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Mission Creep in National Security Law

Fletcher N. Baldwin Jr.

University of Florida Levin College of Law, baldwinfn@law.ufl.edu

Daniel R. Koslosky

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MISSION CREEP IN NATIONAL SECURITY LAW

*Fletcher N. Baldwin Jr.**

*Daniel Ryan Koslosky***

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I. INTRODUCTION

Terrorist attacks precipitate a collective emotional outrage. Calls by the injured body politic for justice and increased security pressure its leaders to undertake a broad array of international and domestic responses. Part of a government’s response to terrorism may be operational: an invasion or attack on another country or sub-national entity. This was the case in the aftermath of the

September 11 attacks as military operations were directed against Iraq, as a country, and Al-Qaeda, as a sub-state entity.

Another aspect of a response to a terror attack may be legal. A significant component of the American response to September 11 was legally-based changes to the structure of the government and authority under which it operates. A new cabinet department—the Department of Homeland Security (“DHS”)—was created along with a historic reshuffling of administrative agencies.¹ Moreover, a host of legal changes to domestic laws altering the range of permissible investigatory and intelligence-collecting tools was enacted as the PATRIOT Act.²

Post-September 11 sociopolitical dynamics are far from unique. Other events in American history have precipitated a legislative response to a terrorist threat. For instance, the April 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City led to a similar call to action and subsequent congressional enactment.³ The American polity, moreover, does not stand alone in responding to terrorist threats or attacks with legislation. Political violence in South Africa, for instance, prompted the then-apartheid government to pass a multitude of increasingly more restrictive measures designed to curtail the activities of the African National Congress.⁴ The United Kingdom also passed nu-

* Chesterfield Smith Professor of Law Emeritus and Director, Center for International Crimes Studies, University of Florida Law School; Honorary Fellow, Institute of Advanced Legal Studies, University of London.

** Attorney, Government of the District of Columbia; Senior Fellow, Institute for Human Rights, Peace, and Development, University of Florida. Portions of this Article were presented at the *27th International Symposium on Financial Crime*, Jesus College, Cambridge University and *Privacy Law: Perspectives of National Security, the First Amendment, the Media, and the Individual*, Center for Governmental Responsibility, University of Florida Law School. Some of the viewpoints expressed in this Article also appear in *RISKY BUSINESS: PERSPECTIVES ON CORPORATE MISCONDUCT* (Shazeeda Ali ed., 2010). The authors gratefully acknowledge the research assistance of Paige Hardy, Richard McDaniel, and Ivandra Smith. All viewpoints, errors, and omissions lay solely with the authors and are not to be associated with others. This Article is in memory of Eugene T. Hague, Jr., a true West Virginian, consummate advocate, and fierce friend.

¹ See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“PATRIOT Act”), Pub. L. No. 107-56, 115 Stat. 272.

³ See Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), Pub. L. No. 104-132, § 301, 110 Stat. 1214 (1996).

⁴ See, e.g., Internal Security Act 74 of 1982 (S. Afr.); Affected Organisations Act 31 of 1974 (S. Afr.); Terrorism Act 83 of 1967 (S. Afr.); General Law Amendment Act 62 of 1966 (S. Afr.); Criminal Procedure Amendment Act 96 of 1965 (S. Afr.); General Law Amendment Act 37 of 1963 (S. Afr.); General Law Amendment Act 76 of 1962 (S. Afr.); Unlawful Organisations Act 34 of 1960 (S. Afr.); Criminal Law Amendment Act 8 of 1953 (S. Afr.); Public Safety Act 3 of 1953 (S. Afr.); Suppression of Communism Act 44 of 1950 (S. Afr.).

merous laws designed to combat terrorism in Northern Ireland and, later, Al-Qaeda.⁵

Many anti-terrorism measures are enacted with broad public support. There is often a general willingness on the part of the public to accept greater civil liberties deprivations in the face of a specific threat, or otherwise in times of general crisis, than would otherwise be the case.⁶ Sweeping anti-terrorism legislation is frequently crafted in reaction to the presence, or perceived presence, of immense, imminent danger. The medium- and long-term consequences of the legislation may not fully be comprehended when political leaders and policymakers take swift action in the face of strong public pressure because of a recent terrorist attack or continuing threat of violence. An unintended, and oft unforeseen, consequence of anti-terrorism legislation is that it may alter substantive and procedural law. Various constitutional protections traditionally afforded to criminal defendants, and indeed the general public, may be eroded in the name of national security. Procedural law may also be affected by anti-terrorism legislation leading to substantive consequences that may not have been anticipated by the law's drafters, and staying on the books long after the immediate threat has passed. This socio-legal phenomenon is "mission creep"—the application of anti-terrorism legislation, its substantive law and procedures, to non-terrorist related offenses and other activities not contemplated in its original enactment.⁷

⁵ See, e.g., Terrorist Asset-Freezing (Temporary Provisions) Act, 2010, c. 2 (Eng.); The Terrorism (United Nations Measures) Order, S.I. 2009/1747 (Eng.); The Counter-Terrorism Act, 2008, c. 28 (Eng.); The Terrorism (United Nations Measures) Order, S.I. 2006/2657 (Eng.); Terrorism Act, 2006, c. 11 (Eng.); Prevention of Terrorism Act, 2005, c. 2 (Eng.); Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.); Terrorism Act, 2000, c. 11 (Eng.); Prevention of Terrorism (Temporary Provisions) Act, 1989, c. 4 (Eng.); Prevention of Terrorism (Temporary Provisions) Act, 1984, c. 8 (Eng.); Prevention of Terrorism (Temporary Provisions) Act of 1976, c. 8 (Eng.); Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56 (Eng.).

⁶ See Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191, 191 (2003) (stating that there is a sense that a curtailment of liberty may be appropriate and that it may be unreasonable to insist on the same restrictions of government power that were present prior to an attack); Michael Welch, *Trampling Human Rights in the War on Terror: Implications to the Sociology of Denial*, 12 CRITICAL CRIMINOLOGY 1 (2003) (discussing the sociology of "moral panic" and the war on terror).

⁷ Risa Berkower, *Sliding Down a Slippery Slope? The Future Use of Administrative Subpoenas in Criminal Investigations*, 73 FORDHAM L. REV. 2251, 2286 (2005) (noting mission creep could erode Fourth Amendment protections); James X. Dempsey & Lara M. Flin, *Commercial Data and National Security*, 72 GEO. WASH. L. REV. 1459, 1492 (2004) (noting that "mission creep" encompasses instances whereby "access to commercial sources of information for counterterrorism purposes, an agency or other agencies will then seek to use the information for purposes extending beyond counterterrorism, purposes that on their own would not have supported access to the information"); Matthew R. Hall, *Constitutional Regulation of National Security Investigation: Minimizing the Use of Unrelated Evidence*, 41 WAKE FOREST L. REV. 61 (2006) (noting that the prospect of mission creep imposes a long term institutional danger); Richard Henry Seamon & William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL'Y 319, 458–60 (2005).

One aspect of anti-terrorism laws that has received considerable attention has been the authority to, and standard by which, enemy combatants can be detained and tried.⁸ Indeed, there are significant implications on separation of powers in the American government; the status and applicability of international law in the American legal framework; and what limits, if any, exist on the President in his or her capacity as Commander-in-Chief. Yet recent anti-terrorism legislation in both the United States and United Kingdom go well beyond traditional limits of constitutional authority. Domestic and foreign legislative responses to September 11 have made significant changes to the law governing financial crimes. New rules on civil forfeiture, asset freezing, financial privacy, and ordinary criminal jurisprudence have taken effect. These new rules are far from benign; financial and legal institutions, criminal defendants, and ordinary citizens are affected by their scope. Presently, financial and white-collar crimes are the areas of criminal law most at risk for mission creep from anti-terrorism legislation.

This Article takes a comparative approach to analyzing mission creep in anti-terrorism legislation and financial crimes, including its foundations, its forms, and its effects. In order to gain a complete perspective of mission creep, its judicial basis must be explored. This Article will examine how judicial procedures and substantive constitutional law may be altered in light of national security concerns, and how blanket deference to the executive in times of crisis may lead to medium- and long-term unintended consequences particularly as

⁸ A multitude of articles have explored the jurisprudence and implications of military tribunals and presidential authority. *See, e.g.*, Fionnuala D. Ni Aolain, *Hamdan and Common Article 3: Did the Supreme Court Get it Right?*, 91 MINN. L. REV. 1523 (2007); Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165 (2007); David Fontana, *A Case for the Twenty-First Century Constitutional Canon: Schneiderman v. United States*, 35 CONN. L. REV. 35 (2002); Amos N. Guiora, *Quirin to Hamdan: Creating a Hybrid Paradigm for Detaining Terrorists*, 19 FLA. J. INT'L L. 511 (2007); Douglas A. Hass, *Crafting Military Commissions Post-Hamdan: The Military Commissions Act of 2006*, 82 IND. L.J. 1101 (2007); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Daniel Ryan Koslosky, *Ghosts of Horace Gray: Customary International Law as Expectation in Human Rights Litigation*, 97 KY. L.J. 615 (2009); Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375 (2004); Robert J. Pushaw, Jr., *The Enemy Combatant Cases in Historical Contest: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005 (2007); Mark Rahdert, *Double-Checking Executive Emergency Power: Lessons from Hamdi and Hamdan*, 80 TEMPLE L. REV. 451 (2007); Eran Shamir-Borer, *Revisiting Hamdan v. Rumsfeld's Analysis of the Laws of Armed Conflict*, 21 EMORY INT'L L. REV. 601 (2007); Ingrid B. Wuerth, *The President's Power to Detain 'Enemy Combatants': Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567 (2004). Legal education has also taken up the cause with symposia and class offerings dedicated to national security law and public policy. *See, e.g.*, Maxwell O. Chibundu, *For God, for Country, for Universalism, Sovereignty as Solidarity in Our Age of Terror*, 56 FLA. L. REV. 883 (2004); Viet D. Dinh, *Nationalism in an Age of Terror*, 56 FLA. L. REV. 867 (2004); Winston P. Nagan & Craig Hammer, *Patriotism, Nationalism, and the War on Terror: A Mild Plea in Avoidance*, 56 FLA. L. REV. 933 (2004); Brad R. Roth, *The Enduring Significance of State Sovereignty*, 56 FLA. L. REV. 1017 (2004).

they relate to civil liberties. Part II presents historical instances of legislative responses to terrorism in both America and Britain. Specifically, the British “criminalization” policy, a response to political violence in Northern Ireland, will be examined. Northern Ireland presents an interesting case study of how anti-terrorism legislation can encroach upon the civil liberties of individuals accused of non-terrorism-related offenses. The British experience also demonstrates how anti-terrorism legislation can perpetuate itself even where there is a relative decrease in violence levels or when the dynamics of the conflict have changed.

The foundations of American national security law are also explored in Part II. American national security institutions have developed in contrast to their British counterparts. Rather than a legislative measure being enacted to respond to a specific danger, American jurisprudence has traditionally been on the forefront in responding to various threats of varying magnitudes. Special needs exceptions have been carved from the Fourth Amendment for reasons such as officer protection and school safety. Various judicial tests have also been formulated throughout American Courts of Appeal for prosecuting criminal defendants based on a theory of willful blindness or deliberate ignorance of criminal activity. In certain circumstances, criminal convictions have been sustained even where the underlying conduct has not fully satisfied the *mens rea* requirement of the specific offense charged. Of course, there are instances where Congress has responded to specific threats such as the Oklahoma City bombing. Indeed, in responding to an act of domestic terrorism, the rules governing the First Amendment and habeas corpus were significantly affected. All of these areas of substantive law have informed how anti-terrorism legislation operates in practice and can germinate into areas of substantive law.

The anti-terrorism measures that have had the greatest impact on the institutional integrity of financial and legal systems, however, are the American and British legal response to the September 11 attacks. Part III begins by outlining traditional notions of bank secrecy and financial privacy. The British response to September 11, with a particular focus on financial crimes, is presented in light of previous efforts to combat terrorist financing in Northern Ireland. Title III of the PATRIOT Act relating to financial crimes is also presented. Provisions of the Act relating to international financial crimes and money laundering will be analyzed in light of traditional protections of financial privacy and underlying jurisprudence. Sections of the Act regarding information sharing between law enforcement agencies and the elimination of the distinction between intelligence gathering and criminal investigations will also be expounded upon. The current dynamics of mission creep resulting from both legislative initiatives and judicial responses is also presented. Finally, Part IV provides a brief conclusion, asserting that judicial institutions should remain vigilant in protecting constitutional rights when reviewing executive action.

II. LEGAL FOUNDATIONS OF MISSION CREEP

Mission creep can be a significant threat for the continued protection of civil liberties during a time of crisis, or the perception thereof.⁹ In order to fully analyze patterns in, and the effects of, this socio-legal phenomenon, anti-terrorism legislation and its related jurisprudence will be examined in both the United States and Britain. Primarily, two responses to crises characterize the dangers inherent in anti-terrorist legislation with regard to inadvertent, often negative effects on other areas of substantive and procedural law. The first instance is the “criminalization” strategy used by the British government to combat Northern Ireland political violence. The second was the American legal response to the Oklahoma City bombing. Both examples illustrate how anti-terrorist legislation, operating within a greater legal framework, can have consequences beyond what was originally intended by the legislation.

A. *Criminalization and Terrorism: The Case of Northern Ireland*

Conflict in Ireland spans its entire history, with cyclical flashpoints of violence and relative tranquility. The Irish Free State was established after the Anglo-Irish War of 1919–1921, and an independent republic was declared in 1949.¹⁰ Yet independence came at the price of the partition of the six northern counties of the island where Protestants/Unionists comprised a majority of the population.¹¹ Electoral boundaries were established so as to give Unionists a disproportional advantage in the Northern Ireland Assembly at Stormont.¹² Security measures were enforced by the sectarian paramilitary police: the B-Specials and the Royal Ulster Constabulary.¹³

An ensuing escalation in the levels of political violence by nationalist paramilitaries followed, the most notable of which was the Provisional Irish Republican Army (“IRA”).¹⁴ Tactics were a mixture of terrorism in the classical sense—targeting non-combatants with the purpose of communicating a political message¹⁵—and political violence directed against targets associated with the

⁹ See *supra* note 8.

¹⁰ CONNOR A. GEARTY, *TERRORISM* 392–93 (1991).

¹¹ *Id.* at 377.

¹² *Id.* at 394; DAVID MCKITTRICK & DAVID McVEA, *MAKING SENSE OF THE TROUBLES: THE STORY OF THE CONFLICT IN NORTHERN IRELAND* 22 (2002).

¹³ GEARTY, *supra* note 10, at 115–16. For a general overview of the Northern Ireland conflict see generally MCKITTRICK & McVEA, *supra* note 12, at 11.

¹⁴ Other nationalist paramilitary groups operating in Northern Ireland were the Real Irish Republican Army (“Real IRA”), the Irish National Liberation Army (“INLA”), Saor Éire, Fianna na hÉireann, and Cumann na mBan. Corresponding unionist paramilitary groups also emerged in the region and included the Ulster Volunteer Force (“UVF”), Ulster Freedom Force (“UFF”), Loyalist Volunteer Force (“LVF”), and Red Hand Command (“RHC”).

¹⁵ There is no consensus on what “terrorism” as a method of violence encompasses. For present purposes it is defined as intentional or reckless violence against the person or property of

British control of Northern Ireland.¹⁶ The escalation of violence, beginning in 1971, resulted in a foreseeable government response: the enactment of emergency (*i.e.* temporary) anti-terrorism legislation.¹⁷ Although the political violence peaked in 1972, the legal responses to political violence were renewed, expanded, and applied to other areas of law despite a relative decrease in the level of violence.

1. The Prevention of Terrorism (Temporary Provisions) Act, 1974

The primary British legal response to politically-motivated violence in Northern Ireland was the Prevention of Terrorism (Temporary Provisions) Act, 1974.¹⁸ The Act was a direct political and legislative reaction to two pub bombings in Birmingham, England, and an increase in the level of violent attacks: 86 explosions occurred in 1973.¹⁹ Indeed, political pressure mounted on the government in Westminster to deal with what was described as “the gravest threat [to Britain] since the end of the Second World War.”²⁰ In introducing the Act in the House of Commons, then-Home Secretary Roy Jenkins described the legislation as “draconian” and “unprecedented in peacetime.”²¹ He also went on to defend it as an enactment that was fully justified to meet the “clear and present danger.”²² The House of Commons passed the Act less than forty-two hours after its introduction, without amendment.

The three key provisions of the Temporary Provisions Act were proscription, exclusion, and detention. Proscription established three new criminal offenses. First, membership in the IRA alone, absent any substantive conduct,

non-combatants to communicate a political message. See Haig Khatchadourian, *Terrorism and Morality*, 5 J. APPLIED PHIL. 131 (1988); Kai Nielsen, *On the Moral Justifiability of Terrorism (State and Otherwise)*, 41 OSGOODE HALL L.J. 427, 428–30 (2003) (noting multiple definitions of terrorism); Igor Primoratz, *State Terrorism*, in TERRORISM AND JUSTICE: MORAL ARGUMENT IN A THREATENED WORLD 31, 37 (Tony Coady & Michael O’Keefe eds., 2002); Jenny Teichman, *How to Define Terrorism*, 64 PHIL. 505, 507 (1989).

¹⁶ For instance, the bombing of the British Conservative Party Conference in Brighton in 1984 was an assassination attempt on the Prime Minister herself rather than intended to communicate a political message. Conversely, the bombings of “Bloody Friday” were intended to communicate a political message without concern for the agency the twenty targets played in the chain of British rule of the territory. See GEARTY, *supra* note 10, at 344; ADRIAN GUELKE, *THE AGE OF TERRORISM AND THE INTERNATIONAL POLITICAL SYSTEM* 123–24 (1998).

¹⁷ The term “anti-terrorism legislation” denotes legal responses to politically-motivated violence falling within and outside classical definitions of terrorism. See *supra* note 15 (noting the classical definition of “terrorism”).

¹⁸ Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56 (Eng.).

¹⁹ K.D. EWING & C.A. GEARTY, *FREEDOM UNDER THATCHER: CIVIL LIBERTIES IN MODERN BRITAIN* 213–14 (1990).

²⁰ 882 PARL. DEB., H.C. (5th ser.) (1974) 743 (U.K.).

²¹ 882 PARL. DEB., H.C. (5th ser.) (1974) 35 (U.K.).

²² *Id.*

was sufficient to secure a conviction punishable by a term of incarceration of no more than five years.²³ Soliciting or collecting funds for any proscribed organization was also punishable under the same provision.²⁴ Second, it was deemed a crime to “assist[] in the arrangement or management” of a meeting of three or more people “knowing that the meeting is to support, or to further the activities of, a proscribed organization.”²⁵ Third, anyone who publicly “wears any item of dress,²⁶ or []wears, carries or displays any article in such a way as to arouse reasonable apprehension that he is a member or supporter of a proscribed organization” could face up to three months in prison and a fine of £200.²⁷

The Prevention of Terrorism Act, 1974, also granted the Secretary of State for Northern Ireland authority to exclude persons from the U.K. on the suspicion of terrorist activities.²⁸ If “satisfied” that “any person . . . is concerned in the commission, preparation or instigation of acts of terrorism” the Secretary may prohibit the individual from entering or residing in the U.K.²⁹ Additionally, if any person is “attempting or may attempt” to enter the United Kingdom with the intent to engage, or assist in an act of terrorism, the Secretary is authorized to prohibit the individual from entering Britain.³⁰ Although there is an obligation to consider nonfrivolous representations made by the subject of an exclusion order, the Secretary is only obligated to consult another appointed official.³¹ Sole discretion to enter and enforce an exclusion order was vested with the Secretary.³²

The most controversial provisions of the Prevention of Terrorism Act, 1974, however, were those pertaining to arrest and detention. An officer had the power to arrest anyone they “reasonably suspect[ed]” to be engaged or who

²³ Prevention of Terrorism Act, 1974, c. 56, § 1(1)(a).

²⁴ § 1(1)(b). The prohibition on IRA financing was drawn broadly. Any person who “solicits or invites financial or other support for a proscribed organisation, or knowingly makes or receives any contribution in money or otherwise to the resources of a proscribed organization” was punishable for a term of ten years imprisonment. *Id.*

²⁵ § 1(1)(c).

²⁶ § 2(1)(a).

²⁷ § 2(1)(b). For the rationale of the House of Commons regarding the prohibition on wearing politically communicative clothing see 882 PARL. DEB., H.C. (5th ser.) (1974) 636 (U.K.) (arguing that the public should not be forced to be affronted by “public demonstrations” in support of the IRA); 38 PARL. DEB., H.C. (6th ser.) (1983) 633 (U.K.) (stating that IRA members should not be afforded the ability to “flaunt themselves in public”).

²⁸ Prevention of Terrorism Act, 1974, c. 56, § 3(1).

²⁹ § 3(3)(a).

³⁰ § 3(3)(a). Exclusion orders, however, do not extend to persons residing in the U.K. for the previous twenty years or were born in the U.K. and resided there throughout their life. § 3(4)(a)–(b). The burden of proof of demonstrating one has been a constant resident is on the suspect. § 3(5).

³¹ § 4(4).

³² §§ 3(1)–(3), 5.

might partake in an act of terrorism or the support thereof.³³ The suspect could be detained for forty-eight hours with a possible five-day extension upon approval of the Secretary of State.³⁴ During this time the police may restrict outside communication to family and legal counsel.³⁵ Moreover, the traditional common-law procedure of bringing an arrested person before a court was eliminated in instances of suspected terrorists.³⁶

2. The Permanence of the Temporary

The 1974 Act, widely considered at the time to be a broad and sweeping incursion into traditional guarantees of civil liberties, was due to expire within six months of its enactment.³⁷ Yet the 1974 Act was given two, half-year extensions in 1975 and 1976 respectively, despite a dramatic drop in the death rate in Northern Ireland. Yearly deaths related to the Northern Irish conflict peaked in 1972 with 467.³⁸ The rate dropped by over half as there were 247 conflict deaths occurring in 1975.³⁹

A new Prevention of Terrorism (Temporary Provisions) Act was enacted in 1976, with a renewal period of one year.⁴⁰ The 1976 Act was renewed annually until it was amended and reenacted in 1984.⁴¹ The 1984 Act was given a maximum life of five years prior to new legislation being required. Also significant was that the 1984 Act incorporated "international terrorism" into its provisions. After the five-year period, the Government in Westminster adopted the Prevention of Terrorism (Temporary Provisions) Act, 1989, which was subject to indefinite annual renewals.⁴² Violence levels during this time, however, had largely stabilized. Between 50 and 115 conflict-related deaths occurred annually between 1978 and 1994.⁴³ Much of the fluctuations in vi-

³³ § 7(1).

³⁴ § 7(2).

³⁵ EWING & GEARTY, *supra* note 19, at 222.

³⁶ Prevention of Terrorism Act, 1974, c. 56, § 7(3). The Prevention of Terrorism Act, 1974, rendered inapplicable multiple due process safeguards relating to arrestees. Specifically, provisions contained in the Magistrates' Courts Act, 1952, c. 55, § 38 (Eng.); the Children and Young Persons Act, 1969, c. 54, § 29 (Eng.); the Summary Jurisdiction (Scotland) Act, 1954, c. 48, § 20(3) (Scot.); the Magistrates' Courts Act (Northern Ireland), 1964, c. 21, § 132 (N. Ir.); the Children and Young Persons Act (Northern Ireland), 1968, c. 34, § 50(3) (N. Ir.) relating to due process and procedures of arrest were abrogated. *See infra* notes 65–77 and accompanying text (discussing changes in trial procedures and substantive law).

³⁷ Prevention of Terrorism Act, 1974, c. 56, § 12(1).

³⁸ GUELKE, *supra* note 16, at 112.

³⁹ *Id.*

⁴⁰ Prevention of Terrorism (Temporary Provisions) Act of 1976, c. 8 (Eng.); *see* EWING & GEARTY, *supra* note 19, at 214.

⁴¹ Prevention of Terrorism (Temporary Provisions) Act, 1984, c. 8 (Eng.).

⁴² Prevention of Terrorism (Temporary Provisions) Act, 1989, c. 4 (Eng.).

⁴³ GUELKE, *supra* note 16, at 112.

olence can be attributed to the conflict's political dynamics: various declared ceasefires, renewed violent campaigns, and negotiations. The constant renewal of British anti-terrorist legislation notwithstanding the relative decline in the levels of violence in Northern Ireland show the self-reinforcing nature of legal responses to terrorism: if there are no attacks, the legislation is *working*; if there is an attack, it is *needed*. Thus, a fundamental irony emerges: as the level of political violence drops, the legal responses designed to counter them strengthens.⁴⁴

The Prevention of Terrorism Act, 1989 supplemented the original 1974 Act with additional offenses and expanded police powers, including a provision providing for the forfeiture of funds and property relating to terrorism.⁴⁵ Detention without legal recourse was continued, as were exclusion orders without judicial review.⁴⁶ The Prevention of Terrorism Acts served as the legal basis for future anti-terrorist legislation targeting violence associated with Al-Qaeda and related organizations.⁴⁷

3. Distortions in the Criminal Law

British anti-terrorist legislation, geographically applicable to only Northern Ireland at first, and then to the U.K. as a whole, was gradually expanded in both scope and applicability.⁴⁸ Corollary to the substantive offenses outlined in the Prevention of Terrorism Acts were changes in criminal procedure. Anti-terrorist provisions morphed into the ordinary criminal law, having substantial implications for defendants. That is, not only did British anti-terrorist legislation expand and perpetuate itself, it affected other areas of substantive and procedural law. The most blatant example of this was the use of juryless "Diplock" trials for "scheduled" offenses.⁴⁹

⁴⁴ EWING & GEARTY, *supra* note 19, at 215.

⁴⁵ Prevention of Terrorism Act, 1989, c. 4, § 13.

⁴⁶ §§ 14–15.

⁴⁷ See, e.g., Terrorist Asset-Freezing (Temporary Provisions) Act, 2010, c. 2 (Eng.); The Terrorism (United Nations Measures) Order, 2009, No. 1747 (Eng.); The Counter-Terrorism Act, 2008, c. 28 (Eng.); The Terrorism (United Nations Measures) Order, 2006, No. 2657 (Eng.); Terrorism Act, 2006, c. 11 (Eng.); Prevention of Terrorism Act, 2005, c. 2 (Eng.); Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.); Terrorism Act, 2000, c. 11 (Eng.). See also Mark Elliott, *United Kingdom: Detention Without Trial and the War on Terror*, 4 INT'L J. CONST. L. 553 (2006) (discussing the expansion of detention periods in British anti-terrorist legislation).

⁴⁸ The Prevention of Terrorism Acts had general applicability throughout the United Kingdom, whereas the Emergency Provisions Acts were applicable solely to Northern Ireland. Fionnuala Ní Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1354 (1996).

⁴⁹ Northern Ireland (Emergency Provisions) Act, 1973, c. 53 (Eng.); Northern Ireland (Emergency Provisions) Act, 1991, c. 24, § 1(1)(3); John D. Jackson, Katie Quinn, & Tom O'Malley, *The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past*, 62 LAW & CONTEMP. PROBS. 203, 219 (1999). The Emergency Provisions Act, like the Prevention of Terrorism Acts, was subsequently revised and extended in 1987, 1991, and 1996. For a general back-

The rationale of the juryless courts was embodied in the 1972 Diplock Report, which stated that the unique nature of paramilitary violence in Northern Ireland necessitated abrogating the right to a jury trial.⁵⁰ Specifically, the presence of paramilitary groups and the threat of intimidation raised the question of the ability of jurors to render verdicts without considering possible repercussions.⁵¹ There was also a perceived risk that sectarian loyalties in the jury pool might result in unjust acquittals or convictions.⁵²

The Diplock Courts have, however, been widely used to prosecute offenses unrelated to terrorism.⁵³ An average of 630 defendants per year were brought before Diplock Courts between 1980 and 1986.⁵⁴ Yet, 40 percent of defendants brought before these special juryless courts were implicated in offenses that had no political *mens rea* or content.⁵⁵ Some solicitors have also admitted to using emergency provisions for offenses outside the scope of anti-terrorism legislation.⁵⁶ Additionally, juryless trials were statutorily required for non-scheduled offenses in instances where the defendant was also charged with a scheduled offense.⁵⁷ Judges not satisfied that the defendant was guilty of a scheduled offense had discretionary authority to render a conviction if they were “satisfied that [the defendant was] guilty of some other offense . . . which a jury *could have* found him guilty.”⁵⁸

Evidentiary standards were also altered for both jury and non-jury trials relating to apolitical and non-paramilitary offenses. In an attempt to clamp down on terrorist activities, judges’ common law rules were replaced by lower statutory standards regarding the admissibility of evidence.⁵⁹ For example, evidentiary

ground of juryless trials in Northern Ireland see generally JOHN D. JACKSON & SEAN DORAN, *JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM* (1995).

⁵⁰ REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185 [hereinafter Diplock Commission].

⁵¹ *Id.* ¶ 36.

⁵² *Id.*

⁵³ EWING & GEARTY, *supra* note 19, at 228.

⁵⁴ *Id.* at 229. The applications to prosecute a crime as a scheduled offense varied throughout the late 1970s and early 1980s. In 1978, for example, 1515 applications were made to prosecute such offenses. *Id.*

⁵⁵ Aolain, *supra* note 48, at 1378; GERARD HOGAN & CLIVE WALKER, *POLITICAL VIOLENCE AND THE LAW IN IRELAND* 122 (1989).

⁵⁶ Aolain, *supra* note 48, at 1378.

⁵⁷ Emergency Provisions Act, 1978, c. 5, § 7(3) (Eng.).

⁵⁸ § 7(4)(a)–(b) (emphasis added). It is also to be noted that some scheduled offenses could be tried summarily.

⁵⁹ Northern Ireland (Emergency Provisions) Act, 1991, c. 24, §§ 11, 12 (Eng.); Peter Hall, *The Prevention of Terrorism Acts*, in JUSTICE UNDER FIRE: THE ABUSE OF CIVIL LIBERTIES IN NORTHERN IRELAND 160–64 (Anthony Jennings ed., 1988). It is also to be noted that the standard for excluding evidence obtained through torture or other degrading treatment was lowered from that which would normally govern. See Police and Criminal Evidence Act, 1984, c. 60, § 76(2) (Eng.) (provisions governing admissibility of confessions).

standards were changed to permit an inference to be drawn from a defendant's silence at trial. If a suspect failed to mention a fact at arrest, and later attempted to rely on it during trial, an inference may be drawn based on the reasonableness of the omission.⁶⁰ A defendant's failure to explain any object, substance, or mark, or why he or she was in a particular location can also be used at trial to infer guilt, as can a failure to give evidence on one's own behalf at trial.⁶¹

Another example of diminished evidentiary and procedural standards used in the United Kingdom in the furtherance of national security was the so-called "supergrass" trials.⁶² Derived from "informer" in Cockney vernacular, the supergrass trials permitted the secret, uncorroborated testimony of only one witness as sufficient to secure a criminal conviction.⁶³ Conviction rates steadily rose to around 88 percent in 1983, with 55 percent of trials in Northern Ireland resting on uncorroborated, supergrass evidence.⁶⁴ Typically, an informer would be given immunity from prosecution in exchange for testimony regarding the paramilitary activities of their associates. This testimony alone was sufficient for a conviction, yet it was often motivated by personal "vindictiveness" on the part of witnesses and informers, thereby increasing the risk of miscarriages of justice.⁶⁵

The case of Joseph Charles Bennett is illustrative of how anti-terrorist legislation can corrupt substantive criminal and evidentiary law. Mr. Bennett was a criminal from an early age, first committing petit larceny at age eleven.⁶⁶ He became involved in loyalist paramilitary activities and served six years in HMP Maze for a weapons conviction.⁶⁷ While incarcerated, he became a bloc commander of incarcerated members of the Ulster Volunteer Force ("UVF"), a loyalist paramilitary organization.⁶⁸ After being released, he stole £1,350 from coworkers and was thereafter sentenced to death *in absentia* by a UVF court-

⁶⁰ EWING & GEARTY, *supra* note 19, at 229.

⁶¹ *See infra* notes 65–77 and accompanying text (discussing changes in trial procedures).

⁶² *See generally* STEVEN C. GREER, SUPERGRASSES: A STUDY IN ANTI-TERRORIST LAW ENFORCEMENT IN NORTHERN IRELAND (1995); JAMES MORTON, SUPERGRASSES AND INFORMERS (2002); DERMOT P.J. WALSH, THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND (1983).

⁶³ *See* Emergency Provisions Act, 1978, c.3, §§ 7(1)–(3) (Eng.) (providing for juryless trials for scheduled offenses and the jurisdictional reach of Diplock Courts as equivalent to that of a jury trial); HOGAN & WALKER, *supra* note 55, at 101 (discussing the context of the Diplock Courts). The term was first coined in London during the 1970s. Evidently the nickname for an informer is "grass" which derives itself from "grasshopper;" rhythmic slang for "copper" which is Cockney terminology for policeman. GREER, *supra* note 62, at 1, n.1.

⁶⁴ GREER, *supra* note 62, at 252.

⁶⁵ Laura K. Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT'L L. 303, 414 (2006).

⁶⁶ GREER, *supra* note 62, at 61.

⁶⁷ *Id.* at 61–62.

⁶⁸ *Id.* at 62.

martial.⁶⁹ As a result, Mr. Bennett informed police of incriminating evidence on eighteen UVF associates.⁷⁰

A subsequent prosecution and trial of the eighteen defendants charged with various terrorism-related offenses was entirely reliant on Mr. Bennett's testimony.⁷¹ Yet, there was no official disclosure by the Royal Ulster Constabulary or Director of Public Prosecutions of the nature of the immunity agreement. In fact, the only proof of the actual existence of immunity was Mr. Bennett's own testimony.⁷² The presiding trial judge, Justice Murray, acknowledged that Mr. Bennett's character was conducive of committing perjury.⁷³ The defense argued that the Crown was required, under the common law, to demonstrate that a crime had occurred and that the accused was implicated in its commission.⁷⁴ The court summarily rejected these arguments and held that supergrass testimony need not be corroborated.⁷⁵

Justice Murray found all but two of the eighteen defendants guilty despite multiple discrepancies in Bennett's testimony.⁷⁶ It was held that there was independent corroboration of Mr. Bennett's testimony with regard to three of the defendants: they simply didn't say anything to the police. That is, the defendants' silence was taken as "significant admission of involvement" as was permitted under the Prevention of Terrorism Acts.⁷⁷ Justice Murray was persuaded that Mr. Bennett had lied about several facts but held the fabrications to be "extraneous" and refused to exclude the testimony in its entirety.⁷⁸

The sacrifices to civil liberties made in response to the emergency continued as the "temporary" legislation was renewed and expanded.⁷⁹ A Diplock trial was used to secure a conviction as recently as 2005, seven years after the

⁶⁹ *Id.*

⁷⁰ *R. v. Graham*, [1983] 7 N.I.J.B. 23, 25–26. At trial Mr. Bennett stated that he "did not want to go to prison again" and that his safety "depended on [the] ability to name as many [people] as possible." *Id.*

⁷¹ GREER, *supra* note 62, at 62–63.

⁷² *Id.* at 63–64.

⁷³ *Graham*, 7 N.I.J.B. at 69.

⁷⁴ *See R. v. Baskerville*, [1916] 2 K.B. 658 (Eng. A.C.).

⁷⁵ The exception carved out by the court allows the independent evidence requirement that a meeting took place to include meeting for unrelated, benign purposes. GREER, *supra* note 62, at 65.

⁷⁶ *Id.* at 67 (sixteen of the eighteen defendants were in the trial; two were found guilty without Bennett's testimony).

⁷⁷ *Graham*, 7 N.I.J.B. at 74.

⁷⁸ *Id.* at 87–88.

⁷⁹ *See, e.g., R. v. Gibney*, [1983] 13 N.I.J.B. 1. There were instances where supergrass trials were described as "nothing short of public spectacle." GREER, *supra* note 62, at 71. Greer notes examples of over thirty defendants in the dock being convicted on the uncorroborated testimony of one witness. *Id.* at 71–72. Also present at the various cases were up to seventy heavily-armed police per courtroom, judges sporting bullet-proof vests during proceedings, and media coverage describing the very survival of Northern Ireland as contingent on the verdicts. *Id.*

official end of the Northern Ireland conflict.⁸⁰ After the attacks of September 11, the original seven day detention, once described as draconian, was extended to indefinite incarceration without charge.⁸¹ What can be said, however, is that an external judicial check on the criminal process in Northern Ireland, and the United Kingdom generally—the European Court of Human Rights—was able to, at least somewhat, curtail the British legal metamorphosis to at least some extent.⁸² Without an external, independent judicial check on special police powers the deprivation of due process may have been much more substantial.

B. Responding to the Threat: The Case of the United States

In contrast to the British experience, mission creep in American national security law did not arise from one primary threat. Rather, its roots are grounded in how the judiciary responded to numerous types of necessities from drugs in schools to money laundering to the safety of beat officers. There are three primary topics that warrant exploration in the context of national security: special needs exceptions, willful blindness jurisprudence, and legislative curtailment of habeas corpus. Each of these topics is unique in its design and application. However, each served as a key component in the construction of America's domestic security regime and continues to inform its operation.

⁸⁰ *R. v. Abbas Boutrab*, [2005] NICC 36. Mr. Boutrab was convicted in a Diplock Court in Belfast for being a member of Al-Qaeda.

⁸¹ See Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.). Part IV authorized the indefinite detention of a person certified by the Home Secretary as a terrorist or threat to national security. The internment power was incorporated into the immigration control laws and is reviewable by the Special Immigration Appeals Commission. Evidence obtained by torture thereby is admissible in the administrative immigration tribunals otherwise excluded from criminal proceedings. In *A, X, & Y & Others v. Secretary of State for the Home Department*, the Lord Chief Justice of England and Wales, Lord Wolff, held that indefinite detention did not violate the European Convention on Human Rights. EWCA (Civ.) 1502 (2002). See Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?*, 65 MOD. L. REV. 724, 730–35 (2002); Philip A. Thomas, *9/11: USA and UK*, 26 FORDHAM INT'L L.J. 1193 (2002).

⁸² See *Brogan v. United Kingdom*, 11 Eur. Ct. H.R. (1989) 117. In *Brogan*, the European Court for Human Rights (“ECtHR”) held that the detention of suspects in Northern Ireland for between five and six days violated Article 5(3) of the European Convention of Human Rights. Article 5(3) of the Convention provides in part that “[e]veryone arrested or detained . . . shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.” Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Art. 5(3). Moreover, the ECtHR held in *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. (1978) 25, that the “five techniques”—wall-standing, hooding, continuous noise, deprivation of food, and deprivation of sleep—used by British authorities in interrogations in Northern Ireland violated the European Court of Human Rights.

1. Special Needs Exceptions

Terrorism is not the only circumstance in which a court is willing to apply a lesser degree of privacy protection in order to protect against a prospective or perceived danger. In the United States, numerous circumstances have arisen which have led courts to find a lesser expectation of privacy or carve out a special exception to an individual's established privacy rights. One such exception has arisen under numerous circumstances to the Fourth Amendment's warrant requirement.⁸³ This "special needs exception" was first elaborated in *Terry v. Ohio*.⁸⁴

In *Terry*, the Supreme Court considered whether a police officer could conduct a "stop and frisk" without probable cause and prior to any crime being committed.⁸⁵ The case arose from a criminal prosecution of two defendants for carrying a concealed weapon in Cleveland, Ohio.⁸⁶ The officer testified that he observed the defendants slowly pacing along several storefronts. This mid-afternoon "casual and oft-repeated reconnaissance of the store window" elicited suspicion by the officer who confronted the men.⁸⁷ Upon patting the defendants' outer clothing, the officer discovered a revolver.⁸⁸

The Supreme Court affirmed the state appeals court in distinguishing between an investigatory stop and an arrest,⁸⁹ and between a weapons frisk and a full-blown evidentiary search.⁹⁰ The Supreme Court was at pains to stress that it was not retreating from its Fourth Amendment jurisprudence requiring police to "obtain advance judicial approval of searches and seizures through the warrant procedure."⁹¹ Thus, the Fourth Amendment did apply to "stop and frisk"

⁸³ See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (holding that evidence obtained in violation of the Fourth Amendment may not be used as evidence in criminal proceedings).

⁸⁴ 392 U.S. 1 (1968).

⁸⁵ *Id.* at 10–11.

⁸⁶ *Id.* at 4–5.

⁸⁷ *Id.* at 6.

⁸⁸ *Id.* at 7.

⁸⁹ See *State v. Terry*, 214 N.E.2d 114, 119 (Ohio Ct. App. 1966) (noting that "[t]o constitute an 'arrest,' four requisites are involved: A purpose to take the person into custody of the law; under real or pretended authority and an actual or constructive seizure of detention of his person, so understood by the person arrested." (quoting *State ex rel. Sadler v. District Court*, 225 P. 1000, 1001–02 (Mont. 1924))).

⁹⁰ *Id.* at 120. The appellate court noted that:

We must be careful to distinguish that the "frisk" authorized herein includes only a "frisk" for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the Fourth Amendment, and probable cause is essential.

Id. (internal citations omitted).

⁹¹ *Terry*, 392 U.S. at 20. The Court positively cited its previous holdings: *Katz v. United States*, 389 U.S. 347 (1967), *Beck v. Ohio*, 379 U.S. 89 (1964), and *Chapman v. United States*,

searches.⁹² However, the traditional standard of probable cause applicable to searches did not apply; rather, the Court looked to the “reasonableness” of the officer’s actions in light of the circumstances.⁹³

The Supreme Court, in determining reasonableness, balanced the invasion of personal privacy that the search entails against an officer’s need to detect for weapons.⁹⁴ The Court found, on balance, the interest in “effective law enforcement” outweighed the “minor inconvenience and petty indignity” of a stop and frisk search,⁹⁵ with the caveat that a weapons search “be strictly circumscribed by the exigencies which justify its initiation.”⁹⁶ That is to say, the search “must be limited to that which is necessary for the discovery of weapons.”⁹⁷ Presumably a search that went beyond the scope of where weapons might be concealed would be unconstitutional absent probable cause.

Educational institutions have also presented a petri dish for cultivating special needs exceptions. *New Jersey v. T.L.O.*⁹⁸ involved the constitutionality of a school official’s search of a student’s purse.⁹⁹ After a high school freshman was discovered smoking in a bathroom, her purse was searched and drug paraphernalia and a small amount of marijuana was discovered.¹⁰⁰ The student was charged with illegally possessing marijuana with the intent to distribute.¹⁰¹ Building upon the balancing of interests outlined in *Terry*, the New Jersey court concluded that the search was reasonable under the circumstances in light of the need to preserve school discipline and order.¹⁰²

365 U.S. 610 (1961) for the notion that it was not seeking to reign in the warrant requirement of the Fourth Amendment. *Id.*

⁹² *Id.* at 19.

⁹³ *Id.* (noting that the “central inquiry under the Fourth Amendment—[is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security”).

⁹⁴ *Id.* at 21. The Court held that:

In order to assess the reasonableness of Officer McFadden’s conduct as a general proposition, it is necessary “first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,” for there is “no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.”

Id. at 20–21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534–35, 536–37 (1967)).

⁹⁵ *Id.* at 10–11 (quoting *People v. Rivera*, 201 N.E.2d 32, 36 (N.Y. 1964)). *See id.* at 26 (stating that “[t]he protective search for weapons . . . constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person”).

⁹⁶ *Id.* at 25–26 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

⁹⁷ *Id.* at 26.

⁹⁸ 469 U.S. 325 (1985).

⁹⁹ *Id.* at 327–32.

¹⁰⁰ *Id.* at 328.

¹⁰¹ *See State ex rel T.L.O.*, 428 A.2d 1327, 1329 (N.J. Juv. & Dom. Rel., 1980).

¹⁰² *Id.* at 1333–34.

The Supreme Court agreed; a *Terry* construction of the Fourth Amendment governed searches of students by school officials.¹⁰³ The Court acknowledged that the Fourth Amendment protects students' privacy vis-à-vis school officials.¹⁰⁴ Yet, a schoolchild's "legitimate" expectation of privacy is weighed against the school's need to maintain an environment in which learning can take place.¹⁰⁵ The Court found the warrant requirement unsuitable in a school setting, which required "some easing of the restrictions to which searches by public authorities are ordinarily subject . . . as well as a modification of the level of suspicion . . . needed to justify a search."¹⁰⁶ Because the probable cause requirement would likely "frustrate the governmental purpose behind the search,"¹⁰⁷ only a showing of reasonableness was required.¹⁰⁸ The Supreme Court articulated a two-part test derived from *Terry*: (1) the action had to be "justified at its inception,"¹⁰⁹ and (2) the search had to be "reasonably related in scope to the circumstances which justified the interference in the first place."¹¹⁰ Only then was a search based on a suspicion less than probable cause justified under the Fourth Amendment.

Interestingly, the Court in *T.L.O.*, as it did in *Terry*, relied on *Camara v. Municipal Court of San Francisco*¹¹¹ for justifying that the reasonableness standard attach to searches under certain circumstances. Yet, in *Camara*, the Supreme Court held that a warrant based on probable cause was needed prior to an inspector conducting an examination of a private residence.¹¹² Arguments that the routine, safeguard-laden inspections were not intrusive and that a warrant requirement would hinder the progress and purpose of the inspections "unduly

¹⁰³ *T.L.O.*, 469 U.S. at 341. The Court noted that:

In a number of cases [it had] recognized the legality of searches and seizures based on suspicion that, although "reasonable," do not rise to the level of probable cause Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

Id. (internal citations omitted).

¹⁰⁴ *Id.* at 334. Justice White, speaking for the majority, rejected the notion that because school administrators act *in loco parentis* "their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment." *Id.* at 336 (citing *R.C.M. v. State*, 660 S.W.2d 552 (Tex. App. 1983)).

¹⁰⁵ *Id.* at 339–40.

¹⁰⁶ *Id.* at 340.

¹⁰⁷ *Id.* (quoting *Camara v. Municipal Court*, 387 U.S. 523, 532–33 (1967)).

¹⁰⁸ *Id.* at 341.

¹⁰⁹ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

¹¹⁰ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

¹¹¹ 387 U.S. 523 (1967).

¹¹² *Id.* at 540.

discount[ed]” the purpose of the Fourth Amendment’s warrant requirement.¹¹³ Yet, those arguments rejected in cases of health and safety inspections were later accepted in the case of officer protection and school discipline.

The Supreme Court subsequently upheld the authority of a school district to require suspicion-less drug tests for students participating in extracurricular programs. In both *Board of Education v. Earls*¹¹⁴ and *Vernonia School District 47J v. Acton*,¹¹⁵ the Supreme Court found that the interest of deterring drug use by students outweighed the intrusion of a urine-based drug test.¹¹⁶ Based on the rationale of *T.L.O.*, the Court evermore stressed the context of the search as dispositive of its constitutionality.¹¹⁷ The Supreme Court looked to other non-school special needs exceptions indicating that the doctrine had greater implications than the confines of *T.L.O.*¹¹⁸ The Court also signaled that the probable cause standard was applicable primarily to the narrow context of criminal law.¹¹⁹ Where an “administrative search” is prophylactic, the probable cause standard may be ill suited to determine the reasonableness of the search.¹²⁰

¹¹³ *Id.* at 531–32.

¹¹⁴ 536 U.S. 822 (2002).

¹¹⁵ 515 U.S. 646 (1995).

¹¹⁶ *Earls*, 536 U.S. at 838; *Acton*, 515 U.S. at 664–65.

¹¹⁷ In *Acton*, Justice Scalia noted:

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require “suiting up” before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. . . . By choosing to “go out for the team,” [students] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. . . . Somewhat like adults who choose to participate in a “closely regulated industry,” students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

515 U.S. at 657. Yet in *Earls*, the Supreme Court found that students participating in voluntary, non-athletic activities also subjected themselves to a lesser expectation of privacy. 536 U.S. at 831–32. *Cf. id.* at 845 (Ginsberg, J., dissenting) (stating that extracurricular activities are “part of the school’s educational program” and that “[p]articipation in such activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience”).

¹¹⁸ The Supreme Court in *Acton* cited four examples: *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding a policy of random drug testing of federal customs officers); *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding police checkpoints targeting drunk drivers); *United States v. Martinez-Fuerte*, 428 U.S. 543 (upholding checkpoints searching for illegal immigrants); *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (upholding random drug testing of railroad employees). 515 U.S. at 653–54.

¹¹⁹ *Earls*, 536 U.S. at 828.

¹²⁰ *Id.* The Court noted that “[i]n certain limited circumstances, the Government’s need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling

The Supreme Court further distinguished constitutional standards of drug testing policies designed to limit involvement and those designed purely to affect an arrest by law enforcement. In *Ferguson v. City of Charleston*,¹²¹ the Medical University of South Carolina (“MUSC”) had enacted a policy of testing pregnant patients for cocaine and then alerting police of positive tests.¹²² The policy—Policy M-7—provided that pregnant patients would be given a warrantless drug test without their consent if they met one or more of a set of criteria with regard to their pregnancy.¹²³ If the patient tested positive for cocaine before or after labor, police were notified, and the woman would be subject to prosecution for criminal offenses ranging from possession to child neglect.¹²⁴

It was not asserted that the nine factors under which a patient could be tested for cocaine gave rise to reasonable suspicion or probable cause.¹²⁵ The Supreme Court distinguished previous cases in which it upheld warrantless drug testing.¹²⁶ Inherent to a patient’s expectation of privacy in a hospital setting was that his or her diagnostic tests were private and not disclosed to third parties or law enforcement without consent.¹²⁷ More fundamental was the nature of the special need. Previous special needs exceptions were upheld when their “justification for the absence of a warrant or individualized suspicion was one divorced from the State’s general interest in law enforcement.”¹²⁸ The critical component of Policy M-7 was the “use of law enforcement to coerce the patients into substance abuse treatment.”¹²⁹ The operation of the policy was “ultimately indistinguishable from the general interest in crime control.”¹³⁰ As such, it ran afoul of the Fourth Amendment.

to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.” *Id.* at 829 (citing *Von Raab*, 489 U.S. at 668).

¹²¹ 532 U.S. 67 (2001).

¹²² *Id.* at 69–72.

¹²³ *Id.* at 71 n.4 (noting that under Policy M-7, pregnant women would be given a drug test if they had: “1) No prenatal care, 2) Late prenatal care after 24 weeks gestation, 3) Incomplete prenatal care, 4) Abruptio placentae, 5) Intrauterine fetal death, 6) Preterm labor ‘of no obvious cause’, 7) IUGR [intrauterine growth retardation] ‘of no obvious cause’, 8) Previously known drug or alcohol abuse, 9) Unexplained congenital anomalies”).

¹²⁴ *Id.* at 72–73.

¹²⁵ *Id.* at 76–77.

¹²⁶ *Id.* at 77–78.

¹²⁷ *Id.* at 78.

¹²⁸ *Id.* at 79, 80 n.17 (stating that the special needs exception “as used in *Skinner* and *Von Raab* . . . was used to describe a basis for a search apart from the regular needs of law enforcement”).

¹²⁹ *Id.* at 80.

¹³⁰ *Id.* at 81 (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)).

2. Prosecuting “Willful Blindness”

The development of willful blindness jurisprudence has made it easier to sustain criminal convictions, as illustrated by the case of Ellen Campbell. Ellen Campbell was a real estate agent in Mooresville, North Carolina.¹³¹ Over the course of a few weeks she had showed several upscale houses to Mark Lawing, a gaudy, soon-to-be-indicted drug trafficker posing as a businessman.¹³² Lawing eventually decided to purchase a home priced at \$182,500.¹³³ Unable to secure a loan in light of his criminal activities, Lawing paid \$60,000 in undisclosed cash, through Ms. Campbell, to the home seller in return for a lower selling price of an equivalent amount.¹³⁴ Ms. Campbell was convicted of, *inter alia*, money laundering and engaging in a transaction involving criminally derived property despite not having the explicit knowledge of Lawing’s criminal activities.¹³⁵

The Fourth Circuit Court of Appeals affirmed the conviction.¹³⁶ Although it acknowledged that the money laundering statute required actual subjective knowledge on the part of the defendant,¹³⁷ the appeals court assessed whether Ms. Campbell was willfully blind to the nature of the transaction.¹³⁸ The physical appearance and conduct of Mr. Lawing was sufficient, according to the court, so that a “reasonable jury could have found that Campbell was willfully blind to the fact that Lawing was a drug dealer and the . . . property was intended, at least in part, to conceal the proceeds of Lawing’s drug selling operation.”¹³⁹

¹³¹ United States v. Campbell (*Campbell I*), 777 F. Supp. 1259, 1260–61 (W.D. N.C. 1991).

¹³² *Id.* at 1261. The trial court gave significant note to Mr. Lawing’s lifestyle, how he often arrived gold-clad in one of two Porsches, and on one occasion brought \$20,000 in cash to a home viewing to demonstrate he had the financial means to purchase an upscale lake home. *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 1260. The money laundering statute reads as follows:

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity . . . knowing that the transaction is designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity. . . .

18 U.S.C. § 1956(a)(1)(B)(i) (2006). *See also* 18 U.S.C. § 1957(a) (2006) (making it a crime to “knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property of a value greater than \$10,000”).

¹³⁶ United States v. Campbell (*Campbell II*), 977 F.2d 854, 855 (1992).

¹³⁷ *Id.* at 857.

¹³⁸ *Id.*

¹³⁹ *Id.* at 859.

The doctrine of willful blindness, or as it may be termed, “deliberate ignorance” or “conscious avoidance,” is not new. Willful blindness was incorporated into the first draft of the Model Penal Code and exists there still.¹⁴⁰ Different courts have articulated various rationales for the doctrine.¹⁴¹ Willful blindness requires juries to deduce the subjective knowledge of the defendant rather than weigh what a reasonable person under the defendant’s circumstances would do.¹⁴² The Supreme Court has held that “reasonable inferences from evidence of defendant’s conduct” can be drawn to “find the requisite knowledge on defendant’s part.”¹⁴³ Jurisdictions are varied on how loose or tight they are regarding what information the jury may use to infer guilt. Thus, prosecutions resting on a theory of willful blindness risk doctrinal overbreadth and an inconsistent application of justice. Moreover, prosecutions of conspiracy also risk forum shopping between various district and circuit courts based on the ease with which criminal evidence may be introduced.

Willful blindness prosecutions often permit an inconsistent introduction of evidence that may otherwise have been barred as extrinsic to the crime charged.¹⁴⁴ For instance in *United States v. Freeman*,¹⁴⁵ the Court of Appeals for the Fifth Circuit affirmed a conviction of, *inter alia*, twenty-two counts of money laundering and one count of conspiracy involving a Ponzi scheme.¹⁴⁶ The defendants comingled funds derived from selling \$17 million in bogus “private

¹⁴⁰ The relevant section of the Model Penal Code reads: “When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.” MODEL PENAL CODE § 2.02(7) (1981). See *United States v. Jewell*, 532 F.2d 697, 701 n.9 (9th Cir. 1976) (discussing MODEL PENAL CODE § 129-30 (Tentative Draft No. 4, 1955)). The Supreme Court has applied the language of Model Penal Code § 2.02(7) to various criminal statutes. See *Barnes v. United States*, 412 U.S. 837, 845 n.10 (1973); *Turner v. United States*, 396 U.S. 398, 416 n.29 (1970); *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969).

¹⁴¹ See, e.g., *United States v. Adeniji*, 31 F.3d 58, 62 (2d Cir. 1994) (“The rationale for the conscious avoidance doctrine is that ‘a defendant’s affirmative efforts to ‘see no evil’ and ‘hear no evil’ do not somehow magically invest him with the ability to ‘do no evil.’” (quoting *United States v. DiTommaso*, 817 F.2d 201, 218 n.26 (2d Cir. 1987)); *United States v. Ramsey*, 785 F.2d 184, 189 (7th Cir.1986) (stating that “actual knowledge and deliberate avoidance of knowledge are the same thing”); *Jewell*, 532 F.2d at 700 (opining that the “substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable”).

¹⁴² See *United States v. Khorozian*, 333 F.3d 498, 508 (3d Cir. 2003) (willful blindness instructions are proper when the defendant was “subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability”); *United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985) (holding that “the judge’s version of the ‘deliberate ignorance’ instruction must make clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability”).

¹⁴³ *Ratzlaf v. United States*, 510 U.S. 135, 149 n.19 (1994). See also *Spies v. United States*, 317 U.S. 492, 499–500 (1943).

¹⁴⁴ See FED. R. EVID. 403(a)–(b), 404(a)–(b).

¹⁴⁵ 434 F.3d 369 (5th Cir. 2005).

¹⁴⁶ *Id.* at 372–73, 382.

placement secured trading programs” and “insulin contracts” investments.¹⁴⁷ On appeal, the defendants argued that the trial court erred in introducing testimony regarding the “insulin contracts” Ponzi as it was not intrinsic to the charged offenses contained in the indictment.¹⁴⁸ The Fifth Circuit rejected the contention that the evidence of the second Ponzi scheme was inadmissible as extrinsic.¹⁴⁹ The court noted that even though the evidence introduced was of acts other than those related to the offense, it was intrinsic “when the evidence of the other act and the evidence of the crime charged are ‘inextricably intertwined’ or both acts are part of a ‘single criminal episode’ or the other acts were ‘necessary preliminaries’ to the crime charged.”¹⁵⁰

The court also upheld the willful blindness jury instruction because a “proper factual basis” for the jury instruction was established at trial.¹⁵¹ Such a proper factual basis exists if the “record supports inferences that ‘(1) the defendant was subjectively aware of a high probability of the existence of illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct.’”¹⁵² Indeed, the court noted that the “wealth of evidence” presented at trial supported an inference that the defendant subjectively knew that he was involved in illicit activity.¹⁵³ It did not matter that the prosecution proceeded on a theory of actual knowledge over the course of the trial.¹⁵⁴ The Fifth Circuit noted that “deliberate indifference instruction is not inconsistent with evidence of actual knowledge.”¹⁵⁵

Other courts of appeal have varied as to when a deliberate indifference jury instruction is appropriate. The Second Circuit permits a “conscious avoidance” jury instruction if (1) “the defendant asserts the lack of some specific aspect of knowledge required for conviction,” and (2) “the evidence is such that a rational juror may reach [the] conclusion beyond a reasonable doubt . . . that [the defendant] was aware of a high probability [of the fact in dispute] and consciously avoided confirming that fact.”¹⁵⁶ The Eighth Circuit, by contrast, permits such a jury instruction where the defendant “asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance.”¹⁵⁷ Simi-

¹⁴⁷ *Id.* at 373–74.

¹⁴⁸ *Id.* at 374.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (quoting *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990) (internal citations omitted)).

¹⁵¹ *Id.* at 378.

¹⁵² *Id.* (quoting *United States v. Scott*, 159 F.3d 916, 922 (5th Cir. 1998)).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 379.

¹⁵⁶ *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000) (quoting *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993)).

¹⁵⁷ *United States v. Sdoulam*, 398 F.3d 981, 993 (8th Cir. 2005) (quoting *United States v. Hildebrand*, 152 F.3d 756, 764 (8th Cir. 1998)).

larly, the Tenth Circuit permits a willful blindness jury instruction “when the prosecution presents evidence that the defendant purposely contrived to avoid learning all the facts in order to have a defense in the event of a subsequent prosecution.”¹⁵⁸ A panel of the Ninth Circuit articulated a relatively high standard permitting a jury instruction only when “specific evidence” is presented that the defendant “(1) actually suspected that he or she might be involved in criminal activity, (2) deliberately avoided taking steps to confirm or deny those suspicions, and (3) did so in order to provide himself or herself with a defense in the event of prosecution.”¹⁵⁹

Perhaps the root of the inconsistency is that federal courts have articulated varying conceptualizations of what constitutes willful blindness. Some courts have seen willful blindness as a function of probability. A willful blindness instruction is appropriate “where the defendant ‘suspects a fact, realizes its probability, but refrains from obtaining final confirmation in order to be able to deny knowledge if apprehended.’”¹⁶⁰ Other courts have viewed willful blindness as an actual theory of knowledge that satisfies the scienter requirement of a criminal offense.¹⁶¹ What is certain, however, is that the development and proliferation of willful blindness prosecutions has made it easier to sustain criminal convictions where the circumstances surrounding the alleged conduct give rise to an increased suspicion of guilt where the underlying conduct does not support a conviction based on the *mens rea* requirement of the offense.

¹⁵⁸ United States v. Espinoza, 244 F.3d 1234, 1242 (10th Cir. 2001); United States v. Hanzlicek, 187 F.3d 1228, 1233 (10th Cir. 1999).

¹⁵⁹ United States v. Heredia, 429 F.3d 820, 824–25 (9th Cir. 2005) (quoting United States v. Baron, 94 F.3d 1312, 1318 n.3 (9th Cir. 1996)), *overruled by* United States v. Heredia, 483 F.3d 913, 920 (9th Cir. 2007) (en banc) (holding that the “deliberately avoided” element of the two-pronged jury instruction is sufficient that the *Baron* three-pronged jury instruction that included motive is discarded).

¹⁶⁰ See *Heredia*, 429 F.3d at 824 (quoting United States v. Mapelli, 971 F.2d 284, 286 (9th Cir. 1992)). See also United States v. Barnhart, 979 F.2d 647, 651–52 (8th Cir. 1992) (stating that a jury instruction “should not be given unless there is evidence to ‘support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution’”) (quoting United States v. Alvarado, 838 F.2d 311, 314 (9th Cir. 1987)); United States v. Ramsey, 785 F.2d 184, 190 (7th Cir. 1986) (holding that the trial court properly instructed the jury that actual knowledge and deliberate avoidance of knowledge are the same).

¹⁶¹ See United States v. Brodie, 403 F.3d 123, 148 (3d Cir. 2005) (applying the “willful blindness theory of knowledge”); United States v. Wert-Ruiz, 228 F.3d 250, 255 (3d Cir. 2000) (holding willful blindness to be a “subjective state of mind that is deemed to satisfy the scienter requirement of knowledge”) (quoting United States v. One 1973 Rolls Royce, 43 F.3d 794, 808 (3d Cir. 1994)).

3. Pre-September 11 Statutory Responses

Times of war or national crisis precipitate the need—or the perception of need—for more stringent law enforcement measures.¹⁶² Political pressure makes elected officials eager to demonstrate their commitment and competency in handling or responding to a threat. As was the case with their British counterparts with the 1974 Prevention of Terrorism Act and its progeny, the American Congress has not hesitated to legislate stricter law enforcement measures in response to a terrorist incident. One example is the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).¹⁶³

In 1994, Representative Don Edwards successfully added a small provision to the Violent Crime Control and Law Enforcement Act of 1994.¹⁶⁴ The rider required that “investigation[s] may not be initiated or continued . . . based on activities protected by the First Amendment of the Constitution, including expressions of support or provision of financial support for the nonviolent political, religious, philosophical or ideological goals or beliefs of any person or group.”¹⁶⁵ The prohibition, however, was to have a short life. In April 1995, a large truck bomb detonated outside the Murrah Federal Building in Oklahoma City, killing 168 people. As a result of that incident and the impending Presidential election cycle, the AEDPA was signed into law by President Clinton.¹⁶⁶

The 1996 Act expressly revoked the Edwards Amendment and allowed “guilt by association” to re-enter the national security discourse of the United States.¹⁶⁷ Under the AEDPA, the Secretary of State could designate any group as terrorist¹⁶⁸ even though that group engaged in both lawful and unlawful activities.¹⁶⁹ Providing any “material support” to any organization designated as en-

¹⁶² See *supra* notes 1–6 and accompanying text.

¹⁶³ AEDPA of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

¹⁶⁴ Pub. L. No. 103-322, 108 Stat. 2022 (1994). For a background of the Act see DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 102–05 (The New Press 3d ed. 2006).

¹⁶⁵ Pub. L. No. 103-322, 108 Stat. 2022 (codified as amended at 18 U.S.C. § 2339A(c)(2) (2000), amended by AEPDA § 323).

¹⁶⁶ COLE & DEMPSEY, *supra* note 164, at 131–32.

¹⁶⁷ See AEDPA § 323 (amending 18 U.S.C. § 2339A (2006)); McCarran-Walter Act, Pub. L. 108-198, 66 Stat. 163 (1952) (adding Communism to the list of ideologies that could make an immigrant deportable and excludable). The McCarran-Walter Act was declared unconstitutional in 1989 by the District Court for the Central District of California. See *Am.-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1084 (C.D. Cal. 1989), *aff'd in part, rev'd in part sub nom.*, *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 940 F.2d 445 (9th Cir. 1991), *opinion amended and superseded on denial of reh'g*, 970 F.2d 501 (9th Cir. 1991) *aff'd in part, rev'd in part sub nom.* *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501 (9th Cir. 1991); see generally David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J. L. & RELIGION 267 (2001) (arguing that the use of secret procedures and guilt by association in immigration trials is unconstitutional and counterproductive).

¹⁶⁸ AEDPA § 302(a), 8 U.S.C. § 1189(a) (2000).

¹⁶⁹ COLE & DEMPSEY, *supra* note 164, at 139–42.

gaged in terrorist activities became a criminal offense.¹⁷⁰ Moreover, financial institutions possessing funds of a suspect organization are obligated to report their existence.¹⁷¹ The power of the Secretary of State pursuant to the AEDPA is functionally equivalent to the proscription provisions in the original 1974 Prevention of Terrorism Act and its progeny. Groups are targeted because of their ideological orientation and the geopolitical disposition of their respective governments.

Thirty organizations were originally designated by the Secretary of State as terrorist. Two of the organizations were the Kurdistan Workers' Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). Two American citizens, one an administrative law judge, formed the Humanitarian Law Project ("HLP"), a non-profit organization "dedicated to furthering international compliance with humanitarian law and human rights law and the peaceful resolution of armed conflicts."¹⁷² HLP was given consultative status with the United Nations and sought to assist the PKK in revealing humanitarian abuses on the Kurdish people in Eastern Turkey.¹⁷³

The AEDPA effectively precluded the HLP from supporting the PKK, which led to a constitutional challenge of the legislation. In *Humanitarian Law Project v. Reno (HLP II)*,¹⁷⁴ the Court of Appeals for the Ninth Circuit held that the AEDPA did not violate the First Amendment protection of freedom of association.¹⁷⁵ The court stated that the AEDPA did not curtail the expressive conduct of those who affiliated with the HLP, but rather was aimed at preventing terrorism.¹⁷⁶ Consequently, the Ninth Circuit held that strict scrutiny was inappropriate.¹⁷⁷ Moreover, the circuit court held that the AEDPA did not grant the Secretary of State "unfettered discretion" to limit the association with certain organizations.¹⁷⁸ The plaintiffs in the case argued that the Secretary of State's

¹⁷⁰ 18 U.S.C. § 2339B(a)(1) (2006). This section provides "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both . . ." *Id.* (emphasis added). "Material support" is broadly defined as "currency . . . or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . , transportation, . . . except medicine or religious materials." § 2339A(b).

¹⁷¹ § 2339B(a)(2)(A)–(B), (b). The civil penalty for non-compliance is the greater of \$50,000 or twice the value of the amount the financial institution was required to report. § 2339B(b)(A)–(B).

¹⁷² *Humanitarian Law Project v. Reno (HLP I)*, 9 F. Supp. 2d 1176, 1181 (C.D. Cal. 1998).

¹⁷³ HLP sought to do this by (1) soliciting funds, (2) advocating on behalf of the PKK in the US Congress, (3) training PKK members how to seek redress for violations of humanitarian law, (4) advocating on behalf of political prisoners, (5) holding press conferences, and (6) providing lodging for PKK visitors. *Id.* at 1182.

¹⁷⁴ 205 F.3d 1130 (9th Cir. 2000).

¹⁷⁵ *Id.* at 1138.

¹⁷⁶ *Id.* at 1135.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1137.

decision was effectively unreviewable.¹⁷⁹ The court held that there was, at least formally, review of the decision in the Court of Appeals for the District of Columbia.¹⁸⁰ The likelihood of success was not a great concern for the court because deference to the executive branch is “a necessary concomitant of the foreign affairs power.”¹⁸¹

What is perhaps most significant, however, is that the AEDPA greatly restricted habeas corpus claims. Called “the most celebrated writ in English law,”¹⁸² habeas corpus predates the Constitution as a component of colonial law. Habeas corpus was prominently featured in the discussions of the delegates at the Constitutional Convention.¹⁸³ Ultimately, the writ would be codified in Article I of the Constitution¹⁸⁴ and section 14 of the Judiciary Act of 1789.¹⁸⁵

The procedural requirements of habeas corpus review were significantly increased by the AEDPA. Existing constitutional jurisprudence was modified by the Act; the deference usually afforded to state court application of facts was dramatically increased via statute. In *Brown v. Allen*,¹⁸⁶ the Supreme Court considered the effect of a denial of certiorari to review a state supreme court decision upholding a criminal conviction on a habeas corpus petition to a federal district court.¹⁸⁷ The Court turned to the status of the facts as determined by a state court in a subsequent habeas petition after affirming that a denial of certi-

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*; see 8 U.S.C. § 1189(c).

¹⁸¹ *HLP II*, 205 F.3d at 1137.

¹⁸² 3 WILLIAM BLACKSTONE, COMMENTARIES 129 (1791).

¹⁸³ Max Rosenn, *The Great Writ—A Reflection of Social Change*, 44 OHIO ST. L.J. 337, 339 (1983).

¹⁸⁴ U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

¹⁸⁵ Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81. Section 14 also provided that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Id. at 82 (emphasis in original).

¹⁸⁶ 344 U.S. 443 (1953), *abrogated by* *Townsend v. Sain*, 372 U.S. 293, 312–13 (1963), *overruled by* *Keeney v. Tamayo-Res*, 504 U.S. 1, 4 (1992), *superseded by statute* 28 U.S.C. § 2254(e)(2) as amended by the AEDPA, *as recognized in* *Williams v. Taylor*, 529 U.S. 420, 434 (2000) (“the opening clause of § 2254(e)(2) codifies *Keeney*’s threshold standard of diligence, so that prisoners who would have had to satisfy *Keeney*’s test for excusing the deficiency in the state-court record prior to the AEDPA are now controlled by § 2254(e)(2)”).

¹⁸⁷ *Id.* at 446–47.

orari “imports no expression of opinion upon the merits of a case.”¹⁸⁸ Justice Reed’s opinion stated that “[w]here the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of trial is not required.”¹⁸⁹ Thus, if no “vital flaw [is] found in the process of ascertaining such facts in the State court,” a district court may accept them in a subsequent habeas petition.¹⁹⁰

Yet the AEDPA added a requirement that state court factual determinations “shall be presumed to be correct.”¹⁹¹ The habeas petitioner “shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.”¹⁹² Federal courts can only hold an evidentiary hearing if two criteria are satisfied.¹⁹³ First, the petitioner must demonstrate “that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or . . . a factual predicate that could not have been previously discovered through the exercise of due diligence.”¹⁹⁴ The petitioner must then prove that “the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.”¹⁹⁵

The AEDPA also significantly curtails the ability of petitioners to bring multiple habeas claims. Prior to 1996, it was significantly easier for criminal defendants to file subsequent habeas claims. The Warren Court held that a subsequent habeas petition could only be denied under three conditions. First, “the same ground presented in the subsequent application was determined adversely to the applicant on the prior application.”¹⁹⁶ Second, the previous denial of ha-

¹⁸⁸ *Id.* at 456 (quoting *House v. Mayo*, 324 U.S. 42, 48 (1945)); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (stating that “this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.”).

¹⁸⁹ *Id.* at 463.

¹⁹⁰ *Daniels v. Allen*, 344 U.S. 443, 506 (1953) *abrogated by* *Townsend v. Sain*, 372 U.S. 293, 312–13 (1963), *overruled by* *Keeney v. Tamayo-Res*, 504 U.S. 1, 4 (1992), *superseded by statute* 28 U.S.C. § 2254(e)(2) as amended by the AEDPA, *as recognized in* *Williams v. Taylor*, 529 U.S. 420, 434 (2000) (“the opening clause of § 2254(e)(2) codifies *Keeney*’s threshold standard of diligence, so that prisoners who would have had to satisfy *Keeney*’s test for excusing the deficiency in the state-court record prior to the AEDPA are now controlled by § 2254(e)(2)”). The Supreme Court noted that a state court’s factual determinations “may have been made after hearing witnesses perhaps no longer available or whose recollection later may have been affected by the passage of time or by the fact that one judicial determination has already been made.” *Id.*

¹⁹¹ AEDPA § 104(4), 28 U.S.C. § 2254(e)(1) (2006).

¹⁹² *Id.*

¹⁹³ 28 U.S.C. § 2244(b)(2)(A) (2006).

¹⁹⁴ § 2244(b)(2)(A)–(B)(i).

¹⁹⁵ § 2244(b)(2)(B)(ii).

¹⁹⁶ *Sanders v. United States*, 373 U.S. 1, 15 (1963).

beas relief “must have rested on an adjudication of the merits of the ground presented in the subsequent application.”¹⁹⁷ Third, “the ends of justice would not be served by reaching the merits of the subsequent application.”¹⁹⁸

The Supreme Court increased the standard by which a successive habeas claim would be permitted. The Supreme Court considered the applicability and standard of the abuse of the writ doctrine—the circumstances under which an issue is raised for the first time in a second petition—to habeas claims in *McCleskey v. Zant*.¹⁹⁹ The Supreme Court held that for a criminal defendant to assert a subsequent claim, he or she must first show cause, that is ““some objective factor external to the defense impeded counsel's efforts to raise the claim in state court.””²⁰⁰ Second, the petitioner must demonstrate that ““actual prejudice”” resulted from the errors raised in the habeas petition.²⁰¹

Yet the AEDPA increased the requirements that a petitioner must meet prior to having a federal court hear a subsequent habeas claim. First, a petitioner has only one year to file for habeas relief from a state court judgment.²⁰² This limitation is further reduced in capital cases where a defendant is deemed to have been provided adequate representation in collateral proceedings.²⁰³ The Act also provided that “[b]efore a second or successive application . . . is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”²⁰⁴ The petitioner must make a prima facie case that his or her case comports with the increased standards of habeas review.²⁰⁵ In addition to the presumption of factual validity, relief is available only when a state court judgment is “contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States.”²⁰⁶ Relief is unavailable on

¹⁹⁷ *Id.* at 16.

¹⁹⁸ *Id.* at 15.

¹⁹⁹ 499 U.S. 467, 470 (1991).

²⁰⁰ *Id.* at 493 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). The Supreme Court elaborated that “objective factors” that meet the threshold of cause include “‘interference by officials’ that makes compliance with the state’s procedural rule impracticable, and ‘a showing that the factual or legal basis for a claim was not reasonably available to counsel.’ . . . In addition, constitutionally ‘ineffective assistance of counsel . . . is cause.’” *Id.* at 493–94 (quoting *Murray*, 477 U.S. at 486–88 (internal citations omitted)).

²⁰¹ *Id.* at 494 (quoting *United States v. Frady*, 456 U.S. 152, 168 (1982)).

²⁰² AEDPA § 101, 28 U.S.C. § 2244(d)(1) (2006).

²⁰³ AEDPA § 107(a), 28 U.S.C. §§ 2261–2263 (2006). Such applicant has 180 days to file a petition. *Id.*

²⁰⁴ AEDPA § 106(b), 28 U.S.C. § 2244(b)(3)(A) (2006). *See also* *Felker v. Turpin* 518 U.S. 651, 664 (1996) (upholding the requirement that a habeas petitioner obtain leave from a circuit court of appeals prior to filing a second habeas petition).

²⁰⁵ AEDPA § 106(b), 28 U.S.C. § 2244(b)(3)(C) (2006).

²⁰⁶ AEDPA § 104(3), 28 U.S.C. § 2254(d)(1) (2006). *See also* *Horn v. Banks*, 536 U.S. 266, 273 (2002) (per curiam) (holding that *Teague* determination, assessing the retroactivity of a new constitutional principle asserted in a habeas petition, is required under AEDPA); *Teague v. Lane*,

the ground that a state court misapplied constitutional principles to the specific facts of a case.²⁰⁷

III. LAW, FINANCIAL CRIMES, AND THE “WAR ON TERROR”

Both the AEDPA and the criminalization policy in Northern Ireland highlight the unique ability of emergency legislation to seep into and alter ordinary law, be it civil or criminal. On September 11, 2001, approximately 3,000 individuals died as a result of the worst terrorist attack on American soil. Inquiries into the causes, nature, and future prevention of terrorism focused, in large part, on the financing of terrorist operations. It was estimated that the September 11 attacks were financed by between \$400,000 and \$500,000.²⁰⁸ This relatively small amount of funding required to produce a massively devastating attack became a chief concern of foreign, domestic, and international policymakers.

On September 28, 2001, the United Nations Security Council adopted Resolution 1373.²⁰⁹ The chief operational goal of Resolution 1373 was to “[p]revent and suppress the financing of terrorist acts.”²¹⁰ The resolution di-

489 U.S. 288, 310–13 (1989) (requiring that a new principle of constitutional law, which petitioner asserts, be applicable retroactively), *superseded by statute*, AEDPA of 1996, Pub. L. No. 104-132, 110 Stat. 1214, *as recognized in* *Morris v. Reynolds*, 264 F.3d 38, 46 n.7 (2d Cir. 2001) (noting that “[p]rior to the passage of the AEDPA . . . *Teague* and its subsequent decisions dictated that when a prisoner sought federal habeas corpus relief based upon a principle announced after a final judgment, federal courts were required to look at whether the state court’s decision relied on an ‘old rule’ . . . or whether it imposed a ‘new rule.’”).

²⁰⁷ AEDPA § 104(3), codified at 28 U.S.C. § 2254(d) (2006). Section 2254(d) provides

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§ 2254(d)(1)–(2).

²⁰⁸ NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, COMPLETE 9/11 COMMISSION REPORT 172 (2004). Similarly, relatively small amounts of funding were required to support terrorist operations in Northern Ireland. The yearly operating budgets for the IRA and Ulster Volunteer Force were £1.5 million and £1-2 million respectively. SELECT COMMITTEE ON NORTHERN IRELAND AFFAIRS, THE FINANCING OF TERRORISM IN NORTHERN IRELAND, FOURTH REPORT OF SESSION (H.C. 978-I, 2002) tbl. 1 at 18, *available at* <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmniaf/978/978.pdf>. Smaller paramilitary group such as the Ulster Freedom Fighters and Ulster Defense Association had annual operating costs of £250,000 and £500,000 respectively. *Id.*

²⁰⁹ S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

²¹⁰ *Id.* at art. 1(a).

rected states to “[c]riminalize the wilful [*sic*] provision or collection . . . of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.”²¹¹ States were also to freeze funds used for acts of terrorism and to prevent funds from being made available to individuals involved in terrorism.²¹² The British response to Resolution 1373 was the Anti-Terrorism, Crime and Security Act of 2001;²¹³ the United States responded with the USA PATRIOT Act.²¹⁴

A. *Traditional Notions of Bank Secrecy*

The American legislative experience regarding bank secrecy and financial privacy has been the quest to balance the needs of customer confidentiality with crime prevention.²¹⁵ Bank customers have traditionally been afforded an implicit common law right to financial privacy.²¹⁶ The federal judiciary has not, however, recognized a legitimate expectation of privacy with regard to financial statements.²¹⁷

American notions of financial privacy are markedly different from those of Europe. The roots of European bank secrecy grew out of a much stronger notion of necessity.²¹⁸ Post-WWI hyperinflation and political instability led individuals to hold assets in stable banking systems and financial markets outside of their home countries.²¹⁹ Germany promulgated a 1933 law which stated that, under a penalty of death, individuals were required to report all assets held outside their jurisdiction of residence.²²⁰ As a result, Switzerland enacted the first modern codified bank secrecy legislation. The aftermath of WWII—economic

²¹¹ *Id.* at art. 1(b).

²¹² *Id.* at arts. 1(c)–(d).

²¹³ Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.).

²¹⁴ PATRIOT Act, Pub. L. No. 107-56, § 313, 115 Stat. 272 (2001).

²¹⁵ Eric J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 TEMP. POL. & CIV. RTS. L. REV. 517, 519 (2005).

²¹⁶ *Id.*

²¹⁷ *United States v. Miller*, 425 U.S. 435, 440–41 (1976) (stating that there is no Fourth Amendment protection of subpoenaed bank records), *superseded by statute*, Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401–21, *as recognized in* *Hancock v. Marshall*, 86 F.R.D. 209, 210 (D.D.C. 1980) (noting that the Act “permits individuals to contest Government access to certain records held by banks and other financial institutions . . . by requiring the Government to notify the bank customer of the subpoena or summons [T]he customer may file a motion to quash in district court.”) (internal citations omitted).

²¹⁸ *See* C. Todd Jones, *Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy*, 12 NW. J. INT'L L. & BUS. 454, 455 (1992).

²¹⁹ *Id.*

²²⁰ *Id.*

devastation, social uncertainty, and high tax rates—obliged individuals again to seek foreign deposit locations.²²¹

These events in large part led Europe to develop broad-based privacy protections. Transnational privacy protection initiatives began in 1981 with the Council of Europe.²²² With the purpose of “secur[ing] in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy,”²²³ the Convention was applicable to data in “automated personal data files and automatic processing of personal data in the public and private sectors.”²²⁴ The Convention measured by which member states protect data contained in automated files. As the Convention was not self-executing, each European member state was to enact implementing legislation to effect its provisions.

The Convention was followed by the European Union’s Data Privacy Directive.²²⁵ Like the Convention, the Data Privacy Directive is applicable to member government only after national implementing legislation is enacted. Unlike its predecessor, the E.U. Directive has two objectives: (1) to protect individuals’ fundamental rights of privacy, and (2) to “neither restrict nor prohibit the free flow of personal data between Member States.”²²⁶ The Data Privacy Directive outlined broad criteria for processing data,²²⁷ disclosing information to the “data subject,”²²⁸ ensuring confidentiality of data,²²⁹ and transferring data to third countries.²³⁰

The United Kingdom enacted the Data Protection Act in 1998 to give effect to the provision of the Data Privacy Directive.²³¹ The Act provides for an individual’s right to access personal data as well as criteria on the disclosure of personal information.²³² Yet as was authorized by the Data Privacy Directive²³³

²²¹ *Id.* at 456.

²²² Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Council of Europe, Jan. 28, 1981, C.E.T.S. No. 108, *available at* <http://conventions.coe.int/Treaty/EN/treaties/html/108.htm>.

²²³ *Id.* at ch. 1, art 1.

²²⁴ *Id.* at ch. 1, art. 3(1).

²²⁵ Council Directive, 95/46, Data Privacy Directive, 1995 O.J. (L 281) [hereinafter Data Privacy Directive].

²²⁶ *Id.* at ch. 1, art. 1(1)–(2).

²²⁷ *Id.* at ch. 2, art. 7.

²²⁸ *Id.* at ch. 2, arts. 10–11.

²²⁹ *Id.* at ch. 2, arts. 16–17.

²³⁰ *Id.* at ch. 4, arts. 25–26.

²³¹ Data Protection Act, 1998, c. 29 (Eng.).

²³² *Id.* § 7. *See also id.* § 10 (governing the disclosure of information “likely to cause damage or distress”); *id.* art. 13 (outlining compensation to unauthorized disclosure of data).

²³³ Data Privacy Directive, *supra* note 225, ch. 2, art. 13(1)(a) (providing that “Member States may adopt legislative measures to restrict the scope of the obligations and rights . . . when such a restriction constitutes a necessary measures to safeguard . . . national security”).

an exception was made for the disclosure of information in the name of national security.²³⁴ The exemption requires that a certificate certify that the purpose of a disclosure of information identified by a “general description,” was made for national security purposes.²³⁵ An individual “directly affected” by the disclosure of personal information may file an appeal to quash the certificate upon a finding that the “Minister did not have reasonable grounds for issuing the certificate.”²³⁶

In contrast to the European Union, and by extension the United Kingdom, the United States has predominantly taken a sectoral approach to privacy, providing differentiated levels of protection to various areas of substantive law.²³⁷ The first modern American financial privacy legislation was the Bank Secrecy Act.²³⁸ Passed in 1970, the Bank Secrecy Act required financial institutions to keep records of their clients’ financial activities. Specifically, financial institutions were required to report every transaction in excess of \$10,000.²³⁹ Furthermore, the Bank Secrecy Act required insured depository institutions to establish internal compliance and monitoring procedures, designate an institutional compliance officer, and provide training for employees.²⁴⁰ The rationale was that “such records and reports are of a high degree of usefulness in criminal, tax, and other regulatory investigations.”²⁴¹

²³⁴ Data Protection Act, § 28(1).

²³⁵ *Id.* § 28(2)–(3).

²³⁶ *Id.* § 28(4)–(5).

²³⁷ *See, e.g.*, Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936; Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394; Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503, 102 Stat. 2507 (amended 1989, 1990); Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195; Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848; Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780; Family Education and Privacy Rights Act of 1974, Pub. L. No. 93-568, 88 Stat. 1855.

²³⁸ Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified as 12 U.S.C. §§ 1829(b), 1951–1959 (2003); 31 U.S.C. §§ 5311–5322 (2003)).

²³⁹ *See* 31 C.F.R. § 1010.311 (2011) (outlining the regulations promulgated by the Treasury Department under the Bank Secrecy Act). The Bank Secrecy Act first introduced the requirement of filing “Currency Transactions Reports” (“CTRs”). This practice was later augmented by the Annunzio-Wylie Anti-Money Laundering Act which required banks and other financial institutions to file “Suspicious Activities Report” (“SAR”). Annunzio-Wylie Anti-Money Laundering Act, 102 Pub. L. No. 550, 106 Stat. 4044 (1992) (codified in various sections of 12, 18, 31 and 42 U.S.C.). Financial institutions were required to report “any suspicious transaction relevant to a possible violation of law or regulation.” 31 U.S.C. § 5318(g)(1) (2006).

²⁴⁰ 31 U.S.C. § 5318(h)(1)(A)–(C) (2006); 12 C.F.R. § 21.21(c) (2003) (describing compliance procedures for national banks pursuant to the Bank Secrecy Act).

²⁴¹ 12 U.S.C. § 1829b(a)(1)(A) (2006). Congress also stated that “microfilm or other reproductions and other records made by insured depository institutions of checks, as well as records kept by such institutions, of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in [criminal proceedings].” § 1829b(a)(1)(B).

Following a backlash to the intrusion into common law financial privacy of deposit holders,²⁴² Congress enacted the Right to Financial Privacy Act.²⁴³ The Right to Financial Privacy Act prohibited the disclosure of an account-holder's records without consent.²⁴⁴ Law enforcement and investigative authorities could, however, obtain records without consent pursuant to search warrants, administrative and judicial subpoenas, or mere written requests.²⁴⁵ Customers were usually entitled to notice that records were the subject of a law enforcement investigation with the caveat being that such notice could be delayed by court order.²⁴⁶

Somewhat counter-intuitively, the Bank Secrecy Act and the Right to Financial Privacy Act did not statutorily define the crime of "money laundering." Money laundering only became a criminal offense under the Money Laundering Control Act of 1986.²⁴⁷ The Act made it a crime to knowingly transfer²⁴⁸ or conduct a financial transaction with the proceeds of an unlawful activity with the intent to continue the unlawful activity,²⁴⁹ evade taxation,²⁵⁰ conceal the nature of the proceeds,²⁵¹ or avoid a reporting requirement.²⁵² Interestingly, the Money Laundering Control Act of 1986 also criminalized money spending. To knowingly engage "in a monetary transaction in criminally derived property of a

²⁴² See, e.g., *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 290 (1961) (holding a duty of confidentiality found in the law of agency); *Grainy Dev. Corp. v. Taksen*, 400 N.Y.S.2d 717, 720 (Ct. App. 1978) (stating that there is a duty on the part of a bank not to disclose information regarding the customer's depository account), *aff'd*, 411 N.Y.S.2d 756 (1978); *Tournier v. National Provincial and Union Bank of England*, [1924] 1 Eng. Rep. 461 (K.B.) (finding a duty of confidentiality based on the law of contract).

²⁴³ Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697 (1978) (codified at 12 U.S.C. §§ 3401-3422(1982)).

²⁴⁴ 12 U.S.C. § 3402(1) (2006).

²⁴⁵ §§ 3402(2)-(5). Written requests are governed by 12 U.S.C. § 3408, which provides that they are appropriate when (1) no subpoena "reasonably appears to be available," (2) the request is authorized by agency regulations, and (3) "there is reason to believe that the records sought are relevant to a legitimate law enforcement." §§ 3408(1)-(3).

²⁴⁶ § 3409. The records sought must be in furtherance of a "legitimate law enforcement inquiry." § 3409(a)(2). Additionally there must be reason to believe that notice would (1) endanger personal safety, (2) result in flight from prosecution, (3) result in evidence destruction or tampering, (4) cause the intimidation of potential witnesses, or (5) jeopardize the investigation or delay an official proceeding. § 3409(a)(2)(A)-(E).

²⁴⁷ Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18. For an overview of the Money Laundering Control Act see generally Charles Thelen Plombeck, *Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT'L L. 69 (1988).

²⁴⁸ 18 U.S.C. § 1956(a)(3) (2006).

²⁴⁹ § 1956(a)(1)(A)(i).

²⁵⁰ § 1956(a)(1)(A)(ii).

²⁵¹ § 1956(a)(1)(B)(i).

²⁵² § 1956(a)(1)(B)(ii).

value greater than \$10,000”²⁵³ was punishable by up to ten years incarceration.²⁵⁴ Yet since the 1978 Right to Financial Privacy Act, the right to financial privacy has been substantially altered.

B. Britain and Terrorist Financing

Current efforts to deprive terrorist organizations from obtaining financial resources had their roots, like other anti-terrorism provisions, with the Prevention of Terrorism Acts. As was the case with incursions into the criminal law, civil forfeiture and asset freezing gradually expanded in complexity and scope. The legal framework used by British authorities to starve the IRA of resources was expanded and applied to current efforts to combat Al-Qaeda financing as presented below.

1. Defunding the IRA

British efforts to stop terrorist financing developed in conjunction with the efforts to criminalize the actions of the IRA in Northern Ireland. The original 1973 Emergency Provisions Act authorized the seizure of property that is suspected of having been or currently being used to commit a terrorist offense.²⁵⁵ Upon conviction of membership in a proscribed organization, the Act permitted forfeiture of “any money or other property which at the time of the offense he had in his possession or under his control for the use or benefit of the proscribed organization.”²⁵⁶ These provisions were carried directly into the Prevention of Terrorism (Temporary Provisions) Act 1974.²⁵⁷ Solicitation of financial support for a proscribed organization was also incorporated into the list of criminal offenses relating to membership in a terrorist organization.²⁵⁸

By 1989, the list of statutory offenses related to terrorist financing had greatly expanded. The Prevention of Terrorism (Temporary Provisions) Act, enacted in 1989, both broadened the scope of previous crimes relating to terrorist financing and added additional related offenses. In addition to solicitation of money for the commission of a terrorist offense, it was deemed a crime to have “enter[ed] into or [be] otherwise concerned in an arrangement whereby money

²⁵³ 18 U.S.C. § 1957(a) (1986). The Money Laundering Control Act defines “monetary transaction” as “the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument.” § 1957(f)(1). It is to be noted that the Money Laundering Prosecution Improvements Act of 1988, Pub. L. No. 100-690, 102 Stat. 4354 (1988), further amended the Bank Secrecy Act by increasing the scope of the definition of what constitutes a “financial institution.” 18 U.S.C. § 5326(3)(b) (2006).

²⁵⁴ § 1957(b)(1).

²⁵⁵ Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 11(3) (Eng.).

²⁵⁶ § 19(2).

²⁵⁷ Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56, § 1(7) (Eng.).

²⁵⁸ § 1(1)(b).

or other property is or is to be made available to another person” or the benefit of such an organisation.”²⁵⁹ The *mens rea* requirement was, moreover, reduced. Where the 1974 Act required that a person “knowingly” provide financial support to a terrorist organization, the 1989 Act required a lesser showing that the individual have a “reasonable cause to suspect” the finances be used in the commission of, or in connection with a terrorist offense or organization.²⁶⁰ The 1989 Act also made it a crime to assist in the retention of terrorist funds.²⁶¹ The Act provides that “[a] person is guilty of an offence if he enters into or is otherwise concerned in an arrangement whereby the retention or control by or on behalf of another person of terrorist funds is facilitated, whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise.”²⁶²

The seizure authority of police services was also expanded in the 1989 Act. In addition to the traditional requirements that the funds or property be under the possession or control of the suspected individual, only a requirement of having “reasonable cause to suspect” the funds would be directed toward a proscribed organization or toward the commission of a terrorism offense was sufficient to secure a conviction.²⁶³ Indeed, the reasonable suspicion standard is operationally equivalent to the willful blindness test found in American criminal jurisprudence. The 1989 Act also established a framework for “forfeiture orders,” court-ordered property seizures in connection with a crime relating to the financing of terrorism or a related offense.²⁶⁴ Two years later, crimes relating to

²⁵⁹ Prevention of Terrorism (Temporary Provisions) Act, 1989, c. 4, §§ 9(2)(b), 10(1)(c) (Eng.) (repealed).

²⁶⁰ §§ 9–10.

²⁶¹ § 11.

²⁶² § 11(1).

²⁶³ § 13(2)(b).

²⁶⁴ Prevention of Terrorism (Temporary Provisions) Act, 1989, at sch. 4. Schedule 4 authorizes a court to make an order:

- (a) requiring any money or other property to which the forfeiture order applies to be paid or handed over to the proper officer or to a constable designated for the purpose by the chief officer of police of a police force specified in the order;
- (b) directing any such property other than money or land to be sold or otherwise disposed of in such manner as the court may direct and the proceeds to be paid to the proper officer;
- (c) appointing a receiver to take possession, subject to such conditions and exceptions as may be specified by the court, of any such property which is land, to realise it in such manner as the court may direct and to pay the proceeds to the proper officer;
- (d) directing a specified part of any money, or of the proceeds of the sale, disposal or realisation of any property, to which the forfeiture order applies to be paid by the proper officer to or for a specified person falling within section 13(6) of this Act;

financing terrorism were deemed to be “Scheduled Offenses” and thereby coming under the jurisdiction of the juryless Diplock Courts.²⁶⁵ Additionally, the asset seizure process and criminal penalties were expounded upon.²⁶⁶

2. Implementing Resolution 1373

The British legislative response to the September 11 attacks did not begin anew, or in a vacuum, particularly relating to anti-terrorist financing measures. The initial British legislative response—the Anti-Terrorism, Crime and Security Act of 2001 (“ATCSA”)²⁶⁷—germinated directly from the Prevention of Terrorism and Emergency Provisions Acts designed to combat political violence in Northern Ireland. The ATCSA contained two primary tools relating to combating terrorist financing: civil *in rem* forfeiture and freezing orders.

The ATCSA authorizes the civil forfeiture of terrorist cash that is either “intended to be used for the purposes of terrorism,” is the property of a terrorist organization, or is obtained through the use of terrorism.²⁶⁸ A collateral criminal prosecution for a related terrorist offense is not a prerequisite to executing civil forfeiture of terrorist finances.²⁶⁹ The Commissioner of Customs and Excise may make an application of forfeiture in magistrate court.²⁷⁰ Financial assets may be initially detained for forty-eight hours upon a reasonable suspicion that the funds are related to terrorism.²⁷¹ A magistrate court may order the detention of such assets for not more than two years.²⁷²

Freezing orders, by contrast, are an extra-judicial means of disrupting terrorist finance networks.²⁷³ The British Treasury may issue a freezing order if

(e) making such other provision as appears to the court to be necessary for giving effect to the forfeiture order or to any order made by virtue of paragraph (a), (b), (c) or (d) above.

Sch. 4, § 1(1)(a)–(e).

²⁶⁵ See Northern Ireland (Emergency Provisions) Act, 1991, c. 24, sch. 1, § 20(b) (repealed). For a discussion of Diplock Courts, see *supra* Part II.A.3.

²⁶⁶ Northern Ireland (Emergency Provisions) Act, 1991, c. 24, at sch. 4.

²⁶⁷ Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.). Preceding the Anti-Terrorism, Crime and Security Act was the Terrorism (United Nations Measures) Order 2001, No. 3365 (Eng.). The United Nations Measures 2001 prohibited an individual from making funds available to those engaged in the commission or execution of terrorist-related offenses. *Id.* § 3. The Order also authorized the freezing of funds by the British Treasury. *Id.* § 4.

²⁶⁸ Anti-Terrorism, Crime and Security Act, 2001, § 1(1)(a)–(c).

²⁶⁹ § 1(2). It is to be noted that terrorist financing also falls under the purview of the Proceeds of Crime Act, 2002, c. 29 (Eng.).

²⁷⁰ Anti-Terrorism, Crime and Security Act, 2001, sch. 1, § 6(1)(a).

²⁷¹ Sch. 1, § 3(1).

²⁷² Sch. 1, § 3(2)(b).

²⁷³ “Freezing orders” are defined in the ATCSA as “an order which prohibits persons from making funds available to or for the benefit of a person or persons specified in the order.” Anti-Terrorism, Crime and Security Act, 2001, § 5(1).

it has a reasonable belief that an individual or organization is undertaking an action “to the detriment of the United Kingdom’s economy (or part of it)” or an action that constitutes a “threat to the life or property of one or more nationals of the United Kingdom.”²⁷⁴ Freezing orders must be submitted to Parliament, which has the power to extend the operational period of the freezing order beyond its original authorization.²⁷⁵

The ATCSA also contained several important provisions regarding the disclosure of financial information.²⁷⁶ A freezing order may require the disclosure of financial information to the Treasury if three criteria are met. First, the freezing order must contain a description of the person required to disclose the information.²⁷⁷ Second, the person required to make a disclosure “knows or suspects, or has grounds for knowing or suspecting” that the person identified in the freezing order is a person whose funds are not to be made available.²⁷⁸ The person whose information is being disclosed is or has been a customer of or has had “dealings” with the discloser since the freezing order came into effect.²⁷⁹ The third and last condition is that the information came into the possession of the discloser during the course of business.²⁸⁰ Because the disclosure is made by a private individual or entity, or may otherwise fall within its national security exception, it is unclear whether a certificate pursuant to the Data Protection Act, 1998 is required prior to the disclosure.

Resolution 1373 was given further effect by the Terrorism (United Nations Measures) Orders 2006 and 2009.²⁸¹ Both acts authorize the freezing of funds of “designated” individuals. An individual can be “designated” either by a decision of the European Council or by the Treasury.²⁸² Under the 2006 Order, the Treasury can “designate” a person if it has “reasonable grounds for suspecting” that the individual is attempting, facilitating, participating in, or has committed an act of terrorism.²⁸³ This again echoes of the willful blindness standard in American jurisprudence. Alternatively, the Treasury can “designate” an individual if it reasonably suspects that the person is “owned or controlled, directly

²⁷⁴ §§ 4(1), 4(2)(a)–(b).

²⁷⁵ § 10(2)(a)–(b).

²⁷⁶ §§ 17–20.

²⁷⁷ Sch. 3, § 6(2).

²⁷⁸ Sch. 3, § 6(3).

²⁷⁹ Sch. 3, § 6(3)(a)–(b).

²⁸⁰ Sch. 3, § 6(4).

²⁸¹ The Terrorism (United Nations Measures) Order, 2009, No. 1747 (Eng.); The Terrorism (United Nations Measures) Order, 2006, No. 2657 (Eng.).

²⁸² The Terrorism (United Nations Measures) Order, 2006, § 3(1); The Terrorism (United Nations Measures) Order, 2009, § 3(1). *See also* Council Decision 379, Implementing Article 2(3) of Regulation (EC) No. 2580/2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism and Repealing Decision 2005/930/EC, 2006 O.J. (L 144) (EC).

²⁸³ The Terrorism (United Nations Measures) Order, 2006, § 4(2)(a).

or indirectly, by a designated person” or acted on behalf of a “designated” person.²⁸⁴ The 2009 Terrorism (United Nations Measures) Order added two significant caveats. First, the seized funds must be deemed to be of “a significant financial benefit” for the designated individual.²⁸⁵ The 2009 Act also required that Treasury designations are “necessary for purposes connected with protecting members of the public from a risk of terrorism.”²⁸⁶

The Supreme Court of the United Kingdom, however, invalidated the designation provisions of the 2006 Act.²⁸⁷ Four British citizens residing in East London were informed that they were designated pursuant to article 4 of the Terrorism (United Nations Measures) Order of 2006, on the basis that an Al-Qaeda operative identified them as terrorist facilitators, none of whom had been charged with a terrorist-related offense.²⁸⁸ The Supreme Court held that the modifying language “reasonable grounds for suspecting” was *ultra vires* in light of the requirements that domestic implementation of a Security Council determination, not involving the use of military force, be *necessary* and *expedient*.²⁸⁹ The U.K. Supreme Court stated that the necessity and expedient requirements allow the United Kingdom to meet its United Nations obligations. Yet “[c]onferring an unlimited discretion on the executive as to how those resolutions, which it has a hand in making, are to be implemented seems to me to be wholly unacceptable. It conflicts with the basic rules that lie at the heart of our democracy.”²⁹⁰

²⁸⁴ § 4(2)(c)–(d).

²⁸⁵ The Terrorism (United Nations Measures) Order, 2009, §§ 12(4)(a), 13(3)(a), 14(4)(a).

²⁸⁶ § 4(1)(b).

²⁸⁷ Her Majesty’s Treasury v. Mohammed Jabar Ahmed, [2010] 2 UKSC (appeal taken from EWCA Civ 1187) (U.K.). The U.K. Supreme Court noted that although the legality of the 2009 Act was not an issue presented, “the arguments that have been directed to the 2006 Order (“the TO”) can be taken to apply to it [the 2009 Act] also.” *Id.* ¶ 28.

²⁸⁸ *Id.* ¶ 32.

²⁸⁹ *Id.* ¶¶ 58, 83. *See also* United Nations Act, 1946, c. 45 (Eng.). The relevant provision reads:

If, under article forty-one of the Charter of the United Nations signed at San Francisco on the twenty-sixth day of June, nineteen hundred and forty-five, (being the article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty’s Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him *necessary* or *expedient* for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order.

§ 1(1) (emphasis added).

²⁹⁰ Her Majesty’s Treasury v. Mohammed Jabar Ahmed, [2010] 2 UKSC (appeal taken from EWCA Civ 1187) (UK) ¶ 45.

C. *The PATRIOT Act*

The American response to Resolution 1373 was the PATRIOT Act. The PATRIOT Act is, to say the least, comprehensive legislation. It covers sixteen broad subjects in 161 sections.²⁹¹ Like the British legislative responses to terrorism, the PATRIOT Act was passed quickly and without substantial congressional debate or amendment.²⁹² On October 4, 2001, the PATRIOT Act was introduced in the Senate.²⁹³ Five days later, Senator Harry Reid “announced that the bill would be held at the desk rather than being referred to committee for” revision.²⁹⁴ Then-Majority Leader Tom Daschle subsequently asked for unanimous consent that the Senate take up the legislation in order to limit possible amendments.²⁹⁵ The three amendments offered by Senator Russell Feingold designed to curb some of the power of federal officials operating under the Act were all tabled,²⁹⁶ and the Senate voted 96-1 to adopt the PATRIOT Act on October 11, 2001.²⁹⁷

1. Title III: Terrorist Financing and Money Laundering

Title III of the PATRIOT Act applies to financial crimes including terrorist financing, organized crime proceeds, and money laundering. Title III is effectively a comprehensive amendment to the Bank Secrecy, Right to Financial Privacy, and Money Laundering Control Acts. Indeed, it boasts its own special designation as the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001.²⁹⁸

The definition of what constitutes a financial institution for purposes of Title III is construed in the broadest possible terms. Private banks, casinos, and even the United States Postal Service are all considered financial institutions among twenty-three other entities outlined in Title III.²⁹⁹ Title III is divided into

²⁹¹ STEPHEN J. SCHULHOFER, *RETHINKING THE PATRIOT ACT: KEEPING AMERICAN SAFE AND FREE* 3 (2005).

²⁹² Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 *GEO. WASH. L. REV.* 1145, 1146 (2004).

²⁹³ *Id.* at 1167.

²⁹⁴ Howell, *supra* note 292, at 1167. This procedure is used to expedite the passage of legislation and limit amendments in deference to the executive. *Id.* The previous day, October 8, 2001, Attorney General Ashcroft announced the arrest of 614 individuals and the continued search for 229 additional individuals. *Id.* This expedited legislative procedure was utilized for anti-terrorism legislation following the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing. *Id.* at n.147. *See also* 147 *CONG. REC.* S19,004 (Oct. 9, 2001).

²⁹⁵ 147 *CONG. REC.* S10,363 (Oct. 9, 2001); Howell, *supra* note 292, at 1167–68.

²⁹⁶ Howell, *supra* note 292, at 1170–72.

²⁹⁷ *Id.* at 1172.

²⁹⁸ Pub. L. No. 107-56, 115 Stat. 333 (2001).

²⁹⁹ 31 U.S.C. § 5312(a)(2)(A)–(Z) (2006). For purposes of the PATRIOT Act, a “financial institution” includes insured banks, commercial banks, trust companies, private bankers, branches

three subtitles. The first, Subtitle A, imposes criminal liability for multiple offenses relating to money laundering.³⁰⁰ It introduces the concept of “special measures” which can be imposed on financial institutions by the Secretary of the Treasury.³⁰¹ Special measures may be invoked when, *inter alia*, there is evidence of terrorist financing or organized crime. Considered are the extent of financial secrecy in a jurisdiction, the relationship between the size of the transaction and that of the jurisdiction, and the experience of U.S. officials in obtaining information in that jurisdiction.³⁰² If the Secretary of the Treasury determines that an account is of “primary money laundering concern,” special measures may require financial institutions to keep comprehensive records concerning aggregate transaction amounts, and information on each transaction involving foreign jurisdictions.³⁰³ The information obtained may be retained until the identities of the owner and recipient of the funds, as well as their legal capacities, are identified.³⁰⁴

Subtitle B of Title III is a sweeping amendment to the Bank Secrecy Act of 1970. It eliminates customer notification requirements when banks disclose their records. Recall, the Bank Secrecy Act provided that financial institutions were required to keep records regarding financial transactions in excess of \$10,000, and institute internal compliance procedures.³⁰⁵ This was then supplemented by the Annunzio-Wylie Anti-Money Laundering Act, which required the filing of a Suspicious Activities Report (“SAR”) for suspect transactions.³⁰⁶ Notwithstanding the reporting requirements, bank customers were entitled under

of foreign banks, credit unions, a thrift institutions, securities brokers, commodities brokers, investment bankers, investment companies, currency exchanges, issuers/redeemer/cashiers of travelers’ checks and money orders, credit card system operators, insurance companies, jewelers, pawn shops, loan companies, travel agencies, conventional and unconventional money senders, a licensed sender of money or any other person who engages as a business in the transmission, telegraph companies, automobile/airplane/boat salesmen, real estate brokers, the United States Postal Service, and casinos. Furthermore, a “financial institution” is defined for purposes of the Act as “any business . . . which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage” or “any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.” *Id.*

³⁰⁰ PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 333 (codified in scattered sections of 12, 18, 21, and 31 U.S.C.).

³⁰¹ 31 U.S.C. § 5318A(a)(1) (2006).

³⁰² § 5318A(c)(2)(A)(i)–(vii); *see also* § 5318A(c)(2)(B) (outlining the institutional factors the Secretary of the Treasury may consider when implementing special measures).

³⁰³ § 5318A(b)(1)(A).

³⁰⁴ § 5318A(b)(1)(B).

³⁰⁵ 31 C.F.R. § 103.22(b)(1) (2011).

³⁰⁶ Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, 106 Stat. 4044 (1992) (codified in scattered sections of 12, 18, 31 and 42 U.S.C.).

the Bank Secrecy Act, as amended, to give notice prior to the disclosure of records to law enforcement authorities.³⁰⁷

Another provision of significance to the confidentiality of financial records is section 505.³⁰⁸ Found in Title V, section 505 amends the Right to Financial Privacy Act.³⁰⁹ The PATRIOT Act widened the scope of FBI investigatory powers relating to financial records. Rather than being required to obtain a warrant, an FBI Special Agent in Charge at a field office may submit a National Security Letter and obtain confidential financial records from any financial institution.³¹⁰ The only requirement is that the request must be made in the furtherance of “clandestine intelligence activities” or the prevention of “international terrorism.”³¹¹

The PATRIOT Act significantly erodes traditional notions of privacy afforded to bank customers and the autonomy by which financial institutions can conduct business. Reporting financial transactions above the \$10,000 threshold now go to the Financial Crimes Enforcement Network (“FinCEN”), which the Act made a bureau of the Treasury department.³¹² FinCEN has become a *de facto* clearinghouse of information from financial institutions.³¹³ Notification to the individual engaged in a transaction which has been reported by the bank or financial institution is now prohibited. Neither the bank nor law enforcement agencies investigating a suspect transaction may provide any suspect notice that they are either under investigation,³¹⁴ or are indemnified against civil or criminal liability for not providing notice to customers.³¹⁵ Thus, the PATRIOT Act gives government authorities a significant tool to obtain private financial data in the name of national security.³¹⁶ Taken as a whole, Title III creates a broad special needs exception to financial privacy. An account holder’s previously established expectation of privacy with regard to his or her financial data is reduced in light of the need to target terrorist financing.

³⁰⁷ See 12 U.S.C. §§ 3401(4), 3402(1) (2006).

³⁰⁸ See 12 U.S.C. § 3414(a)(5)(A) (2006).

³⁰⁹ §§ 3401–3422.

³¹⁰ § 3414(a)(5)(A).

³¹¹ *Id.*

³¹² 31 U.S.C. §§ 310, 5331 (2006).

³¹³ C. WILLIAM MICHAELS, *NO GREATER THREAT: AMERICA AFTER SEPTEMBER 11 AND THE RISE OF A NATIONAL SECURITY STATE* 85 (2002).

³¹⁴ 31 U.S.C. § 5318(g)(2)(i)–(ii) (2006). See *Whitney Nat’l Bank v. Karam*, 306 F. Supp. 2d 678 (S.D. Tex. 2004) (holding that a defendant was precluded under the PATRIOT Act from obtaining records of Suspicious Activities Report filed by his or her financial institution).

³¹⁵ § 5318(g)(3).

³¹⁶ Anita Ramasastry, *Lost in Translation? Data Mining, National Security and the “Adverse Inference” Problem*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 757, 768–69 (2006) (noting that “data mining” financial records constitutes a counter-terrorism policy).

2. Extraterritorial Effects on Banks

The rationale of Title III is rooted in strong, and indeed correct, belief that foreign banks play a key role in illicit financial transactions.³¹⁷ Congress found that “outmoded and inadequate statutory provisions that make investigations, prosecutions, and forfeitures more difficult, particularly in cases in which money laundering involves foreign persons, foreign banks, or foreign countries,” should be amended to facilitate investigations and successful prosecutions.³¹⁸ Congress further noted that “the ability to mount effective countermeasures to international money launderers requires national, as well as bilateral and multilateral action, using tools specifically designed for that effort.”³¹⁹ With those aims in mind, Title III’s enactment significantly expanded the transnational authority of domestic law enforcement agencies by codifying United States forfeiture law.³²⁰ It set guidelines for prosecuting international financial crimes and terrorist financing.³²¹ Title III also heightened the recordkeeping and reporting requirements of financial institutions.

Congress added a new provision to the federal civil forfeiture statute.³²² The new provision, section 981(k), outlines special rules for forfeitures from interbank accounts held by foreign banks at banks in the United States.³²³ This section states:

³¹⁷ See PATRIOT Act, Pub. L. No. 107-56, § 302(a)(4)–(5), 31 U.S.C. § 5311 (2006). The provision stated:

[C]ertain jurisdictions outside of the United States that offer “offshore” banking and related facilities designed to provide anonymity, coupled with weak financial supervisory and enforcement regimes, provide essential tools to disguise ownership and movement of criminal funds, derived from, or used to commit, offenses ranging from narcotics trafficking, terrorism, arms smuggling, and trafficking in human beings, to financial frauds that prey on law-abiding citizens; transactions involving such offshore jurisdictions make it difficult for law enforcement officials and regulators to follow the trail of money earned by criminals, organized international criminal enterprises, and global terrorist organizations.

Id.

³¹⁸ § 302(a)(8).

³¹⁹ § 302(a)(9).

³²⁰ See 1 OTTO G. OBERMAIER & ROBERT G. MORVILLO, WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES 6A.01, at 6A-4 (2002).

³²¹ 18 U.S.C. § 1956(c)(7)(B) (2006) (outlining foreign crimes that can be used as predicates for a money laundering offence, public corruption, and all crimes of violence). Thus, the laundering of the proceeds of any offence and the transfer of any funds into or out of the United States with the intent of promote any such offense is a violation of the law. *Id.*

³²² 18 U.S.C. § 981(k) (2006).

³²³ § 981(k)(4)(A). An “interbank account” is defined as “an account held by one financial institution at another financial institution primarily for the purpose of facilitating customer transactions.” 18 U.S.C. § 984(c)(2)(B) (2006).

For the purpose of a forfeiture under this section . . . if funds are deposited into an account at a foreign financial institution, and that foreign financial institution . . . has an interbank account in the United States with a covered financial institution . . . the funds shall be deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in rem regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign financial institution . . . may be restrained, seized, or arrested.³²⁴

Interbank accounts—also known as correspondent accounts—are utilized by foreign banks to facilitate transactions in jurisdictions where the banks do not have physical presence. Liquidity, the internationalization of financial transactions, and the need of foreign banks to have access to American currency have all necessitated the use of interbank accounts.³²⁵ Indeed, Congress specifically noted the susceptibility of interbank accounts to be utilized in illicit financial transactions.³²⁶

It was relatively difficult for a federal agency to acquire the *in rem* forfeiture of laundered funds in interbank accounts of foreign banks prior to the enactment of section 981(k).³²⁷ Under the pre-amended forfeiture statute, a foreign bank was deemed to be the owner of interbank funds rather than individual depositors.³²⁸ Unless the bank “knowingly engaged” in money laundering, it was entitled to assert an innocent owner defense to a forfeiture action.³²⁹ In nearly all cases, a bank’s conduct would not meet a threshold of knowingly engaged in criminal wrongdoing, thus most forfeiture actions would fail.³³⁰

Section 981(k) expanded the government’s civil forfeiture power in two significant ways. First, the section deems funds deposited at a foreign bank that

³²⁴ § 981(k)(1)(A) (internal citations omitted).

³²⁵ See MINORITY STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, 107TH CONG., REPORT ON CORRESPONDENT BANKING: A GATEWAY FOR MONEY LAUNDERING 11–14 (Comm. Print 2001) [hereinafter LEVIN REPORT].

³²⁶ See PATRIOT Act, Pub. L. No. 107-56, § 302(a)(6), 31 U.S.C. § 5311 (2006) (noting that “correspondent banking facilities are one of the banking mechanisms susceptible in some circumstance to manipulation by foreign banks to permit the laundering of funds by hiding the identify of real parties in interest to financial transactions”).

³²⁷ See LEVIN REPORT, *supra* note 325, at 41–42.

³²⁸ See *United States v. Union Bank for Sav. & Inv. (Jordan)*, 487 F.3d 8, 15 (1st Cir. 2007) (discussing the pre-PATRIOT Act asset forfeiture statute).

³²⁹ See 18 U.S.C. § 984(d)(1) (1994 & Supp. 5 1999) (stating that “[n]o action . . . to forfeit property not traceable directly to the offense that is the basis for the forfeiture may be taken against funds held by a financial institution in an interbank account, unless the financial institution holding the account knowingly engaged in the offense”).

³³⁰ See *Jordan*, 487 F.3d at 15.

has an interbank account in the United States as deposited into an interbank account in the United States.³³¹ Thus, any restraining order, seizure warrant, or arrest *in rem* against funds in a foreign bank may be served on a United States bank holding the interbank account.³³² The deposit of forfeitable funds at a foreign bank triggers the forfeiture of an equivalent amount from an interbank account.³³³ Fluctuations in the amount held by the depositor at the foreign bank, as a result of periodic withdrawals and additional deposits from other licit sources, will not affect the forfeitability of funds.³³⁴ There is no requirement that any funds in an interbank account be traced to forfeitable funds deposited at the foreign bank.³³⁵

A second important change is how the owner of interbank funds may contest their forfeiture.³³⁶ Under the new statute, the foreign depositor, rather than the foreign bank, is considered to be the owner of the funds.³³⁷ Only when the wrongdoing can be attributed to the foreign financial institution,³³⁸ or when the foreign financial institution can prove by a preponderance of evidence that it “discharged all or part of its obligation to the prior owner” will the financial institution be deemed the owner of the funds.³³⁹

Additionally, the revised statutory language reverses the burden of proof of the innocent owner defense. Under the previous statutory language, the government could not take action “against funds held by a financial institution in an interbank account, unless the financial institution holding the account knowingly engaged in the offense.”³⁴⁰ Yet under the amended language, the claimant of the seized funds has the burden to prove, by a preponderance of the evidence, that he or she was an innocent owner.³⁴¹ The statute also imposes an affirmative obligation on the individual owner of the forfeited funds to prevent the use of those funds for illegal purposes “upon learning of the conduct giving rise to the forfeiture.”³⁴² The revised statutory language in effect codifies *Campbell v. United States* and much of the willful blindness case law established over the course of the preceding years.³⁴³

³³¹ 18 U.S.C. § 981(k)(1)(A) (2006).

³³² *Id.*

³³³ § 981(k)(2).

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ See § 981(k)(3) (authorizing actions to contest the forfeiture of funds). See also 18 U.S.C. § 983 (2006) (outlining the procedures by which a contestation of forfeited funds may proceed).

³³⁷ §§ 981(k)(4)(B)(i)(I)–(II).

³³⁸ § 981(k)(4)(B)(ii)(I).

³³⁹ § 981(k)(4)(B)(ii)(II).

³⁴⁰ 18 U.S.C. § 984(d)(1) (1994).

³⁴¹ 18 U.S.C. § 983(d) (2006).

³⁴² § 983(d)(2)(A)(ii).

³⁴³ See discussion *supra* Part II.B.2.

3. The Case of *Union Bank*

A recent decision by the First Circuit illustrates how section 981(k) operates in practice and affects both depositors and financial institutions. The case arose out of a Canadian telemarketing scheme, whereby individuals were informed that they were eligible to collect proceeds of Canadian lottery winnings. In order to collect the winnings, they were to pay processing expenses by sending cashier's checks, drawn on U.S.-based accounts, to post office boxes in Montreal.³⁴⁴ After exchanging hands several times, those checks eventually made their way to a money exchange business in East Jerusalem.³⁴⁵ The proprietors of the money exchange, Mohammed, Samir, and Talal Esseilheh, deposited the finds in their accounts at a Ramallah, West Bank branch office of Jordan-based Union Bank for Savings and Investment ("Union Bank").³⁴⁶ Union Bank transferred the U.S.-based cashier's checks to its interbank account held at the Bank of New York ("BoNY") to facilitate payment.³⁴⁷ BoNY gave Union Bank a provisional credit on its interbank account for the sum of the checks.³⁴⁸ None of the seized funds were ever transferred at any time to an account in the United States.³⁴⁹

The United States seized approximately \$2.8 million from the interbank account as proceeds from the telemarketing scheme.³⁵⁰ Union Bank filed an *in rem* claim in United States District Court for the amount of the seized funds, arguing, *inter alia*, that it was an innocent owner of the funds in its interbank account at BoNY.³⁵¹ The government prevailed on its motion for summary judgment, arguing that Union Bank was not the owner of the funds, and that as a result, the bank lacked any right arising under section 981(k) to recover any of the funds.³⁵² Both parties appealed.

The First Circuit in *Union Bank (Jordan) v. United States* upheld the district court's holding that the Esseilheh brothers were the owners of the deposited funds, notwithstanding the money exchange did not have its own business

³⁴⁴ *Jordan*, 487 F.3d 8, 11 (1st Cir. 2007).

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 11–12. The first Union Bank account was in the name of Samir Esseilheh. Under the terms of a written agreement with Union Bank, Mohammed Esseilheh also had deposit and withdrawal authority. This account was closed prior to the seizures, and the balance transferred to a second account. The second account was in the name of Mohammed Esseilheh. Union Bank permitted the deposit of U.S. dollar-denominated instruments in the account. Samir Esseilheh and Talal Esseilheh served as guarantors on the account and thus they were, along with Mohammed Esseilheh, liable for the account. *Id.*

³⁴⁷ *Id.* at 12.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 12–13.

³⁵⁰ *Id.* at 10.

³⁵¹ *Id.* at 10, 13.

³⁵² *Id.* at 13.

account.³⁵³ The brothers, as joint venturers, were the owners of the funds at the time of deposit, and the accounts were used in the normal course of business.

Union Bank had grounded its defense on the assertion that it had discharged all its obligations to the brothers at the time of the seizure. It could accordingly claim standing as an owner of the funds under the exception contained in section 981.³⁵⁴ Moreover, it argued that its obligation to depositors should be linked to its ability to obtain recourse for the seizure of funds from the depositor. Under Union Bank's depository relationship with the Esseilheh brothers and under applicable foreign law, it had no recourse to recover for the loss the bank would suffer through the seizure.³⁵⁵ The First Circuit rejected this argument as the bank's obligations to the brothers were measured by their account balances. On the seizure date, the bank's obligations to the brothers exceeded the amount of the forfeitable cashier's checks, and thus it had not fulfilled the entirety of its obligations.³⁵⁶ The court also rejected the bank's public policy arguments that its inability to collect from the foreign depositor would circumvent the expressed purpose of Congress in crafting the ownership provisions.³⁵⁷ The depositor, it was argued, would have no losses and thus no incentive to appear in a forfeiture proceeding.³⁵⁸ The court, however, noted that there was no evidence in the record why foreign banks could not protect themselves from seizure by contract or other agreement.³⁵⁹

According to the First Circuit, the legislative history of the provision suggested that Congress intended to treat foreign and domestic *deposits*, not foreign and domestic *banks*, similarly.³⁶⁰ Thus, section 981(k) was intended to reach through the bank, as an intermediary, to particular depositors rather than specific accounts.³⁶¹ Thus, any pre-PATRIOT Act statutory construction mandating that forfeiture of illicit funds had to be directed at those contained in a specific account were inapplicable in light of the PATRIOT Act's amendments to the civil forfeiture statute.

Foreign banks thus face a dilemma. Title III of the PATRIOT Act grants comprehensive powers to the United States government to prescribe special measures against any foreign financial institution without jurisdictional consid-

³⁵³ *Id.* at 17–18.

³⁵⁴ *Id.* at 18. See 18 U.S.C. § 981(k)(4)(B)(ii)(II) (2006) (“The foreign financial institution . . . may be considered the ‘owner’ of the funds only if—[it] establishes, by a preponderance of the evidence, that prior to the restraint, seizure, or arrest of the funds, the foreign financial institution . . . had discharged all or part of its obligation to the prior owner of the funds.”).

³⁵⁵ *Jordan*, 487 F.3d at 18.

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 19.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 19–20.

³⁶⁰ *Id.* at 21.

³⁶¹ *Id.* at 21–22.

erations.³⁶² Union Bank could not seek recourse from the brothers based upon the customer agreements and guarantees, as they provided that the brothers would be liable when a deposited check is “proved to be invalid, counterfeited or unacceptable for cashing due to any reason whatsoever.”³⁶³ However, the BoNY presented the checks to the issuing banks for payment, none of which sought to reverse payment.³⁶⁴ All applicable statutory and regulatory time periods for a reversal had expired allowing for the credit on the foreign bank’s interbank account to become final. Therefore, the brothers were entitled to the funds as neither the customer service agreements nor the applicable banking laws provided any basis for Union Bank to recover based on the seizures.³⁶⁵

The Union Bank had to pay for its customer’s participation in money laundering and criminal offenses with little or no chance of recovery. Banks must decide whether the difficulty of recovering for any U.S.-based seizure from their customers requires them to implement additional contractual or security measures. When United States agencies investigate a suspect transaction the agency may provide notice that the financial institution is either under investigation,³⁶⁶ or can be indemnified against civil or criminal liability for not providing notice to customers.³⁶⁷ The risk of seizure in the United States may thus necessitate that foreign banks initiate anti-money laundering programs which exceed what they would be required to do under the laws of their home country. Although this is desirable, conflicts may develop when the bank has varying, mandated duties under its domestic banking laws and those of the United States. Section 981(k) does permit consideration of whether a forfeiture proceeding should be terminated due to a conflict of law between the United States and the foreign bank’s home jurisdiction.³⁶⁸ However, this provision will only apply if it is in the interest of justice to do so and provided that national interests of the United States are not harmed.³⁶⁹

4. Inter-Agency Information Sharing

One aspect of the causal analysis following the September 11 attacks that became prominent in the national security reform discourse was the lack of information sharing between federal agencies.³⁷⁰ Members of Congress would

³⁶² *Id.* at 20.

³⁶³ *Id.* at 12–13.

³⁶⁴ *Id.* at 12.

³⁶⁵ *Id.* at 12–13.

³⁶⁶ 31 U.S.C. § 5318(g)(B)(2)(i)–(ii) (2006). *See* Whitney Nat’l Bank v. Karam, 306 F. Supp. 2d 678 (S.D. Tex. 2004).

³⁶⁷ § 5318(g)(B)(3). *See also* Ramasastry, *supra* note 316, at 768–69.

³⁶⁸ 18 U.S.C. § 981(k)(1)(B) (2006).

³⁶⁹ *Id.*

³⁷⁰ *See, e.g.,* SEPTEMBER 11 AND THE IMPERATIVE OF REFORM IN THE U.S. INTELLIGENCE COMMUNITY (ADDITIONAL VIEWS OF SENATOR RICHARD C. SHELBY) at 5 (December 10, 2002)

come to see increased information sharing as a key reform component in light of the Central Intelligence Agency not sharing information regarding the possible use of aircraft as weapons, or its suspicions of the individuals who would later pilot a plane into the Pentagon. The legislative response to these concerns—notably PATRIOT Act section 218—would fly in the face of decades of jurisprudence and constitutional safeguards.

a. Conventional Distinctions Between Foreign Intelligence and Criminal Investigations

Traditionally, there has been a wall between criminal investigations and national security intelligence gathering. In *United States v. United States District Court* (“*Keith*”),³⁷¹ the Supreme Court considered the executive’s power to conduct warrantless surveillance pursuant to the interests of national security.³⁷² The defendants in *Keith* were being prosecuted in the Eastern District of Michigan for planting a bomb at a Central Intelligence Agency field office.³⁷³ During the course of the investigation, federal authorities used electronic surveillance to monitor conversations of the defendants. The district court convened a preliminary hearing to ascertain whether the intelligence information gathered had “tainted” the evidence contained in the indictment which was to be introduced at trial.³⁷⁴ Judge Damon J. Keith held that the surveillance evidence was obtained in violation of the Fourth Amendment.³⁷⁵

The Supreme Court held that the Fourth Amendment required the government to obtain a warrant during the course of a domestic national security investigation.³⁷⁶ In finding no Fourth Amendment exception applicable to domestic security threats, the Court balanced the risk of “unreasonable surveillance to individual privacy and free expression” against the government’s duty to keep the United States safe.³⁷⁷ Specifically, the Supreme Court looked to whether the surveillance was “deemed necessary” to a national security investigation.³⁷⁸ The surveillance was required to be “directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and [was]

(stating that the September 11 attacks “should be an object lesson in the perils of failing to share information promptly and efficiently between (and within) organizations”).

³⁷¹ 407 U.S. 297 (1972).

³⁷² *Id.* at 299.

³⁷³ *Id.*

³⁷⁴ *Id.* at 300.

³⁷⁵ *Id.* at 301.

³⁷⁶ *Id.* at 321.

³⁷⁷ *Id.* at 314–15.

³⁷⁸ *Id.* at 308–09.

not an attempt to gather evidence for specific criminal prosecutions.”³⁷⁹ The “primary purpose” test was also incorporated directly into the Foreign Intelligence Surveillance Act (“FISA”), the statutory framework governing the procedures by which electronic surveillance and physical searches are conducted.³⁸⁰

In *United States v. Falvey*,³⁸¹ the District Court for the Eastern District of New York was confronted with the admissibility of electronic surveillance evidence obtained pursuant to FISA at trial.³⁸² The government sought to introduce telephone conversations of the defendants—all United States citizens—who were suspected of smuggling weapons to the IRA.³⁸³ The defendants were provided notice and the transcripts of all the wiretaps as well as documentation of “minimization logs” kept by law enforcement pursuant to FISA and constitutional requirements.³⁸⁴

The district court held that the electronic evidence gathered pursuant to FISA was admissible in criminal proceedings.³⁸⁵ The court found the primary purpose of the surveillance was to obtain foreign intelligence, and as such did not run afoul of the *Keith* requirements.³⁸⁶ The court also noted that the government did not have a *carte blanche* for obtaining information after the primary purpose test had been satisfied. The resulting search and seizure for intelligence surveillance was still required to be “reasonable” for purposes of the Fourth Amendment.³⁸⁷

b. Blurring Intelligence Gathering and Criminal Investigations

Section 203(a) of the PATRIOT Act changed Federal Rule of Criminal Procedure 6(e) to allow for the sharing of grand jury information.³⁸⁸ Grand jury

³⁷⁹ *Id.* at 318–19. For background on *Keith* see Seth F. Kreimer, *Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror*, 7 U. PA. J. CONST. L. 133, 145–48 (2004).

³⁸⁰ The Foreign Intelligence Surveillance Act, § 1804(a)(7)(B) Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801–1811(1982)) provided that the “purpose of the surveillance is to obtain foreign intelligence information.” FISA further required “minimization” procedures to curtail the collection, retention, and dissemination of information relating to American citizens. §§ 1801(h), 1804(a)(5), 1805(a)(4).

³⁸¹ 540 F. Supp. 1306 (E.D.N.Y. 1982).

³⁸² *Id.* at 1307–08.

³⁸³ *Id.* at 1308.

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 1314.

³⁸⁶ *Id.* The district court noted that evidence obtained pursuant to FISA where the primary purpose is a criminal investigation is inadmissible in court. *See United States v. Truong Dinh Hung*, 629 F.2d 908, 912–13, 916 (4th Cir. 1980).

³⁸⁷ *Falvey*, 540 F. Supp. at 1312.

³⁸⁸ PATRIOT Act Pub. L. No. 107-56, § 203(a), 115 Stat. 272 (2001); FED. R. CRIM. P. 6(e).

secrecy has long been a fundamental legal tenet traceable to English jurisprudence.³⁸⁹ Section 203(a) created an exception to Rule 6(e) by allowing grand jury information to be disclosed to a government attorney in the course of criminal proceedings.³⁹⁰ One instance in which disclosure of grand jury information to an attorney of the United States is specifically authorized is financial crimes.³⁹¹ In operation, section 203 permits unrestricted sharing of information related to terrorism.³⁹² Essentially, a special needs exception mandating the disclosure of financial crimes information in criminal proceedings further erodes traditional understandings of bank secrecy and the secrecy of grand jury investigations. Read in conjunction with the special measures permitted by Title III, the reduction of grand jury secrecy relating to bank crimes demonstrates how anti-terrorism legislation can permeate and infuse into other areas of law.³⁹³

The distinction between criminal and intelligence investigations was further eroded by PATRIOT Act section 218.³⁹⁴ The preexisting FISA standard that “*the purpose*” of surveillance is to gather foreign intelligence was replaced by a lower threshold of constitutionality requiring only that foreign intelligence gathering be “*a significant purpose*” of surveillance.³⁹⁵ The constitutionality of the significant purpose standard was considered by the Foreign Intelligence Surveillance Court (“FISC”).

³⁸⁹ See *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958) (holding that grand jury secrecy is not to be violated except for reasons substantially necessary); Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 13 (1996); Sara Levy, *The PATRIOT Act Grand Jury Disclosure Exception: A Proposal for Reconciling Civil Liberties and Law Enforcement Concerns*, 5 CHI.-KENT J. INT'L & COMP. L. 2 (2005).

³⁹⁰ See PATRIOT Act § 203(a); FED. R. CRIM. P. 6(e)(3).

³⁹¹ FED. R. CRIM. P. 6(e)(3); 18 U.S.C. § 3322(b)(1) (2006). The statute provides:

Upon motion of an attorney for the government, a court may direct disclosure of matters occurring before a grand jury during an investigation of a banking law violation to identified personnel of a Federal or State financial institution regulatory agency—

(A) for use in relation to any matter within the jurisdiction of such regulatory agency; or

(B) to assist an attorney for the government to whom matters have been disclosed

Id.

³⁹² Kate Martin, *Why Sections 203 and 905 Should be Modified*, in PATRIOT DEBATES 6 (Stewart A. Baker & John Kavanagh eds., 2005).

³⁹³ Jennifer M. Collins, *And the Walls Came Tumbling Down: Sharing Grand Jury Information With the Intelligence Community Under the USA PATRIOT Act*, 39 AM. CRIM. L. REV. 1261, 1286 (2002).

³⁹⁴ 50 U.S.C. § 1804(a)(7)(B) (2006).

³⁹⁵ *Id.* (emphasis added); see generally William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147, 1174–81 (2003) (discussing the erosion of the foreign intelligence and criminal investigation dichotomy).

The FISC exercises jurisdiction over “applications for and grant orders approving electronic surveillance anywhere within the United States.”³⁹⁶ Subsequent to the passage of the PATRIOT Act the Department of Justice moved to vacate the intelligence sharing procedures dealing with minimization and intelligence sharing as required by FISA.³⁹⁷ Originally promulgated by the Attorney General in 1995, these procedures construct a legal “wall”³⁹⁸ separating intelligence gathering and criminal investigations by curtailing the collection and dissemination of intelligence information gathered about American citizens.³⁹⁹

The government proposed to amend the guidelines by allowing criminal prosecutors to advise and consult with intelligence officials in the course of investigations.⁴⁰⁰ The FISC rejected the idea that law enforcement and intelligence operations could be combined and denied the Justice Department’s request. It held that the separation of criminal and intelligence investigations was eliminated by the proposed amendments, which gave “criminal prosecutors every legal advantage . . . used by U.S. intelligence agencies.”⁴⁰¹ As such, the protection of individual privacy was unfairly encumbered by the competing interest of collecting foreign intelligence.⁴⁰²

The opinion was, however, overruled on appeal by the Foreign Intelligence Surveillance Court of Review (“FISCR”); the first time it convened in its twenty-four year history.⁴⁰³ The FISCR held in *In re Sealed Cases*⁴⁰⁴ that the FISA as intended by Congress “clearly did *not* preclude or limit the govern-

³⁹⁶ 50 U.S.C. § 1803(a) (2006). *See also* 50 U.S.C. § 1822(c) (2006) (granting FISC jurisdiction over physical searches conducted pursuant to FISA).

³⁹⁷ 50 U.S.C. §§ 1801(h), 1804(a)(5), 1805(a)(4) (2006); *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 613 (Foreign Intel. Surv. Ct., 2002).

³⁹⁸ *See* STEPHEN J. SCHULHOFER, *RETHINKING THE PATRIOT ACT: KEEPING AMERICA SAFE AND FREE* 37–38 (2005).

³⁹⁹ *See* *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972).

⁴⁰⁰ *In re All Matters Submitted*, 218 F. Supp. 2d at 622.

⁴⁰¹ *Id.* at 624. The FISC also added:

[T]he plain meaning of consultations and coordination now specifically authorized in the Act is based on the need to adjust or bring into alignment two different but complementary interests—intelligence gathering and law enforcement. In FISA cases this presupposes separate intelligence and criminal investigations, or a single investigation with intertwined interests, which need to be brought into harmony to avoid dysfunction and frustration of either interest. If criminal prosecutors direct both the intelligence and criminal investigations, or a single investigation having combined interests, *coordination becomes subordination* of both investigations or [*sic*] interests to law enforcement objectives.

Id. at 623–24.

⁴⁰² *Id.* at 625.

⁴⁰³ Under the FISA, the Foreign Intelligence Court of Review has jurisdiction “to review the denial of any application made under this chapter.” 50 U.S.C. § 1803(b) (2006).

⁴⁰⁴ 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (*per curiam*).

ment's use or proposed use of foreign intelligence information, which included evidence of certain kinds of criminal activity, in a criminal prosecution."⁴⁰⁵ The FISCR stated that it was "puzzling" that the Department of Justice read the FISA as a limit on its ability to obtain foreign intelligence orders in cases it intended to prosecute.⁴⁰⁶

As such, the court found that separating intelligence and criminal law was "a false dichotomy" rectified by section 218 of the PATRIOT Act.⁴⁰⁷ The FISCR rejected the approach by the FISC of balancing interests of privacy and intelligence gathering.⁴⁰⁸ The "significant purpose" standard was held as constitutionally valid since it still required the government to have a "measurable foreign intelligence purpose" consistent with the intent of the FISA.⁴⁰⁹ The FISCR stated that if the "sole objective" of the government in requesting a FISA warrant was criminal prosecution, it would be denied.⁴¹⁰ However, if a federal agency "entertains a realistic option" in an investigation other than a criminal prosecution or "articulates a broader objective than criminal prosecution," then the significant purpose standard is met.⁴¹¹

Moreover, the minimization procedures established under the FISA were construed so as to morph intelligence and criminal investigatory functions together. According to the FISCR, the minimization procedures established under the FISA were not intended to limit the ability of a prosecutor to counsel federal intelligence agencies regarding "the initiation, operation, continuation, or *expansion* of FISA surveillances."⁴¹² As such, the FISCR has significantly curtailed the legal mechanisms that previously separated intelligence and criminal functions of government and safeguarded individual liberty.

D. Mission Creep: The U.S. and Abroad

Anti-terrorism legislation, both in the United States and abroad, has had an uncanny ability to perpetuate and morph itself from its original intent notwithstanding the underlying threat. Both British anti-terrorist responses and the American PATRIOT Act altered substantive and procedural law. In Northern Ireland, due process rights once guaranteed to criminal defendants as bedrock principles of the common law were subordinated to the more urgent concerns of

⁴⁰⁵ *Id.* at 727 (emphasis removed). The FISCR called into question the operating assumption of the FISC that there was an inherent barrier under the FISA between intelligence activities and ordinary law enforcement. *Id.* at 721.

⁴⁰⁶ *Id.* at 723.

⁴⁰⁷ *Id.* at 735; *see also* 50 U.S.C. § 1804(a)(7)(B) (2006).

⁴⁰⁸ *In re Sealed Case*, 310 F.3d at 735.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.* at 731 (emphasis added).

national security.⁴¹³ Anti-terrorist legislation in the United Kingdom was drafted, for instance, so as to target a specific group; only nationalist paramilitary organizations were proscribed in the Prevention of Terrorism Acts.⁴¹⁴

Yet, despite the metamorphic nature of legislation promulgated by the British Government in Westminster, it was to an extent controlled by an external judicial tribunal, the European Court of Human Rights (“ECtHR”). The ECtHR in *Borgan v. United Kingdom*⁴¹⁵ held that the detention of suspects in Northern Ireland for between five and six days was incompatible with the European Convention of Human Rights.⁴¹⁶ In *Ireland v. United Kingdom*, the ECtHR also invalidated official British policy sanctioning the maltreatment of suspected terrorists.⁴¹⁷ Moreover, the court entertained complaints from deaths resulting from British “shoot-to-kill” policies leading to settlement and compensation for victims’ families.⁴¹⁸

However, even the presence of a supranational tribunal does not guarantee the preservation of basic human rights or civil liberties. Much of current efforts targeting terrorist finances in the U.K. are embodied by civil forfeiture statues and are beyond the jurisdiction of the ECtHR.⁴¹⁹ However, British courts are becoming more adept at curtailing the usurpation of legislative power by the executive, as the Supreme Court of the United Kingdom did in *Her Majesty’s Treasury v. Mohammed Jabar Ahmed*.⁴²⁰ Yet unknown is the extent to which civil forfeiture and other actions will be curtailed in light of the rights of ordinary criminal defendants.

United States legal institutions, by contrast, do not contemplate an extraterritorial or international tribunal having the authority to invalidate anti-terrorism polities whether originating under the PATRIOT Act, the FISA, or otherwise. The only legal institution capable of serving as a check on terrorism legislation is the federal judiciary. It is a fundamental canon of American jurisprudence that the judiciary ensure that acts of the executive and the legislature

⁴¹³ See discussion *supra* Parts II.A.1. and II.A.3.

⁴¹⁴ See Prevention of Terrorism Act, 1974, c. 56, § 1(1)(a)–(b) sch. 1 (Eng.) (providing that the Irish Republican Army is the only organization to be proscribed and covered by penalties under the act). It is to be noted that the Prevention of Terrorism Act, 1989, Schedule 1 included only the Irish Republican Army and the Irish National Liberation Army, both republican paramilitary organizations. See *supra* notes 21–25 and accompanying text.

⁴¹⁵ 11 Eur. Ct. H.R. 117 (1989).

⁴¹⁶ *Id.* at 62.

⁴¹⁷ Eur. Ct. H.R. 25 (1978) (invalidating wall-standing, hooding, continuous noise, deprivation of food, and deprivation of sleep in interrogations).

⁴¹⁸ See *Farrell v. United Kingdom*, 5 Eur. Ct. H.R. 466 (1983). For a discussion of British “shoot-to-kill” polities with regard to suspected nationalist paramilitaries see EWING & GEARTY, *supra* note 19, at 230–41.

⁴¹⁹ IV EDWARD REES & RICHARD FISHER, BLACKSTONE’S GUIDE TO THE PROCEEDS OF CRIME ACT 2002, at 2–3 (2005).

⁴²⁰ [2010] UKSC 2 (Eng.).

comply with the Constitution.⁴²¹ A potentially dangerous situation arises when the judiciary allows its own procedures to be altered by anti-terrorist legislation.

Like the case of the United Kingdom and Northern Ireland, American anti-terrorist legislation is targeted at a specific entity. But this entity is not a class of people like the republican communities of Belfast or Derry.⁴²² Rather, this entity is a specific class of crime that is defined by its institutional and legal nature. American anti-terrorist legislation is targeted largely at crimes offenses financial transactions, banks, and other financial institutions; areas that the law has traditionally afforded a degree of protection and confidentiality.

Much of the basis of American anti-terrorist legislation has its roots in pre-2000 special needs exception and willful blindness jurisprudence. The PATRIOT Act's provisions come harmoniously together, not only providing for virtually unlimited access to financial records under a legislatively-created special needs exception, but also for eliminating the wall between intelligence gathering and criminal investigations. The PATRIOT Act covers almost every conceivable entity involved in financial transactions, from the biggest international bank to the local 7-Eleven.⁴²³ The definition of what constitutes a financial institution is also so broad that the emergency legislation's reach is omnipresent, affecting virtually every American from every walk of life.

Title III of the PATRIOT Act allows the Secretary of the Treasury to invoke "special measures" requiring any financial institution to keep and make available records involving designated accounts.⁴²⁴ Customers of banks and other financial institutions are no longer entitled to notification regarding the filing of SARs due to Title III's amendment of the Bank Secrecy Act.⁴²⁵ Moreover, a particular exception in Title V of the PATRIOT Act specifically allows federal law enforcement authorities to obtain financial information.⁴²⁶ The authority is granted to the Special Agent in Charge who is merely required to file a National Security Letter.⁴²⁷ This provision effectively places the assessment of

⁴²¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁴²² This is not to say that Arab-Americans have not been forced to bear hardships of anti-terrorism legislation, ethnic profiling, and civil rights deprivations resulting from the moral panic subsequent to the attacks on the World Trade Center, as well as the general Middle Eastern construction of terrorism. See generally GEARTY, *supra* note 10, at 113 (arguing that popular conceptualizations of terrorism have arisen from violence associated with the Middle East); Michael Welsh, *Trampling Human Rights in the War on Terror: Implications to the Sociology of Denial*, 12 CRIT. CRIMINOLOGY 1, 5–11 (2003) (discussing moral panic after the September 11 attacks).

⁴²³ See 31 U.S.C. § 5312(a)(2)(A)–(X) (2006).

⁴²⁴ 31 U.S.C. §§ 5318A(a)(1), 5318A(c)(2)(A)(i)–(vii), 5318A(c)(2)(B) (2006).

⁴²⁵ 31 U.S.C. § 5318(g)(2)(i)–(ii) (2006) (prohibiting financial institutions from giving notice to customers whose bank records were disclosed to investigative authorities); *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678 (S.D. Tex. 2004) (holding that the PATRIOT Act precluded a defendant from obtaining records of Suspicious Activities Report filed by his or her financial institution).

⁴²⁶ See 12 U.S.C. § 3414(a)(5)(A) (2006).

⁴²⁷ *Id.*

the reasonableness of the investigation and its techniques in the hands of the agents conducting the investigation themselves. The judicial check on executive branch investigations is altogether eliminated, risking unconstrained encroachment by indefinite, unimpeded investigations into bank privacy and civil liberties.

Mission creep can also occur in the manner in which anti-terrorism legislation is implemented. The Department of Justice currently contracts many of its functions arising under the PATRIOT Act's authorization to outside contractors. Often these contractors employ newly graduated law students as "law clerks." Despite only requiring the lowest level, "confidential" security clearance, newly-graduated "legal" contractors work within the Department of Justice organization and carry out functions related to asset and data seizures. Indeed, should legal malfeasance occur, questions may arise as to whether an unbarred or newly barred law clerk was acting in the capacity as an attorney. Potential abuses of power may also be complicated by issues such as contractual liability, indemnification, sovereign immunity, and so forth.

The erosion of the distinction between criminal investigations and intelligence gathering further magnifies the threat of mission creep regarding financial crimes. *Sealed Case* marked the effective *coup de grace* of the criminal-intelligence dichotomy announced in *Keith* and utilized in subsequent investigations.⁴²⁸ Authorities conducting clandestine intelligence investigations pursuant to FISA are required only to demonstrate that a significant purpose of the investigation is the collection of foreign intelligence.⁴²⁹ The FISCR stated that this standard effectively inextricably combines criminal and intelligence investigations by allowing ordinary law enforcement officials to assist and consult with intelligence officers in the "initiation, operation, continuation, or expansion" of FISA surveillance.⁴³⁰

Defendants under federal criminal grand jury indictment are liable to have information disclosed to other investigatory agencies pursuant to the PATRIOT Act's alteration of the Federal Rules of Criminal Procedure.⁴³¹ Grand jury information can now be disclosed to any government attorney, and is not limited to information regarding a threat or incident of terrorism.⁴³² Not only does the information flow both ways—to and from both criminal and intelligence investigations—but it also flows prior to and during the course of criminal proceedings.

Thus, defendants are subject to an investigatory cul-de-sac by which an endless assault of evidence obtained in successive rounds of intelligence and

⁴²⁸ See *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982).

⁴²⁹ 50 U.S.C. § 1804(a)(7)(B) (2006).

⁴³⁰ *In re Sealed Cases*, 310 F.3d 717, 731 (Foreign Intel. Surv. Ct. Rev. 2002) (per curiam).

⁴³¹ PATRIOT Act Pub. L. No. 107-56, § 203(a), 115 Stat. 272 (2001); FED. R. CRIM. P. 6(e).

⁴³² See *Martin*, *supra* note 392, at 6; *Jennifer M. Collins*, *supra* note 393, at 1286.

criminal investigations are brought to bear without any meaningful judicial supervision. Once information is obtained by law enforcement pursuant to law created for anti-terrorist intelligence investigations, it may be shared with the intelligence community. Intelligence agencies then may utilize and disseminate information without restriction as they see fit back to law enforcement, which may then be able to open a new investigation into another alleged criminal activity with respect to the same or different defendant. Further, defendants are not often given the chance to ascertain the veracity or challenge the admissibility of evidence obtained pursuant to FISA and introduced into evidence in criminal proceedings.⁴³³

IV. CONCLUSIONS AND IMPLICATIONS

Moral panic is a normal and logical consequence after a mass crime or terrorist attack. A legislative response to a threat to public safety or national security is often necessary to supplement existing criminal laws. However, such a response can also damage the gentle balance between security and liberty. Following the attacks of September 11, 2001, the United States government enacted the most comprehensive changes and sweeping additions to the investigative authority of the United States government. In light of existing criminal jurisprudence, the PATRIOT Act risks attacking the institutional safeguards designed to protect individuals from the awesome investigatory powers of the state. American jurisprudence has traditionally afforded legal insulation of substantive and procedural rights against encroachment from the intelligence community to ensure that investigations are reasonably limited to comport with notions of justice and fairness. However, this insulation has been eroded in the name of necessity. Special needs exceptions and willful blindness jurisprudence have both germinated into the judicial underpinnings of a comprehensive statutory framework that risks curtailing the constitutional liberties of the American public.

Anti-terrorism legislation in both the United States and the United Kingdom has penetrated into non-terrorist related offenses. Perhaps this is inevitable to the extent that laws are made and applied by imperfect individuals. The combination of the increased ability of investigatory agencies to obtain financial data, and subsequently share it without impede puts the systemic integrity of financial and legal institutions at unique risk. Although some of these measures are necessary in combating international terrorist networks, it is essential that legal institutions in the U.S. and abroad be vigilant in monitoring terrorist and non-terrorist related prosecutions, and prepared to constrain anti-terrorism laws to that which they are intended, and guard against unwarranted encroachment.

⁴³³ See *United States v. Sattar*, No. 02-CR.395(JGK), 2003 WL 22510435 (S.D.N.Y. Nov. 5, 2003) (unpublished case) (holding a defendant is not entitled to a pretrial discovery hearing regarding evidence obtained pursuant to the FISA).