

Winter 2018

Limitless Discretion in the Wars on Drugs and Terror

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Recommended Citation

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

Available at: <https://scholar.law.colorado.edu/lawreview/vol89/iss1/3>

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LIMITLESS DISCRETION IN THE WARS ON DRUGS AND TERROR

WADIE E. SAID*

The wars on terror and drugs have been defined, largely, by what they lack: a readily identifiable opponent, a clear end goal, a timeline, and geographical boundaries. Based on that understanding, this Article discusses the increasingly expansive discretion of American authorities to prosecute individuals where the wars on terror and drugs intersect. Through laws such as the Maritime Drug Law Enforcement Act, the ban on providing material support to foreign terrorist organizations, and the narco-terrorism statute, the United States exercises a kind of universal jurisdiction to pursue anyone, anywhere it believes its laws are being violated. Wielding the power of federal criminal prosecution on a global scale is a natural result of characterizing the anti-drug and anti-terror campaigns as “wars,” yet with such power comes essentially limitless police and prosecutorial discretion. However, such a broad jurisdictional scheme risks exporting several of the most unjust and ineffective practices of both the war on terror and the war on drugs, which threaten to impact disproportionately minority communities, based on impermissible factors like race and religion. Specifically, this Article compares the war on drugs to the war on terror, arguing that the paradigm of fighting terror has led to a war model that deeply informs the complexities and shortcomings of the war on drugs. The phenomenon is one we should not ignore or downplay, as the vast discretion enjoyed by law enforcement and prosecutors to charge individuals with no

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ties to the United States represents an expansion of the reach of American laws that needs to be understood and more thoroughly debated. As a matter of public policy and constitutional interpretation, courts should be wary of broad assertions of discretion to fight wars of dubious provenance. While the United States, as a sovereign nation, can pursue its interests in stopping trafficking in narcotics and political violence against its own citizens, those interests must be defined more narrowly, lest the country transform into a sort of world police force without an international mandate.

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I. INTRODUCTION

What is the difference between a drug dealer and a terrorist? A drug kingpin and a terrorist mastermind? Both the campaign against prohibited narcotic trafficking and the wider efforts against non-state political violence are described as “wars,” the former a “war on drugs,” the latter a “war on terror.” The war model is a powerful metaphor meant to underscore the seriousness of the country’s efforts and the idea that the enemy, which threatens the nation and exists in direct opposition to its continued existence, must be defeated.

While obviously distinct, the wars on drugs and terror suffer from many of the same shaky assumptions and discriminatory outcomes. At the outset, the notion that a

limitlessly expanding entity like “drugs,” or an abstract concept like “terror” can be defeated like a nation-state in a war is debatable at best.¹ As has been well documented in both situations, the focus of the wars has been on discrete and insular minorities; African-Americans and Latinos have been the chief victims of the war on drugs,² while Muslims represent the main focus of the war on terror.³ So, while few would question the need for government to organize its efforts to control the illegal narcotics trade and prevent the proliferation of political violence targeting civilians, the results of the policies of the wars on drugs and terror, respectively, have been racially and ethnically disparate. This state of affairs calls into question the validity of those policies, even as courts rarely find that law enforcement efforts in prosecuting these wars exceed constitutional limits. For example, while scholars and analysts have long pointed out that minorities have largely borne the costs of the war on drugs, analyses of terrorism prosecutions demonstrate that the vast majority of those prosecutions failed to thwart an actual violent plot.⁴

1. In December 2001, British comedian and Monty Python member Terry Jones published an op-ed entitled “When Grammar is the First Casualty of War” critiquing the entire notion of a war on terror. “How do you wage war on an abstract noun? It’s rather like bombing murder,” he asked, further pondering the concept of declaring victory: “With most wars, you can say you’ve won when the other side is either all dead or surrenders. But how is terrorism going to surrender? It’s hard for abstract nouns to surrender.” The satirical tone of the piece does not detract from the force of its criticisms. Nevertheless, over the many years of each campaign, the government has not retreated from its militaristic posture, since being at war serves as both an appeal to patriotism and the idea that what is at stake is more than just the usual crimes covered by ordinary police work. Terry Jones, *When Grammar is the First Casualty of War*, DAILY TELEGRAPH (Dec. 1, 2001, 12:01 AM), <http://www.telegraph.co.uk/news/uknews/1364012/Why-grammar-is-the-first-casualty-of-war.html> [<https://perma.cc/7MM3-DNZ5>]. The article paved the way for a series of interventions that ultimately became a book entitled TERRY JONES’ WAR ON THE WAR ON TERROR: OBSERVATIONS AND DENUNCIATIONS BY A FOUNDING MEMBER OF MONTY PYTHON (2004).

2. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

3. See, e.g., ARUN KUNDNANI, *THE MUSLIMS ARE COMING!: ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR* (2014); see also STEPHEN SHEEHI, *ISLAMOPHOBIA: THE IDEOLOGICAL CAMPAIGN AGAINST MUSLIMS* (2011).

4. See Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609, 610 (2015) (noting that while one analyst argues that only one percent of post-9/11 terrorism prosecutions concerned a true threat of violence, their data puts the number at nine percent).

Despite this latter point on the limits of the law in regulating the war effort, it is clear that the declaration of war in each situation has created multifaceted and complex phenomena that have been the subject of much study and coverage—academic, journalistic, or otherwise. The effects of the war on drugs have been acutely felt in the domestic arena. Its racially disproportionate impact on people of color has played a major role in the emergence of mass incarceration,⁵ the militarization of police,⁶ and a radical transformation of the criminal justice system into one of often unjust plea bargaining and largely unfettered prosecutorial power.⁷

Conversely, for the sixteen years after September 11, 2001, the focus of the war on terror has been largely foreign, generating innumerable controversies. Debates over the ambit of the 2001 congressional Authorization on the Use of Military Force (AUMF), the legality and wisdom of extended military campaigns in Afghanistan and Iraq, the controversy of the Central Intelligence Agency's program on torturing detainees, military detention and prosecution at the Naval base in Guantanamo Bay, Cuba, and drone warfare in the Arabian Peninsula and Central Asia, among other examples, reflect this pattern.

As a point of departure, unlike open-ended and contentious debates over executive power and the ability to conduct military operations abroad, there is no doubt that criminal prosecution takes place in duly constituted courts, which are empowered to see a case through to its ultimate disposition. These courts produce rulings and outcomes that are regarded as fully legitimate. So even though criticism of the war on drugs has been sustained and withering, that criticism does not seriously call for the elimination of all criminal prosecution in its entirety. In the war on terror context, criminal prosecution has been held up as the ideal form of adjudicating terrorism suspects, as opposed to the much-disparaged and seemingly stillborn efforts to prosecute detainees in special military tribunals outside the purview of the federal courts.⁸

5. See, e.g., JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* (2014).

6. RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (2014).

7. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007).

8. For example, in April 2014, on the occasion of the conviction of Osama Bin

The comparison between the two types of wars is rarely drawn and remains under-theorized. Those scholars who have commented on the war metaphor have noted its distorting effects on those legal institutions at the heart of the criminal justice system. Jonathan Simon noted in 2008 that “[m]any of the deformations in American institutions produced by the war on crime, deformations that have made our society less democratic, are being publicly rejustified as responses to the threat of terror.”⁹ For example, where law enforcement’s use of informants to prey on poorer communities of color as part of the war on drugs had come under sustained attack by scholars and activists, leading to congressional inquiry into the effectiveness of such tactics, the war on terror provided a new justification for a proliferation of informant-driven stings, as the public was in a state of heightened fear over the next attack.¹⁰ When once informants and undercover policing had been viewed with greater suspicion and scrutiny, the war on terror has worked to eliminate such concerns, focusing instead on the concept of a threat of terrorism all around us that demands a proactive response. James Forman observed that “our approach to the war on terror is an extension—sometimes a grotesque one—of what we do in the name of the war on crime.”¹¹ Writing specifically in the context of the prison regime, he argued that the harsh nature of incarceration in the United States directly inspired the conditions for detainees at Guantanamo Bay, Cuba, and Abu Ghraib.¹² In a strange twist, the dynamic Forman described has inverted itself. Recently, revelations have come to light regarding a detention facility maintained by the Chicago Police Department, in which individuals are detained and interrogated incommunicado, i.e.,

Laden’s son-in-law on various terrorism charges, then-Attorney General Eric Holder praised the criminal model as the best vehicle for trying terrorism suspects. See Benjamin Weiser, *Holder, in New York City, Calls Terror Trials Safe*, N.Y. TIMES, Apr. 2, 2014, at A22.

9. Jonathan Simon, *Choosing Our Wars, Transforming Government: Crime, Cancer, and Terror*, in RISK AND THE WAR ON TERROR 79, 93 (Louise Amoore & Marieke de Goede eds., 2008).

10. Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 689–90 (2010) [hereinafter Said, *Terrorist Informant*].

11. James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 332–33 (2009).

12. *Id.* at 341–67.

without being formally charged or allowed access to counsel.¹³

In a 2016 article subjecting the war on drugs to critical scrutiny by applying to it the actual laws of war, Erik Luna notes the price that metaphor extracts on society and the legal structure charged with waging and policing the war's limits.¹⁴ Speaking directly on the role the judiciary plays, he writes: "Experience has . . . shown that when government actors speak in belligerent terms and individual rights are beset by claims of necessity, the courts sometimes seem to lack the wherewithal or confidence to intercede."¹⁵ Inevitably, the powers that accrue during wartime can remain even after the end of hostilities, as "the government steps away from its wartime footing far larger than before and often with a greater arsenal at its disposal."¹⁶ The declaration of war therefore produces a "state of exception," which Mark Danner explains, constitutes the time "during which, in the name of security, some of our accustomed rights and freedoms are circumscribed or set aside."¹⁷

Applied directly to the framework of criminally prosecuting individuals in both war scenarios, these critiques retain their force. The innovations of the war on terror have their genesis in measures adopted and approved through the war on drugs (as the main target of the war on crime). Taking the analysis a bit further, I have written at length about the effect that the war on terror has had on the criminal process more generally, creating a kind of terrorism exception to the normal rules of criminal law and procedure.¹⁸ That those rules had already been shaped by the war on drugs only underscores the distorting effect of the war metaphor more generally. The end result is a scenario where the exceptional measures used in fighting an abstract enemy come to reside within the normal or

13. Brandon Ellington Patterson, *Chicago's "Black Site" Police Scandal Is Primed to Explode Again*, MOTHER JONES (Dec. 8, 2015), <http://m.motherjones.com/politics/2015/12/rahm-emanuel-chicago-police-homan-square-scandal> [<https://perma.cc/FQZ4-73HV>]; Spencer Ackerman, *Homan Square Revealed: How Chicago Police "Disappeared" 7,000 People*, GUARDIAN (Oct. 19, 2015) http://www.theguardian.com/us-news/2015/oct/19/homan-square-chicago-police-disappeared-thousands?CMP=Share_iOSApp_Other [<https://perma.cc/7UF5-T7UJ>].

14. See generally Erik Luna, *Drug War and Peace*, 50 U.C. DAVIS L. REV. 813 (2016).

15. *Id.* at 818.

16. *Id.* at 817.

17. MARK DANNER, SPIRAL: TRAPPED IN THE FOREVER WAR 16 (2016).

18. See, e.g., WADIE E. SAID, CRIMES OF TERROR 6 (2015).

ordinary criminal justice system. Using examples from both the war on drugs and the war on terror, this Article demonstrates how this type of exceptionalism has created a system of worldwide enforcement housed in the American judicial system, where law enforcement and prosecutors retain almost limitless discretion to investigate and bring charges. This development is one we should not ignore or downplay, as the vast discretion enjoyed by law enforcement and prosecutors to charge individuals with no ties to the United States represents an expansion of the reach of American laws that needs to be understood and more thoroughly debated. Specifically, as a matter of public policy and constitutional interpretation, courts should be wary of broad assertions of jurisdiction to fight wars of dubious provenance. While the United States, as a sovereign nation, can pursue its interests in stopping trafficking in narcotics and political violence against its own citizens that harms its sense of national security, those interests must be defined more narrowly, lest the country transform into a sort of world police force without an international mandate.

This Article proceeds as follows. Part II begins by reviewing three examples of the worldwide enforcement scheme generated by the war model: (A) American overseas drug interdiction laws; (B) the criminal ban on providing material support to foreign terrorist organizations; and (C) the newer statute regulating “narco-terrorism.” Through these innovations, we see the possibility of fighting a war on drugs and terror, wherever they occur or originate. Part III discusses the lack of constitutional checks on the selective enforcement of these laws, with their worldwide scope. This situation is compounded by the fact that, although the Department of Justice has taken measures to eliminate some forms of racial profiling, patterns and residual forms of the practice remain in use. And even if the danger of overt profiling has been minimized, more carefully crafted theories like “radicalization” in the terrorism context, and the drug courier profile in the war on drugs, reproduce the effects of racial profiling without being described as such. These are all dynamics that must be better understood to properly weigh the benefits and risks of the government spreading criminal liability the world over. This Article concludes by noting that as the wars on drugs and terror continue, their feasibility and legality remain in question.

II. A SCHEME OF WORLDWIDE ENFORCEMENT

A. *The Maritime Drug Law Enforcement Act*

The first example of worldwide enforcement schemes comes from the war on drugs. Going by the somewhat unwieldy name of the Maritime Drug Law Enforcement Act (MDLEA), it signals the immutability of narcotics' status as the enemy that must be fought no matter where they are manufactured, sold, or used.¹⁹ Passed in 1986 during the initial years of the legislative escalation of the drug war, the law provides the government with the ability to prosecute even mere drug possession by bestowing U.S. jurisdiction over anyone detained on any ship, even foreign-registered, on the high seas if: (a) the ship has some American connection; (b) the ship is stateless; or (c) the nation in which the ship is registered consents to jurisdiction.²⁰ Two key features of this scheme are: (1) that ships stopped in international waters that refuse to produce evidence of registry will be considered stateless under the law, and (2) that consent is construed quite expansively, can be given orally, and may not be subject to legal challenge.²¹

A chief result of the MDLEA is the rise of the "go-fast boat" prosecution—the apprehension and interdiction by the U.S. Coast Guard of small foreign vessels carrying drugs and traveling at a high rate of speed in international waters.²² Efforts to challenge the application of the jurisdictional reach of the statute by those unfortunate enough to have been charged and convicted under its aegis have been largely

19. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 46 U.S.C. §§ 70501–70507 (2007)).

20. 46 U.S.C. § 70502(a), (b), & (c) (2007).

21. *Id.*; see also Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction Over Drug Crimes*, 93 MINN. L. REV. 1191, 1200 (2009) ("This consent is broadly defined—it may be 'oral'—and not subject to challenge in court: it 'may be verified or denied by radio, telephone, or similar oral or electronic means.' Moreover, the MDLEA expanded the definition of stateless vessels to include those that do not produce evidence of their registry when requested by the Coast Guard—a request which, on the high seas or in foreign territorial waters, they may feel fully entitled to reject—as well as those whose registry is not 'affirmatively and unequivocally' confirmed by the foreign state.") (citations omitted).

22. *United States v. Tinoco*, 304 F.3d 1088, 1120 (11th Cir. 2002) ("In the present case, government witnesses testified that the term 'go-fast' was used by the Coast Guard to describe a type of vessel commonly used in smuggling operations.").

unsuccessful.²³

The prosecution of Geovanni Rendon, a Colombian national, serves as a typical example of the phenomenon.²⁴ In May 2001, a U.S. Navy plane spotted a speedboat traveling at a high speed in international waters in the Pacific Ocean and tracked its movements.²⁵ Upon seeing members of the boat's crew throwing bales overboard, the plane marked the location of the bales by deploying a sonar buoy and then alerted a Coast Guard ship to further investigate.²⁶ After following the boat for several hours and attempting to contact the crew, who did not answer, the Coast Guard intercepted the boat and detained all four individuals on board.²⁷ Rendon, a Colombian national, identified himself as the captain of the boat, which he claimed was registered in Colombia, and stated that the boat had left his homeland the day before to aid some fishermen who were lost at sea.²⁸ Subsequent efforts to verify the boat's registration with Colombian authorities were unsuccessful, as those authorities could not find a record of the boat being so registered.²⁹ When the Coast Guard recovered the bales that had been thrown overboard, they counted over 1,100 kilograms of cocaine.³⁰ Rendon was brought to the United States and charged under the MDLEA.³¹

After being convicted and sentenced to 30 years in prison, Rendon moved to overturn his conviction on the basis that the MDLEA does not provide subject matter jurisdiction in a case like his, where no nexus to the United States was alleged.³² More specifically, he argued that the MDLEA violates both his Fifth Amendment Due Process rights as well as his right to trial by jury under the Sixth Amendment.³³

At this point, we might pause to consider the dispute at

23. *United States v. Wilchcombe*, 838 F.3d 1179, 1186 (11th Cir. 2016) (rejecting Due Process challenge to MDLEA based on it not requiring a nexus between the defendant and the United States, and noting that four of the five circuits deciding the issue ruled the same way) (citations omitted).

24. *United States v. Rendon*, 354 F.3d 1320 (11th Cir. 2003).

25. *Id.* at 1322.

26. *Id.*

27. *Id.* at 1322–23.

28. *Id.* at 1323.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1324.

33. *Id.*

issue. On the one hand, it seems perfectly understandable that the government might want to stop the flow of illegal narcotics to the United States and elsewhere, even before they have entered into U.S. territory or territorial waters. Drug smugglers make use of these small boats traveling at high speed on the open seas precisely to minimize the risk of detection. And unlike terrorism plots, many of which are driven by government informants and rely on constructs like material support—as opposed to actual violent activity or conspiracy not concocted by a government actor—here there can be no dispute that Rendon was responsible for transporting a significant amount of cocaine from Colombia to unknown points abroad. However, Rendon also makes an argument that is not without grounding in basic jurisdictional principles. Why should the United States be able to prosecute him criminally for his actions as captain of the boat when he had not in any way come into contact with the United States, at least until the time his boat was intercepted? Additionally, despite his dangerous trafficking activities, there was no indication that the cocaine itself was bound for the United States.³⁴

The Eleventh Circuit, following a long line of its own precedent, made short work of Rendon's argument and affirmed his conviction and sentence.³⁵ Noting that the boat was a stateless vessel, the United States, like all other sovereign nations, was entitled to treat it as subject to its jurisdiction.³⁶ Moreover, the court noted that "Congress, under the 'protective principle' of international law, may assert extraterritorial jurisdiction over vessels in the high seas that are engaged in conduct that 'has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.'"³⁷ Drug smuggling fits within the strictures of this statement, and the court further noted precedent that would allow jurisdiction in cases like

34. *Id.* at 1324–28.

35. *Id.* at 1324–28, 1334.

36. *Id.* at 1325.

37. *Id.* (citing *United States v. Tinoco*, 304 F.3d 1088, 1108 (11th Cir. 2002)). However, in 2012 the Eleventh Circuit ruled that in passing the MDLEA, the Offences Clause of Article I of the Constitution limited Congress to jurisdiction over crimes proscribed by customary international law; because drug smuggling in the territorial waters of a foreign nation could not be said to violate customary international law, the MDLEA did not allow for the prosecution of individuals seized in Panamanian territorial waters and handed over to the United States. *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1249 (11th Cir. 2012).

these even where the boat is properly registered in a foreign nation.³⁸ In any event, *Rendon* was precisely the type of scenario the MDLEA was drafted to combat.

Outside of *Rendon*'s holding, there are additional hurdles to challenging the terms of the MDLEA. As with the vast majority of federal criminal cases, "go-fast" MDLEA prosecutions are often resolved by a guilty plea. But by pleading guilty, a defendant waives all non-jurisdictional challenges to the statute underlying his conviction.³⁹ And, according to *United States v. Miranda*, it seems subject-matter jurisdiction extends farther than the factual scenario encompassed by *Rendon*.⁴⁰ The defendants in *Miranda* were arrested in Colombia on suspicion of running a narcotics smuggling operation and extradited to the United States, where they ultimately pled guilty to drug conspiracy charges under the MDLEA.⁴¹ The allegations were rooted in their roles running a "go-fast" boat smuggling operation.⁴² It was undisputed that the defendants never left, nor intended to leave, Colombia. The defendants hinged their subject matter jurisdictional challenge on the contention that the go-fast boats at issue in their prosecution could not be considered stateless vessels because they were seized in Colombia, not on the high seas.⁴³ The court rejected that argument by noting that Congress did not enact such a requirement in the MDLEA and that their argument, if successful, would create perverse incentives.⁴⁴ Specifically, it remarked that "[i]f a vessel in fact ventured in and out of statelessness depending on where it happened to be located when seized, the [MDLEA] would create a perverse incentive for vessels to race to a foreign nation's territorial waters before submitting to interdiction."⁴⁵

The MDLEA's provisions allowing American authorities to stop and prosecute drug smugglers on the high seas seem to be immune from judicial challenge. In service of stopping the flow

38. *Rendon*, 354 F.3d at 1325.

39. *See, e.g.*, *United States v. Miranda*, 780 F.3d 1185, 1189–91 (D.C. Cir. 2015); *see also* *United States v. De La Garza*, 516 F.3d 1266, 1271 (11th Cir. 2008).

40. *Miranda*, 780 F.3d at 1189–91.

41. *Id.* at 1186–88.

42. *Id.*

43. *Id.* at 1197.

44. *Id.*

45. *Id.*

of illegal drugs on the high seas, courts have not found fault with MDLEA prosecutions, even where there are no links between the United States and the hapless defendants in these prosecutions.⁴⁶ Here then we see the United States arrogating to itself the right to fight its war on drugs almost anywhere in the world, free of jurisdictional constraint.⁴⁷ One scholar has described this state of affairs as the United States making use of the international law principle of universal jurisdiction on an unprecedented scale.⁴⁸ However, this scholar points out that invoking universal jurisdiction is something that lies beyond Congress's power to regulate.⁴⁹ As historically and logically grounded as this argument may be, it has attained limited support among the federal judiciary in MDLEA prosecutions.⁵⁰ So, while there exists the odd case ruling against the MDLEA's sweeping nature, and reasoned arguments that strike a chord with a handful of federal judges, the reality is that the statute creates a norm of worldwide enforcement for American narcotics laws, with no requirement that the drugs be tied to the United States. In effect, drugs found anywhere in international waters, and maybe even a sovereign nation's

46. *United States v. Wilchcombe*, 838 F.3d 1179, 1186 (11th Cir. 2016) (“The text of the MDLEA does not require a nexus between the defendants and the United States; it specifically provides that its prohibitions on drug trafficking are applicable ‘even though the act is committed outside the territorial jurisdiction of the United States.’”).

47. *United States v. Trinidad*, 839 F.3d 112, 120 (1st Cir. 2016) (Torruella, J., dissenting) (emphasis in original) (citations omitted) (“The Maritime Drug Enforcement Act (MDLEA) . . . has been used to expand United States *criminal* jurisdiction well beyond U.S. borders to include people and acts that have no connection whatsoever with the United States. This extraterritorial exercise is far in excess of any powers either permitted by international law or granted by Congress to the Executive branch.”).

48. Universal jurisdiction allows a nation to prosecute individuals for certain offenses of such a serious international nature even where it has no connection to the crime or participants. *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

49. Kontorovich, *supra* note 21, at 1193, 1195 (“[Under the MDLEA], America uses [universal jurisdiction] far more than any other nation, and perhaps even more than all other nations combined,” but that “the MDLEA can only be a valid exercise of [Congress’s constitutional powers] if the drug offenses are [universal jurisdiction] offenses in international law—which they are not.”).

50. See *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1255–58 (11th Cir. 2012); see also *United States v. Cardales-Luna*, 632 F.3d 731, 738–51 (1st Cir. 2011) (Torruella, J., dissenting); see also *United States v. Matos-Luchi*, 627 F.3d 1, 20 (1st Cir. 2010) (Lipez, J., dissenting); see also *United States v. Angulo-Hernandez*, 576 F.3d 59, 59–63 (1st Cir. 2009) (Torruella, J., dissenting from denial of en banc review).

territorial waters, can render an individual subject to prosecution in American courts, with no real jurisdictional constraint.

B. *The Material Support Ban*

In the war on terror context, the statute most utilized by the government in its prosecutions is 18 U.S.C. § 2339B (Section 2339B), the ban on providing material support⁵¹ to a foreign terrorist organization (FTO).⁵² Passed in 1996 to counter the perceived problem of foreign terrorist groups raising money in the United States under the cover of humanitarian activity, the law prohibits material support to specially designated FTOs, of which there are now sixty-one.⁵³ Operating on a theory that money is fungible—i.e., money for charity frees up money for violent activity—Congress made a key finding when passing the law: “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”⁵⁴ I have expressed many criticisms of the law over several articles and in my recent book on federal terrorism prosecutions; for example, the selectivity of the

51. Material support is

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339B (2012).

52. *Id.* I have written extensively about this law and its infirmities, constitutional and otherwise, in both theory and application, over several articles and book chapters. See, e.g., SAID, *supra* note 18, at 51–72; see also Wadie E. Said, *Humanitarian Law Project and the Supreme Court's Construction of Terrorism*, 2011 B.Y.U. L. REV. 1455 (2011); see also Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543 (2011) [hereinafter Said, *Material Support*].

53. Press Release, U.S. Dep't of State, Bureau of Counterterrorism, Foreign Terrorist Organizations, <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Mar. 2, 2017) [<https://perma.cc/XV42-T5B5>].

54. 18 U.S.C. § 2339B (finding that, *inter alia*, certain foreign terrorist groups raised funds in the United States for violence under humanitarian pretenses). Many courts reviewing the statute, including the Supreme Court, have cited this finding with approval. See Said, *Material Support*, *supra* note 52, at 577 n.200 (citing cases).

designation and enforcement process, the fact that material support itself can now take the form of protected speech, as well as the more nebulous and elusive concept of “legitimacy.”⁵⁵ This is true even where the material support as speech is geared toward getting an FTO to eschew violence in favor of nonviolent advocacy.⁵⁶ Putting those criticisms aside for the moment, a more recent strain of Section 2339B prosecutions also shows the law’s applicability on a worldwide scale, calling into account the question of jurisdiction, in a manner that resembles the MDLEA.

The statute itself explicitly recognizes extraterritorial jurisdiction, and three out of its five main jurisdictional bases call for a direct link of some sort to the United States.⁵⁷ However, one provision allows for jurisdiction “after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States.”⁵⁸ And another permits its exercise if “the offense occurs in or affects interstate or foreign commerce.”⁵⁹ A recent case reflects the government’s willingness to charge and prosecute individuals with material support violations, even where no ostensible link to the United States exists, in keeping with the above two jurisdictional bases.

In January 2016, two Swedish citizens of Somali origin and one British resident of Somali origin were sentenced to long prison terms for materially supporting al-Shabaab, a banned Somali FTO.⁶⁰ Several years prior, in August 2012, they were

55. For an extended discussion, see SAID, *supra* note 18, at 51–72.

56. Holder v. Humanitarian Law Project, 561 U.S. 1, 36 (2010) (“Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government’s interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups’ nonviolent ends.”).

57. 18 U.S.C. § 2339B ¶¶ (d)(1)(A), (B), (D) & (d)(2) (recognizing jurisdiction over U.S. citizens, legal permanent residents, and stateless individuals residing in the United States, as well as over acts that take place in whole or in part in the United States).

58. *Id.* ¶ (d)(1)(C).

59. *Id.* ¶ (d)(1)(E).

60. Press Release, U.S. Dep’t of Justice, Two Members of al-Shabaab Sentenced for Conspiring to Provide Material Support to the Terrorist Organization (Jan. 15, 2016), <http://www.justice.gov/opa/pr/two-members-al-shaabaab-sentenced-conspiring-provide-material-support-terrorist-organization>

apprehended by local authorities in Djibouti, then turned over to the FBI a few months later, and finally brought to New York to face Section 2339B charges.⁶¹ The district court made clear that jurisdiction existed under the statute's terms, as there was no question the men were properly charged with a violation of American law.⁶² It then duly considered whether the extraterritorial application of § 2339B comported with due process, as the defendants, as non-citizens, argued that they never intended to subject themselves to American prosecution when they acted entirely outside the United States.⁶³ The court rejected the defendants' arguments, reasoning that a jurisdictional nexus with the United States existed through al-Shabaab's threats to harm the United States, thereby satisfying due process.⁶⁴ The fact of the group's designation, coupled with its hostile posture, was enough to overcome the fact that al-Shabaab was active in the Horn of Africa, and apparently seemed to be actively targeting only rival Somali groups, Kenya, and Ethiopia.⁶⁵ The two Swedish defendants obviously disagreed that their quarrel was with the United States, as one of their lawyers told the *N.Y. Times*, "They never wanted to harm [this country] . . . [t]hat's what's so frustrating for them. Their accuser is a country they never intended to hurt, never wanted to hurt."⁶⁶

The case of the third defendant, Mehdi Hashi, a former British citizen of Somali origin, is particularly troubling. After refusing to work as an informant for MI-5, the British internal security service, he felt so harassed by MI-5 that he left Britain to live in Somalia.⁶⁷ While there, the British government moved to strip him of his citizenship, and he crossed the border from Somalia into Djibouti to appeal against the loss of his

[<https://perma.cc/7S28-JWA8>]; Stephanie Clifford, *A Growing Body of Law Allows the U.S. to Prosecute Foreign Citizens*, N.Y. TIMES, June 10, 2015, at A9.

61. *United States v. Ahmed*, 94 F. Supp. 3d 394, 405 (E.D.N.Y. 2015) (noting the defendants' allegations that they were tortured while in Djiboutian custody and then questioned by two separate teams of F.B.I. agents).

62. *Id.* at 408.

63. *Id.* at 408–11.

64. *Id.*

65. *Id.*

66. Clifford, *supra* note 60.

67. Aviva Stahl, *How a British Citizen Was Stripped of His Citizenship, Then Sent to a Manhattan Prison*, NATION (Feb. 28, 2014), <http://www.thenation.com/article/how-british-citizen-was-stripped-his-citizenship-then-sent-manhattan-prison/> [<https://perma.cc/PVS3-HE7Y>].

citizenship at the latter's British consulate.⁶⁸ However, the authorities in Djibouti detained him, held him for several months—during which time he was severely mistreated while in custody—and then turned him over to the United States for prosecution on Section 2339B charges.⁶⁹ He ultimately pled guilty, partially to escape the solitary confinement-like conditions of his pre-trial detention, where he spent several years.⁷⁰ After his guilty plea was accepted by the court, the government admitted he posed no threat and was in fact mistreated while in Djibouti.⁷¹ His sister criticized his prosecution by asking: “He was in his own country. . . . It had nothing to do with the United States. Why does this country that has nothing to do with us have a say in his life?”⁷²

Perhaps the argument that the material support statute potentially overreaches in bestowing police and prosecutorial discretion too liberally can be limited by the fact that the existence of the FTO list keeps the law's force narrowly focused on those groups already designated, a number firmly in the manageable range of double digits. While I have made the argument that the implications of the statute and its attendant prosecutions are that terrorism writ large is the enemy, no matter where it occurs and what group carries it out,⁷³ the concrete and limited nature of the FTO list stands, admittedly, in counterpoint to that contention. However, consider the full implications of the law and its reach. It can target speech, it is not bound by any geographical limits, and to make out a jurisdictional nexus so as to not offend constitutional notions of due process, all that suffices is some sort of vague statement about an FTO's quarrel with the United States.⁷⁴ As the

68. *Id.*

69. Arun Kundani, *The Guantánamo in New York You're Not Allowed to Know About*, INTERCEPT (Feb. 5, 2016, 6:55 AM), <https://theintercept.com/2016/02/05/mahdi-hashmi-metropolitan-correctional-center-manhattan-guantanam-o-pretrial-solitary-confinement/> [<https://perma.cc/39UV-D2UZ>].

70. *Id.*

71. *Id.*

72. *Id.*

73. See Said, *Material Support*, *supra* note 52, at 570.

74. *United States v. Ahmed*, 94 F. Supp. 3d 394, 409 (E.D.N.Y. 2015) (citing al-Shabaab threat to the United States as the following: “[W]e say to the patron and protector of the cross, America: the wager that you made on the Ethiopians, Ugandans, and Burundians in Somalia was a failure, and history has proven it. Allah willing, we will attack them, roam [through their ranks], cut off every path they will take, chase away those who follow them, and fight them as insects and wolves. [We] will give them a taste of the heat of flame, and throw them into

prohibited conduct is material support, and not a specific act of violence or operational structure of a terrorist group, the statute expands the notion of who is tarred by the terrorism brush by several degrees. Once the government decides to designate a group, however direct or tangential a threat it represents to the United States, worldwide enforcement is the next step, regardless of a defendant's links to the country.

C. *The Narco-Terrorism Statute*

At the apogee of conceptual and concrete convergence between the two wars lies the narco-terrorism statute, 21 U.S.C. § 960a, which ostensibly criminalizes drug trafficking that fuels terrorist activity.⁷⁵ In the wake of the 9/11 attacks, the Drug Enforcement Agency's (DEA) international operations increased, as the government sought links between drug smuggling and terrorist groups.⁷⁶ Ultimately, the agency lobbied for a statute that drew the link directly and created heightened penalties for narco-terrorism.⁷⁷ Passed in 2006 as part of the reauthorization of the Patriot Act, the legislative record is replete with examples of congressional leaders and experts extolling the need for such a statute, all the while proclaiming the severe danger narco-terrorism poses to the United States.⁷⁸ This statement by Senator John Cornyn of Texas exemplifies the congressional approach:

hell.”).

In a recent article, a former federal prosecutor makes the argument that due process should only bar jurisdiction in cases where there is a conflict between American law and the local criminal law of the country where the conduct at issue takes place, so as to satisfy principles of basic fundamental fairness. See Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507, 531–45 (2016). Presumably, drug trafficking and support for violence or violent extremists would be easily satisfied. However, the material support ban, a novel type of statute very few countries actually have on their books, with its expansive notion of what constitutes support, might prove a more difficult issue. What the United States may view as prohibited conduct may be perfectly legal in the country where it took place, especially if it comes in the form of speech, advocacy, or even support for charitable activities associated with an FTO.

75. 21 U.S.C. § 960a (2006).

76. Ginger Thompson, *Trafficking in Terror*, NEW YORKER (Dec. 14, 2015), <http://www.newyorker.com/magazine/2015/12/14/trafficking-in-terror> [<https://perma.cc/G2Y4-9XTE>] [hereinafter Thompson, *Trafficking Terror*].

77. *Id.*

78. See John E. Thomas, Jr., *Narco-Terrorism: Could the Legislative and Prosecutorial Responses Threaten Our Civil Liberties?*, 66 WASH. & LEE L. REV. 1881, 1898–1903 (2009) for numerous examples from the legislative record.

This bill confronts the new reality and very real danger of the deadly mix of drug trafficking and terrorism. . . . Post 9/11, governments now find themselves combating classic terrorist groups that participate in, or otherwise receive funds from, drug trafficking in order to further their agenda. But whether narco-terrorists are actual drug traffickers who use terrorism against civilians to advance their agenda, or are principally terrorists who out of convenience or necessity use drug money to further their cause, the label of narco-terrorist may be equally applicable to both groups, and the full force of U.S. law should be brought to bear on these organizations.⁷⁹

There is no wavering or dithering in the statement, which stands for the proposition that narco-terrorism is a very real and highly dangerous phenomenon that demands a strong response and specially dedicated criminal prohibition. The statute's evocative name, therefore, is quite powerful and links the bogeymen of the 1980s with those of the post-9/11 era. And in the abstract, the merger of the two phenomena seems terrifying: terrorists and drug dealers working together to use the proceeds of the sale of narcotics to carry out illegal political violence. However, the statute itself suffers from a few deficiencies, both in terminology and application.

As an initial matter, consider the statutory language itself. The relevant section of the law reads as follows:

Whoever engages in conduct that would be punishable under section 841(a) [criminal drug activity] of this title if committed within the jurisdiction of the United States, or attempts or conspires to do so, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity (as defined in section 1182(a)(3)(B) of Title 8) or terrorism (as defined in section 2656f(d)(2) of Title 22), shall be sentenced to a term of imprisonment of not less than twice the minimum punishment under section

79. 151 CONG. REC. S9846 (daily ed. Sept. 8, 2005) (statement of Sen. Cornyn).

841(b)(1), and not more than life, a fine in accordance with the provisions of Title 18, or both.⁸⁰

At first blush, there seems not much here other than typical formulations used by legislators when drafting laws. However, an analysis of the legislative history reveals that the original language used by both houses of Congress included phrasing that created a critical linkage between the drug crimes and terrorism.⁸¹ In other words, the original formulation of the statute required that the drug activity be in furtherance of terrorist activity or a terrorist group.

A 2009 student note reviewed this strange state of affairs and speculated that Congress must have simply made a mistake in the drafting process, because “it certainly is not readily apparent” why it eliminated the drug-terrorism nexus language from the final version of the statute.⁸² After all, he noted that both the law’s summary and the statements of legislators introducing the final version of the statute highlighted the link between the two.⁸³ Without a nexus, the narco-terrorism statute is rendered redundant to the multiplicitious other laws criminalizing drug activities and terrorism crimes already on the books.

While these criticisms are valid, they have been rejected by at least one federal court of appeals.⁸⁴ In *United States v. Mohammed*, the District of Columbia Circuit upheld the use of the law, ruling that a link between the drug activity and support for terrorism was not required; it also rejected many of the same arguments raised in the student note cited above.⁸⁵ Specifically, it noted that had Congress wished to require such a nexus, it could have simply written one into the statute.⁸⁶ The court issued its ruling in the case of an Afghan national who was convicted of international drug trafficking and narco-terrorism, and challenged only the narco-terrorism charge on

80. 21 U.S.C § 960a(a).

81. Thomas, *supra* note 78, at 1898–1904.

82. *Id.* at 1903.

83. *Id.*

84. *United States v. Mohammed*, 693 F.3d 192 (D.C. Cir. 2012).

85. *Id.* at 198–201.

86. *Id.* at 199 (“The text is abundantly clear that Congress intended to target drug offenses the defendant knows will support a ‘person or organization’ engaged in terrorism, with no additional requirement that the defendant intend his drug trafficking to advance specific terrorist activity.”); *see also* *United States v. Saade*, No. S1 11 Cr. 111(NRB), 2012 WL 2878087, at *3–6 (S.D.N.Y. July 11, 2012).

appeal.⁸⁷ While it is not clear how often federal authorities will make use of the statute to prosecute activity that lacks absolutely any connection—even a fabricated connection—between drugs and terrorism, the fact that the law is missing explicit language to that effect leaves open the possibility that drug dealers or possessors with no link to terrorism could find themselves convicted of narco-terrorism offenses. The result of such a link can be costly for a convicted defendant. In Mohammed's case, the narco-terrorism charge allowed the district court to apply a special terrorism sentencing enhancement, resulting in a life term, which the D.C. Circuit upheld on appeal.⁸⁸

1. Jurisdiction

Another wrinkle lies in the language covering jurisdiction. The narco-terrorism statute contains the following language to delineate who is subject to its strictures:

- (1) the prohibited drug activity or the terrorist offense is in violation of the criminal laws of the United States;
- (2) the offense, the prohibited drug activity, or the terrorist offense occurs in or affects interstate or foreign commerce;
- (3) an offender provides anything of pecuniary value for a terrorist offense that causes or is designed to cause death or serious bodily injury to a national of the United States while that national is outside the United States, or substantial damage to the property of a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions) while that property is outside of the United States;
- (4) the offense or the prohibited drug activity occurs in whole or in part outside of the United States (including on the high seas), and a perpetrator of the offense or the prohibited drug activity is a national of the United States or a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions); or

87. *Id.* at 195–97.

88. *Id.* at 201–02.

(5) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States.⁸⁹

The third and fourth provisions reflect standard jurisdictional language requiring an American nexus to the criminal activity. But the remaining provisions reveal greater ambitions and a greater reach. The first provision indicates that this law applies to anyone who, without geographical limit, violates the laws of the United States. Much like the related provision in Section 2339B, the second provision more or less reflects this point, as activity occurring in or affecting interstate or foreign commerce similarly recognizes no boundaries. With these assertions, the statute resembles the open-ended application of the wars on drugs and terror. As in those wider conflicts, and as part of them, the law applies everywhere narco-terrorism is taking place, granting the United States the right to fight the phenomenon wherever it occurs. To underscore that point, the fifth provision allows for jurisdiction even if the conduct takes place abroad and the defendant is “brought into or found in the United States,” irrespective of how that might occur, a position that resembles the analogous provision in Section 2339B.⁹⁰ Reflecting on the narco-terrorism statute, one judge remarked that “Congress has passed a law that attempts to bind the world.”⁹¹

89. 21 U.S.C. § 960a(b) (2006).

90. See *United States v. Yousef*, No. S3 08 Cr. 1213(JFK), 2011 WL 2899244, at *6–9 (S.D.N.Y. June 11, 2011) (finding jurisdiction in a narco-terrorism prosecution where defendant alleged he was kidnapped by U.S. agents while in Honduras); *United States v. Yousef*, No. S3 08 Cr. 1213(JFK), 2010 WL 3377499, at *2–5 (S.D.N.Y. Aug. 23, 2010) (finding jurisdiction under 21 U.S.C. § 960a based on a sufficient nexus between defendant’s activities and the United States, even though at the time of the narco-terrorism conspiracy he was in a Honduran prison). The Second Circuit refused to delve further in Yousef’s case and upheld his guilty plea and sentence, ruling that his argument that there was not a sufficient nexus between his conduct and the United States was non-jurisdictional and therefore waived by his guilty plea. See *United States v. Yousef*, 750 F.3d 254, 259–63 (2d Cir. 2014).

91. Thompson, *Trafficking Terror*, *supra* note 76.

2. Further Permutations

Perhaps in the post-9/11 reality, the lack of any jurisdictional restraint on the law's reach should come as no surprise. Outside the larger conceptual context of what expansive jurisdiction connotes, however, rests a slightly absurd as-applied challenge. Recall that the final version of the statute did away with language linking the criminal drug and terrorism activity, despite what looked like a legislative understanding to the contrary. The statute as currently written would sanction a prosecution along the lines of the following hypothetical. DEA agents operating undercover in Uruguay, where the growth, possession, and sale of marijuana are fully legal, approach a resident of that country with no ties to the United States and ask him to sell a large number of the plants he cultivates in his own home. They say they are members of the FARC, a Colombian rebel group that is classified as a Foreign Terrorist Organization in the United States and considers the United States one of its main enemies. They agree to exchange \$10,000 for the plants. Upon completing the transaction, the undercover DEA agents comment that they really like his wristwatch, which he designed himself and is worth around \$50. Touched by the praise, the man hands over his watch as a gift to the agents. They detain him after he delivers the marijuana and watch, and arrange to have him smuggled out of the country and flown to the United States, where he is charged with violating the terms of the narco-terrorism statute. While this hypothetical may appear far-fetched, and show the DEA engaging in conduct that is politically-risky and wasteful of agency and prosecutorial resources, nothing in it strays outside the law's parameters. Obviously, when a war mentality invades the criminal process, authorities seek more and greater powers with which to fight. But with strategy comes over-criminalization and the fear that anyone might be a narco-terrorist.

Narco-terrorism prosecutions evince some of the same problems as many criminal terrorism prosecutions: their reliance on sting operations led by informants, whose central role in suggesting the plot and then providing the means to carry it out is undisputed.⁹² In a *New Yorker* article from

92. See Jesse J. Norris, *Why the FBI and Courts Are Wrong About*

December 2015, journalist Ginger Thompson explores the use of stings run by the DEA and concludes that in a “disturbing number” of narco-terrorism prosecutions, “the only links between drug trafficking and terrorism entered into evidence were provided by the D.E.A., using agents or informants who were paid hundreds of thousands of dollars to lure the targets into staged narco-terrorism conspiracies.”⁹³ The example she cites is the prosecution of three Malian citizens whose primary occupation was transporting smuggled goods across borders.⁹⁴ They were approached by DEA informants pretending to be representatives of the FARC, the Colombian terrorist group, who promised them millions of dollars to transport the group’s South American cocaine across the Sahara desert.⁹⁵ During the months of back-and-forth in working out the deal’s arrangements, the informants mentioned that the FARC and al-Qaeda are like “brothers . . . [w]e have the same cause,” because they both consider the United States the enemy.⁹⁶ Over the course of his work as a smuggler, one of the Malians told the informants that he had provided al-Qaeda with food and gasoline in return for safe passage of his trucks.⁹⁷ He later mentioned that, in preparation for the cocaine transportation scheme, he had hired a driver with ties to al-Qaeda.⁹⁸ It later became clear that the men were exaggerating their made-up al-Qaeda connections in response to the informants’ provocations, which were designed to produce incriminating statements.⁹⁹

The men were arrested by the DEA at a hotel in Ghana and then transported to the United States, where they were charged with narco-terrorism and providing material support to an FTO, and ultimately pled guilty to the latter count.¹⁰⁰

Entrapment and Terrorism, 84 MISS. L.J. 1257, 1263–68 (2015) for a summary of the lengths to which the F.B.I. has gone to in carrying out stings in terrorism prosecutions.

93. Thompson, *Trafficking Terror*, *supra* note 76.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* It is apparently the norm to plead guilty to material support charges in prosecutions involving both those and narco-terrorism counts. In only three cases have defendants had their cases adjudicated by a jury, all of which resulted in convictions of the narco-terrorism counts, and two of which produced life sentences. *See id.*; *see also* United States v. Mohammed, 693 F.3d 192, 195 (D.C. Cir. 2012).

However, when the government sought the then-maximum sentence of 15 years in prison, the court refused, sentencing one defendant to 63 months, another to 57, and the third to 46, and specifically noted that the defendants were not ideologically motivated; they had simply been trying to convince the informants to follow through on the drug deal, lured on by promises of money.¹⁰¹ The absurdity of the situation was summed up when one defendant's public defender relayed what the Ambassador of Mali to the United States had told her after visiting her client in jail: "If your country is going to come to my country and offer our young men lots of money to transport drugs or do things criminal, you'd better tell your country to build a lot more prisons, because we are very poor people and it is very hard to pass that up."¹⁰²

And in one recent prosecution, an informant's credibility, or lack thereof, led to the reversal of a defendant's conviction on a charge of narco-terrorism. Haji Bagcho, an Afghan national and leader of a large-scale heroin smuggling operation, was convicted by a jury in the District of Columbia federal district court on two counts of heroin trafficking, as well as one narco-terrorism count.¹⁰³ While there was ample evidence to show that Bagcho was heavily implicated in the production and export of Afghani heroin, the links between those activities and the Taliban, a designated FTO, were entirely the product of the DEA's informant.¹⁰⁴ In 2015, three years after his conviction, the government turned over materials that revealed the informant was, according to a federal agency, "a fabricator," whose "statements regarding counterterrorism matters seemed unrealistic and sensational."¹⁰⁵ While the court upheld the defendant's convictions and life sentence on drug smuggling grounds, the court overturned his narco-terrorism conviction.¹⁰⁶

The danger posed by narco-terrorism is hard to gauge, but seems overstated, in light of the rationale offered for the statute's passage, and the background of the people who have been prosecuted under its authority. Given that only three

101. Benjamin Weiser, *Citing Terror Defendants' Motivation, Judge Shows Sentencing Leniency*, N.Y. TIMES, Nov. 23, 2012, at A27.

102. *Id.*

103. *United States v. Bagcho*, 151 F. Supp. 3d 60, 63–65 (D.D.C. 2015).

104. *Id.* at 65–67.

105. *Id.*

106. *Id.* at 75–76.

cases actually ended up before a jury, it appears that incentives to plead guilty are no less prevalent in the narco-terrorism context than throughout the criminal justice system overall. Yet, when Ginger Thompson went searching for statistics on prosecutions for her *New Yorker* article, “[n]either the D.E.A. nor the Justice Department would provide [her] with a complete list of alleged narco-terrorists who have been captured since 9/11,” yet the number appears to be in the “dozens.”¹⁰⁷ Further, she notes that the main groups associated with the terrorism threat, such as ISIS and al-Qaeda, have no drug operations, and the Taliban play a very limited role in the Afghan heroin trade.¹⁰⁸ Yet much like federal officials discussing the use of informant-driven sting operations in terrorism prosecutions,¹⁰⁹ DEA officials strenuously defend the use of the practice, as it produces convictions.

D. *Convergence of the Two Wars*

What is left is an uneven picture that does not conclusively prove the need for a narco-terrorism statute, especially not one so ill-defined. So, while it is unclear what sort of a threat narco-terrorism poses, maybe limiting the analysis to threat levels leads us to miss the larger point. If the United States is truly at war with both drugs and terror, an expansive and nebulous statute like narco-terrorism reflects perfectly the seriousness of being at war and renders those two abstract concepts enemies that must be defeated in concrete and defined terms by reducing them to statutory language. Getting lost in discussions about the nature of the threat, the proper use of government resources, and even the morality of stringing along benighted individuals from poverty-stricken areas of the world with no link to the United States is of no moment to the

107. Thompson, *Trafficking Terror*, *supra* note 76. Thompson also notes the link the DEA draws between drugs and terrorism as related to its relevance and funding status in a new era in a quote from a former investigator stating:

“What is going on after 9/11 is that a lot of resources move out of drug enforcement and into terrorism,” [a former senior money-laundering investigator at the DOJ] said. “The D.E.A. doesn’t want to be the stepchild that is last in line.” Narco-terrorism, the former investigator said, became an “expedient way for the agency to justify its existence.”

Id.

108. *Id.*

109. SAID, *supra* note 18, at 45.

properly committed warrior. Courts can ignore and dismiss reasoned arguments on the limits of extraterritorial jurisdiction and the foreign nature of the criminal/terrorist threat when the war footing of a nation allows them to do so.¹¹⁰ The mere thought that people might contemplate engaging in a government-sponsored scheme like taking FARC-sourced cocaine across the Sahara for more money than they can even imagine means they must be defeated, much like the enemy on the opposing hill of the battlefield. The fact that the enemy is an illusory concept rather than an actual national army doesn't shake the drug or terror warrior. However, if we are to make progress against the hitherto unimaginable expansion of laws criminalizing innocent or nonthreatening conduct and individuals the world over, the war model must be resisted.

The same model has produced phenomena like mass surveillance and the drone assassination program, both of which symbolize the notion of American worldwide prosecution of its anti-terror campaign. Considering that the MDLEA, Section 2339B, and the narco-terrorism statute all speak to a regime of global enforcement, we see the war on drugs leading the way for the war on terror to seek to fight the abstract enemy everywhere. So American law enforcement and military forces work together, standing in a Panopticon-like position to scan the whole world looking for drug or terror activity that calls out to be combatted, regardless of its relation to the United States.

The problem inherent in such a system is that not all drug trafficking or terror activity (which is defined very broadly)¹¹¹ can be combatted. Even the United States, with its not insubstantial federal and state anti-drug expenditures and anti-terror/national security budgets, cannot target every individual who violates its drug and terrorism laws. So

110. See Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303 (2014), for an explanation of extraterritorial jurisdiction. See Margaret K. Lewis, *When Foreign is Criminal*, 55 VA. J. INT'L L. 625 (2015), for an explanation of the foreign nature of the threat.

111. See, e.g., 18 U.S.C. § 2331(1) (2006) (defining "international terrorism" as "violent acts or acts dangerous to human life" occurring abroad that are intended "(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping"); see also 22 U.S.C. § 2656f(d)(2) (2006) ("['T]errorism' means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.").

naturally, decisions as to who should be prosecuted need to be made, a process that threatens to result in the selective application of the law. Additionally, prosecuting these wars abroad with the goal of generating a domestic criminal prosecution requires a substantial use of resources that often reinforces preexisting stereotypes.

For example, both the public and law enforcement have long associated Colombia with cocaine production, maybe not without reason. The relevant case law in the MDLEA context, as cited above, reveals that the typical defendant picked up on the high seas under its contours hails from South America—usually Colombia—which reflects that country’s long and complicated history with the production and export of drugs. Similarly, criminal prosecutions under Section 2339B and other relevant terrorism-related laws tend to feature a Muslim defendant. A look at the list of designated FTOs reinforces that position. Of the sixty-one groups on the list, forty-six are Islamist in ideology or composed of Muslim cadres, with thirty-five of the thirty-eight designated after September 11, 2001, meeting those criteria.¹¹²

Here it bears noting that the war on drugs differs from the war on terror in a significant manner. Whatever the wisdom of criminalizing the production and use of certain narcotic substances, in the cases involving prosecution under the MDLEA, the exercise of a kind of universal jurisdiction requires the seizure of actual drugs, which have been brought into a global commercial chain to be sold and consumed. Presumably, governments the world over could decriminalize and legalize the production and use of narcotics, as has already started to occur in incremental steps around the world and in the United States. But the product does not change, and the authorities are unlikely to say heroin from Afghanistan is illegal, but heroin from Thailand is not. In the case of terrorism, going by the statutory definitions in American law, any non-state violence for a political purpose can transform a group into a terrorist organization, though the law criminalizes material support only to those groups that have been designated as FTOs.¹¹³ Based on the political interests of the

112. Press Release, U.S. Dep’t of State, Bureau of Counterterrorism, Foreign Terrorist Organizations, <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Mar. 2, 2017) [<https://perma.cc/KD59-4WHR>].

113. See SAID, *supra* note 18, at 58–62.

United States, a non-state group that carries out the same type of violence in Latin America as another group in the Middle East may not be designated, whereas the latter might. Such political and administrative sleight of hand is not possible when dealing with drugs; some cocaine is not permissible just because it comes from one part of the world as opposed to another. The inherently political nature of terrorism therefore renders the debate over its criminalization different from that of narcotics in a fundamental and immutable way.

III. DISCRETION, SELECTIVITY, AND PROFILES

A. *Discretion in Enforcement*

In the context of the three offenses discussed in this Article, as with most other crimes, there is the potential for biased enforcement due to no meaningful legal checks on police discretion. The Supreme Court's 2001 decision in *Atwater v. City of Lago Vista* recognized the right of the police to effect full custodial arrests on individuals, even in the case of minor offenses that would not result in prison time.¹¹⁴ The majority opinion in that five-to-four decision, written by Justice Souter, emphasized that, though the police have essentially limitless discretion to make those custodial arrests, as long as there exists probable cause to do so, "it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason."¹¹⁵ Justice Souter reasoned that part of the rationale behind upholding the power of arrest to such an extent is that the police will use their own discretion wisely to focus on more serious crimes, and in any event, "the country is not confronting anything like an epidemic of unnecessary minor-offense arrests."¹¹⁶

Atwater has been roundly criticized for going too far, as the concern that its rule would allow for selective enforcement was articulated shortly after it was decided.¹¹⁷ This is not an idle

114. 532 U.S. 318, 354 (2001).

115. *Id.* at 353.

116. *Id.*

117. See, e.g., Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 *FORDHAM L. REV.* 329, 333 (2003) ("Of course, the police will not follow, arrest, and search every driver they see, given the potentially staggering costs that such a program of 'full enforcement' would involve. Instead, the extremely broad arrest and search

concern, since evidence available at the time the case was decided, as well as subsequent to the ruling, demonstrates that the police routinely arrested people for minor offenses, contrary to Justice Souter's contention.¹¹⁸ This dynamic exists even in contexts where certain criminal conduct has been de facto decriminalized. For example, the Dane County, Wisconsin D.A.'s office announced in 2007 that it would no longer prosecute individuals for possessing less than an ounce of marijuana, due to budgetary concerns.¹¹⁹ However, despite this announcement, three years later the police continued to arrest African-Americans in the county at six and a half times the rate of white residents for marijuana possession.¹²⁰ *Atwater* thus demonstrates the immense discretionary power that law enforcement officers enjoy, even with regard to relatively minor criminal activity.

B. *Selective Enforcement*

The Supreme Court has also ensured that there is no meaningful check on potentially biased enforcement of criminal laws. It did so with its 1996 decision in *United States v. Armstrong*, which required a defendant to prove a violation of the Equal Protection clause by pointing to bias at the heart of

powers now enjoyed by the police will be applied in a highly selective manner, thus virtually ensuring even more frequent complaints of racial profiling and other forms of disparity.”); Wayne A. Logan, *Street Legal: The Court Affords the Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 422 (2002) (“[The] unfettered authority [granted in *Atwater*] is extremely significant not only because it broadens the inherent power of police to intrude upon citizens’ liberty and privacy, but also because it affords police even more discretion to selectively enforce the law and to give effect to possible discriminatory motives.”).

118. See Wayne A. Logan, *Reasonableness as a Rule: A Paean to Justice O’Connor’s Dissent in Atwater v. City of Lago Vista*, 79 MISS. L.J. 115, 129–31 (2009) (collecting examples from before and after the Court’s decision of custodial arrests for petty offenses like “walking in a roadway; possessing an open container of alcohol in public; driving with an expired vehicle registration sticker; making an illegal turn while driving; jaywalking; driving a car with a non-working headlight; driving a car with a hole in the car’s license plate; riding a bicycle the wrong direction on a residential street or without a headlight; public urination; driving a bike against traffic; and violating a city ordinance for remaining in a public park after hours” (citations omitted)).

119. Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 687–89 (2015) (citations omitted).

120. *Id.* (noting that this state of affairs contributed to the efforts of citizens in Dane County to vote through a nonbinding referendum recommending legalization of the possession of marijuana in small quantities).

the prosecutor's decision to charge him.¹²¹ However, to gain access to such information, the defendant would already have to have it in his possession, a situation the late William Stuntz described as a "classic legal Catch-22: Armstrong's claim couldn't win without more information, yet Armstrong could get that information only if he had a winning claim without it."¹²²

The same year, in *Whren v. United States*, the Court also held that a traffic stop based on probable cause was not unreasonable under the Fourth Amendment, even if the officer was engaging in racial profiling of the suspect, as an officer's subjective motivations are irrelevant to the analysis.¹²³ *Whren* has been roundly criticized, as it has led to many instances of courts upholding what appear to be racially discriminatory police stops.¹²⁴ Yet these decisions, along with others in the Court's recent jurisprudence, ensure that for the average defendant, claims of selective or pretextual enforcement based on race will fail.

In the context of a war on drugs or a war on terror, where the defendant is abroad and can be tied to large quantities of drugs or terrorist groups, it is even less likely that claims of bias and selectivity might prevail. This is true both as a matter of law, as the cases cited here demonstrate, but also as a practical matter—South American drug smugglers and foreigners of Muslim background most probably represent the key stereotype of the main enemy in the wars on drugs and terror, respectively.¹²⁵ Details such as the lack of any actual

121. 517 U.S. 456, 458–71 (1996) (holding that an attorney's affidavit to the effect that all twenty-four prosecutions for crack offenses in the Central District of California over a year period were of black defendants was not enough to justify discovery on the selective enforcement claim).

122. WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 120 (2011).

123. 517 U.S. 806, 813 (1996).

124. See Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 884 n.2, 885 n.8 (2015) (listing the literature critical of *Whren* and listing instances of racially discriminatory stops upheld by courts under its holding).

125. See Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 19 (2008) (media depictions of Latinos often portray them as "drug dealers or gang members who are 'violent, foreign, criminal-minded, [and] disloyal'") (citations omitted); see also Cynthia Kwei Yung Lee, *Race and Self Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 441–42 n.304

ties to the United States will almost assuredly not stand in the way of their prosecution, regardless of what doctrine and constitutional protections should require.¹²⁶

C. *Profiling in Form and Substance*

Hovering over the discussion is the specter of racial profiling. As a matter of law and practice, profiling on the basis of race—i.e., that an individual of a particular background has a propensity to commit a given crime simply because of his/her race—has long been a source of controversy for the citizenry, political actors, and even large sections of law enforcement.¹²⁷ Over the past several years, the Black Lives Matter movement has worked to bring attention to the fact that the construct of race retains salience within the law enforcement apparatus and the community it is supposed to serve by continually protesting racially selective enforcement of the laws and police violence.¹²⁸ Yet in December 2014 the Department of Justice

(1996) (“News stories about Colombian drug cartels may feed [the] Latino-as-criminal stereotype.”) (citations omitted); *see also* SAID, *supra* note 18, at 154 n.8 (citing Leti Volpp, *The Boston Bombers*, 82 *FORDHAM L. REV.* 2209, 2215 (2014)) (noting “that whatever a Muslim person does will potentially be perceived as a terrorist act; a person who appears Arab, Muslim, or Middle Eastern is presumptively a terrorist; mass killing is presumptively an act of Muslim terrorists”); *see also* Said, *Terrorist Informant*, *supra* note 10, at 706–07 (collecting examples). *See generally* SHEEHI, *supra* note 3.

126. *See* Chin & Vernon, *supra* note 124, at 891 (concluding “that the Court should overrule the influential dicta in *Whren* and offer the police an accurate bright line rule that racial discrimination in searches and seizures is unconstitutional”); *see also* STUNTZ, *supra* note 122, at 297 (recommending that *Armstrong* be overruled to ensure that racial discrimination in the charging process be eliminated).

It should be noted, however, that when American law enforcement plays a role akin to an international police force, concerns about selectivity can be raised in a more direct sense, geopolitically speaking. To this end, consider the fact that African nations have sharply criticized the International Criminal Court (ICC) for focusing all its investigations on the continent, even as human rights abuses and war crimes continue to occur in other areas of the globe. The thrust of the criticism seems to be that when more powerful nations are implicated in such international crimes, the ICC shies away from investigating them for political reasons, while defendants from less powerful and more impoverished African states have been seen as easier to investigate and prosecute, due to their lack of political influence. *See, e.g.*, David Bosco, *Palestine in the Hague: Justice, Geopolitics, and the International Criminal Court*, 22 *GLOBAL GOVERNANCE: A REV. OF MULTILATERALISM & INT’L ORGS.* 155, 165–66 (2016).

127. Chin & Vernon, *supra* note 124, at 887 (listing examples) (citations omitted).

128. *About the Black Lives Matter Network*, BLACK LIVES MATTER,

took the most important step so far in moving law enforcement away from profiling by issuing guidelines intended to eliminate the practice.¹²⁹ Stemming from “the Federal government’s deep commitment to ensuring that its law enforcement agencies conduct their activities in an unbiased manner,” those agencies are prohibited from considering “race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity to any degree, except that officers may rely on the listed characteristics in a specific suspect description.”¹³⁰ Where one of the prohibited attributes is relevant to such a specific suspect description, officers may only rely on it to the extent that, under the totality of the circumstances, they reasonably believe the attribute links a suspect to a given crime, plot, threat to national security, violation of immigration law, or is used for an authorized intelligence purpose.¹³¹

Criticism of these guidelines, which represent the government’s farthest reaching efforts to control profiling in law enforcement, centers on the fact that they only apply to federal officers, not local, state, or municipal police forces, and exempt the Department of Homeland Security when acting under its authority for border and immigration control, from its strictures.¹³² Also, in the terrorism context, while the

<http://blacklivesmatter.com/about/> (last visited July 11, 2017) [<https://perma.cc/5FJX-FGT7>].

129. See U.S. DEP’T OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY (2014), <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf> [<https://perma.cc/3Q28-WWU6>].

130. *Id.* at 1.

131. *Id.* at 2 (“In conducting all activities other than routine or spontaneous law enforcement activities, Federal law enforcement officers may consider race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons possessing a particular listed characteristic to an identified criminal incident, scheme, or organization, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity. In order to rely on a listed characteristic, law enforcement officers must also reasonably believe that the law enforcement, security, or intelligence activity to be undertaken is merited under the totality of the circumstances, such as any temporal exigency and the nature of any potential harm to be averted. This standard applies even where the use of a listed characteristic might otherwise be lawful.”).

132. Matt Apuzzo & Michael E. Schmidt, *U.S. to Continue Racial Profiling in Border Policy*, N.Y. TIMES, Dec. 6, 2014, at A1; Sari Horwitz, *Justice Dept. Announces New Rules to Curb Racial Profiling by Federal Law Enforcement*, WASH. POST (Dec. 8, 2014), <https://www.washingtonpost.com/world/national->

guidelines make clear that they apply to national security related investigations, there is a loophole allowing the authorities to “map” communities.¹³³ Without exploring the other shortcomings of the guidelines, the mapping provision is the investigative tactic that has seen the FBI develop detailed data regarding the American Muslim population, data that is then utilized to send informants into those communities, even where no preexisting suspicion exists, for the purpose of crafting elaborate terrorism-inspired stings.¹³⁴ This practice has proved extremely controversial; informants have tended to target vulnerable and marginal individuals, suggest violent plots to their targets, and provide both the means and financial inducement to carry out those plots, all the while engaging in manipulative—bordering on coercive—tactics to have the targets stick to the plots.¹³⁵ Because of these dynamics, one

security/justice-dept-to-announce-new-rules-to-curb-racial-profiling-by-federal-law-enforcement/2014/12/07/e00eca18-7e79-11e4-9f38-95a187e4c1f7_story.html?utm_term=.6664b3f71222 [https://perma.cc/4J55-WHNY].

133. The specific language reads as follows:

Good law enforcement work also requires that officers take steps to know their surroundings even before there is a specific threat to national security. Getting to know a community and its features can be critical to building partnerships and facilitating dialogues, which can be good for communities and law enforcement alike. Law enforcement officers may not, however, target only those persons or communities possessing a specific listed characteristic without satisfying the requirements of this Guidance.

Example: An FBI field office attempts to map out the features of the city within its area of responsibility in order to gain a better understanding of potential liaison contacts and outreach opportunities. In doing so, the office acquires information from public sources regarding population demographics, including concentrations of ethnic groups. This activity is permissible if it is undertaken pursuant to an authorized intelligence or investigative purpose. The activity would not be permitted without such an authorized purpose or in circumstances that do not otherwise meet the requirements of this Guidance.

U.S. DEP’T OF JUSTICE, *supra* note 129, at 10.

134. Letter from Leadership Conference on Civil & Human Rights, to President Barack Obama, (Feb. 24, 2015), <http://civilrights.org/re-concerns-with-the-u-s-department-of-justice-guidance-for-federal-law-enforcement-agencies-regarding-the-use-of-race-ethnicity-gender-national-origin-religion-sexual-orientation-or-gender-id/> [https://perma.cc/MWU9-QUS6]; Press Release, Council on American-Islamic Relations (CAIR), CAIR Concerned that New DOJ Guidelines Allowing “Mapping” of Muslims, Profiling at Airport, Border (Mar. 11, 2015), <https://www.cair.com/press-center/press-releases/12762-new-doj-guidelines-allow-mapping-of-muslims-and-profiling.html> [https://perma.cc/9H DU-D9FS].

135. See, e.g., SAID, *supra* note 18, at 30–50; see, e.g., TREVOR AARONSON, THE

researcher who studied terrorism informants in depth concluded “the FBI is responsible for more terrorism plots in the United States than any other organization.”¹³⁶

1. Radicalization

In the terrorism context, profiling persists, albeit in a slightly more developed guise than a simple racial or religious category. The government adheres to a theory called “radicalization,” with the attendant assumptions that Muslims can change from individuals who do not pose a threat to those who do, based on a series of markers. In 2006, the FBI issued a short document—dubbed an “Intelligence Assessment”—entitled “The Radicalization Process: From Conversion to Jihad,” which remains operative.¹³⁷ Although ostensibly focused on people who convert to Islam, its definition of conversion also includes those who were born Muslim, but have recently become more religious, thereby equating Muslims with terrorism more broadly.¹³⁸ Radicalization features a four-stage process through which an individual passes before transforming into an operational terrorist.¹³⁹ According to the document, one can become radicalized in mosques, prisons, universities, the workplace, or internet chat rooms, i.e.,

TERROR FACTORY: INSIDE THE FBI'S MANUFACTURED WAR ON TERRORISM (2013); see also Aviva Stahl, *NYPD Undercover “Converted” to Islam to Spy on Brooklyn College Students*, GOTHAMIST (Oct. 29, 2015, 2:58 PM), http://gothamist.com/2015/10/29/nypd_undercover_brooklyn.php [<https://perma.cc/6ZJW-PB6A>]; see also Murtaza Hussain & Razan Ghalayini, *Christie's Conspiracy: The Real Story Behind the Fort Dix Five Terror Plot*, INTERCEPT (June 25, 2015, 5:45 AM), <https://theintercept.com/2015/06/25/fort-dix-five-terror-plot-the-real-story/> [<https://perma.cc/R2FT-8QWF>].

136. Trevor Aaronson, *How this FBI Strategy is Actually Creating US-Based Terrorists*, TECH., ENTMT. & DESIGN (TED) (Mar. 2015), https://www.ted.com/talks/trevor_aaronson_how_this_fbi_strategy_is_actually_creating_us_based_terrorists?language=en [<https://perma.cc/3RSW-MPEU>].

137. FBI COUNTERTERRORISM DIV., *THE RADICALIZATION PROCESS: FROM CONVERSION TO JIHAD 2* (2006) [hereinafter *RADICALIZATION PROCESS*], <http://cryptome.org/fbi-jihad.pdf> [<https://perma.cc/KES2-4CU2>]; Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809, 827 n.51 (2014) (collecting sources demonstrating continued reliance of the FBI on the Intelligence Assessment).

138. *RADICALIZATION PROCESS*, *supra* note 137, at 2 (defining conversion as “a noticeable change in one’s religious identity, a conscious self-transformation that may take the form of a change from: [o]ne formal faith to another; [a] secular belief to a formal faith; [a] recommitment to an existing faith”).

139. *Id.* at 3 (defining the four stages as “pre-radicalization,” “identification,” “indoctrination,” and “action”).

essentially anywhere.¹⁴⁰ An individual who is radicalized identifies “with a particular extremist cause and accepts a radicalized ideology that justifies, condones, encourages, or supports violence or other criminal activity against the US Government, its citizens, its allies, or those whose opinions are contrary to his own extremist agenda.”¹⁴¹ Considering that the United States has many allies whose form of government does not exactly offer freedom and good governance to its citizens, this definition is remarkably broad. Finally, indicators of radicalization can come in the form of travel abroad to a Muslim country, and what is otherwise innocuous or constitutionally protected activity, such as “[i]ncreased isolation from former life,” “[a]ssociation with new social identity,” “[w]earing traditional Muslim attire,” “[g]rowing facial hair,” and “[f]requent attendance at a mosque or a prayer group.”¹⁴²

Drawing all the inferences from the Intelligence Assessment leads to the conclusion that radicalization works as a functional profile hidden behind an attempt to make it sound more studied and objective. After all, there is no named author of the twelve-page document, which contains only seven footnotes, and offers no real empirical or experiential basis for its conclusions. In light of the fact that most terrorism plots are introduced and directed by government informants, many of whom receive substantial inducement or payment to concoct those plots, the true scope of the radicalization problem seems difficult to divine. Regardless, the government has been undeterred and continues to rely on the theory of radicalization, which has led to the creation of a government-sponsored anti-radicalization program, known as Countering Violent Extremism (CVE), which problematically tries to predict which Muslim behaviors are indicators of future terrorist activity at an early stage.¹⁴³ Rather than slowing

140. *Id.* at 6–7.

141. *Id.* at 7.

142. *Id.* at 7, 10.

143. *See, e.g.*, Belén Fernández, *The Cult of Countering Violent Extremism*, TELESUR (Dec. 4, 2015), www.telesurtv.net/english/opinion/The-Cult-of-Countering-Violent-Extremism-20151204-0014.html [<https://perma.cc/3CJB-TGAX>]; Belén Fernández, *Opinion, The Pseudoscience of Countering Violent Extremism*, AL JAZEERA AM. (Apr. 17, 2015, 2:00 AM), <http://america.aljazeera.com/opinions/2015/4/the-pseudoscience-of-countering-violent-extremism.html> [<https://perma.cc/4PM7-APVM>].

down the spread of the radicalization construct, CVE has widened the theory's scope, as the FBI has recently articulated new standards for monitoring those it perceives as exhibiting signs of radicalization and violent extremism while still in high school.¹⁴⁴ While politically neutral on its face, the FBI document, entitled "Preventing Violent Extremism in Schools," exhibits a disproportionate focus on Muslim youth and their purported propensity for being radicalized.¹⁴⁵ An even more recent journalistic report has revealed the existence of a checklist comprised of forty-eight questions the FBI asks to determine whether someone represents a danger of radicalizing.¹⁴⁶ Finally, the latest reports indicate that the Trump administration intends to change the name of CVE to Countering Islamic Extremism, thereby doing away with the charade that Islamic groups and individuals are not the sole target of counter-radicalization efforts.¹⁴⁷

2. The Drug Courier Profile

Radicalization can be likened to another type of problematic profile from the war on drugs model, that of the drug courier, one of the types of profiles that developed in the latter part of the twentieth century, to prevent crime and serve as an "order maintenance" approach to criminal justice, in the words of Bernard Harcourt.¹⁴⁸ Commentators like David Cole and Michelle Alexander have long criticized the use of the drug

144. See Sarah Lazare, *The FBI Has a New Plan to Spy on High School Students Across the Country*, ALTERNET (Mar. 2, 2016), www.alternet.org/grayzone-project/turning-high-schools-panopticons-heres-fbis-new-plan-spy-students-across-country [<https://perma.cc/RZ55-V9TS>].

145. *Id.* (discussing the FBI document's emphasis on radicalization of Muslim youth toward Islamism over that of other ethno-religious groups and political ideologies); see also FBI, OFFICE OF PARTNER ENGAGEMENT, PREVENTING VIOLENT EXTREMISM IN SCHOOLS (2016), <https://info.publicintelligence.net/FBI-PreventingExtremismSchools.pdf> [<https://perma.cc/QV3C-F6TL>].

146. Cora Currier & Murtaza Hussain, *48 Questions the FBI Uses to Determine if Someone is a Likely Terrorist*, INTERCEPT (Feb. 13, 2017, 10:52 AM), <https://theintercept.com/2017/02/13/48-questions-the-fbi-uses-to-determine-if-someone-is-a-likely-terrorist/> [<https://perma.cc/XR9E-T6ZB>].

147. Julia Edwards Ainsley et al., *Exclusive: Trump to Focus Counter-Extremism Program Solely on Islam—Sources*, REUTERS (Feb. 2, 2017), <http://www.reuters.com/article/us-usa-trump-extremists-program-exclusiv-idUSKBN15G5VO> [<https://perma.cc/8QQ6-93SV>].

148. BERNARD HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 103 (2007).

courier profile for the simple fact that, as each profile differs from office to office and agent to agent, the characteristics of a drug courier appear to be incoherent and contradictory.¹⁴⁹ A compilation of those characteristics reveals, e.g., that a courier can be someone who bought a coach airline ticket or a first-class ticket, a round-trip ticket or a one-way ticket, acted too nervous or acted too calm, or someone who “left airport by taxi,” “left airport by limousine,” “left airport by private car,” or “left airport by courtesy van.”¹⁵⁰ As Cole notes, “it would be extremely difficult for anybody *not* to come within such a profile,” as it “provide[s] law enforcement officials a ready-made excuse for stopping whomever they please.”¹⁵¹

3. Linkages and Limits

While the link between radicalization and the drug-courier profile is not totally symmetrical, in that the former is more narrowly focused on adherents of one particular religion, whereas the latter could apply to anyone, the overlap lies in that both represent a more sophisticated profile (in form at least) than a simple racial profile, although the effect is somewhat similar. Given the charges of impermissible ethnic and racial discrimination that haunt much of the enforcement of the drug laws, as well as the focus on Muslims as terrorists, these two constructs begin to resemble each other in that they represent the strategic by-products of a decision to fight a war with both worldwide and domestic enforcement. Although the government employs the war metaphor to grant itself the right to combat the threat wherever it occurs, these loosely defined but suggestive profiles allow the authorities to focus their energies on what they perceive as the main threat—namely, the Muslim terrorist, and the minority drug criminal. The government cannot quite put it in those terms, but the perceived foreign-ness of the terrorist threat allows for a more explicit profile, whereas the drug profile must be more malleable so as to accommodate the requirements of domestic

149. DAVID COLE, *NO EQUAL JUSTICE* 47–52 (1999); ALEXANDER, *supra* note 2, at 70; see Charles L. Becton, *The Drug Courier Profile: “All Seems Infected that Th’ Infected Spy, As All Looks Yellow to the Jaundic’d Eye,”* 65 N.C. L. REV. 417 (1987).

150. COLE, *supra* note 149, at 48–49.

151. *Id.* at 49 (emphasis in original).

policing in a diverse and fractious society. Both, however, are well served by being at war.

Finally, it should be said that the war metaphor can only justify so much, especially outside of the confines of federal law enforcement. To this end, witness the New York Police Department's (NYPD) recent decision to cease its suspicion-less spying program that targeted the city's Muslim community in its entirety, as part of a settlement to a larger lawsuit.¹⁵² The terms of the agreement included partial civilian oversight of NYPD counterterrorism activity, as well as the withdrawal from use of the NYPD's own document on radicalization, which was more wide-ranging and problematic than that of the FBI.¹⁵³ The decision to settle did not result from a court ruling that the spying program was illegal, but reflected a policy reversal that coincided with a new mayor taking office.¹⁵⁴ Additionally, the fact that the program did not yield one criminal conviction over its years of operation probably had something to do with the decision as well.¹⁵⁵ Likewise, as a result of the same mayoral change in early 2014, the city also agreed to administer court-mandated changes to its stop-and-frisk program, which disproportionately targeted minority males for low-level drug and weapons violations, even as the large majority of stops resulted in no criminal charges.¹⁵⁶ These developments, important as they are, do not impact the federal government's powers of investigation, arrest, and prosecution in the areas of drug and terrorism interdiction far removed from the domestic front. After all, the key distinction between the now-defunct New York City programs of spying and stop and frisk, and the federal laws discussed above, is that the

152. Matt Apuzzo & Al Baker, *Sued Over Spying, New York Police Get Oversight*, N.Y. TIMES, Jan. 8, 2016, at A1.

153. *Id.* For more on the problematic nature of the NYPD radicalization document, see SAID, *supra* note 18, at 17–29.

154. Apuzzo & Baker, *supra* note 152, at A1.

155. *Id.* (“If we were following terrorists or doing things that led to cases, we all would have supported that,” said Hector Berdecia, a now-retired lieutenant who oversaw the unit and became convinced that it was a waste of time. “To go out and listen to conversations and report on what they’re hearing, they had a problem with that, and I had problem with that.”); SAID, *supra* note 18, at 28 (“After the existence of the program was revealed, the head of the Intelligence Division admitted in a sworn deposition in 2012 the following: ‘I could tell you that I never made a [criminal] lead from the rhetoric that came from [the spying program], and I’m here since 2006.’”).

156. Benjamin Weiser & Joseph Goldstein, *Mayor Says City Will Settle Suits on Frisk Tactics*, N.Y. TIMES, Jan. 31, 2014, at A1.

latter have produced a high number and percentage of convictions, while political spying and stop and frisk have not.

IV. CONCLUSION: THE WARS CONTINUE

So the wars on drugs and terror continue, with the government's wide-ranging powers of international enforcement either regarded as unremarkable or mostly ignored by observers in the United States. And this state of affairs is perhaps to be expected, given the danger the enemy in both wars represents. However, real questions remain about the feasibility and legality of the program of worldwide enforcement they have brought us. While legal limits and boundaries may be hard to draw, the least we can do is question the wisdom of pursuing threats that exist in the abstract the world over, knowing what we do about the lack of accountability our legal system places upon law enforcement and prosecutors.

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