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### The War on Terror & Vigilante Federalism

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## ESSAY

# THE WAR ON TERROR & VIGILANTE FEDERALISM

*Maryam Jamshidi*†

In their article, *Vigilante Federalism*, Jon Michaels and David Noll sound the alarm about the rising trend of “vigilante federalism” across various states.<sup>1</sup> As Michaels and Noll describe this phenomenon, Republican-led jurisdictions have been passing private enforcement laws empowering private actors to bring civil suits targeting certain activities and communities, including abortion, LGBTQI persons, and teachers discussing issues of race and sexuality in the classroom.<sup>2</sup> According to the authors, these “private subordination” regimes, which aim to marginalize already vulnerable groups, are a byproduct of efforts to promote a thoroughly white and fundamentally Christian vision of American identity.<sup>3</sup>

The private enforcement schemes canvassed in *Vigilante Federalism* starkly contrast with the canonical view of private enforcement. For much of the twentieth and early twenty-first centuries, private enforcement measures were understood to support public policies and laws antithetical to subordination, like anti-discrimination norms and environmental protection.<sup>4</sup> On Michaels and Noll’s account, private subordination regimes mark a relatively recent break with this history.<sup>5</sup> Indeed, in their view, the fairly new phenomenon of “MAGA” politics—the brand of politics associated with former president Donald

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† Maryam Jamshidi is an Associate Professor of Law at the University of Colorado Law School. Many thanks to Jon Michaels and David Noll for a fascinating contribution to the private enforcement literature, as well as to the editors of the *Cornell Law Review* for their helpful comments and revisions to this essay. All errors are my own.

<sup>1</sup> Jon Michaels and David Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187 (2023).

<sup>2</sup> *Id.* at 1189-90.

<sup>3</sup> *Id.* at 1190.

<sup>4</sup> Maryam Jamshidi, *The Private Enforcement of National Security*, 108 CORNELL L. REV. 101, 111 n.53, 121 n.115 (2023).

<sup>5</sup> See Michaels and Noll, *supra* note 1, at 1192-93.

Trump—is the primary reason for this novel crop of oppressive, anti-egalitarian private enforcement statutes.<sup>6</sup>

As this Essay attempts to demonstrate, however, private subordination schemes are not limited to the laws identified by Michaels and Noll. They are also neither exclusive byproducts of Trump-era politics nor state-level legislatures. Since well before the rise of MAGA politics, private enforcement schemes in the areas of terrorism and immigration have targeted and subordinated vulnerable communities—specifically Middle Easterners,<sup>7</sup> Muslims, and undocumented immigrants.<sup>8</sup> These terrorism and immigration-related private enforcement laws either emerged or were enhanced and expanded after the 9/11 attacks.<sup>9</sup> In contrast to MAGA-era subordination regimes, these laws exist at both the federal and state level,<sup>10</sup> often with bi-partisan support.<sup>11</sup>

These older private subordination schemes carry several implications for Michaels and Noll’s important work. First, terrorism and immigration-related private enforcement demonstrate that no party or political movement has a monopoly on weaponizing private enforcement schemes to marginalize vulnerable groups. Rather, private subordination schemes can be and have been supported by both sides of the political aisle.<sup>12</sup>

Second, terrorism and immigration-related private enforcement laws—all of which further the War on Terror’s policy objectives<sup>13</sup>—underscore an argument Michaels and Noll gesture at but do not substantially unpack—namely how private enforcement can be used to identify so-called “enemies,” deprive them of their rights, and exclude them from broader notions of citizenship and national identity. Terrorism and immigration-related private subordination schemes reflect these dynamics while also highlighting the ways MAGA-era private enforcement laws similarly transform rights-bearing individuals into enemies of the state.<sup>14</sup>

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<sup>6</sup> *Id.* at 1191.

<sup>7</sup> I define the Middle East to include countries in North Africa and southwest Asia that are Arab and/or Muslim-majority. These countries include, but are not limited to, Iran, Afghanistan, and Pakistan.

<sup>8</sup> Michaels and Noll date the start of MAGA-era private enforcement laws to 2021. Michaels and Noll, *supra* note 1, at 1189.

<sup>9</sup> See *infra* notes 18, 36, 38, 40 and accompanying text.

<sup>10</sup> See *infra* Part I.

<sup>11</sup> See *infra* notes 19, 44 and accompanying text.

<sup>12</sup> *Id.*

<sup>13</sup> See *infra* notes 26, 41 and accompanying text.

<sup>14</sup> See *infra* notes 52-55 and accompanying text.

Finally, these older subordination regimes remind us of the ways the War on Terror has both seeded MAGA politics and created a category of security-obsessed citizen primed to generally participate in private subordination efforts. In particular, the War on Terror has encouraged Americans to understand themselves as vulnerable to and threatened by a host of foreign enemies—from terrorists seeking to blow up buildings to immigrant “hordes” threatening to burst through the border.<sup>15</sup> It has encouraged some Americans to more vigilantly police their own daily lives and communities, particularly in relation to their children.<sup>16</sup> MAGA has harnessed and exploited these phenomena by creating a new private subordination regime these Americans can use to target the latest list of “enemies.”<sup>17</sup>

Part I of this Essay briefly describes the terrorism and immigration-related private subordination regimes that emerged from the War on Terror. Part II discusses the lessons these enforcement schemes bring to bear on MAGA-era private subordination laws. A brief conclusion follows.

## I

### Terrorism and Immigration-Related Private Subordination Regimes

At both the federal and state level, various private enforcement laws have long empowered private persons to join the fight against terrorism and “illegal” immigration by bringing particular kinds of civil suits that enforce public laws and policies. This section briefly describes these regimes and their subordinating effects on Middle Easterners, Muslims, and undocumented immigrants. It begins with terrorism-related private subordination laws—which subordinate Middle Easterners and Muslims—and then turns to immigration-related private subordination schemes—which subordinate undocumented immigrants.

#### A. Terrorism-Related Private Subordination Laws

Various federal statutes give private litigants the right to bring tort suits to recover for their terrorism-related injuries. These laws include the Anti-Terrorism Act’s (ATA) private right of action under 18 U.S.C. § 2333 (“Section 2333” or “ATA’s private right of action”), as well as two terrorism-related

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<sup>15</sup> See *infra* notes 56-59 and accompanying text.

<sup>16</sup> See *infra* notes 62-67 and accompanying text.

<sup>17</sup> See *infra* notes 60-61, 68 and accompanying text.

exceptions to the Foreign Sovereign Immunities Act (FSIA) under 28 U.S.C. § 1605A (“Section 1605A”) and 28 U.S.C. § 1605B (“Section 1605B”). While some of these laws were passed before 9/11, they either remained largely dormant or were substantially bolstered and strengthened in the years following 9/11.<sup>18</sup> Far from being a byproduct of partisan politics, these statutes were all passed with firm and sometimes overwhelming bi-partisan support.<sup>19</sup>

Using these laws, private parties have variously sued individuals, groups, institutions, and countries for allegedly providing “material support” to terrorism or terrorist groups.<sup>20</sup> Under the ATA’s private right of action, plaintiffs can bring claims for both primary liability, under 18 U.S.C. § 2333(a) (“Section 2333(a)”), and secondary liability, under 18 U.S.C. § 2333(d) (“Section 2333(d)”), for acts of international terrorism

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<sup>18</sup> As discussed below, Section 2333 has two provisions. One of these provisions, 18 U.S.C. § 2333(a), was passed in 1992 but infrequently used until after 9/11. *The Private Enforcement of National Security*, *supra* note 4, at 122 n.18. The original version of Section 1605A was passed in 1996, but was substantially bolstered and expanded through a 2008 amendment. *Id.* at 141 n. 228-30. The remaining statutes were all passed well after 9/11. *Id.* at 127, 146 n. 248. For more on the terrorism-related private enforcement statutes discussed here see *The Private Enforcement of National Security*, *supra* note 4.

<sup>19</sup> Section 2333(a) was passed as part of the Anti-Terrorism Act of 1992, which received bi-partisan support. *Grassley Lauds Inclusion of Plan to Restore Access to Justice for U.S. Victims of Terrorism in Spending Package*, News Releases, OFF. OF SEN. CHUCK GRASSLEY, Dec. 18, 2019, <https://www.grassley.senate.gov/news/news-releases/grassley-lauds-inclusion-plan-restore-access-justice-us-victims-terrorism> [<https://perma.cc/82KQ-RPWY>]. Sections 2333(d) and 1605B were passed as part of the Justice Against State Sponsors of Terrorism Act (“JASTA”). *The Private Enforcement of National Security*, *supra* note 4, at 127, 146 n. 248. Like the ATA, JASTA enjoyed broad bi-partisan support. *Congress Overrides Obama’s Veto to Pass Justice Against State Sponsors Act*, 111 AM. J. INT’L L. 156, 156 (Kristina Daugirdas and Julian Davis Mortenson eds., 2017). The original version of Section 1605A was passed as part of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *The Private Enforcement of National Security*, *supra* note 4, at 141 n. 228. AEDPA was also passed with broad bi-partisan support. Matthew Christiansen and William Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions*, 92 TEX. L. REV. 1317, 1320 (2014). Finally, the amendment that created Section 1605A received similarly widespread bi-partisan backing. Danica Curavic, *Compensating Victims of Terrorism or Frustrating Cultural Diplomacy - The Unintended Consequences of the Foreign Sovereign Immunities Act’s Terrorism Provisions*, 43 CORNELL INT’L L. J. 381, 389-90 (2010).

<sup>20</sup> Under federal law, material support includes: “[A]ny 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. § 2339A(b)(1).

that cause death or injury to persons, property, or businesses. Typically, ATA cases have involved a defendant bank accused of providing material support in the form of financial services to an entity that is allegedly affiliated with a terrorist group that caused plaintiff's injuries.<sup>21</sup>

Under Section 1605A of the FSIA, private parties may sue foreign states designated by the U.S. State Department as state sponsors of terrorism, as well as their officials, employees, and agents acting in their official capacity, for personal injury or death resulting from particular terrorism-related activities.<sup>22</sup> Using Section 1605A, plaintiffs have typically sued state sponsors of terrorism for providing material support, such as funding or training, to terrorist groups or activities.<sup>23</sup> Under Section 1605B of the FSIA, plaintiffs can sue for death or injury to persons and/or property resulting from an act of international terrorism occurring on U.S. soil caused by the tortious acts of a foreign state, even if it is not designated as a state sponsor of terrorism.<sup>24</sup> As with the other private enforcement statutes, Section 1605B cases have primarily focused on material support claims, including financing and/or providing weapons and logistical support, to terrorist groups or activities.<sup>25</sup>

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<sup>21</sup> Cases under Section 2333(a) of the ATA have long involved material support allegations against banks. *See, e.g.*, *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 19 (D.D.C. 2010) (Section 2333(a) suit alleging that bank provided material support to an agent of a terrorist group). More recently, plaintiffs have also brought Section 2333(a) cases against tech companies, such as Google, Facebook, and Twitter, for allegedly providing material support to terrorist groups or activities, in part by making their services available to those groups. *E.g.*, *Fields v. Twitter, Inc.*, 881 F.3d 739, 741 (9<sup>th</sup> Cir. 2018). Like Section 2333(a), cases under Section 2333(d) of the ATA have been brought primarily against private companies, particularly tech companies and banks, for providing material support to terrorist groups or activities. *The Private Enforcement of National Security*, *supra* note 4, at 128 n. 149; *see, e.g.*, *Honickman v. BLOM Bank SAL*, 6 F.4th 487, 490 (2d Cir. 2021) (Section 2333(d) case alleging that defendant bank aided and abetted terrorism by providing material support in the form of financial services to customers affiliated with terrorist organization).

<sup>22</sup> Section 1605A is both a jurisdictional statute, which gives U.S. courts authority to hear terrorism cases against state sponsors of terrorism, and a substantive statute, which provides for an independent federal cause of action for those claims. *See* 28 U.S.C. § 1605A(a) (jurisdictional provision); 28 U.S.C. § 1605A(c) (substantive provision).

<sup>23</sup> *See, e.g.*, *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128 (D.D.C. 2011) (Section 1605A case alleging that Iran and Sudan provided material support, including training and technical advice, as well as safe haven, to Al Qaeda).

<sup>24</sup> 28 U.S.C. § 1605B(b).

<sup>25</sup> *See, e.g.*, *In re Terrorist Attacks on September 11, 2001*, 298 F. Supp. 3d 631, 646-48 (S.D.N.Y. 2018) (Section 1605B case raising various claims against defendants relating to alleged material support provided to Al Qaeda).

As I have described in previous work, these federal tort statutes are the private enforcement arm of various public laws, including criminal and sanctions laws prohibiting the material support of terrorism, and otherwise align with the government's War on Terror objectives.<sup>26</sup> They also reinforce the government's subordination of Middle Eastern and Muslim communities.<sup>27</sup> As my earlier work shows, suits under these terrorism-related private enforcement statutes rely on the same policies used by the U.S. government to target Middle Eastern and Muslim communities in the War on Terror.<sup>28</sup> In perpetuating these policies, these terrorism-related private subordination regimes exacerbate discriminatory stereotypes about Middle Easterners and Muslims and those perceived to be such—including those living in the United States—as being predisposed to terrorist violence.<sup>29</sup> They also encourage third-parties—like banks and other organizations—to refrain from associating with or donating to members of these groups.<sup>30</sup>

#### B. Immigration-Related Private Subordination Laws

In addition to the private subordination of Middle Easterners and Muslims, private enforcement regimes—at both the federal and state level—have subordinated undocumented immigrants.

At the federal level, the Racketeer Influenced and Corrupt Organizations Act (“RICO”)<sup>31</sup> contains a private right of action that allows private parties to sue private individuals or organizations that have provided certain services or support to undocumented immigrants. In general, RICO's private right of action allows any person or entity injured in their business or property as a result of a RICO violation to bring suit against the person or organization that injured them.<sup>32</sup> To be subject to this provision, defendant's activity needs to qualify as a

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<sup>26</sup> *The Private Enforcement of National Security*, *supra* note 4, at 107, 175-77.

<sup>27</sup> *Id.* at 195-201.

<sup>28</sup> *Id.*

<sup>29</sup> Maryam Jamshidi, *The World of Private Terrorism Litigation*, 27 MICH. J. RACE & L. 203, 220-21 (2021).

<sup>30</sup> *See, e.g.*, Maryam Jamshidi, *How The War on Terror Is Transforming Private U.S. Law*, 96 WASH. U. L. REV. 559, 601 (2018) (noting how Section 2333 litigation can chill donations to organizations working in the Middle East and Arab World, as well as prompt organizations, like banks, to shutter operations in that region).

<sup>31</sup> Racketeer Influenced and Corrupt Organizations Act of 1970, Pub. L. No. 91-452, 84 Stat. 922.

<sup>32</sup> 18 U.S.C. § 1964(c).

predicate crime under RICO.<sup>33</sup> RICO's private right of action is, in other words, explicitly aimed at enforcing the statute's public law provisions. In 1996, Congress added various felonies under Section 274 of the Immigration and Naturalization Act (INA)—which prohibits “bringing in and harboring” undocumented immigrants—to the list of predicate crimes triggering private RICO suits.<sup>34</sup> That same year, Congress made it a felony under Section 274 of the INA to knowingly hire undocumented immigrants,<sup>35</sup> making this a possible basis for a private RICO claim as well.

Since the early 2000s, private individuals and corporations have relied on this provision of Section 274 to bring RICO private enforcement actions<sup>36</sup> against companies and private individuals in the United States that have allegedly hired undocumented workers.<sup>37</sup> Often, these plaintiffs have alleged injury based on the “lower wages” they received or the “lower costs” competitor businesses obtained as a result of employing undocumented immigrant workers.<sup>38</sup>

At the state level, legislatures have passed laws empowering private persons to bring civil suits or complaints to broadly enforce federal immigration law. In Arizona, for example, the legislature passed a law in 2010 allowing any legal resident of Arizona to sue a political subdivision of the state or any official or agency of the state that does not fully

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<sup>33</sup> See 18 U.S.C. § 1961(1) (listing RICO's predicate crimes).

<sup>34</sup> See ADEPA, Pub. L. No. 104-132, § 433, 110 Stat. 1214, 1274 (1996) (making Section 274 of the INA a predicate violation of RICO). While beyond the scope of this Essay, Congress has also added other INA-related crimes to RICO's list of predicate acts. 18 U.S.C. § 1961(1).

<sup>35</sup> See Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 203(b)(4), 110 Stat. 3009-546, 3009-566 (1996) (adding a felony hiring provision for undocumented immigrants to 8 U.S.C. § 1324 which codifies Section 274 of the INA (“IIRIRA”). While there are other parts of Section 274 that a private RICO suit can be based on, they are not explored in this Essay.

<sup>36</sup> Meghan M. Reed, *RICO at the Borders: Interpreting Anza v. Ideal Steel Supply Corp. and Its Effect on Immigration Enforcement*, 64 WASH. & LEE L. REV. 1243, 1257-58 (2007).

<sup>37</sup> See, e.g., *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 606-07 (6th Cir. 2004) (private RICO suit brought by former employees against company for hiring undocumented workers); *Commercial Cleaning Services, LLC v. Colin Service Systems, Inc.*, 271 F.3d 374, 378-80 (2d Cir. 2001) (private RICO suit brought by corporate competitor against private company for hiring undocumented workers).

<sup>38</sup> See, e.g., *Trollinger*, 370 F.3d at 606 (RICO suit alleging that defendant hired undocumented workers in order to depress the wages of plaintiffs and other legal employees); *Commercial Cleaning Services*, 271 F.3d at 378 (RICO suit alleging defendant's hiring of undocumented workers allowed it to reduce its costs and underbid plaintiff, which lost contracts and customers to defendant).



enforce federal laws on immigration.<sup>39</sup> In 2017, the Texas legislature passed a law, which was inspired by the Arizona immigration statute<sup>40</sup> and allowed legal residents of the state to file complaints with the Texas attorney general against localities and campus police departments that fail to enforce federal immigration laws.<sup>41</sup>

As with terrorism-related private subordination statutes, these federal and state laws—some of which preceded 9/11—further the War on Terror’s objectives, which include bolstering the securitization and criminalization of immigration<sup>42</sup> that began in the 1980s and 90s.<sup>43</sup> Some of these laws have also received bi-partisan support. Though the Texas and Arizona laws were primarily Republican measures,<sup>44</sup> the RICO

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<sup>39</sup> ARIZ. REV. STAT. ANN. § 11-1051(H) (“Section 11-1051(H)”). This private enforcement provision was part of a larger immigration bill passed by the Arizona state legislature, parts of which were declared unconstitutional in 2012 by the U.S. Supreme Court. *Arizona v. United States*, 567 U.S. 387, 392-94, 416 (2012). Section 11-1051(H) was not addressed by the Court and remains on the books and available to prospective plaintiffs.

<sup>40</sup> Jonathan Blitzer, *Why Police Chiefs Oppose Texas’s New Anti-Immigrant Law*, NEW YORKER (June 2, 2017), <https://www.newyorker.com/news/news-desk/why-police-chiefs-oppose-texas-new-anti-immigrant-law> [<https://perma.cc/9GGK-HPJ2>]. Trump’s presidency gave a boost to the proposed Texas law, which had been circulating within the Texas legislature for several years but was formally introduced only after Trump came into office. *Id.* This is yet another example of the relationship between War on Terror and MAGA-era politics discussed in this Essay.

<sup>41</sup> TEX. GOV’T CODE § 752.055 (“Section 752.055”). Instead of *directly* enforcing federal immigration law, Section 752.055 allows for the private enforcement of *another* Texas law, Tex. Gov’t Code § 752.023 (“Section 752.023”), that calls on local entities to enforce federal immigration law. *Id.* Section 752.023 was passed as part of the same bill as Section 752.055 and prohibits the existence of “sanctuary cities”—which protect undocumented immigrants from detention and deportation—by demanding local entities enforce federal immigration laws to their fullest extent. TEX. GOV’T CODE § 752.023; *City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 173-74 (5th Cir. 2018). While one portion of Section 752.023 has been declared unconstitutional, Section 752.055 can still be used to privately enforce Section 752.023’s remaining parts. *See generally* *El Cenizo*, 890 F.3d 164 (holding one subsection of Section 752.023 unconstitutional under the First Amendment but upholding other sections of the statute as constitutional on their face).

<sup>42</sup> *See* Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1177 (2004) (“Following 9/11, the Department of Homeland Security . . . has assumed responsibility for immigration and immigrant policy and has subordinated these concerns to separate and larger terrorism policy goals.”).

<sup>43</sup> *See* César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1467 (2013) (“Beginning in the 1980s and blooming in the 1990s and the early years of the twenty-first century, criminal law and immigration law lost much of their separate identities.”).

<sup>44</sup> *See* Blitzer, *supra* note 40 (noting role of Republican officials in passing Texas immigration bill associated with Section 752.055); *Ariz. Lawmakers Pass*

immigration provision was passed as part of congressional bills broadly supported by both Republicans and Democrats.<sup>45</sup>

While cases brought under these federal and state statutes vary in frequency,<sup>46</sup> they reinforce the marginalization of undocumented immigrants and exacerbate stereotypes about undocumented persons or those perceived to be undocumented as potential criminals who “steal” jobs from citizens.<sup>47</sup> In doing so, these private enforcement regimes aggravate various troubling trends that make undocumented immigrants and their families particularly vulnerable members of U.S. society, including the constant threat of deportation by the government,<sup>48</sup> family separation,<sup>49</sup> and economic exploitation by employers.<sup>50</sup>

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*Controversial Illegal Immigration Bill*, KPHO.COM (Apr. 16, 2010), <https://web.archive.org/web/20110614055311/http://www.kpho.com/politics/23179490/detail.html> [<https://perma.cc/4SNH-BF7G>] (describing Arizona immigration bill associated with Section 11-105(H) as primarily supported by Republican state legislators).

<sup>45</sup> These bills include AEDPA and IIRIRA. As already noted, AEDPA was passed with bipartisan support. *See supra* note 19. IIRIRA was also passed with bi-partisan support. Christiansen and Eskridge, Jr., *supra* note 19, at 1320.

<sup>46</sup> Based on a Westlaw search conducted at the time of this writing, plaintiffs have brought dozens of private RICO cases alleging violations of Section 274, including for hiring undocumented immigrants. There are no published or unpublished cases involving Section 11-1051(H), at the time of this writing. As for Section 752.055, the Texas attorney general has filed at least one petition against local officials based on Section 752.055 complaints. *Paxton v. McManus*, No. 03-19-00466-cv, Original Petition, ¶¶ 27-39 (Nov. 30, 2018) (345th District Court, Travis County, TX).

<sup>47</sup> Rubén Rumbault and Walter Ewing, *The Myth of Immigrant Criminality*, SOCIAL SCIENCE RESEARCH COUNCIL (May 23, 2007), <https://items.ssrc.org/border-battles/the-myth-of-immigrant-criminality/> [<https://perma.cc/CLZ2-67SW>].

<sup>48</sup> *See* Elizabeth Fussell, *The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery* 52 SOCIOLOGICAL QUARTERLY 593, 593-94 (2011) (noting increase in deportation of and fear of deportation amongst undocumented immigrants since the mid-1990s).

<sup>49</sup> *See* American Immigration Council, *U.S. Citizen Children Impacted by Immigration Enforcement* (June 24, 2021) (discussing separation of undocumented immigrant parents from their U.S. citizen children), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement> [<https://perma.cc/7YQY-8JWE>].

<sup>50</sup> Fussell, *supra* note 48, at 594-96. Undocumented persons have actually brought cases under RICO’s immigration provision to challenge abusive labor practices, those suits, however, remain rare—an unsurprising reality given the economic and legal precarity most undocumented immigrants experience. *See, e.g., Zavala v. Wal-Mart Stores, Inc.* 393 F. Supp. 2d 295, 302, 308-09 (D.N.J. 2005) (unsuccessful RICO suit brought by undocumented immigrants against their employer for hiring them in violation of RICO and exploiting their economic vulnerability, amongst other claims).

## II

## A NEW CHAPTER IN AN OLD STORY

Together, these terrorism and immigration-related private subordination regimes highlight some important points relevant to Michaels and Noll's analysis of MAGA-era private subordinate laws.

First, while the authors describe private subordination regimes as a byproduct of the MAGA era, these older schemes demonstrate that private subordination can be supported by both Republicans and Democrats.<sup>51</sup> And though the bipartisan nature of these private enforcement laws may have helped them appear less *explicitly* repressive on their face, the subordinating consequences of these statutes are no less problematic for Middle Eastern, Muslim, and undocumented immigrant communities than MAGA-era regimes are for targeted groups.<sup>52</sup> Indeed, their broad-based political popularity and more subtle discrimination arguably make these older regimes particularly insidious.

Second, terrorism and immigration-related private subordination regimes highlight the ways private subordination laws are generally used to identify enemies of the state, deprive them of their rights, and exclude them from citizenship and national identity—all of which is reflected in MAGA-era private enforcement laws, as well. Early in the War on Terror, Leti Volpp identified and described the mechanism by which “enemies” are designated, excluded from the American body politic, and stripped of their rights.<sup>53</sup> As Volpp describes it, this process of exclusion and deprivation happens through a process of “interpellation” in which both the state and private individuals use a mix of law and ideology, like jingoistic nationalism, to transform other individuals from

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<sup>51</sup> See *supra* notes 19, 45 and accompanying text.

<sup>52</sup> It is hard to say whether the bipartisan nature of these laws actually had anything to do with their less explicitly repressive character. What is clear, however, is that one reason the subordinating effects of these private enforcement suits are relatively subtle is that they are brought mostly against third-parties—often, corporations—who are not themselves part of marginalized communities or otherwise vulnerable. See *supra* notes 20, 37, 39, 41 and accompanying text. As reflected in my earlier work on terrorism-related private enforcement regimes, the subordinating consequences of some of these frameworks are also less obvious because they are connected to other laws and policies that these private enforcement suits depend upon but which are not explicitly reflected on the face of the statutes themselves. *The Private Enforcement of National Security*, *supra* note 4, at 197-201.

<sup>53</sup> Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1592-95 (2002).

rights-bearing persons into enemies threatening the nation.<sup>54</sup> Terrorism and immigration-related private enforcement schemes targeting Middle Easterners, Muslims, and undocumented immigrants (who remain entitled to at least some constitutional rights)<sup>55</sup> help to interpellate those groups as enemies excluded from the U.S. political community, by implicitly treating them as terrorists and criminals. Similarly, MAGA-era private subordination regimes interpellate certain individuals—who were once rights-bearing—into enemies of the state who threaten the American family and especially American children<sup>56</sup> and must be excluded from U.S. citizenship and identity.

Finally, terrorism and immigration-related private subordination regimes underscore the War on Terror’s enduring impact on U.S. society, including its role in the rise of MAGA politics and the creation of security-obsessed citizens who are the ideal users of these new MAGA private subordination laws.

The relationship between the War on Terror and MAGA politics is long-standing and complex. As journalist Spencer Ackerman has argued, the War on Terror is not just an event that happens “over there,” but rather something that also happens here.<sup>57</sup> It has “revitalized the most barbarous currents in American history, [giving] them renewed purpose, and set[ting] them on the march, an army in search of its general.”<sup>58</sup> The War on Terror has accomplished this by framing its mission, in part, as saving American “civilization”—defined as primarily white and Christian—<sup>59</sup> from two primary enemies: Islam—which allegedly seeks to “replace the Constitution with sharia law”—and immigrants.<sup>60</sup>

As Ackerman argues, Donald Trump harnessed and amplified these nativist trends and made the “sense of civilizational besiegement that the [War on Terror] inspired” central to MAGA politics.<sup>61</sup> While this revitalized existential threat still included Muslims and immigrants, the Trump

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<sup>54</sup> *Id.* at 1592-94.

<sup>55</sup> *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (“[W]e have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government.”).

<sup>56</sup> *See infra* note 69 and accompanying text.

<sup>57</sup> SPENCER ACKERMAN, *REIGN OF TERROR: HOW THE 9/11 ERA DESTABILIZED AMERICA AND PRODUCED TRUMP* xv (2021).

<sup>58</sup> *Id.* at xvii.

<sup>59</sup> *Id.* at 165.

<sup>60</sup> *Id.* at 165, 171.

<sup>61</sup> *Id.* at 241, 245.

administration expanded the “threat” category to also include leftists, Black Lives Matter activists, and anti-fascist protestors.<sup>62</sup> Since the end of Trump’s presidency, MAGA politicians have further expanded the threat list to include other domestic enemies, some of which have also been targeted by MAGA-era private subordination regimes.

In addition to promoting existentialist fears, the War on Terror has helped to create a category of “exceptional citizens” tasked with “saving” the U.S. security state and the American family. As Professor Inderpal Grewal has argued, these “exceptional citizens”—who are almost exclusively white, heterosexual, and Christian—are a byproduct both of the War on Terror and neoliberalism.<sup>63</sup> While the former has made these individuals feel perpetually insecure—“through mediated panics about external threats from immigrants and terrorists”—the latter—with its emphasis on individualism and erosion of the welfare state—has empowered them to believe only *they* can protect themselves, their families, and the nation.<sup>64</sup>

Grewal’s concept of the “security mom”—which is one kind of exceptional citizen—is particularly relevant to MAGA-era private subordination laws. As Grewal describes it, the “security mom” is a “conservative female feminist and exceptional citizen who embraces whiteness and fears nonwhite and foreign Others as threats to the heterosexual family.”<sup>65</sup> For this citizen, “the security of home, state, and nation” are “constitutive, requiring the actions and vigilance of private individuals . . .”<sup>66</sup> According to Grewal, the security mom aims to protect her family from “gays, lesbians, feminists, immigrants, black men, and Muslims.”<sup>67</sup> In particular, her objective is to ensure her children are not “corrupted” by these supposedly insidious actors.<sup>68</sup>

Grewal’s account was published in 2017, several years

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<sup>62</sup> *Id.* at 241, 316-21.

<sup>63</sup> Inderpal Grewal, *Saving the Security State: Exceptional Citizens in Twenty-First Century America* 2, 4-5 (2017).

<sup>64</sup> *Id.* at 4-5. Though I focus on Grewal’s work here, others have also argued that the War on Terror and neo-liberalism have combined together to produce “citizen-subjects” primed and ready for the next security emergency. Marc Neocleous, *The Universal Adversary Will Attack: Pigs, Pirates, Zombies, Satan, and the Class War in Neoliberalism and Terror: Critical Engagements* 15-32, 16 (Charlotte Heath-Kelly et al eds., 2016).

<sup>65</sup> Grewal, *supra* note 63, at 121.

<sup>66</sup> *Id.* at 125.

<sup>67</sup> *Id.* at 125-27.

<sup>68</sup> *Id.* at 152.

before the current hysteria over trans rights and the teaching of race and sexuality in the classroom—all of which have been framed as threatening children.<sup>69</sup> Grewal's framework, nevertheless, helps us understand these phenomena—and the private enforcement regimes they have spawned—not only as byproducts of MAGA politics but also of a decades-long forever war that has spawned security moms primed to use subordination regimes to protect their (white Christian) American families from imagined threats.

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MAGA-inspired private subordination schemes are both the wave of the future and a reflection of the recent past. To protect persons targeted by these regimes, we must, at minimum, work to dismantle them. We must do the same for the War on Terror's private subordination laws, which have flown under the radar for too long. No private subordination regime—MAGA-inspired or otherwise—can be tolerated in a society that presumes to value and cherish all its members.

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<sup>69</sup> E.g., Virginia Heffernan, *Column: How to Stop Worrying that CRT is Corrupting Your Kinds*, L.A. TIMES, (Aug. 20, 2021), <https://www.latimes.com/opinion/story/2021-08-20/critical-race-theory-parents-school-boards-teachers> [https://perma.cc/RUU3-EV28]; Thomas O'Donnell, *Can Transgender Females Destroy Girls' Sports? What the Numbers, Science, and Common Sense Say*, IOWA CAPITAL DISPATCH, (Mar. 3, 2022), <https://iowacapitaldispatch.com/2022/03/03/can-transgender-females-destroy-girls-sports-what-the-numbers-science-and-common-sense-say/> [https://perma.cc/KX56-NMPK].