race to the Bottom}

These negative domestic externalities of counterterrorism coordination are sufficiently serious that they can no longer be ignored. Not only have laws and practices changed, but also a culture of intolerance has arisen in American political culture.\textsuperscript{333} The effects were glaringly evident during the 2016 presidential campaign. Republican candidates competed for who was most hawkish on national security and immigration, which manifested in scapegoating Muslims and equating Islam with terrorism.\textsuperscript{334}

Calls to keep America safe included registering all Muslims in the United States, barring Muslims from entering the country, and surveilling mosques under the presumption that they are hotbeds of terrorism.\textsuperscript{335} Government officials betrayed America’s historical

\textsuperscript{330} See id. at 59–70 (documenting FBI’s targeting and monitoring groups’ speech and assembly).

\textsuperscript{331} Id.

\textsuperscript{332} Id.

\textsuperscript{333} See generally Lawrence D. Bobo, \textit{Racism in Trump’s America}, 68 BRIT. J. SOC. 85 (2017) (outlining a new wave of racism following the 2016 campaign and election).


\textsuperscript{335} See Greg Sargent, \textit{Paul Ryan Joins Barack Obama in Condemning}
commitment to granting refuge to civilians victimized by war abroad as they called to ban Syrian refugees from entering the United States. Then-presidential candidate Trump condemned Syrian refugees as a collective security risk when he stated

[W]hen the Syrian refugees are going to start pouring into this country, we don’t know if they’re ISIS, we don’t know if it’s a Trojan horse. And I definitely want a database and other checks and balances. We want to go with watch lists. We want to go with databases. And we have no choice.

The fear mongering and collective suspicion cast upon minorities led to changes in laws that jeopardized their rights. In January 2017, for example, President Trump issued executive orders banning citizens from seven Muslim majority countries from entering the United States and indefinitely barring Syrian refugees many of who were victims of terrorism themselves. When Acting Attorney General Sallie Yates refused to enforce the ban on grounds that it was unconstitutional, Trump immediately fired her. Similarly, Trump fired FBI Director James Comey


336. See id. (noting politicians who expressed the need for a ban or did not condemn a call for a ban).


Just as the United States does not negotiate with terrorists, neither should it coordinate counterterrorism operations with state human rights violators. That Middle Eastern regimes’ authoritarian rights-infringing practices have made the region more, not less, susceptible to terrorist violence should further caution Western nations adopting similar practices.\footnote{343}{See, e.g., Braithwaite & Li, supra note 26, at 283 (“[T]he Middle East has the highest concentration of transnational terrorist incidents, with Europe ranked second.”).} Indeed, the region has the highest concentration of transnational terrorist attacks causing over tens of thousands of civilians killed over the past four decades.\footnote{344}{See id. at 294 (“[P]olicy makers] should invest more resources directed at combating terrorist activities in countries located in hot-spot neighborhoods because these represent countries that are highly likely to experience a sharp increase in terrorist attacks in subsequent years.”).}

Financial restraints should be imposed on federal agencies who coordinate with counterparts who violate rights in counterterrorism. The United States has established the promotion of internationally recognized human rights as a component of its foreign policy.\footnote{345}{See generally U.S. DEP’T OF STATE, U.S. HUMAN RIGHTS COMMITMENTS AND PLEDGES (2017).} Toward that end, a pair of amendments to the Foreign Assistance Act of 1961 and the National Defense Authorization Act, also known as the Leahy Laws, prohibit the State and Defense Departments from giving
foreign aid to any unit of a security or military force of a foreign
country if that unit has committed gross human rights
violations. 346 Financial restraints should be imposed on federal
agencies that coordinate with counterparts who violate rights in
counterterrorism.

Gross human rights are defined as including “torture or cruel,
inhuman, or degrading treatment or punishment, prolonged
detention without charges and trial, causing the disappearance of
persons by abduction and clandestine detention of those persons,
and other flagrant denial of the right to life, liberty, or the security
of person.” 347 Such conditions are intended to incentivize and deter
foreign security forces from committing human rights violations. 348
With the increase in coordination in counterterrorism operations
between the U.S. and foreign security forces, such conditions
should not be limited to the behavior of foreign security forces. U.S.
security and intelligence officials must also be held accountable.
One way to do so is through budgetary and policy restraints.

Funding of government security agencies’ coordination or
cooperation with their foreign counterparts should be conditional
on their adherence to domestic civil rights and constitutional law
as well as international human rights law. While the means in
which such conditions can be incorporated into law is a separate
project beyond the scope of this Article, I proffer the following
conceptual framework: (1) reporting on counterterrorism
coordination; (2) monitoring of coordination to ensure U.S. officials
are not participating directly or indirectly in human rights
violations; and (3) conditioning funding of government agencies
engaged in transnational counterterrorism coordination. As the
overarching coordinator of intelligence and national security

347. 1961 Foreign Assistance Act § 116. Extrajudicial killing and politically
motivated rape are also included in this definition. See U.S. GOV’T
ACCOUNTABILITY OFFICE, SECURITY ASSISTANCE 9 (2016).
348. See U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 347, at 8 (discussing
that the Leahy Laws prevent U.S. assistance to human rights violators).
operations, the Office of the Director of National Intelligence (ODNI) is a potential candidate as the implementing authority.349

First, agencies would be required to submit an annual report to the ODNI about their counterterrorism coordination with foreign governments in which they demonstrate that they are not cooperating with counterparts that violate human rights.350 For instance, when Afghan police and military units abuse and torture detainees, the United States should not be cooperating with such units, much less funding them.351 The same applies for FBI and CIA agents or DOJ lawyers who work with foreign intelligence and anti-terrorism counterparts.352 Not only do such restrictions prevent violations against civilians abroad, but they also prevent the long-term exposure of U.S. counterterrorism personnel to authoritarian practices permissible under the foreign countries' laws and policies. Such exposure contributes toward normalizing these human rights violations within the American national security community.

Second, the ODNI would monitor U.S. counterterrorism coordination through review of the reports and auditing processes to ensure compliance. The ODNI would have a similar role in counterterrorism coordination human rights compliance as the


350. The agencies subject to this process should include the Department of Homeland Security, the Federal Bureau of Investigations, the Department of Justice, the Central Intelligence Agency, the Department of Treasury, and the National Security Agency.


State Department in enforcing compliance with the Leahy Laws in the foreign aid context.353

Third, should an agency be found out of compliance, funding for counterterrorism coordination should be suspended until the agency takes effective measures to bring itself into compliance.354 This may include repealing memorandums of understanding for cooperation with foreign units, cancellation of training programs, and providing additional training to U.S. personnel on U.S. law and international human rights law. Corrective measures for noncompliance should be adopted with the goal of preventing short-term human rights and civil rights violations and longer-term compliance through a culture of democracy and respect for individual rights.355

To be sure, implementation of human and civil rights conditions will not be free of challenges.356 Information about U.S. partners’ counterterrorism efforts may not always be available to U.S. officials. Nor will documentation always be available to prove U.S. compliance. Because what constitutes a violation must be clearly defined and consistently applied, the proposed framework

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353. See U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 347, at 10 (describing the process in the State Department that monitors compliance with the Leahy Laws).

354. This proposal is taken from the language in the Leahy amendment stating:

No assistance shall be furnished under this Act or the Arms Export Control Act to any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights. The prohibition in subsection (a) shall not apply if the Secretary determines and reports to the Committee on Foreign Relations of the Senate, the Committee on Foreign Affairs of the House of Representatives, and the Committees on Appropriations that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice.


VI. Conclusion

The authoritarianization of U.S. counterterrorism spans multiple administrations in the post-9/11 era. At the same time that Western nations focus on the democratization of Muslim majority countries, citizens in the West experience attrition in their civil liberties.357 “Hard on terror” approaches where the rulebook is figuratively thrown out the window are mistaken for “smart” national security measures.358 National security is used to justify rights violations, emergency law, prosecutions, and military trials of civilians.

Those advocating for a development approach to terrorism prevention are dismissed as naïve.359 Human rights and individual freedoms are characterized as a luxury the West cannot afford to preserve in the face of a transnational terrorist threat.360 These are the same views long held by Middle Eastern authoritarian regimes mired in political instability.

Although transnational counterterrorism is necessary for the security of both West and Middle Eastern nations, the exchange of information, skills, and strategy may be contributing towards a normalization of illiberal practices among U.S. officials. Countries such as Egypt with a higher rate of terrorism become the experts advising their U.S. counterparts that violence and brutality is the only effective means of preventing terrorism. Consequently, a cultural transformation occurs within the U.S. law enforcement and intelligence community that subordinates rights—particularly

357. See Piazza & Walsh, supra note 15, at 129 (noting that Western countries face diminishing civil liberties).
359. See Wolfendale, supra note 2, at 762 (describing how some view advocates of the development approach).
360. See DUFFY, supra note 13, at 544, 567 (noting the United States denying the relevance of international human rights law in the war on terror).
of groups with the same religious or racial identity of the terrorists—to militarized counterterrorism practices.

Although evidence of a causal link between rights violations and counterterrorism coordination is far from conclusive, the United States' post-9/11 national security practices troublingly mirror those frequently found in authoritarian states. Abuse of detainees, torture, indefinite detention, mass surveillance, secret courts, selective enforcement of criminal and immigration law based on race and religion, and extrajudicial killings are some obvious examples. The acculturation of American security officials into an authoritarian, militaristic approach is more insidious and rights infringing over the long run. As such, concrete accountability measures on federal security and intelligence agencies coordinating with their foreign counterparts shields the United States from meandering down the slippery slope that leads to authoritarianism. For once a nation surpasses the tipping point, reversing course may be insurmountable.361

361. See generally Sahar F. Aziz, Bringing Down an Uprising: Egypt’s Stillborn Revolution, 30 CONN. J. INT’L L. 1 (2014) (examining why the attempt to remove an authoritarian regime proved to be insurmountable for Egyptians, notwithstanding years of U.S.-sponsored democracy promotion projects and a popular uprising).