EFFECT OF THE NATIONAL SECURITY PARADIGM ON CRIMINAL LAW

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INTRODUCTION

Criminal law goes through phases. The criminal justice system in the common law era evolved from medieval law emphasizing retribution and moral culpability, with a list of felonies that were incidents of exploitative and opportunistic behavior.[1] Affirmative defenses and mitigating factors from this epoch were cases of moral messiness that shrouded the defendant's internal decision process, injecting hesitancy into condemnation.[2] The punishment for most felonies, bluntly stated, was to dispatch the defendant to Hell, cleansing the wicked from the land and instructing the crowds who witnessed the execution about the seriousness of wrongdoing. This is not to say the system was wrong or brutal, even though this description may grate on modern sentiments. Actually, most people were able to avoid becoming criminal defendants, and most people avoided becoming the victims of serious crimes.

The last century saw a fundamental shift in our criminal laws and available defenses due to the advent of "vice" laws,[3] such as the Harrison Act (narcotics), Prohibition (alcohol), the Mann Act[4] (sex trafficking), Comstock Laws[5]

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1. *See* WAYNE R. LAFAVE, CRIMINAL LAW 9-11 (3d ed. 2000).

2. *See* Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 338-40 (1966) (discussing historical retribution theories in terms of vengeance or blameworthiness and the function of criminal defenses in this context); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 989-90, 1012-16 (1932) (discussing the medieval development of defenses and the influence of church law).

3. *See, e.g.*, CRAIG REINARMAN & HARRY G. LEVINE, CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 5-8 (1997).

4. *See* Mann Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)) (also known as the White Slave Traffic Act); *see also* Lindsay Rogers, *The Power of the States over Commodities Excluded by Congress from Interstate Commerce*, 24 YALE L.J. 567, 567-72 (1915).

5. *See* Comstock Act, ch. 258, 17 Stat. 598 (1873) (current version at 18 U.S.C. §§ 1416-62 (1964) and 19 U.S.C. § 1305 (1964)); United States v. Chase, 135 U.S. 255, 257-58 (1890). For a thorough judicial discussion of the history and background of Comstock Laws, see Williams v. Pryor, 220 F. Supp. 2d 1257, 1285-88 (N.D. Ala. 2002).

(obscenity and contraceptives), and the contemporaneous federalization of criminal law.[6] Vice laws save people from themselves.[7] The criminal law began treating addictions as a form of enslavement.[8] In terms of underlying values, retribution yielded to rehabilitation and then to deterrence,[9] embodied as the goal of the Model Penal Code.[10] Rehabilitation and deterrence share a common utilitarian goal of making individuals behave better.[11] Incarceration replaced corporal and capital punishment for all felonies besides murder.[12] This second phase saw the advent of the entrapment defense and exclusionary rules, which balanced the individual's rights, expectations, and behavior against the rights, expectations, and behavior of police officers.[13] Exclusionary rules and the entrapment defense were true innovations, unknown in common law England. "Admissibility" became a central component of the defense lawyer's arsenal; courts found it contradictory to trample individual expectations of privacy in the process of protecting people from enslaving themselves to addictions. This period also saw the universal codification of penal laws and sentencing rules.[14] The goal of shaping everyone's behavior, unlike the common law's pursuit of defining evil, necessitated a massive proliferation of delineated felonies,[15]

6. *See* Note, *Federal Cooperation in Criminal Law Enforcement*, 48 HARV. L. REV. 489 (1935). *See generally* Rogers, *supra* note 4, at 567-72.

7. Richard S. Markovits, *On the Economic Inefficiency of a Liberal-Corrective-Justice-Securing Law of Torts*, 2006 U. ILL. L. REV. 525, 540; *see also* Rufus G. King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 YALE L.J. 736 (1953).

8. *See* REINARMAN & LEVINE, *supra* note 3, at 324-27.

9. *See* Eugene Smith, *Crime in Relation to the State and to Municipalities*, 11 AM. J. SOC. 90, 93-94 (1905).

10. MODEL PENAL CODE § 1.02 (2007).

11. *See* Livingston Hall, *The Substantive Law of Crimes, 1887-1936*, 50 HARV. L. REV. 616, 652-53 (1937).

12. *See* Simeon E. Baldwin, *Whipping and Castration as Punishments for Crime*, 8 YALE L.J. 371 (1899) (lamenting the advent of imprisonment and the disappearance of whipping and castration); *see also* Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17 (1899).

13. *See* Dubin, *supra* note 2, at 340-43 (connecting utilitarianism and deterrence to excuses in criminal law).

14. *See, e.g.*, Hall, *supra* note 11, at 616 (writing in 1937); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 863 (1930) ("Anglo-American law is in a fair way of becoming statutory, not by a great act of summation like the Bürgerliches Gesetzbuch or the Swiss Code, but piecemeal by the relentless annual or biennial grinding of more than fifty legislative machines."); *see also* Lewis, *supra* note 12 (writing in 1899 about problems with the new sentencing codes).

15. *See* Hall, *supra* note 11, at 622-23 ("One result of this has been to make everyone a criminal. If the fines and short jail terms for which one was legally liable were actually enforced, few would have any net income, or leisure out of jail in which to spend it."); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383 (1908) ("Not the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers.").

prohibiting harmful conduct in as many situations as possible. Criminal law's response to organized crime in this period (culminating in the RICO statute[16]) targeted conspiracies to exploit people's weaknesses and addictions.[17] Clarity, precision, and predictability about the rules and punishments were important for fostering obedience.

The last three or four decades have brought the gradual advent of a new phase in which the national security emphasis permeates our entire criminal law framework. The national security paradigm is affecting our underlying assumptions about the nature of culpability and the goals of law enforcement, the way in which we draft and interpret penal code sections or criminal statutes, our approach to affirmative defenses, and the strategies or techniques most favored by enforcement officers and prosecutors.[18] Protecting the American way of life from terrorism, natural disasters, and other disturbances or uncertainties has become the overarching goal. Now crime is disruption, rather than sin (as in the common law era), or degradation (as in the last century). As Professor Kent Roach observed, "New anti-terrorism laws . . . incorporate a more modern approach that sees crime as one of the many risks of modern society."[19]

Trends in this new era include militarization of the police,[20] obsession with

16. 18 U.S.C. §§ 1961-68 (2006).

17. *See* Note, *Criminal Conspiracy: Bearing of Overt Acts upon the Nature of the Crime*, 37 HARV. L. REV. 1121 (1924).

18. *See, e.g.*, DAVID H. BAYLEY & CLIFFORD D. SHEARING, U.S. DEP'T OF JUSTICE, THE NEW STRUCTURE OF POLICING: DESCRIPTION, CONCEPTUALIZATION, AND RESEARCH AGENDA vii (2001) ("[T]he role of the public police may be changing significantly. In particular, its agenda is becoming increasingly that of government rather than individuals; it is specializing in criminal investigation and undercover surveillance; its operations are undertaken in groups; and it is increasingly militarized in equipment and outlook.").

19. Kent Roach, *The Criminal Law and Terrorism*, *in* GLOBAL ANTI-TERRORISM LAW AND POLICY 129, 129 (Victor V. Ramraj, Michael Hor & Kent Roach eds., 2005).

20. *See* Edward R. Maguire & William R. King, *Trends in the Policing Industry*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 21 (2004) ("Militarism has always been present to some degree in policing, but some observers note that it is expanding, in both the United States and abroad."); *see also* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 113 n.293 (1998); Raj Dhanasekaran, *When Rotten Apples Return: How the Posse Comitatus Act of 1878 Can Deter Domestic Law Enforcement Authorities from Using Military Interrogation Techniques on Civilians*, 5 CONN. PUB. INT. L.J. 233, 252-53 (2006); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 385-87 (2003); David A. Koplow, *Tangled Up in Khaki and Blue: Lethal and Non-Lethal Weapons in Recent Confrontations*, 36 GEO. J. INT'L L. 703, 800 (2005); Diane Cecilia Weber, *Warriorcops: The Ominous Growth of Paramilitarism in American Police Departments* (Cato Institute, Briefing Paper 50, 1999); Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1 (1997); Robert Dreyfuss, *Hawks and Doves*, ROLLING STONE, Aug. 7, 1997, at 42 ("[T]he continuing militarization of drug law enforcement is symbolized by President Clinton's appointment of a retired Gulf War general, Barry McCaffrey as "drug czar . . . McCaffrey in turn has increased the staff positions several-fold and filled many of

gathering information and intelligence,[21] and collaboration between law enforcement agencies,[22] even across national borders. A greater portion of law enforcement funding now goes toward anti-terrorism activities rather than previous allocations. Funding pushes priorities at the same time that it incentivizes agency managers to recharacterize unfunded (but needed) areas as anti-terrorist or related to national security.[23]

We increasingly view criminal activity in terms of group associations, with those associations balanced against collective interests of society.[24] Commonplace crimes such as movie piracy,[25] drug trafficking,[26] money laundering,[27] counterfeiting,[28] and carjacking now have associations with terrorism.[29] The Executive Director of the U.N. Office on Drugs and Crime observed in 2002 "public security is now frequently perceived as the primary, or at least the most effective, way of solving the drug problem – certainly the

them with active-duty military officers.").

21. *See, e.g.*, C.J. EDWARDS, CHANGING POLICE THEORIES FOR 21ST CENTURY SOCIETIES 262-69 (1999); Ellen Nakashima, *White House Proposal Would Ease FBI Access to Records of Internet Activity*, WASH. POST, July 29, 2010, at A1, *available at* www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072806141.html.

22. *See* ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 103-247 (1993) (describing a process that began slowly in the last century but has greatly accelerated since publication of his text); Maguire & King, *supra* note 20, at 28-30.

23. *See* William A. Niskanen, *The Several Costs of Responding to the Threat of Terrorism*, 128 PUB. CHOICE 351, 355 (2006); Evan N. Turgeon, *National Security, Policing, and the Fourth Amendment: A New Perspective on Hiibel*, 27 BUFF. PUB. INT. L.J. 23, 59-60 (2009).

24. *See* David Cole, *Terror Financing, Guilt by Association, and the Paradigm of Prevention in the 'War on Terror', in* COUNTERTERRORISM: DEMOCRACY'S CHALLENGE, 233, 234-46 (Andrea Bianchi & Alexis Keller eds., 2008).

25. *See, e.g.*, MARK S. HAMM, TERRORISM AS CRIME: FROM OKLAHOMA CITY TO AL-QAEDA AND BEYOND 7 (2007); GREGORY F. TREVERTON ET AL., FILM PIRACY, ORGANIZED CRIME, AND TERRORISM (2009); LAURA ZAKARAS, RAND CORPORATION, FILM PIRACY AND ITS CONNECTION TO ORGANIZED CRIME AND TERRORISM (2009), *available at* http://www.rand.org/pubs/research_briefs/RB9417/index1.html.

26. *See* HAMM, *supra* note 25, at 7, 201-17; *see also* Executive Director of the U.N. Office on Drugs and Crime, *Making Drug Control 'Fit For Purpose': Building on the UNGASS Decade*, 17-18, U.N. Doc. E/CN.7/2008/1 (Mar. 7, 2008), *available at* http://www.unodc.org/documents/commissions/CND-Session51/CND-UNGASS-CRPs/ECN72008CRP17E.pdf [hereinafter U.N. Drug Control Report] ("Institutionally, the support structure for this multilateral machinery was put in better order by merging drugs and crime in the UNODC in 2002. The need to treat drug trafficking, organized crime, corruption and terrorism as linked phenomena is increasingly recognized and has moved up high on international priority concerns.").

27. *See* JIMMY GURULE, UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM 176 (2008); HAMM, *supra* note 26, at 9-17, 196.

28. *See* HAMM, *supra* note 26, at 17-19, 128-32.

29. *See id.* at 217; *see also* Daniel M. Filler, *Terrorism, Panic, and Pedophilia*, 10 VA. J. SOC. POL'Y & L. 345 (2003) (documenting instances where public commentators have repeatedly linked terrorism with pedophiles).

one that delivers quicker results than public health programmes, with greater media attention than prevention campaigns."[30] In 2006, the United Nations adopted yet another anti-terrorism resolution, the Global Counter-Terrorism Strategy, urging member states to combat "crimes that *might be connected* with terrorism," including all drug crimes, weapons violations, and smuggling of "any potentially deadly material."[31]

This is not another essay about how 9/11 changed everything or dented our democratic values.[32] Modern legal reactions to terrorism actually began in the 1970s, after a wave of domestic hijackings and bombings.[33] The 9/11 terrorist attacks continued this trend, with more thrust given the unprecedented scale of the harm.[34] Nonviolent disasters, such as Hurricane Katrina, have also helped to

30. *See* U.N. Drug Control Report, *supra* note 26, at 10; *see also* Peter H. Reuter, *The Unintended Consequences of Drug Policies*, at 11-13 (RAND Corporation, Report No. 5, 2009).

31. United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sep. 6, 2008) (emphasis added).

32. *See, e.g.*, Russell Hardin, *Civil Liberties in the Era of Mass Terrorism*, 8 J. ETHICS 77 (2004) (arguing that the legal responses to 9/11 have undermined the Madisonian ideal for restrained government).

33. *See, e.g.*, Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843, 850-871 (2010) (providing an excellent history of anti-terrorism laws and enforcement measures in the twentieth century). *See generally* PHILIP B. HEYMANN, TERRORISM AND AMERICA (1998) (providing a history of terrorism in the twentieth century); William F. Shughart II, *An Analytical History of Terrorism, 1945-2000*, 128 PUB. CHOICE 7 (2006). Courts in the 1970s created an "administrative search" or "special needs" exception to the warrant requirement for airport screening in light of the threat of bombings and hijackings. *See, e.g.*, McMorris v. Alioto, 567 F.2d 897, 900-02 (9th Cir. 1978); United States v. Edwards, 498 F.2d 496, 499-501 (2d Cir. 1974) (upholding the warrantless pre-boarding search of an airline passengers' bags); United States v. Albarado, 495 F.2d 799, 806 (2d Cir. 1974) ("[T]he use of a magnetometer is a reasonable search despite the small number of weapons detected in the course of a large number of searches. The absolutely minimal invasion in all respects of a passenger's privacy weighed against the great threat to hundreds of persons if a hijacker is able to proceed to the plane undetected is determinative of the reasonableness of the search."); United States v. Cyzewski, 484 F.2d 509, 512 (5th Cir. 1973) ("[C]ourts have consistently held airport security measures constitutionally justified as a limited and relatively insignificant intrusion of privacy balanced against the need to protect aircraft and its passengers."); United States v. Slocum, 464 F.2d 1180, 1182 (3d Cir. 1972) (upholding metal detector screening for airline passengers); United States v. Bell, 464 F.2d 667, 673 (2d Cir. 1972) ("In view of the magnitude of the crime sought to be prevented, the exigencies of time which clearly precluded the obtaining of a warrant, the use of the magnetometer is . . . a reasonable precaution."); United States v. Epperson, 454 F.2d 769, 771 (4th Cir. 1972) (upholding airport metal detectors); Downing v. Kunzig, 454 F.2d 1230, 1231-32 (6th Cir. 1972); United States v. U. S. Dist. Court, 407 U.S. 297 (1972) (upholding courthouse metal detector screening).

34. *See* Leonieh Uddy, Nadia Khatib, & Theresac Apelos, *Trends: Reactions to the Terrorist Attacks of September 11, 2001*, 66 PUB. OPINION Q. 418 (2002) (comprehensive survey of poll data documenting effects of 9/11 on popular sentiments about government and law enforcement); *see also* DENNIS PISZKIEWICZ, TERRORISM'S WAR WITH AMERICA: A HISTORY 15-98 (2003) (detailing twentieth-century domestic terror attacks and the legal and

recast police work as disaster response and preparedness;[35] even the collapse of Enron has pushed criminal law in the direction of preventing harm rather than responding to it. Thus, while 9/11 has been a major factor in the shift toward a national security paradigm in criminal law, it has not been the only factor.

Shifts in a legal culture are not instantaneous, or even sudden, events.[36] Changes come incrementally, and periods or epochs overlap at the margins. Jeremy Bentham heralded the codification of criminal laws and the ascendancy of utilitarianism,[37] the end of the common law, generations before Oliver Wendell Holmes instructively wrote *The Common Law*. The "material support of terrorism" statute (18 U.S.C. § 2339B), now the cornerstone of anti-terrorism prosecutions, predated 9/11 by five years, and several United Nations resolutions pushing every country to pass anti-terrorist legislation had predated that.[38] The Patriot Act was not just a lurching reaction to the events of a single day, but rather a continued trajectory that started years earlier;[39] some of its more controversial provisions reflected proposals that President Clinton had made.[40]

In the years after 9/11, several commentators warned that the legal backlash to the event may diminish civil liberties over time.[41] Public outrage

political responses prior to 9/11).

35. *See, e.g.*, EDWARDS, *supra* note 21, at 301-03; John R. Harrald, *Agility and Discipline: Critical Success Factors for Disaster Response*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 256 (2006) (describing major overhauls and the reorganization of law enforcement after 9/11, and again after Hurricane Katrina).

36. *See* Sayre, *supra* note 2, at 1017 (describing the gradual and fluctuating shift from the common law era into his own era at the beginning of the twentieth century).

37. Bentham was very concerned about this problem, and included "notoriety" (being easily knowable) as one of the seven "[p]roperties or qualities which . . . a body of laws, designed for all purposes without exception, must be possessed of." JEREMY BENTHAM, *Jeremy Bentham, an Englishman, to the Citizens of the several American United States: Letter II*, *in* JEREMY BENTHAM, 'LEGISLATOR OF THE WORLD': WRITINGS ON CODIFICATION, LAW, AND EDUCATION 117 (Philip Schofield & Jonathan Harris eds., 1998).

38. *See* Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901 (1986)

39. *See* Catherine Lutz, *Making War at Home in the United States: Militarization and the Current Crisis*, 104 AM. ANTHROPOLOGIST 723, 731 (2002); Simmons, *supra* note 33, at 850-71.

40. *See* Thomas C. Martin, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201, 212 n.50 (1996); Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059, 1091 (2009); Diane Carraway Piette, *Piercing the "Historical Mists": The People and Events Behind the Passage of FISA and the Creation of the "Wall,"* 17 STAN. L. & POL'Y REV. 437, 470 (2006); Ilya Podolyako, *Nowhere to Hide: Overbreadth and Other Constitutional Challenges Facing the Current Designation Regime*, 14 TEX. J. C.L. & C.R. 193, 199 n.25 (2009); *see also* Orin S. Kerr, *Internet Surveillance Law After the USA PATRIOT ACT: The Big Brother that Isn't*, 97 NW. U. L. REV. 607 (2003).

41. *See, e.g.*, Hardin, *supra* note 32; M. Shamsul Haque, *Government Responses to Terrorism: Critical Views of Their Impacts on People and Public Administration*, 62 PUB. ADMIN. REV. 170 (2002); Shirin Sinnar, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA PATRIOT ACT*, 55 STAN. L. REV. 1419 (2003); William

and panic, the argument goes, could result in more aggressive police tactics used against everyone,[42] more court decisions upholding police aggression,[43] more legislation authorizing panoptic surveillance,[44] suppression of political dissent, and racial or religious persecution in the guise of security profiling. Many saw all these problems, at least in nascent form, in the Patriot Act.[45] Carried to an extreme, the ultimate fear was domestic totalitarianism, an Orwellian police state in which Americans forfeit their freedoms and tyrannical politicians seize the opportunity to impose martial law.[46] Even if these predictions turned out to be hyperbole, the essential concern remains: that anti-terrorism measures might escalate to the point of government overreaching.

At the same time, some called for more reliance on traditional criminal law to combat terrorism in place of the usual toolbox of national defense: military force, economic sanctions, and international diplomacy. The argument was that our criminal justice system was more effective and more just, less prone to ad hoc rationalizations or expediencies, and would avert the collateral damage and unseemly alliances that attend military ventures.[47] Some suggested reforming criminal law to better handle terrorists,[48] while others argued that we could use our system in its present form.[49]

In other words, this is not the first article to discuss a convergence of domestic criminal law and national defense policy. This may be the first,

J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002).

42. *See* HEYMANN, *supra* note 33, at 114-20; Elizabeth A. Cheney, *Leaving No Loopholes for Terrorist Financing: The Implementation of the USA PATRIOT ACT in the Real Estate Field*, 58 VAND. L. REV. 1705 (2005).

43. *See* Christian Halliburton, *Leveling the Playing Field: A New Theory of Exclusion for a Post-Patriot Act America*, 70 MO. L. REV. 519 (2005).

44. *See* Heather Hillary & Nancy Kubasek, *The Remaining Perils of the Patriot Act: A Primer*, 8 J.L. SOC'Y 1 (2007); Joshua H. Pike, *The Impact of a Knee-Jerk Reaction: The PATRIOT ACT Amendments to the Foreign Intelligence Surveillance Act and the Ability of One Word to Erase Established Constitutional Requirements*, 36 HOFSTRA L. REV. 185 (2007); Sharon H. Rackow, *How the USA PATRIOT ACT Will Permit Governmental Infringement upon the Privacy of Americans in the Name of 'Intelligence' Investigations*, 150 U. PA. L. REV. 1651 (2002); Douglas J. Sylvester & Sharon Lohr, *Counting on Confidentiality: Legal and Statistical Approaches to Federal Privacy Law After the USA PATRIOT ACT*, 2005 WIS. L. REV. 1033 (2005); Andrew E. Nieland, Note, *National Security Letters and the Amended PATRIOT ACT*, 92 CORNELL L. REV. 1201 (2007).

45. *See, e.g.*, MARK SIDEL, MORE SECURE, LESS FREE? (2007) (arguing that anti-terrorism measures since 9/11 have significantly eroded civil liberties); Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67 (2006) (arguing that the Act relegated the courts to a subservient position, eliminating important checks and balances).

46. *See* Alison M. Jaggar, *Responding to the Evil of Terrorism*, 18 HYPATIA 175 (2003) (arguing that governments can perpetrate terrorism on their own citizens via so-called anti-terrorism measures); *see also* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (2006).

47. *See* HAMM, *supra* note 25, at 14-20.

48. *See generally* Sofaer, *supra* note 38.

49. *See* Roach, *supra* note 19, at 129-30.

however, to describe an all-encompassing paradigm shift, rather than focusing on a particular law, case, or police practice. It may also be the first to take a decidedly neutral position on whether the paradigm shift is good or bad. Viewed as a Kuhnian revolution in the law,[50] the national defense phase approach to criminal law is both crisis-triggered and a product of changing cultural norms, shared national values, electioneering dynamics, information access, and the new technologies available to both criminals and law enforcement agencies.[51]

Anti-terrorism laws, tactics, and prosecutions are relatively few in number, and are still a negligible percentage of our overall criminal docket or police work.[52] The more blunted changes that anti-terrorism measures bring to everything else reach further.

Anti-terrorism measures can easily infect contiguous components of criminal law, creating a large spillover effect.[53] Cops on the beat who undergo a dozen sessions of special training in anti-terrorism tactics, whether in detection skills, prevention strategies, or disaster response, inevitably carry that experience into their other police work.[54] Similarly, in the legislature, lawmaking is an evolutionary process, in which each session bears the influence of previous sessions and the existing corpus of enactments.[55] The session after the one in which Congress enacted anti-terror laws continues to some extent on a trajectory.[56] When appellate courts rule on a terrorism

50. *See generally* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

51. *See* Sven Bislev, *Globalization, State Transformation, and Public Security*, 25 INT'L POL. SCI. REV. 281 (2004).

52. *See* Niskanen, *supra* note 23, at 353; Charles D. Weisselberg, *Terror in the Courts: Beginning to Assess the Impact of Terrorism-Related Prosecutions on Domestic Criminal Law and Procedure in the USA*, 50 CRIME L. & SOC. CHANGE 25, 29 (2008).

53. *See* Roach, *supra* note 19, at 139 ("There are normative dangers of distorting criminal law principles in order to facilitate the apprehension of terrorists. One danger is that extraordinary powers may be introduced and justified in the anti-terrorism context but then spread to other parts of the criminal law."); *see also* COUNCIL OF EUROPE COUNTER-TERRORISM TASK FORCE, CYBERTERRORISM—THE USE OF THE INTERNET FOR TERRORIST PURPOSES 81-83 (2007) (discussing how counter-terrorism cybercrime statutes "can be applied to all kinds of criminal activities on the Internet.").

54. *See, e.g.*, James Pinkerton, *Former Air Force Jet Gets New Orders: Help Police Make Life Safer for the Flying Public Plane*, HOUS. CHRON., July 10, 2010, at B1 ("Diverted from a final flight to an Arizona airplane graveyard, a retired U.S. Air Force aircraft's new mission will be to help Houston police train on how to tackle terrorists, foil hijackers and search for on-board bombs . . . .").

55. Regional influences and perceptions of threat also play an ongoing role in the modern adoption of criminal statutes by states. *See* Robert Chamberlain and Donald P. Haider-Markel, *"Lien on Me": State Policy Innovation in Response to Paper Terrorism*, 58 POL. RES. Q. 449 (2005).

56. For an interesting discussion of the legislative session that enacted the Patriot Act, *see* Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT ACT*, 72 GEO. WASH. L. REV. 1145 (2004).

prosecution, they create precedents that affect other types of criminal laws.[57] Empirical evidence suggests that during periods of armed conflict, when national defense permeates the culture, the Supreme Court rules more often in favor of law enforcement, at least on non-war claims, than during other periods, although the Court is no more likely to rule in favor of the government on war-related issues.[58]

Terrorism sits at the juncture of national defense and criminal law, and it would be an overstatement to characterize it entirely as one or the other. This dualistic character makes it a conduit through which one domain creeps in and pervades the other.[59] Gradually, foreign policy begins to look like global policing, and domestic criminal law becomes an instrument of national security.[60]

Part I of the following addresses the impact of modern national security law on the assumptions and goals that underlie our criminal justice system. For example, we are witnessing a shift toward focusing on incapacitation and prevention of crime rather than traditional deterrence or retribution.[61] Whereas the emphasis of criminal law in previous eras was punishing the blameworthy (retribution)[62] or saving people from themselves (deterrence),[63] the new, modern focus is on preserving our comfortable, secure way of life. Thus, we approach law as a method of eliminating risks.[64] When we do incorporate elements of deterrence, the new paradigm shifts the focus towards lowering the

57. *See* United States v. Ressam, 553 U.S. 272 (2008) (holding that "carrying explosives during the commission of a felony" could apply to felonies as unrelated as the nonviolent act of lying to a government official); Weisselberg, *supra* note 52, at 31-33; Stuntz, *supra* note 41, at 2139.

58. *See* Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005); Weisselberg, *supra* note 52, at 42.

59. *See* Weisselberg, *supra* note 52, at 26; Michael B. Mukasey, *Jose Padilla Makes Bad Law: Terror Trials Hurt the Nation Even when They Lead to Convictions*, WALL ST. J., Aug. 22, 2007, at A15 ("[I]f conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptations will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law.").

60. *See* Roach, *supra* note 19, at 139.

61. *See* Cole, *supra* note 24, at 247-49 (describing Attorney General Ashcroft's new "paradigm of prevention" after 9/11); *see also* Ariela Gross, *Review: History, Race, and Prediction: Comments on Harcourt's "Against Prediction,"* 33 L. & SOC. INQUIRY 235, 238-42 (2008). For a recent judicial discussion of the distinction between incapacitation, retribution, and deterrence, see *United States v. Smith*, 387 F. App'x 565, 572 (6th Cir. 2010). *See also* FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION—PENAL CONFINEMENT AND THE RESTRAINT OF CRIME (1995); Catherine M. Sharkey, *Out of Sight, Out of Mind: Is Blind Faith in Incapacitation Justified?*, 105 YALE L.J. 1433 (1996).

62. *See* Sayre, *supra* note 2, at 988-89.

63. *See* Smith, *supra* note 9, at 93-95.

64. *See* DAVID A. MOSS, WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER 300-02 (2002); Cole, *supra* note 24, at 247-49 (describing the DOJ's new "paradigm of prevention"); Maguire & King, *supra* note 20, at 22.

rewards of illegal activity (by foiling terrorist plots or conspiracies before they succeed) or raising the investment costs for criminals (by forcing them to screen recruits for undercover agents, launder money, etc.) rather than traditional deterrence, which focused on the threat of punishment.[65] Additionally, we are now more likely to presume that criminals are altruistic or cause-motivated rather than merely self-interested or greedy.[66] Rehabilitation, an important policy goal in the era of the Model Penal Code,[67] is virtually absent in the new paradigm.[68]

Part II will address how the national security paradigm is changing the way in which we draft and interpret penal code sections or criminal statutes. The "new" statutes attack the problem of criminal activity indirectly, by criminalizing material support for terrorist organizations, transport of illegal workers, etc., rather than the traditional direct approach of simply proscribing the "bad activity" or delict. This shift is an outgrowth of the assumption that direct threat-of-sanction deterrence is ineffective against criminals motivated by ideologies rather than personal gain. Similarly, the scienter requirement in these modern statutes is being drafted differently, and traditional formulations are being interpreted differently, to reflect a more risk-based concept of "knowingly" or "should have known."[69] This new approach to scienter is more general than common law specific intent, but more specific than common law general intent.[70]

Part III will focus on the availability of affirmative defenses under the new paradigm. Given the shift towards greater surveillance[71] and infiltration-

65. *See* Kai A. Konrad, *The Investment Problem in Terrorism*, 71 ECONOMICA 449 (2004) (discussing terrorist incentives and strategies from a game theory perspective, and the effect of different response measures by the attacked state).

66. *See, e.g.*, Robert A. Pape, *The Strategic Logic of Suicide Terrorism*, 97 AM. POL. SCI. REV. 343 (2003); Shughart, *supra* note 33, at 11-13, 35-36; *see also* Richard A. Bierschbach, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1203-05 (2007) (discussing the underlying assumptions of traditional retributivism).

67. MODEL PENAL CODE §1.02 (2007).

68. *See* D.A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCHOL. PUB. POL'Y & L. 39, 40-41 (2010); Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 276 (2009); Nancy Glass, *The Social Workers of Sentencing? Probation Officers, Discretion, and the Accuracy of Presentence Reports Under the Federal Sentencing Guidelines*, 46 CRIM. L. BULL., no. 1, 2010; Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1100-02 (2009).

69. *See, e.g.*, 18 U.S.C. § 2339 (2006) (making it a felony to harbor or conceal "any person he knows, or has reasonable grounds to believe, has committed or is about to commit" terrorist acts); *id.* § 175b(c) (imposing penalties for anyone who "knowingly violates this section" pertaining to shipping biological agents and toxins in interstate or foreign commerce).

70. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (upholding the constitutionality of the "material support of terrorism" statute and interpreting its scienter element of "knowingly"); Negusie v. Holder, 129 S. Ct. 1159 (2009) (discussing the "knowingly" verbiage in exclusion provisions of refugee statutes).

71. *See* Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245

oriented undercover agents, the entrapment defense takes on new importance, as well as search-and-seizure evidentiary issues related to intercepted phone calls and emails, tracking of web browsing, and ubiquitous surveillance cameras. Overall, the new regime appears less merciful toward defendants when it comes to affirmative defenses and exclusionary rules, as courts weigh the public's privacy concerns against the seriousness of the threat posed by the new criminals (a threat to national security and "our way of life"). In earlier eras, courts also used the "lesser of two evils" approach to defenses and exclusionary rules, but the equation was different; most crimes were either opportunistic exploitation of a single victim or "victimless crimes" where the defendant primarily harmed himself. Thus, in the past, defendants enjoyed more favorable outcomes.

The final part describes how the national security paradigm is exerting broad-based influence over the strategies or techniques favored by enforcement officers and prosecutors. There is much greater perceived need for surveillance and infiltration by undercover agents. Profiling has become more important and necessary, at least in the perception of law enforcement.[72] The demand for national and interstate cooperation has grown, and there is more overlap with disaster response teams, immigration and border control, etc. Interestingly, our government uses non-penal measures more frequently, like cancelling flights,[73] intensifying airport screening, and creatively using obstructions to make crime less convenient.[74] These measures exploit *uncertainty* to frustrate or complicate the terrorists' plans. Ironically, uncertainty is often the terrorists' greatest goal, as it exponentially magnifies the social impact of a single bombing to have citizens live in uncertainty about the timing, location, and probability of future attacks, even where the attacks are statistically less frequent than natural disasters or other risks that modern life accepts. Uncertainty is the terrorist's ultimate weapon, but it is also a tool to combat them in the new regime. Earlier

(2008).

72. *See, e.g.*, Mariano-Florentino Cuéllar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9 (2003); Hardin, *supra* note 32, at 79-82; Stuntz, *supra* note 41, at 2162-80; Brian Michael Jenkins, Bruce Butterworth & Cathal Flynn, *What We Can Learn from the Christmas Day Bombing Attempt*, WASH. POST, March 26, 2010, at A23, *available at* http://www.rand.org/commentary/2010/03/26/WP.html ("Don't treat all passengers alike. . . . Screening all passengers identically means that nearly all passengers will be screened inadequately. Stringent screening can be used on only a fraction of passengers, so intelligence must help define who they will be."); *see also* LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME 48-51 (2005) (discussing profiling in pretextual traffic stops from a sociolinguistic perspective).

73. *See* David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1774 (2004); Kelly Yamanouchi, *Feds Approve Liberia Flights*, ATLANTA J.-CONST., May 26, 2010, at A15, *available at* 2010 WLNR 10807041 ("Also last year, Delta's planned inaugural flight to Nairobi, Kenya, was canceled amid terrorist threats . . . .").

74. *See* Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002).

periods of criminal law, in contrast, focused instead on the need for increased certainty. Clarity of the rules and certainty of punishments were paramount.

Writing about a widespread cultural drift from an academic perspective is challenging because one rarely finds sources like court opinions or legislative history explicitly announcing a sudden, broad-based change in beliefs or policy thinking.[75] A second-best way of supporting the hypothesis in this article is to predict what would happen if a paradigm shift toward national security had happened, and look at the emerging evidence to compare it to the prediction. Subsequent sections follow this methodology at times, when sources indicate a change but the etiology is not explicit or acknowledged.

I. ASSUMPTIONS

Criminal law in every era rests upon certain underlying beliefs and values.[76] Overarching goals or purposes of penal law shape the relevant legislation, enforcement, prosecution, and sentencing. Beliefs about the motivations and abilities of criminals yield predictions about their likely responses to prohibitions, potential punishments, and probability of detection.

This Part addresses the impact of modern national security law on the assumptions and goals that underlie our criminal justice system. Currently there is a paradigm shift toward incapacitation[77] and prevention of crime rather than traditional deterrence or retribution.[78] Increasingly, law functions as a method of eliminating societal risks.[79] Deterrence continues as a factor, of course, but with a diminished role and different emphasis. Instead of using threats of punishment to offset the rewards of crime (traditional deterrence), newer methods boost the up-front transaction costs of committing crimes. Traditional deterrence focused on the threat of punishment.[80] Increasingly, deterrence

75. *See* Sayre, *supra* note 2, at 1017 (describing the same challenge in explaining the shift that was occurring in his day from the common law era to the early modern approach: "As the underlying objective of criminal administration has almost unconsciously shifted, and is shifting, the basis of the requisite *mens rea* has imperceptibly shifted, lending a change to the flavor, if not to the actual content, of the criminal state of mind which must be proved to convict. Of course, established legal formulae and recognized doctrines continue. No abrupt changes are discernible. We still convict for cases of malicious houseburning and not for purely accidental ones. But every change in the underlying objective colors the application of the old doctrines and leads to gradual modification.").

76. *See* Dubin, *supra* note 2.

77. *See* Roach, *supra* note 19, at 131; *see also* Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103 (1998) (describing and analyzing the extreme growth in incarceration rates and the underlying policy of incapacitation).

78. *See* Cole, *supra* note 24, at 247-49 (describing the DOJ's "paradigm of prevention").

79. *See* MOSS, *supra* note 64, at 300-02.

80. *See* Konrad, *supra* note 65 (discussing terrorist incentives and strategies from a game theory perspective, and the effect of different response measures by the attacked state).

focuses on raising the investment costs for criminals.

Our assumptions about criminal intentions or motivations have also changed. Instead of impulsive or desperate criminals who may be responsive to traditional deterrence, terrorists and terror-associated criminals tend to serve a larger cause, making threats of punishment less important.[81]

A. Retribution and Other Assumptions in the Common Law Era

In the common law era, the overall goal of retribution had a large influence on the shape of criminal law.[82] The emphasis on retribution had significant implications. The intentions of the perpetrator were elemental for categorizing an act as evil.[83] We punished wrongdoers because they deserved punishment.[84] Justice required punishment of the guilty and protection of the innocent.[85] When deterrence appeared as a consideration, it was subordinate to ideas of moral culpability and "just deserts."[86] During this period, specific intent was an element of property-related crimes,[87] because the evil of theft was not in the transport or use of otherwise handy objects, but rather in the covetousness that sought to have more assets for oneself at another's expense.[88] Having juries peer into the soul of the defendant was part of the criminal justice process.[89] In the modern era, these psychological considerations faded in importance, as

81. *See* PISZKIEWICZ, *supra* note 34, at 127-29; Pape, *supra* note 66 (discussing the pragmatic strategy of suicide terrorists to affect political change, particularly territorial independence); Shughart, *supra* note 33, 11-13, 35-36.

82. *See* Dubin, *supra* note 2, at 338-40.

83. *See* Dubin, *supra* note 2, at 348. Strict liability was disfavored at common law, except for certain sex crimes that seemed inherently immoral enough to evince inner depravity automatically. *See id.*

84. *See* Bierschbach, *supra* note 66, at 1203-05.

85. *See id.* at 1203 ("All varieties of retributivism are concerned primarily with one thing: doing justice in the particular case. Retributivism holds that an offender should be punished 'because, and only because, [he] deserves it'" (quoting Michael S. Moore, *The Moral Worth of Retribution*, *in* PUNISHMENT & REHABILITATION 94 (Jeffrie G. Murphy ed., 1995))). The early law courts descended from ecclesiastical courts, so it is not surprising that morality was central. *See* Hall, *supra* note 11, at 637 (describing how the "rule of strict construction" evolved from this earlier era but was disappearing in the early twentieth century); Sayre, *supra* note 2, at 983-84 (explaining the influence of canon law on the development of *mens rea*).

86. *See* United States v. Barnaby, 51 F. 20, 24 (C.C.D. Mont. 1892); Covy v. State, 4 Port. 186, 1836 WL 639, at *4 (Ala. 1836); Rogers v. State, 149 N.W. 318, 319 (Neb. 1914); McKay v. State, 132 N.W. 741, 745 (Neb. 1911); Gibson v. Somers, 103 P. 1073, 1074 (Nev. 1909); Territory v. McFarlane, 37 P. 1111, 1112 (N.M. Terr. 1894); State v. Kerns, 34 S.E. 734, 735 (W.Va. 1899); State v. Tyler, 5 Ohio Dec. 588, 1898 WL 666, at *4 (Ohio Comp.Pl. 1898); Eastman v. Premo, 49 Vt. 355, 360 (1877); *see also* Note, *A "Constructive" Flight from Justice*, 8 HARV. L. REV. 494, 495 (1895).

87. *See* Hall, *supra* note 11, at 641-42.

88. *See id.* at 653 (calling in 1937 for the final extirpation of the common law "vicious will" concept from modern "penology").

89. *See* Sayre, *supra* note 2, at 988-89.

strict liability crimes became commonplace and utilitarian concerns focused attention on the harmful consequences of an act rather than the depraved heart of the actor.[90] The "depraved-heart" of common law became "recklessness" in the Model Penal Code and twentieth-century statutes.[91]

Generally, felonies at common law shared a characteristic of crass opportunism on the part of the perpetrator.[92] Given the lack of cops, forensics, or other features of modern public safety, deterrence was only marginally feasible, and the law focused on the internal moral compass of the citizenry, the mens rea.[93] The public morality (retribution)[94] aspect of common law crimes meant that felonies should be few but general, easy for everyone to remember, and easy to avoid violating simply by keeping one's heart and intentions pure, selfless, and true.[95] Common law mens rea rules meant that people had less need to know the precise parameters of the acts or circumstances that constituted a crime.

Some practical considerations also influenced the common law approach to crime. There were no professional police forces or beat cops, so most crimes went unsolved. There was no forensic science to objectively determine the perpetrator, further reducing the likelihood of solving a crime. Weapons and other instrumentalities of crime were cumbersome, such as single-loading muskets or pistols, which affected the types of crimes that perpetrators would undertake, as well as the ability of law enforcement to deter or apprehend wrongdoers. Particularly relevant compared to the current paradigm shift, wrongdoers in the common law era lacked the ability to harm more than a handful of people at one time. It was virtually impossible for a lone actor to kill hundreds or thousands of people in one feat.

B. The Interstitial Era

A profound shift occurred after the Civil War due to a convergence of factors. Federalism,[96] codification,[97] and moral crusades against addictions and organized crime characterize this period.[98] The federal government emerged

90. *See* Dubin, *supra* note 2, at 350.

91. *See* Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 188 (2003).

92. *See* Sayre, *supra* note 2, at 990-92.

93. *See* Hall, *supra* note 11, at 641-42.

94. *See* Ferdinand Tonnies, *The Prevention of Crime*, 2 INT'L J. ETHICS 51, 52-53 (1891).

95. *See* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 759 n.56 (1935).

96. *See* Felix Frankfurter, *The Business of the Supreme Court of the United States — A Study in the Federal Judicial System*, 39 HARV. L. REV. 325, 331 (1926).

97. *See generally* Hall, *supra* note 11 (discussing codification of criminal laws in particular); Radin, *supra* note 14, at 883.

98. *See* Craig M. Bradley, *Anti-Racketeering Legislation in America*, 54 AM. J. COMP.

from the war supreme, and through the Thirteenth and Fourteenth Amendments, the states acceded to federal intrusions to prevent re-enslavement of freed slaves.[99] Advances in transportation and technology facilitated the distribution of addictive substances and trafficking in sex labor.[100] Problems we view as commonplace were novel at the end of the nineteenth century.[101] The federal criminalization of slavery led logically to federal prohibitions of seemingly enslaving vices.[102] Trafficking enabled such ensnarement, and penalizing traffickers was a new step in criminal law; prohibition through indirect means became a centerpiece of criminal law today.[103] The dawn of the twentieth century brought the Harrison Act (narcotics),[104] the Mann Act (sex trade or "white slave trafficking"),[105] Prohibition (alcohol),[106] Comstock laws

L. 671, 673-75 (2006).

99. *See* James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1482-92 (2010); *see also* Maguire & King, *supra* note 20, at 736 (explaining that federal intervention into narcotics trafficking had originally seemed reasonable: "[i]n other areas of law enforcement, when Congress has thrown federal power into the balance, these local problems have usually diminished or disappeared." (citing Lacey Act of 1900, Pub. L. No. 97-79, § 2, 95 Stat. 1073 (1981) (current version at 16 U.S.C. §§ 3371-3378 (2006)) (poaching); Act of October 29, 1919, ch. 89, §§ 1, 3, 5, 41 Stat. 324, 325 (1919) (current version at 18 U.S.C. § 2312 (2006)) (transportation of stolen vehicles); Lindbergh Law, ch. 271, §§ 1, 3, 47 Stat. 326 (1932) (current version at 18 U.S.C. § 1201 (2006)) (kidnapping)).

100. *See* Note, *Depression Migrants and the States*, 53 HARV. L. REV. 1031 (1940) (discussing the massive migrations that occurred during the Great Depression and their effect on state and federal laws).

101. *See* Bradley, *supra* note 98, at 673-77; *see also* Hall, *supra* note 11, at 618 ("Expansion and alteration of the substantive criminal law since 1887 has been largely the result of two types of forces. One has called for an increase of the area of conduct regulated by penal sanctions, to cope with new problems raised by changes in the social and economic *milieu* of the country since the Civil War, and to enforce by legislation the increasingly high standards of business morality which were coming to be generally accepted. The other force has sought greater effectiveness in law enforcement by changing the common law pattern of act and intent, so as to make conviction simpler and surer . . . .").

102. *See* David T. Courtwright, *The Hidden Epidemic: Opiate Addiction and Cocaine Use in the South, 1860-1920*, 49 J. S. HIST. 57, 71 (1983) (connecting cocaine prohibitions to whites' fears of slave uprisings); Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 288 (1987) ("The once popular view was that the addict was enslaved to his habit, irresistibly hooked in ways beyond his capacity to alter, and in the thrall of the body-and-soul-wracking experiences of withdrawal."); Kimani Paul-Emile, *Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy*, 19 CORNELL J.L. & PUB. POL'Y 691, 714 (2010).

103. *See* Bradley, *supra* note 98, at 674.

104. Harrison Narcotics Tax Act, ch. 1, 38 Stat. 785 (1914). The United States was following the Hague Opium Convention (International Opium Convention art. 9, Jan. 23, 1912, 38 Stat. 1912, T.S. No. 612), which obliged adherents to control the manufacture, sale, use, and transfer of "morphine, cocaine and their respective salts." *Id.*

105. Mann Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)).

106. *See* Bradley, *supra* note 98, at 676-78.

(obscenity),[107] and the first controls on illegal immigration (addressing slave-like working conditions). The common thread was to protect people from themselves, and the idea that normal or "good" people could unwittingly become "slaves" and live in misery.[108] All of these laws, of course, also contained elements of racism, sexism, and classism,[109] but they are not really in the same category as Jim Crow laws or overt measures to persecute minorities or the poor. These laws often reflected stereotypes about immigrants, women, or the poor as being impulsive, helpless, naïve, or irresponsible, and therefore needing the protection of the state; this self-appointed protective role is very

107. Comstock Act, ch. 258, 17 Stat. 598 (1873) (current version at 18 U.S.C. §§ 1416-62 (2006) and 19 U.S.C. § 1305 (2006)); *see also* Williams v. Pryor, 220 F. Supp. 2d 1257, 1285-88 (N.D. Ala. 2002) (detailing the history of enactment, subsequent amendments, enforcement, and judicial interpretations); Margaret A. Blanchard, *Anthony Comstock and His Adversaries: The Mixed Legacy of This Battle for Free Speech*, 11 COMM. L. & POL'Y 317 (2006); Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society - from Anthony Comstock to 2LiveCrew*, 33 WM. & MARY L. REV. 741 (1992); Jon M. Garon, *Entertainment Law*, 76 TUL. L. REV. 559, 635 (2002).

108. *See* Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 427 (1975) ("A typical layman's view of drug addiction is dominated by the myth of the addict's slavery: In this view drugs typically associated with drug-dependency have powers such that their repeated use even for a short period will "hook" the user."); Jessica G. Katz, *Heroin Maintenance Treatment: Its Effectiveness and the Legislative Changes Necessary to Implement it in the U.S.*, 26 J. CONTEMP. HEALTH L. & POL'Y 300, 327 (2010) (describing how in the 1960s, the head of the Bureau of Narcotics and Dangerous Drugs talked about heroin maintenance programs as "consigning hundreds of thousands of our citizens to the slavery of heroin addiction forever."); Gregory A. Loken, *Legal Cocaine and Kids: The Very Bitterness of Shame*, 18 HOFSTRA L. REV. 567, 603 n.225 (1990) ("Abuse of children by drunken fathers was a favorite image of the temperance movement in the nineteenth century . . . . [Eventually,] however, Prohibitionists were relying instead on arguments about the "slavery" of alcohol addiction and the economic benefits to society from a sober working class."); Rufus G. King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 YALE L.J. 736, 748 (1953) ("The true addict, by universally accepted definitions, is totally enslaved to his habit. He will do anything to fend off the illness, marked by physical and emotional agony, that results from abstinence . . . . [H]e must remain the abject servitor of his vicious nemesis, the peddler."); Sidney J. Spaeth, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CALIF. L. REV. 161, 167 (1991); Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL'Y & L. 552, 564 (2006) (citing examples of Prohibition Era advocacy that linked alcoholism to slavery). See also Steven Wisotsky, 1983 WIS. L. REV. 1305, 1414-15, who reports the following interesting anecdotes:

> Similar rumors about cocaine circulated during World War I. Reports in the press alleged that German agents were attempting to enslave America by selling or giving cocaine to school children in an attempt to convert them into addicts. In the pre-Harrison Act period, other baseless, outrageous and racist claims about the effects of cocaine were made. For example, it was alleged that "[m]ost attacks upon white women of the South . . . are the direct result of a coke-crazed negro brain." One doctor claimed that cocaine improved the marksmanship of blacks and conferred a temporary "resistance to the 'knockdown' effects of fatal wounds."

Id.

109. *See* Bradley, *supra* note 98, at 674.

different than laws designed to exclude, marginalize, or punish societal outsiders.

In a break from the common law era, criminal law became paternalistic, a tool for social engineering. Criminals were either pathetic and helpless,[110] or were tempters and slavemasters (i.e., the traffickers).[111] The mens rea element that was central to the common law gradually gave way to many strict liability crimes for public safety regulations.[112] Possession crimes sit on the border between general intent and strict liability. Knowing that one possesses contraband suffices, regardless of the reason or motivation. The Model Penal Code (MPC), a product of this era and the basis for criminal codes in almost three dozen states,[113] replaced the "mens rea" or "intent" requirement with a four-tiered "culpability" regime. The gradations of culpability represented levels of awareness of potential harm from the criminal act.

Threats of punishment, or deterrence, became a tool for offsetting the anticipated benefits of committing a particular crime, rather than a means of restoring the moral equilibrium.[114] An engineered form of deterrence gives would-be perpetrators something to lose by committing the crime. Parole and probation, which emerged during this period,[115] and plea bargaining, to a lesser

110. *See, e.g.*, Carmona v. Ward, 576 F.2d 405, 411 (2d Cir. 1978); Heard v. United States, 348 F.2d 43, 48 n.1 (D.C. Cir. 1964) (mentioning "the body's slavery to the continued use of opiates"); Castle v. U.S., 347 F.2d 492, 493 (D.C. Cir. 1964) (slavery to opiates); People v. Thomas, 566 P.2d 228, 281 (Cal. 1977) ("[T]he heroin addict is widely believed to be a self-indulgent social parasite who caters to his uncontrolled craving for the drug at the expense of his family and community obligations; a member of a criminal subculture who feeds his habit by engaging in theft, prostitution . . . ."); Tracy v. Mun. Court, 144 Cal. Rptr. 263, 281 (Ct. App. 1978); McMurtry v. Bd. of Med. Exam'rs, 4 Cal. Rptr. 910, 915-16 (1960); State v. Caldeira, 602 P.2d 930, 933 (Haw. 1979); Op. of the Justices to House of Representatives, 393 N.E.2d 313, 319 (Mass. 1979); Commonwealth v. Silva, 488 N.E.2d 34, 39 (Mass. App. Ct. 1986) ("A statute designed to protect the public from illegal drugs recognizes that drug addiction degrades and impoverishes those whom it enslaves and that addiction is a significant cause of family disruption and crime."); State v. Bejar, 717 P.2d 591, 595 (N.M. Ct. App. 1985); State v. Terrebonne, 364 So.2d 1290, 1292 (La. 1978); People v. Broadie, 332 N.E.2d 338, 477 (N.Y. 1975) ("Drug addiction degrades and impoverishes those whom it enslaves. This debilitation of men, as well as the disruption of their families, the Legislature could also lay at the door of the drug traffickers.").

111. *See, e.g.*, Ormento v. United States, 328 F. Supp. 246, 256 (S.D.N.Y. 1971) ("Petitioner carefully avoided the personal use of drugs while preying on the community and profiting from the enslavement of others to drug addiction."); People v. Thomas, 566 P.2d 228, 234 (Cal. 1977) (stating that any heroin addict is "a dangerous proselytizer who corrupts and enslaves the young and the weak in order to gratify his own needs").

112. *See* Dubin, *supra* note 2, at 350; Hall, *supra* note 11, at 641-42 (describing the decline of specific intent in the early decades of the twentieth century).

113. *See* Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 973 (2007) ("Indeed, the greatest change to substantive criminal codes during the first seventy years of the twentieth century was probably the Model Penal Code, which was designed by academics and other professionals to simplify and streamline substantive criminal law.").

114. For a critical review of the academic literature on deterrence, see Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279 (2008).

115. *See* Hall, *supra* note 11, at 652 (writing in 1937 that "[p]robation, parole, the

extent, are outgrowths of assumptions about deterrence and incentivizing lawful behavior.

Codification of criminal law became widespread in this period. Unfortunately, codification also subtly separates criminal law from the norms of the community and commonsense ideas of morality. Published criminal codes may appear superficially to provide better notice to the citizenry of the law's requirements, but it also allows for the proliferation of new, technical prohibitions.[116] Previously, judges could remember the elements of common law crimes, and the common law populace could generally grasp and remember what actions were punishable.[117] Written laws can be infinitely more numerous and unmemorable, as long as they are retrievable through an indexing system for judges and lawyers. The common law system imposed natural restraints on the number of felonies; codification has no restraints on quantity except the time it takes legislatures to promulgate more laws.[118] Legislatures can regulate conduct in every conceivable domain. During this period, official sentencing guidelines and gradations of offenses codified punishments as well. Calibrated sentences, with arithmetic enhancements and reductions, represented an underlying shift toward deterrence.

Exclusionary rules and the entrapment defense sprouted up during this period; they were not present in the common law system. Criminal procedure in England and other common law countries functioned without categorical exclusionary rules for evidence obtained by illegal searches or seizures.[119] No

indeterminate sentence and appellate review of the length of sentence, as they exist today, are largely products of the past half century").

116. *See generally* Luna, *supra* note 15; Hall, *supra* note 11, 619-40; Pound, *supra* note 15.

117. *See* Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 14 (1993) ("The successful barristers and the royal judges—virtually all of whom were former barristers—formed a small, cozy, homogeneous community. The common law is the expression of the values of this community. The lack of a felt need to systematize the common law by reducing it to a code is a reflection of the community's homogeneity. They had no more need for a code than the native speakers in a language community need a grammar book to know how to speak.").

118. *See* Radin, *supra* note 14, at 863 (describing the "relentless annual or biennial grinding of more than fifty legislative machines").

119. Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting); Wolf v. Colorado, 338 U.S. 25, 30 (1949) (surveying ten jurisdictions of the United Kingdom and the British Commonwealth of Nations); Regina v. Leatham, (1861) 8 Cox C.C. 498, 501 ("It matters not how you get it; if you steal it even, it would be admissible . . . ."); *see also* Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL'Y 961 (2008); Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 48 (2002); Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 319-20 (2004); Jenny McEwan, *Striking a Balance in Unlawfully Obtained Confession Cases: United Kingdom Pragmatism Against Principle*, 44 SAN DIEGO L. REV. 597, 600 (2007); Mike Redmayne, *The Structure of Evidence Law*, 26 OXFORD J. LEGAL STUD. 805, 807 n.11 (2006); Bruce P. Smith, *The Fourth Amendment, 1789-1868: A Strange History*, 5 OHIO ST. J. CRIM. L. 663, 665 (2008); Kweku Vanderpuye, *The International Criminal Court and Discretionary Evidential Exclusion: Toeing the Mark?*, 14

other country had the entrapment defense.[120] The introduction of these components in our criminal justice system corresponded to federalization and the enactment of vice laws. Nearly all of the leading cases for Fourth, Fifth, and Sixth Amendment exclusionary rules involved police enforcement of vice laws, narcotics, illegal betting operations, and obscenity, as did all six of the entrapment cases through which the Supreme Court shaped the rules for this defense.[121] In a sense, exclusionary rules and the entrapment defense merely recognize a contradiction in enforcing paternalistic laws against self-enslavement with methods that also ensnare or entice defendants. They also were expressions of the deterrence paradigm, as courts often said the purpose of each was to deter police misconduct.[122]

TUL. J. INT'L & COMP. L. 127, 151 (2005); Rebecca R. Zubaty, *Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority*, 54 UCLA L. REV. 1413 (2007). *But see* New York v. Quarles, 467 U.S. 649, 673 (1984) (O'Connor, J., concurring).

120. *See* Jacqueline Ross, *Tradeoffs in Undercover Investigations: A Comparative Perspective*, 69 U. CHI. L. REV. 1501, 1521-22 (2002) (explaining that in Europe the general rule is for the defendant to be found guilty but for the police to be charged as accessories to the crime in situations that would be analogous to entrapment in the United States); Ian Walden & Anne Flanagan, *Honeypots: A Sticky Legal Landscape?*, 29 RUTGERS COMPUTER & TECH. L.J. 317, 320-39 (2003) (comparing entrapment rules for the United States, England, Canada, and Australia, particularly with regard to computer-crime decoys known as "honeypots").

121. *See* Jacobson v. United States, 503 U.S. 540, 554 (1992) (reversing the defendant's conviction because the government failed to establish that defendant was independently predisposed to commit the crime for which he was arrested); Mathews v. United States, 485 U.S. 58, 63-66 (1988) (rejecting government's argument that entrapment defense should be unavailable because defendant did not concede all elements of the charged crime); Hampton v. United States, 425 U.S. 484, 488-89 (1976) (holding that the defense of entrapment was unavailable to the defendant because he was predisposed to commit the crime); United States v. Russell, 411 U.S. 423, 433 (1973) (holding that the defendant's concession that there was evidence to support the jury's finding that he was predisposed to commit the crime barred his claim of entrapment); Sherman v. United States, 356 U.S. 369, 373 (1958) (holding that entrapment was established as a matter of law because petitioner was induced to commit the crime); Sorrells v. United States, 287 U.S. 435, 451 (1932) (holding defense of entrapment available for defendant who gave government agent alcohol during Prohibition).

122. Deterring police misconduct was the primary justification for the exclusionary rule during the Warren Court era. United States v. Calandra, 414 U.S. 338, 347 (1974) ("[T]he rule's prime purpose is to deter future unlawful police conduct . . . ."); Lego v. Twomey, 404 U.S. 477, 489 (1972) ("This is particularly true since the exclusionary rules are very much aimed at deterring lawless conduct by police . . . ."); McGautha v. California, 402 U.S. 183, 211 (1971) ("[T]o permit such use created an unacceptable risk of deterring the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior."); Harris v. New York, 401 U.S. 222, 225 (1971) ("Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."); Chapman v. California, 386 U.S. 18, 45 n.2 (1967) (Stewart, J., concurring) ("The exclusionary rule in that context balances the desirability of deterring objectionable police conduct against the undesirability of excluding relevant and reliable evidence."); Linkletter v. Walker, 381 U.S. 618, 637 (1965) ("[A]s to the exclusionary rule, the purpose was to deter the lawless action of the police and to

Another hallmark distinguishing this era from the common law was the surge in criminal laws targeting organizations rather than individuals.[123] Common law crime was very individualistic, and assumed person-on-person actions. The last century saw a profound shift toward assumptions about criminal syndicates and gangs, with the concern being their efficiency in cycling through crimes and ensnaring victims, their impressive aggregate resources, and to some extent, their impersonal character as soulless entities.[124] This laid the groundwork for the criminal treatment of groups in the next era.

C. The National Security Era of Criminal Law

The new paradigm in criminal law operates with two important changes in these underlying assumptions. First, guaranteeing peace and safety for the whole society has replaced punishing the blameworthy or saving people from various enslavements as an overarching goal.[125] Stability and security are the motivators for penal policy.[126] Second, incapacitation, or making crimes less feasible to commit, is replacing the tactic of deterring through threatened punishments.[127]

There seems to be a consensus that terrorists are impervious to classic deterrence because they are not afraid of punishment.[128] The symbol of the clever suicide bomber, who spends months in flight lessons or learning about pyrotechnics, has shattered the traditional view of criminals as impulsive, antisocial, and supremely selfish. Punishment twists into martyrdom.

effectively enforce the Fourth Amendment."); Elkins v. United States, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."); Mapp v. Ohio, 367 U.S. 643, 651 (1951). *But see* Irvine v. People of Cal., 347 U.S. 128, 136 (1954) ("That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police.").

123. For a good historical discussion that aligns well with the points in this article, see Bradley, *supra* note 98, at 678-90.

124. *See id.*; *see also* Orin S. Kerr, *Updating the Foreign Intelligence Surveillance Act*, 75 U. CHI. L. REV 225 (2008) (arguing that FISA is too "person-oriented" and should be rewritten to address networks and aggregate behavior).

125. *See* Roach, *supra* note 19, at 132 ("[C]riminal law reform has been offered as a symbolic and relatively cheap response to a broad range of social, economic and cultural problems.").

126. *See id.* at 132-33.

127. *See* Gross, *supra* note 61. Deterrence remains within our system, but is giving way to policies calibrated to make specific crimes less likely to occur and harder to carry out. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 230-48 (2007).

128. *See id.* at 147 ("[W]e should assume that at least some terrorist activity cannot be deterred and spend more resources on regulating tile environment before, during and after acts of terrorism so as to minimize the harms of terrorism."). *But see* ALAN DERSHOWITZ, WHY TERRORISM WORKS 117 (2002).

Disincentives for terrorists are on the front end of the equation, increasing the transaction costs of committing the act[129] or raising the risk of botching the job,[130] rather than offsetting the presumed rewards with a possible penalty, as we have done in the past. The new paradigm is more concerned with lowering the chances of success than discouraging the behavior through threats.

Incapacitation and deterrence can lead in different directions when applied. Increased security, such as airport screening or ID checks, is an essential tool of incapacitation, but has less deterrent value. The ability of government agents to predict crime (who, when, where, and how) is paramount for ex ante harm prevention, whereas deterrence prioritized ex post capture of criminals. Methods of gathering information, whether surveillance or self-reporting, change as the goals turn from ferreting out criminals to flagging potential threats.[131] Crime statistics became important in the last century as a way to understand why crime happened and how policymakers could change the incentives for would-be offenders.[132] The national security paradigm uses statistics to know where to put roadblocks and checkpoints.

An additional trend is to associate other seemingly unrelated types of crime, such as narcotics, counterfeiting, or DVD piracy, with terrorism.[133] Terrorism colors how we perceive criminal groups;[134] attacks always spawn a flurry of efforts to uncover "links" to larger terrorist groups or organized crime.[135] Notions of guilty association relate closely to the underlying assumptions we have embraced.[136]

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129. *See* GURULE, *supra* note 27, on defunding terrorism.

130. *See generally* HAMM, *supra* note 25, about routine law enforcement activities repeatedly foiling dangerous terrorist plots.

131. *See* Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245 (2008); Roach, *supra* note 19, at 135.

132. *See* Kenneth Chelst, *An Algorithm for Deploying a Crime Directed (Tactical) Patrol Force*, 24 MGMT. SCI. 1314 (1978).

133. *See* HAMM, *supra* note 25, at 12-20, 128-132.

134. *See* Roach, *supra* note 19, at 140 ("Some terrorism offences are defined in such a broad manner that they resemble both status offences and guilt by association.").

135. For a good discussion of how group association is changing defenses in criminal law, see Eugene R. Milhiz, *Group Status and Criminal Defenses: Logical Relationship or Marriage of Convenience?*, 71 MO. L. REV. 547 (2006).

136. *See* PISZKIEWICZ, *supra* note 34, at 127-29; Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 6 (2004); Roach, *supra* note 19, at 138 ("The idea of collective punishment is implicit in Dershowitz's argument that the political cause of the terrorists should be punished for acts of terrorism because 'the cause hopes and expects to benefit collectively from terrorism'. The problem is that 'causes' do not commit acts of terrorism, individuals do. From the perspective of the criminal law, the punishment of the cause imposes punishment on the innocent. Although at times he seems aware of the injustice of collective punishment, Professor Dershowitz concludes that 'any effective attack calculated to reduce terrorism – especially suicide bombers – must include an element of collective responsibility and punishment for those supporting terrorism'. This departs from the fundamental focus on individual responsibility under the criminal law and the idea 'that

Terrorists are the ultimate embodiment of how we have come to view criminals: as a threat to our way of life. This same underlying attitude, however, is also visible in newer criminal law developments regarding white-collar criminals who create havoc in the financial sector,[137] the approach taken to illegal immigration,[138] or even how we deem looting in the wake of disasters.[139]

II. THE LAW

The national security paradigm is changing the way in which we draft and interpret penal code sections or criminal statutes. The argument here is not that everything has already changed, but rather that things are moving, gradually but observably, in a particular direction.

The few statutes designed to address terrorism directly are influencing the rest of the criminal law system through ancillary provisions. An example is the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[140] a response to the Oklahoma City bombings, which has changed the structure of habeas proceedings in the years since. In fact, most of the Supreme Court's interpretations of AEDPA pertain to the level of judicial deference required[141] and the statute of limitations for habeas petitions in capital cases,[142] rather than

punishing the mentally innocent with a view to advancing particular objectives is fundamentally unfair. It is to use the innocent as a means to an end'. Although the notion of collective guilt can influence public discourse, it is alien to legal discourse.").

137. *See* FRANCIS T. CULLEN ET AL., CORPORATE CRIME: UNDER ATTACK 355-64 (2d ed. 2006).

138. *See* Cole, *supra* note 24, at 238-46 (describing the immigration applications of the "paradigm of prevention").

139. Modern "looting" statutes, for example, usually provide that the offense be committed in circumstances "in which normal security of property is not present." LA. REV. STAT. ANN. §14:62.5(A) (2010); *see also* Stuart P. Green, *Looting, Law, and Lawlessness*, 81 TUL. L. REV. 1129, 1145 (2007).

140. *See* 28 U.S.C. §§ 2241-2255, 2261-2266. (2006).

141. *See, e.g.*, Magwood v. Patterson, 130 S. Ct. 2788 (2010) (permitting AEDPA review of habeas petition); Renico v. Lett, 130 S. Ct. 1855 (2010) (relying on AEDPA in upholding state court ruling that a retrial based on a hung jury did not violate double jeopardy); Berghuis v. Smith, 130 S. Ct. 1382 (2010) (holding that AEDPA forbids review of fair cross-section requirement for jury in murder trial); Waddington v. Sarausad, 129 S. Ct. 823 (2009) (reinstating conviction under AEDPA that had been reversed due to jury instructions on accomplice liability in a murder); Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) (reversing conviction under AEDPA review based on contrary mitigating evidence); Carey v. Musladin, 549 U.S. 70 (2006) (upholding, based on AEDPA, state court decisions about whether victim's family members wearing supportive buttons in the courtroom prejudiced the murder trial); Miller-El v. Dretke, 545 U.S. 231 (2005) (relying on AEDPA to uphold state court decision against the defendant on a claim of juror prejudice); Brown v. Payton, 544 U.S. 13 (2005) (relying on AEDPA to uphold court's decision, over defendant's objection, to permit prosecutor's remarks asking the jury to ignore mitigating factors).

142. Holland v. Florida, 130 S. Ct. 2549 (2010); Jimenez v. Quarterman, 129 S. Ct. 681 (2009); Burton v. Stewart, 549 U.S. 147 (2007); Pace v. DiGuglielmo, 544 U.S. 408

cases involving actual terrorists. Judicial interpretations of provisions in anti-terrorism statutes, such as the scienter requirement of the "material support for terrorism" statute, generate binding precedent for non-terrorism cases that use identical phrasing.[143]

A. Indirect Rules

Terrorism statutes more often attack the problem indirectly, by criminalizing material support for terrorist organizations, transport of illegal workers, money laundering, etc. This pattern of indirect crime control now characterizes other areas as well. The traditional approach to criminal law directly proscribed the bad activity itself. This shift is an outgrowth of the assumption that direct threat-of-sanction deterrence is ineffective against criminals motivated by ideologies rather than personal gain.[144]

Terrorism has proved impervious to traditional criminal prohibitions and deterrence, so increasingly the United Nations and the federal government have called for indirect measures that seek to make commission of the crime less feasible. Indirect rules attacking the funding sources[145] or the ability of criminals to communicate secretly, travel easily from place to place, get information about targets, or obtain weapons, are the favored means in combating terrorism.[146] Typical is the call from Professor Roach, who suggests:

> [We should] spend more resources on regulating the environment before, during and after acts of terrorism so as to minimize the harms of terrorism. Before the act of terrorism, this means better regulation of sites and substances that are attractive to terrorists. It is particularly important to take steps to ensure that potential terrorists cannot obtain access to lethal substances such as toxins, nuclear material and airplanes. The terrorist attacks that brought down two aircraft in Russia reveal that more can be done to screen passengers and

(2005); Johnson v. U.S., 544 U.S. 295 (2005); Carey v. Saffold, 536 U.S. 214 (2002); Duncan v. Walker, 533 U.S. 16 (2001); Artuz v. Bennett, 531 U.S. 4 (2000).

143. Another trend is the intentional convergence of judicial interpretations from various countries and jurisdictions in reaction to worldwide anti-terrorist legislation. *See* Cole, *supra* note 24, at 269-75.

144. *See* PISZKIEWICZ, *supra* note 34, at 127-29.

145. *See, e.g.*, Cole, *supra* note 24, at 239-41 (embargoing of individuals or groups under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-06 (2006)).

146. *See* GURULE, *supra* note 27 (discussing U.S. legislation for freezing the assets of foreign terrorists); Roach, *supra* note 19, at 138 ("Laws against the financing of terrorism are not aimed at terrorists or even those who may sympathize with their cause, but business people who are required, on pain of criminal conviction, to use their own resources to ensure that they are not assisting terrorists. Such systems are also encouraged by lists distributed by international, regional and domestic agencies of people who are designated as terrorists, lists that are often incorporated in the domestic law of many nations. Those listed are not generally given an opportunity to make submissions before they are listed and the provisions for removing those mistakenly added to the list may be slow and not repair the damage of being officially listed as a terrorist.")

> baggage. Much of this type of environmental regulation may be achieved by administrative laws that may present less of a threat to values such as liberty, due process and equality than the criminal law. Some of these preventive measures may also have the advantage of making us safer from accidents involving nuclear material and toxins.[147]

The "material support for terrorism" statute is perhaps the clearest illustration of this, making it a felony to provide any type of aid, useful information, or other indirect support to terrorist groups.[148] The Supreme Court upheld the constitutionality of this provision in June 2010. There are several other similar statutes that allow the government to freeze assets of terrorists.[149]

This "fence around the law" approach, while most vivid in the anti-terrorism context, is becoming more typical in other areas of law enforcement as well,[150] especially in combating narcotics use. For example, the federal drug-involved premises statute imposes criminal liability on those who "knowingly open, lease, rent, use, or maintain any place . . . for the purpose of manufacturing, distributing, or using any controlled substance," discussed more below.[151] Another federal statute forbids aiding and abetting a felon in obtaining firearms.[152] White collar crimes under Sarbanes-Oxley, an area far removed from the violence of terrorism, imposes potential criminal liability on lawyers and accountants who indirectly enable various types of security fraud or embezzlement.

Of course, enforcement agencies may use indirect crime control, even without explicit statutory guidance, by using other unrelated penal sections to target terrorists or other threats to national security. These are crossover prosecutions.[153] Immigration enforcement and deportations have been the most-used tool since 9/11 to attack terrorism, and narcotics enforcement measures merge into "narcoterrorism" investigations.[154] As mentioned above,

147. Roach, *supra* note 19, at 147.

148. *See* Cole, *supra* note 24, at 236-39 (describing the "material support" statute and its use by the federal prosecutors).

149. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

150. *See* Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 159-62 (2005) (discussing the modern proliferation of proxy crimes and their disconnect from retributive rationales for punishment).

151. 21 U.S.C. § 856(a)(1) (2006).

152. *Id.* § 841(c)(2).

153. "Crossover prosecutions" is used here to refer to the application of regular criminal laws (unrelated to terror) to combat terrorism, usually as a means of incapacitating potential terrorists; "spillover effects" is the mirror image of this concept, the application of anti-terror legislation to non-terrorism contexts. For poignant examples of spillover, see SIDEL, *supra* note 45, at 91-92 (describing a case of prosecutors using New York's antiterrorism statute to charge a gang leader for the murder of a ten-year-old girl in the Bronx; a North Carolina prosecutor who tried using his state's antiterrorism statute to charge methamphetamine producers with manufacturing "chemical weapons;" and Virginia's use of antiterrorism statutes to prosecute and convict lone snipers John Allen Muhammed and Lee Boyd Malvo).

154. *See* United States v. Mohammed, 538 F. Supp. 2d 281 (D.D.C. 2008); Miller v.

commentators are associating even film piracy and pedophilia with terrorism. This brings the influence of national security thinking into other, seemingly unrelated areas of law, eventually affecting the drafting or amendments of those statutes. Enforcement tactics are the subject of a subsequent section; the point here is merely to mention this as an influence on penal legislation.

B. Evolving Scienter Requirements

Federal criminal statutes favor a scienter formulation of "knowingly" or "should have known."[155] This new approach to scienter is more general than common law specific intent, but more specific than common law general intent. More importantly for the present topic, the current scienter formulation dovetails with the overarching goal of prevention or avoidance of harms, rather than penalizing selfishness or impulsiveness on the part of the wrongdoer.

The new approach has both an objective component (what the defendant should reasonably have known) and a somewhat diluted subjective component (what the defendant actually knew or thought); "knowingly" is thus the equivalent of a duty to avoid foreseeable harms, and fits well with the policy goal of maintaining security and preventing disaster.[156] The "material support

U.S. Dep't of Justice, 562 F. Supp. 2d 82, 102 n.12 (D.D.C. 2008); Press Release, U.S. Dep't of Justice, Member of Afghan Taliban Convicted in U.S. Court on Narco-terrorism and Drug Charges (May 15, 2008), *available at* http://www.justice.gov/opa/pr/2008/May/08-crm-429.html; Terry Frieden, *U.S. Indicts 50 Colombians it Calls 'Narcoterrorists'*, CNN ONLINE (March 22, 2006), http://articles.cnn.com/2006-03-22/justice/justice.farc_1_farc-face-drug-trafficking-charges-cuevas-cabrera?_s=PM:LAW; *Narcoterrorism*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/ongoing/narco-terrorism.html (last visited Dec. 8, 2010); INSPECTOR GENERAL, DEP'T OF DEFENSE, REPORT NO. D-2009-109, CONTRACTS SUPPORTING THE DOD COUNTER NARCOTERRORISM TECHNOLOGY PROGRAM OFFICE (2009), *available at* http://www.dodig.mil/audit/reports/fy09/09-109.pdf (last visited Dec. 8, 2010); LOCKHEED MARTIN'S COUNTER NARCO-TERRORISM TECHNOLOGY PROGRAM AND OPERATIONS SUPPORT (CNTPO), http://www.lockheedmartin.com/products/CounterNarcoTerrorism/index.html (last visited Dec. 8, 2010).

155. Stephanie Martz, Why Criminal Law Should Matter To Business, Speech Before the Civil Justice Reform Group (May 23, 2006), *in* CHAMPION, July 2006, at 42.

156. For example, in drafting the federal drug-involved premises statute, Congress imposed criminal liability on those who "knowingly open, lease, rent, use, or maintain any place . . . for the purpose of manufacturing, distributing, or using any controlled substance." 21 U.S.C. § 856(a)(1) (2006). The legislative goal apparently was to cover a broad spectrum, but the *mens rea* requirement has befuddled the courts. *See* Matthew P. Fitzsimmons, *Primary, Significant, or Merely More than Incidental: What Level of Intent Does the Federal Drug-Involved Premises Statute Really Require?*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 177, 208-10 (2009). Similarly, the Comprehensive Drug Abuse Prevention and Control Act makes it a crime for a person to possess or distribute a listed chemical "knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance." 21 U.S.C. § 841(c)(2) (2006). There is a current split between circuit courts as to this *mens rea* provision as well. *See, e.g.*, United States v. Khattub, 536 F.3d 765, 769 (7th Cir. 2008); United States v. Truong, 425 F.3d 1282, 1289 (10th Cir. 2005); United States v. Galvan, 407 F.3d 954, 958 (8th Cir. 2005); United States v. Kaur, 382 F.3d 1155, 1157-58 (9th Cir. 2004); United States v. Prather, 205 F.3d 1265,

of terrorism" statute follows this same scienter formulation, which became the subject of the Supreme Court's recent *Holder* case;[157] the Court upheld the "knowingly" element of the "material support of terrorism" statute (which Congress added after 9/11) against a rather plausible void-for-vagueness challenge. The open-endedness of the modern scienter formulation allows for easy prosecutions following sting operations, and in the *Holder* case, allowed the "material support" label to apply to providing legal advice to a terrorist organization about how to participate in the mainstream political process as a non-violent alternative for pursuing its goals.

The point here is not that the government always wins under statutes using this mens rea formulation (they do not), but rather that this formulation facilitates the emerging policy goals of eliminating risks and incapacitating threats. Judicial opinions discuss the grammatical ambiguities rather than employing the psychological precision one might expect when interpreting mens rea provisions; the analysis turns on deciding to which clauses "knowingly" refers in the rest of the sentence.[158] Grammaticism is a versatile tool. Adverbial scienter clauses, especially those as ambiguous as "knowingly," are always susceptible to being stretched or constrained by interpretations of which phrases in the rest of the statute they modify.[159] The social harm of the underlying offense seems to be a better predictor of the case outcomes in these mens rea cases than subjective mental factors, such as the availability of the designated information to the defendant in the case.[160]

This seems counterintuitive, given that the scienter term in question is "knowingly." One would think that the cases would turn almost entirely on whether the defendant knew, or could easily have known, the predicate facts that trigger liability under the statute.[161] The defendant's knowledge or the ease

1269 (11th Cir. 2000). The majority view is that it requires *either* subjective knowledge *or* an objective cause to believe to convict. *See Galvan*, 407 F.3d at 957; *Kaur*, 382 F.3d at 1157; *Prather*, 205 F.3d at 1270-72. See also the thorough discussion in Brian Walsh, *Circuits Split as to Statutory Interpretation of the Mens Rea Requirement in 21 U.S.C. § 841(C)(2): The Tenth Circuit Provides the Correct Answer*, 48 DUQ. L. REV. 123 (2010).

157. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (upholding the constitutionality of the "material support of terrorism" statute and interpreting its scienter element of "knowingly").

158. For example, in 2009 the Supreme Court addressed a scienter provision nearly identical to the one in *Holder* in the federal identity theft statute, which prosecutors were using to ferret out illegal immigrants whose phony Social Security numbers on employment paperwork happened to be someone else's real number (another example of a crossover prosecution). Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009); *see also The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 312 (2009).

159. *See* Hall, *supra* note 11, at 644.

160. *See also* United States v. Williams, 553 U.S. 285, 290 (2008) (mentioning how grammatical analysis often controls interpretation of the "knowingly" scienter requirement, and then ruling in favor of the defendant in a pornography case).

161. The MPC's four levels of culpability, however, were mostly tiers of the awareness of risk that factfinders could attribute to defendants.

of access to the relevant "knowledge" seem less important, however, than how disruptive the predicate *act* is to society. The social harm at stake can drive the result, using grammar as the vehicle.

In fact, mens rea seems to be moving beyond mere risk awareness. For example, an individual who aids and abets a felon's firearm ownership can be charged as an accomplice to the felon-in-possession offense, pursuant to 18 U.S.C. § 2(a),[162] without a clear mens rea element related to the gun-receiver's status as a convicted felon under § 922(g)(1).[163] There is a current split among circuit courts over whether a defendant charged with aiding and abetting a felon under § 922(g)(1) can be held strictly liable for knowing the principal's status as a convicted felon.[164] Similarly, the centerpiece of federal cybercrime legislation is the Computer Fraud and Abuse Act (CFAA), enacted in 1984.[165] There have been at least ten amendments to this section, some included in the Patriot Act, and all significantly expanding the reach or punishments of the statute.[166] While it includes some provisions for "intentional" fraud,[167] it also includes what appears to be strict liability for causing damage to another computer after one has intentionally accessed it without authorization.[168]

162. 18 U.S.C. § 2(a) (2006) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

163. *See* Lisa Rachlin, *The Mens Rea Dilemma for Aiding and Abetting a Felon in Possession*, 76 U. CHI. L. REV. 1287 (2009).

164. The Ninth Circuit applies strict liability, while the Third and Sixth Circuits require that the defendant had knowledge or "reasonable cause to believe" that the principal is a convicted felon for the defendant to be convicted as an accomplice under § 922(g)(1). *See* United States v. Gardner, 488 F.3d 700, 713 (6th Cir. 2007); United States v. Graves, 143 F.3d 1185 (9th Cir. 1998); United States v. Xavier, 2 F.3d 1281 (3d Cir. 1993); United States v. Canon, 993 F.2d 1439 (9th Cir. 1993).

165. Counterfeit Access Device and Computer Fraud and Abuse Act of 1984, Pub. L. No. 98-473, § 2102(a), 98 Stat. 2190 (codified as amended at 18 U.S.C. § 1030 (2006)).

166. *See id.*; Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, § 2, 100 Stat. 1213 (1986); Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, § 7065, 102 Stat. 4404 (1988); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 962(a)(5), 103 Stat. 502 (1989); Crime Control Act of 1990, Pub. L. No. 101-647, §§ 1205(e), 2597(j), 3533, 104 Stat. 4831, 4910, 4925 (1990); Computer Abuse Amendments Act of 1994, Pub. L. No. 103-322, § 290001(b)-(f), 108 Stat. 2097 (1994); National Information Infrastructure Protection Act of 1996, Pub. L. No. 104-294, §§ 201, 604(b)(36), 110 Stat. 3491, 3508 (1996); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, §§ 506(a), 814, 115 Stat. 366, 382 (2001); Criminal Law Technical Amendments Act of 2002, Pub. L. No. 107-273, §§ 4002(b)(1), (12), 4005(a)(3), (d)(3), 116 Stat. 1807, 1808, 1812, 1813 (2002); Cyber Security Enhancement Act of 2002, Pub. L. No. 107-296, § 225(g), 116 Stat. 2158 (2002); Identity Theft Enforcement and Restitution Act of 2008, Pub. L. No. 110-326, §§ 203-08, 122 Stat. 3560, 3560-65 (2008).

167. 18 U.S.C. § 1030(a)(4) (2006).

168. *Id.* § 1030(a)(5)(C).

In other words, the scienter element applies only to the unauthorized access, not the actual damage done to the victim's computer or network. This has elicited some criticism in the academic community, but appears to be exactly what Congress intended when it added this provision in 1996.[169] Strict liability is also increasingly common in criminal statutes.[170] Once reserved for regulatory offenses that carried no penalty of imprisonment,[171] our criminal justice system has grown more comfortable with strict liability as a valuable tool in the incapacitation of dangerous individuals.

C. Greater Discretion

Newer statutes also give prosecutors and investigators more discretion and flexibility. Criminal law has decreasing clarity about the specific actions to prohibit, but increasing clarity about protecting a crime-free state of affairs.

The Patriot Act conferred more authority and discretion on federal law enforcement officials, and on the executive branch generally.[172] Most of the increased authority pertains to gathering information, such as surveillance or authority to demand voluntary disclosure of information.[173] Data mining[174] is

169. *See* Trevor A. Thompson, *Terrorizing the Technological Neighborhood Watch: The Alie-Nation and Deterrence of the "White Hats" Under the CFAA*, 36 FLA. ST. U. L. REV. 537, 561-68 (2009).

170. For example, the Ohio state legislature amended its criminal gambling statute to make strict liability more explicit in reaction to the Ohio Supreme Court's determination that some level of criminal intent must be present in State v. Lozier, 803 N.E.2d 770, 774-75 (Ohio 2004). *See* Act of June 24, 2004, Amend. Sub. H.B. 163, 2004 Ohio Laws 4620; Felicia I. Phipps, *Strict Liability or Recklessness: Untangling the Web of Confusion Created by Ohio Revised Code Section 2901.21(B)*, 35 U. DAYTON L. REV. 199 (2010); *see also* John L. Diamond, *The Myth of Mortality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111, 116-17 (1996); Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415 (2007) (describing several examples of the trend and suggesting that *mens rea* requirements should be calibrated according to the perpetrator's information costs); Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1166-69 (1995); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 831 (1999); Jarrod Forster Reich, Note, *"No Provincial or Transient Notion": The Need for a Mistake of Age Defense in Child Rape Prosecutions*, 57 VAND. L. REV. 693, 694-97 (2004).

171. *See* United States v. Bailey, 444 U.S. 394, 404 n.4 (1980); MODEL PENAL CODE § 2.05(1)(a) (1985); *id.* § 2.05 cmt. at 283 ("The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed."); Larry Kupers, *Aliens Charged with Illegal Re-entry Are Denied Due Process and, Thereby, Equal Treatment Under the Law*, 38 U.C. DAVIS L. REV. 861, 880-81 (2004); *see also* David J. Karp, Note, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249, 1253 n.13 (1978).

172. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960-72 (2002) (discretion to detain immigrants); Harold C. Relyea, *Organizing for Homeland Security*, 33 PRES. STUD. Q. 602 (2003).

173. SIDEL, *supra* note 45, at 66-71.

174. *See* Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317 (2008).

one important issue. Information-related discretion is the most obvious pro-government discretionary shift in anti-terrorism and other newer penal statutes, but the effect is not boundless.[175]

Less obvious, but still significant, is the increased discretion that comes from a proliferation of indirect crime-control laws, gradations of offenses, and ambiguity in mens rea provisions. Each of these multiplies the options for investigators in selecting targets and prosecutors in charging and plea bargaining.[176] A recent practitioner's journal observed that criminal laws in our country "have become dangerously disconnected from the English common law tradition and its insistence on fair notice, so prosecutors can find some arguable federal crime to apply to just about any one of us, even for the most seemingly innocuous conduct (and since the mid-1980s have done so increasingly)."[177]

III. DEFENSES & EXCLUSIONS

The "information premium" that characterizes the national security paradigm has also affected the exclusionary rules pertaining to self-incrimination and searches. Exclusionary rules have increased significance in the criminal justice system as police rely more on intercepting phone calls and emails, tracking of web browsing, and ubiquitous surveillance cameras. In addition, the shift towards greater surveillance and infiltration-oriented undercover agents gives the entrapment defense new importance, even if the defense is usually unsuccessful.

A. Information Premium vs. Privacy

In recent years, information has become all-important, making privacy intrusions seem more reasonable. A complete factual picture at trial has more value than before; the exclusionary rules from the Warren Court era contradict this growing value. Explicit statutory authorizations for surveillance and extensive data mining[178] have curbed defendants' abilities to have

175. An additional offset to the potential invasion of privacy is the clutter phenomenon—an overwhelming amount of information makes it infeasible to find the useful intelligence in the pile. Clutter makes terror prevention very difficult, but it also makes it hard to cull information useful for targeting anyone.

176. *See* Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 646 (2006).

177. Harvey A. Silvergate, *The Decline and Fall of Mens Rea*, CHAMPION, Sept.-Oct. 2009, at 15. Silvergate also discusses the expanding discretion and plea-bargaining leverage that prosecutors have in the multiplication of gradations of offenses. *Id.* at 18.

178. *See* Slobogin, *supra* note 174. The PATRIOT Act reduced restrictions on law enforcement agencies' ability to search telephone, e-mail communications, medical, financial, and other records; eased restrictions on foreign intelligence gathering within the United States; expanded the Secretary of the Treasury's authority to regulate financial

incriminating evidence excluded from their trials; not only do courts tend to defer to explicit intentions of the legislature,[179] but the new statutes also impact the "reasonable expectation of privacy" analysis that has framed Fourth Amendment exclusionary rules since *Katz*.[180]

The Supreme Court's recent *Hiibel*[181] case provides an illustration. The Court upheld state statutes that require citizens to give their name to police during *Terry* stops.[182] This is one of the clearest cases of national security concerns influencing other areas of criminal procedure, as the Supreme Court upheld a ruling by the Nevada Supreme Court that relied heavily on concerns about terrorism and other threats to our social order.[183] Other commentators have noted the spillover effect in the *Hiibel* case, which appealed a defendant's conviction for refusing to identify himself to an officer responding to a domestic violence call; it does provide evidence of the new paradigm affecting both statutes and jurisprudence.[184]

Other recent Supreme Court cases indicate a trend toward favoring information disclosure over concerns about privacy or self-incrimination. In *Berghuis v. Thompkins*,[185] the Court decided that defendants must invoke their right to silence explicitly to trigger a police duty to relent in questioning;

transactions, particularly those involving foreign individuals and entities; and broadened the discretion of law enforcement and immigration authorities in detaining and deporting immigrants suspected of terrorism-related acts. The Act also expanded the definition of terrorism to include domestic terrorism, thus enlarging the number of activities to which the PATRIOT Act's expanded law enforcement powers could be applied. Abrams indicates that

> [t]he main thrust of the Act was directed to broadening and strengthening law enforcement tools of investigation and procedures and methods that can be used to attack terrorist groups and activities. Many of these strengthened tools, procedures and methods can be used as well against ordinary criminals and criminal activity; they are not restricted to being used only in anti-terrorism contexts.

NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 9-10 (2003).

179. See the recent discussion of the phenomenon, and emerging trends in this regard, in Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005).

180. Katz v. United States, 389 U.S. 347 (1967).

181. Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177 (2004).

182. *Id.*

183. Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201 (Nev. 2002), *cert. granted*, 540 U.S. 965 (2003), *aff'd*, 542 U.S. 177 (2004).

184. *See, e.g.*, Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753 (2005); M. Christine Klein, *A Bird Called* Hiibel*: The Criminalization of Silence*, *in* CATO SUPREME COURT REVIEW, at 357 (Cato Institute, 2004); Peter Koclanes, *Unreasonable Seizure: "Stop and Identify" Statutes Create an Illusion of Safety by Sacrificing Real Privacy*, 57 FLA. L. REV. 431 (2005); Luna, *supra* note 15, at 707; Turgeon, *supra* note 23; James G. Warner, *Dudley Do Wrong: An Analysis of a "Stop and Identify" Statute in* Hiibel v. Sixth Judicial District Court of Nevada, 39 AKRON L. REV. 245 (2006); William H. Weisman, *Where Everybody Knows Your Name: Compulsory Identification and the Fallacy of the* Hiibel *Majority*, 71 BROOK. L. REV. 1421 (2006); Jamie L. Stulin, Comment, *Does* Hiibel *Redefine* Terry*? The Latest Expansion of the* Terry *Doctrine and the Silent Impact of Terrorism on the Supreme Court's Decision to Compel Identification*, 54 AM. U. L. REV. 1449 (2005).

185. 130 S. Ct. 2250 (2010).

otherwise, police can continue interrogating a stone-silent witness for hours. As mentioned above, the new *Shatzer* decision allows police to reinitiate questioning without defense counsel present fourteen days after the invocation of the Fifth Amendment right.[186]

Calls for increased information access, or license to interrogate, come from both sides of the political spectrum. Attorney General Eric Holder has asked Congress to pass legislation that would eliminate the *Miranda* defense in national security cases;[187] it is not clear how this would align with the Court's decision in *Dickerson v. United States*,[188] which invalidated a legislative attempt in the 1970s to undo *Miranda.* On the other side, Richard Posner (among many others) has suggested that the high stakes in anti-terrorism efforts warrant rule-bending when it comes to obtaining information.[189]

B. Affirmative Defenses Under the New Paradigm

An observable shift is occurring in the area of affirmative defenses.[190] Previously, courts used the "lesser of two evils" balancing test to defenses and exclusionary rules,[191] but the balancing test was different than today, as most

186. Maryland v. Shatzer, 130 S. Ct. 1213, 1219-22 (2010).

187. *See* Charlie Savage, *Holder Backs a Miranda Limit for Terror Suspects*, N.Y. TIMES, May 10, 2010, at A1 ("We're now dealing with international terrorists, and I think that we have to think about perhaps modifying the rules that interrogators have and somehow coming up with something that is flexible and is more consistent with the threat that we now face.").

188. 530 U.S. 428 (2000).

189. Judge Richard Posner, however, sees a significant conflict between intelligence gathering and law enforcement, of which stings are an integral part, and argues that an agency attempting to do both simultaneously will be ineffective at both. *See* RICHARD A. POSNER, UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM 110-17, 135 (2006). In another book, Posner states:

> The broader point is that prevention is a much more important policy goal in the case of global terrorism than in the case of ordinary crime. The nation can live with 30,000 ordinary murders a year, but not 30,000 murders by terrorists. Criminal punishments are designed to limit the crime rate, but not to reduce it to zero; the costs would be disproportionate to the benefits. This is much less clear in the case of terrorism.

RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 2245 (7th ed. 2007).

190. *See* POSNER, UNCERTAIN SHIELD, *supra* note 189.

191. *See, e.g.*, United States v. LaFleur, 971 F.2d 200, 204 (9th Cir. 1992) ("The duress defense, which provides the defendant a legal excuse for the commission of the criminal act, is based on the rationale that a person, when confronted with two evils, should not be punished for engaging in the lesser of the evils."); State v. Rumble, 680 S.W.2d 939 (Mo. 1984); PAUL H. ROBINSON, CRIMINAL LAW 410 (1997) ("Many statutes require that the threat of harm must be 'imminent' in order to entitle the actor to act under a lesser-evils defense."); Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1511 (2009); Kyron Huigens, *The Continuity of Justification Defenses*, 2009 U. ILL. L. REV. 627, 676-77 (2009); Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1072 (2008). For a discussion of the development of affirmative defenses at common law, and the scienter requirement for each, see Sayre, *supra* note 2, at 1004-16.

crimes were either opportunistic exploitation of a single victim, or "victimless crimes" where the defendant was mostly harming himself. This may have led to more favorable outcomes for defendants than we are seeing today.[192] In the context of affirmative defenses, there is more popular (and judicial) resistance today to the utilitarian idea of "lesser evils."[193]

Recent commentators have argued that the policymakers have more influence on the availability of affirmative defenses than the case-by-case application that occurs in the courts,[194] making the growing legislative hesitancy in this area more significant. Congress considered and rejected the proposal to include a necessity defense in the federal criminal code.[195] As Professor Hoffmeier recently reported, "Seventeen of the nineteen states that codify some version of the defense reject the unrestricted balancing of harms proposed by the Model Penal Code."[196]

The defense of entrapment is our legal system's primary method for regulating undercover operations or stings.[197] The national security paradigm has made the entrapment defense more significant (but probably less available) because the goal of protecting safety necessitates more use of undercover informants.[198] More entrapment claims today relate to funding terrorism[199] and to bomb plots.[200] Sting operations are even more useful for incapacitation than

192. *See* Sayre, *supra* note 2, at 1016-20; Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1 (2005) (showing that the entrapment defense is on the decline, both in how often it arises and in how often it succeeds).

193. *See* Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191 (2007).

194. *See generally* Thorburn, *supra* note 191.

195. *See* Hoffheimer, *supra* note 193, at 233-34.

196. *Id.* at 242-43. An additional new trend in affirmative defenses is the effect of group association, discussed above as a component of the emerging national security paradigm. *See generally* Milhiz, *supra* note 135, at 548 ("Group status has become increasingly significant with respect to criminal defenses. With varying degrees of success, academics, judges, and commentators have argued that group status can serve as an appropriate basis for defending against a charge or for avoiding or reducing punishment.").

197. *See* McAdams, *supra* note 150, at 108.

198. *See* Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125 (2008).

199. *See, e.g.*, United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008); United States v. Abdi, 463 F.3d 547, 554 (6th Cir. 2006) (defendant charged with providing material support); United States v. Aref, No. 04-CR-402, 2007 WL 603508, at *2-4 (N.D.N.Y. Feb. 22, 2007) (sting operation and criminal prosecution for providing funds to Islamic terrorists); Almog v. Arab Bank, 471 F. Supp. 2d 257, 259 (E.D.N.Y. 2007) (involving tort action against Jordanian bank alleged to have knowingly provided banking and other services that facilitated the actions of terrorist organizations); United States v. Salah, 462 F. Supp. 2d 915, 915 (N.D. Ill. 2006).

200. *See, e.g.*, United States v. Merlino, 592 F.3d 22 (1st Cir. 2010); United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008); United States v. Siraj, No. 07-0224-cr, 2008 WL 2675826 (2d Cir. July 9, 2008); United States v. Hughes, 273 F. App'x. 587 (9th Cir. 2007); United States v. Nettles, 476 F.3d 508, 510 (7th Cir. 2007) (personal vendetta bomb plot to mimic Oklahoma City bombing); United States v. Ressam, 474 F.3d 597, 598 (9th Cir. 2007) (Al-Qaeda attempt to bomb the Los Angeles Millennium celebrations); United States

for deterrence, because they allow infiltration of criminal groups and sabotage of plots from within, or diversion of dangerous potential criminals into decoy plots.

Stings and other undercover operations also illustrate the front-end deterrence that permeates the new paradigm. They divert criminals' resources from their own harmful objectives by plaguing criminal organizations with uncertainty, internal mistrust, costly screening methods for recruits, etc. As explained elsewhere,[201] terrorist leaders and syndicate organizers know that a significant percentage of their recruited minions are likely to be informants or undercover agents; conversely, potential recruits may realize that their recruiter could be a government agent, which would have a chilling effect on the entire enterprise.[202] Mistrust within a criminal organization raises the transaction costs of crime, including terrorism, because criminal leaders and subordinates alike must divert resources to screening and testing their co-conspirators more than they would otherwise.[203] Criminal conspiracies make less progress when added costs drain away time, energy, and other resources. As the field becomes more cluttered with undercover government agents, leaders find it more difficult to

v. McMorrow, 471 F.3d 921, 923 (8th Cir. 2006) (bomb threats on Fargo, North Dakota); United States v. Olmeda, 461 F.3d 271, 277 (2d Cir. 2006) (possession of eighteen pipe bombs and other munitions); United States v. Mohamed, 459 F.3d 979, 981 (9th Cir. 2006) (threatened Islamic terror bomb attack on Los Angeles); United States v. Campa, 459 F.3d 1121, 1158-60 (11th Cir. 2006) (history of bombings in southern Florida); United States v. Keller, No. 2:09-cr-20303, 2010 WL 55508 (E.D. Mich. Jan. 6, 2010); United States v. El-Hindi, No. 3:06CR719, 2009 WL 1373270 (N.D. Ohio May 15, 2009); Fenton v. U.S., No. 02-57-P-S, 2009 WL 230081 (D. Me. Jan. 20, 2009); United States v. McDavid, No. 2:06-cr-00035-MCE, 2008 WL 850307 (E.D. Cal. Mar. 28, 2008); United States v. Crocker, 260 F. App'x 794 (W.D. Tenn. 2008); United States v. Patterson, No. S-99-0551, 2007 WL 2705224 (E.D. Cal. Sept. 14, 2007); United States v. Mazloum, No. 3:06CR719, 2007 WL 2778731 (N.D. Ohio Sept. 4, 2007); *Aref*, 2007 WL 603508, at *9 n.10 (Islamic terror bomb plots); Hurst v. Socialist People's Libyan Arab Jamahiriya, 474 F. Supp. 2d 19, 22 (D.D.C. 2007) (litigation over Lockerbie plane crash); United States v. Lin, No. CR-01-20071-RMW, 2007 WL 101647, at *1 (N.D. Cal. Jan. 5, 2007) (defendant told woman that her family was going to die and that her brother was next); Estate of Heiser v. Islamic Republic of Iran, 466 F. Supp. 2d 229, 248 (D.D.C. 2006) (bombing of American installations in Saudi Arabia); United States v. Coronado, 461 F. Supp. 2d 1209, 1210 (S.D. Cal. 2006) (involving violation of statute prohibiting distribution of information relating to explosives, destructive devices, and weapons of mass destruction); Blais v. Islamic Republic of Iran, 459 F. Supp. 2d 40, 45 (D.D.C. 2006) (bombing of American installations in Saudi Arabia); People v. Quinonez, No. H027654, 2006 WL 2567718, at *1 (Cal. Ct. App. Sept. 7, 2006) (bombs placed at elementary schools and childcare center in California to distract authorities during bank heist); People v. Osantowski, 736 N.W.2d 289, 295 (Mich. Ct. App. 2007) (terror threats and bomb production); State v. Sands, No. 2007-L-003, 2008 WL 5428252 (Ohio Ct. App. Dec. 31, 2008); State v. Sands, No. 2006-L-171, 2007 WL 37792, at *1 (Ohio Ct. App. Jan. 5, 2007) (attempted bombing of municipal authorities in Ohio); State v. Luers, 153 P.3d 688, 691 (Or. Ct. App. 2007) (bombing of oil refinery/storage facilities).

201. *See* Stevenson, *supra* note 198, at 192-94.

202. *See* Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 MO. L. REV. 387, 412-13 (2005).

203. *See id.*; *see also* Stevenson, *supra* note 198, at 192-94.

trust recruits with necessary details and assignments, and more difficult to recruit anyone in the first place. The likelihood of unknown traitors within the ranks is discouraging and deflating for radicals. If terror groups find motivation in their zeal instead of pecuniary gain, infiltrators undermine the most valuable resource of the conspiracy.[204] This is a type of "lemons effect" on criminal conspiracies, which provides an indirect benefit to the rest of society.[205]

Anti-terrorism sting operations often lead to entrapment claims.[206] Even so, the defense appears to be less availing for defendants than before.[207] The federal system, and most states, follows the "subjective test" for the entrapment defense, which focuses on whether the defendant was "predisposed" to commit the crime.[208] Yet predisposition is plain, at least for jurors, merely from the radicalism that necessarily motivates a terror crime. The national security mindset clouds the predisposition question under the subjective test, because these criminals seem less like weak or selfish misfits and more like a true threat to society.[209] Radical political views overlap with anti-social attitudes, and color the predisposition question under the subjective test.[210] In the minority of states that use an alternative test for the entrapment defense, the "objective test" of the Model Penal Code,[211] the question instead is how overboard the police actions were during the undercover operation. Viewed through the lens of

204. *See* Stevenson, *supra* note 198, at 192-94.

205. See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488-90 (1970).

206. *See* Stevenson, *supra* note 198, at 125-30; *see also* United States v. Lakhani, 480 F.3d 171, 178-80 (3d Cir. 2007); United States v. Nettles, 476 F.3d 508, 517 (7th Cir. 2007); United States v. Hale, 448 F.3d 971, 989 (7th Cir. 2006); United States v. Rahman, 189 F.3d 88, 142 (2d Cir. 1999); United States v. Polk, 118 F.3d 286, 289-91 (5th Cir. 1997); United States v. Aref, No. 04-CR-402, 2007 WL 603508, at *4 (N.D.N.Y. Feb. 22, 2007); United States v. Siraj, 468 F. Supp. 2d 408, 413-14 (E.D.N.Y. 2007); Elgabrowny v. United States, No. S5 93 CR. 181, 2003 WL 22416167, at *10 (S.D.N.Y. Oct. 22, 2003); United States v. Awadallah, 202 F. Supp. 2d 82, 107-08 (S.D.N.Y. 2002); United States v. Bin Laden, No. S(7) 98 CR. 1023, 2001 WL 30061, at *1-2 (S.D.N.Y. Jan. 2, 2001) (describing surveillance and capture of Al Qaeda associate); United States v. Bin Laden, 91 F. Supp. 2d 600, 613 (S.D.N.Y. 2000); Paul Marcus, *Presenting Back from the (Almost) Dead, the Entrapment Defense*, 47 FLA. L. REV. 205, 244 n.227 (1995) (discussing sting operation against Egyptian Sheik Omar Abdel Rahmen and subsequent criminal proceedings and defenses); John Caher, *Terrorism Trial of Muslims Raises Issues of Entrapment*, 236 N.Y. L.J., Sept. 14, 2006, at 1-2; Brendan J. Lyons, *Intent of Missile Plot Not Lost in Translation: FBI Case Juror Says Panel Dismissed Concerns that Defendants Were Duped*, ALBANY TIMES UNION, Oct. 13, 2006, at A1; William K. Rashbaum, *Lawyer Confronts Informer in Subway Bomb Plot Case*, N.Y. TIMES, May 5, 2006, at B2; Michelle Shepherd, *Muslim Went Undercover to Save Lives*, HAMILTON SPECTATOR (Ont., Can.), July 14, 2006, at A12.

207. *See* Stevenson, *supra* note 192, at 16-24 (documenting a decline over the last several years in entrapment defense cases).

208. *See id.* at 10-11.

209. *See* Stevenson, *supra* note 198, at 187-92 (discussing the subtle effect that antiterrorism stings have on the predisposition analysis).

210. *See id.*

211. *See id.*; MODEL PENAL CODE § 2.13 (1985).

national security, however, the perceived stakes of societal harm and disruption will inevitably justify more extreme police actions that would seem otherwise appropriate.[212]

National security concerns will tend to make undercover operations more prevalent, as this tactic can offset, not merely supplement, surveillance.[213] A sting operation can be cheaper than surveillance in many ways: in terms of political blowback, necessary equipment, warrants, and data sorting/analysis. Of course, sting operations also supplement surveillance where dangerous individuals are secretive or generate too little identifying information.

IV. POLICING TACTICS AND STRATEGIES

The national security paradigm is exerting broad influence over the strategies or techniques most favored by enforcement officers and prosecutors. This section focuses on three main areas of change: information gathering, profiling, and random enforcement measures. Before proceeding to these sections, however, a few miscellaneous trends in policing deserve at least passing mention, as they affect the ensuing discussion.

First, police have generally taken on the role of risk management: crime prevention and disaster response. "[P]olice agencies have become an increasingly crucial node in the network of institutions responsible for risk management. Their traditional roles are expanding to include collection and dissemination of information."[214]

Another widely observed trend in the public administration literature is the explosion in private security firms that patrol shopping malls, university campuses, residential developments, shipyards, etc. as a supplement to regular police.[215] This is not in response to terrorism, but it does relate to the subject at hand. Ubiquitous private patrolling is consistent with the shift in deterrence discussed in previous sections. Private security guards cannot punish criminals,

212. *See* Stevenson, *supra* note 198, at 179-83.

213. *See id.* at 183-85 (arguing that more use of undercover operations in the fight against terrorism will lower the government's need for surveillance and indirectly enhance the protection of civil liberties).

214. Maguire & King, *supra* note 20, at 22.

215. *See* EDWARDS, *supra* note 21, at 255-59; BAYLEY & SHEARING, *supra* note 18, at 13-28; David H. Bayley and Clifford D. Shearing, *The Future of Policing*, 30 L. & SOC. REV. 585, 586-91, 598-603 (1996); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 49 (2004) ("Increasingly, the private police are considered the first line of defense in the post-September 11th world. Hardly anything is known about the private police, yet they are by far the largest provider of policing services in the United States, at least triple the size of the public police. More importantly, the functions, responsibilities, and appearance of the private and public police are increasingly difficult to tell apart. This development has been surprisingly underappreciated. What's more, the law recognizes a nearly absolute distinction between public and private. This means that private police are largely unburdened by the law of constitutional criminal procedure or by state regulation."); Maguire & King, *supra* note 20, at 20-21.

and may seldom refer cases to regular police or prosecutors, but screening (checking for IDs) and patrolling help with prevention and early warning, raising the front-end costs of crime and the risks of failure for criminal planners.[216] The prevalence of private security patrols frees up regular police departments to become much more specialized.[217]

Police forces themselves have grown in recent decades.[218] "The growth of police relative to population should be considered a basic social indicator representing an expansion of formal social control and is clearly worthy of further investigation."[219] They have retooled and retrained in recent decades to combat organized crime.[220] Cooperation, both national, interstate, and interagency, is now commonplace, as is the increasing overlap with disaster response teams, immigration and border control, etc.[221] Policing today is more federalized and globalized than ever before.[222]

Militarization of policing is an important, widespread trend.[223] Police organizations increasingly "adopt many of the trappings of military organizations, including formal ranks, insignias, uniforms, codes of discipline, organizational structures, equipment, doctrine, and culture."[224] Changes in federal law have permitted, and sometimes required, more blurring between the military and domestic police forces.[225] Changes to the Posse Comitatus Act, which once forbade military involvement in civilian law enforcement, came after 9/11 and against the backdrop of Hurricane Katrina.[226] This is part of a general trend.[227] Even before 9/11, nearly all police agencies had paramilitary

216. *But see* Bruce L. Benson & Brent D. Mast, *Privately Produced General Deterrence*, 44 J.L. & ECON. 725 (2001) (arguing—against what they admit is the mainstream view–that private security does not reduce crime rates for larceny or assault).

217. *See* EDWARDS, *supra* note 21, at 255-57, 271-74.

218. *See* Maguire & King, *supra* note 20, at 24.

219. *Id.*

220. *See* EDWARDS, *supra* note 21, at 276-80.

221. *See* Maguire & King, *supra* note 20, at 28-30.

222. *See id.* at 29-30.

223. *See* Kraska & Kappeler, *supra* note 20; *see also* Maguire & King, *supra* note 20, at 21-22; Dhanasekaran, *supra* note 20, at 252-53; Kealy, *supra* note 20, at 385-87; Koplow, *supra* note 20, at 800.

224. Maguire & King, *supra* note 20, at 21; *see also* BAYLEY & SHEARING, *supra* note 18, at 19 (noting that "military equipment and tactics are being used more often").

225. *See* Maguire & King, *supra* note 20, at 21.

226. *See* Dhanasekaran, *supra* note 20; Kealy, *supra* note 20; Tom A. Gizzo & Tama S. Monoson, *Call to Arms: The Posse Comitatus Act and the Use of the Military in the Struggle Against International Terrorism*, 15 PACE INT'L L. REV. 149 (2003); Jessica DeBianchi, Note, *Military Law: Winds Of Change—Examining the Present-Day Propriety of the Posse Comitatus Act After Hurricane Katrina*, 17 U. FLA. J.L. & PUB. POL'Y 473 (2006); John R. Longley III, Note, *Military Purpose Act: An Alternative to the Posse Comitatus Act—Accomplishing Congress's Intent with Clear Statutory Language*, 49 ARIZ. L. REV. 717 (2007); Sean McGrane, Note, *Katrina, Federalism, and Military Law Enforcement: A New Exception to the Posse Comitatus Act*, 108 MICH. L. REV. 1309 (2010).

227. *See* Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of*

units or SWAT teams, a significant change from just twenty years before.[228] Regular police have adopted surveillance technology[229] and other equipment from the military.[230]

Just as indirect criminal legislation is a hallmark of the new approach, indirect enforcement is a trend in policing. The largest example is the use of immigration enforcement as a primary tool in preventing terrorism,[231] even though the vast majority of deportees pose no individual security risk. Terrorism, however, is not the only example of roundabout methods for achieving crime prevention. A significant rise in background checks for transactions of everyday life, like renting an apartment, reflect the new approach to societal risk management.[232]

A. Information

Information access is the single most obvious way in which the national security paradigm has already changed police tactics and strategies.[233] Local law enforcement found itself recruited into anti-terrorism campaigns, primarily assisting by gathering and sharing potentially useful information. National security concerns, triggered by horrific surprise attacks, drove a crusade to cull useful facts from as many sources as possible.[234] Information gathering has brought budgetary shifts,[235] diversion of police training time, and a completely different type of collaboration between enforcement agencies.[236]

Less obvious, perhaps, is the notion that the technology, and the corresponding cultural infatuation with information and communication, are as much a cause of the shifting paradigm in policing as they are a means for implementation.[237] For the first time in history, technology allows police to do

Terror, 69 BROOK. L. REV. 1231 (2004) (discussing trends in the doctrine restricting the federal government from imposing duties on non-federal officials).

228. *See* Maguire & King, *supra* note 20, at 21.

229. *See, e.g.*, Tom Hays, *NYPD Commissioner: NYC Bomb Suspect 'Homegrown'*, ABCNEWS.COM (May 11, 2010), http://abcnews.go.com/US/wireStory?id=10615890 ("The system covering the streets of lower Manhattan eventually will have 3,000 police and private cameras—far fewer than in London. But the NYPD officials said they hope to make their system much more sophisticated by using computer software that can program cameras to automatically detect suspicious packages or activity picked up by the cameras and alert police.").

230. *See id.*

231. *See* Cole, *supra* note 172, at 960-74.

232. David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & SOC. INQUIRY 5 (2008).

233. *See* BAYLEY & SHEARING, *supra* note 18, at 19.

234. *See* Niskanen, *supra* note 23, at 353.

235. *See id.* at 355; Turgeon, *supra* note 23, at 59-60.

236. *See* Maguire & King, *supra* note 20, at 28-30; NADELMANN, *supra* note 22, at 177-81 (describing trends in the New York City Police Department in the 1990s).

237. For an interesting example of this phenomenon, see Maguire & King, *supra* note

more prevention than post-crime pursuit, and even when prevention fails and incidents occur, to respond instantly rather than gradually. Police, prosecutors, and lawmakers have an opportunity to reinvent their roles in criminal justice. National security concerns certainly imposed an intelligence-gathering role on law enforcement, but growth in capacities for intelligence opened new horizons for ensuring public safety, rather than merely restoring it after an incident. It is a mutually reinforcing phenomenon.

Aggressive government surveillance since 9/11 is a well-worn subject,[238] as is our culture's obsession with information generally. The correlation between the two has received less discussion, except for constant concerns that the private information portals, such as Google or smartphone services, will also be sources for sinister government surveillance of ordinary citizens. Government officials are also a product of the information-obsessed culture. It would be surprising, in fact, if even the most benevolent leaders did not want as much data as possible in today's milieu. Some gathering of information is done simply "because we can," and this grows alongside any sinister agendas to suppress political dissent or to tighten control. This is not to discount the validity of privacy concerns or the protests of civil libertarians; if sinister characters are in government and want to oppress the citizenry, panoptic surveillance certainly empowers such ends.

In practical terms, however, this means that we have entered a new era of policing, which places a premium on information and intelligence in three forms: fact accumulation, data generation, and information sharing. Aptitude and knowledge become more useful and necessary, and as a result, these traits become qualifications for positions on the force.[239] This affects not only hiring, but also department policies about continuing education for officers.[240]

20, at 31:

> In fact, however, new technologies sometimes change what officers do and can thus alter the activity systems of police organizations. For example, before the adoption of mobile data terminals (MDTs), officers required some visible display of probable cause before stopping a motor vehicle. The installation of MDTs in patrol cars, however, allowed officers to unobtrusively run motor vehicles in fishing expeditions for warrants and probable cause. Access to such information increases the number of people with which the police will have contact, and it also defines the conditions of their interactions.

238. Allison Jones, *The 2008 FBI Guidelines: Contradiction of Original Purpose*, 19 B.U. PUB. INT. L.J. 137 (2009) (arguing that the FBI's changed guidelines for wiretaps and other surveillance give unfettered discretion to authorities and few protections to innocent civilians); Niskanen, *supra* note 23, at 353. Innumerable commentators have exhausted the increased prevalence of government surveillance, data mining, and reporting requirements, and the encroachment of national security thinking in this domain of policing, so it seems unnecessary here to cover the same ground.

239. *See* EDWARDS, *supra* note 21, at 297 ("[C]ourts' increasing reliance on scientific evidence means that there are some growing training needs for detectives with regard to crime scene analysis. The use of computers and the organization of investigative teams in major inquiries also requires the sort of skills that many detectives do not possess but could reasonably be expected to acquire.").

240. *See id.* at 304-08.

Law enforcement in recent decades has become "actuarial," basing decisions on statistical predictions.[241] The huge supply of data now available lends itself naturally to statistical analysis, and statistical analysis leads easily into "actuarial policing," preventing crime by predicting it.[242] This second step, from data-mongering to statistical-based decisions, involves some blurry logic because statistics are patterns of past behavior and predictions are obviously forward-looking. Actuarial or prediction-based policing tacitly assumes a particular level of consistency between past patterns and future patterns and may discount the reactive nature of criminality. This is now the subject of growing debate in the academic literature.[243] From a game theory perspective, prediction-based policing is also predictable policing, which makes it easier for criminals (terrorists or otherwise) to orchestrate a surprise attack, or simply work around the policing patterns.[244] From an etiological perspective, statistics can become self-fulfilling prophecies or a cycle of escalation when they furnish the basis for policymaking; as police target certain areas or types of suspects, future statistics about high-crime locales and apprehended offender traits will reflect this channeling of effort. Bernard Harcourt calls this the "ratchet effect" of actuarial policing.[245]

The information obsession, therefore, is the staging for the subjects of the

241. *See* BERNARD E. HARCOURT, AGAINST PREDICTION 1-38 (2007); Gross, *supra* note 61, at 235-38.

242. *See* HARCOURT, *supra* note 241, at 77-110 (documenting the "proliferation of actuarial methods in punishing and policing"); Thacher, *supra* note 232, at 7-11.

243. *See, e.g.*, HARCOURT, *supra* note 241; John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006); Katherine Y. Barnes, *Against Judgment*, 93 CORNELL L. REV. 689 (2008) (reviewing HARCOURT, AGAINST PREDICTION (2007)); Gross, *supra* note 61; Yoav Sapir, *Against Prevention? A Response to Harcourt's "Against Prediction" on Actuarial and Clinical Predictions and the Faults of Incapacitation*, 33 LAW & SOC. INQUIRY 253 (2008) (book review); Yoram Margalioth, *Looking at Prediction from an Economics Perspective: A Response to Harcourt's "Against Prediction*", 33 LAW & SOC. INQUIRY 243 (2008) (book review); Bernard E. Harcourt, *A Reader's Companion to "Against Prediction": A Reply to Ariela Gross, Yoram Margalioth, and Yoav Sapir on Economic Modeling, Selective Incapacitation, Governmentality, and Race*, 33 LAW & SOC. INQUIRY 265 (2008).

244. *See* RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS 34 (2005) ("[I]f only people who appear to be of Middle Eastern origin are searched carefully at the airport, terrorist groups will focus on recruiting people who do not fit the profile."). This is part of Bernard Harcourt's "elasticity" argument in his stinging critique of prediction-based policing—that it may fail in reducing crime. *See* HARCOURT, *supra* note 241, at 3. It is also a variation of the "equilibrium" argument about profiling, which suggests that the profiled group will alter its behavior—or perhaps find itself mostly incarcerated—to the point where the predictions begin to fail, and police return to random selection. *See, e.g.*, John Knowles et al., *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 203 (2001).

245. *See* HARCOURT, *supra* note 241, at 145-70. Of course, these two problems contradict each other: if profiling fails as criminals respond, there will be less of a ratchet effect; and, a pronounced ratchet effect would lead to a less accurate profile of the remaining population, such that police would abandon it after repeated failures.

next two sections, on profiling tactics and random policing. Of course, many see profiling as prejudice,[246] instead of scientific crime prevention.[247]

Random policing may seem like a foil to prediction-based tactics (like profiling),[248] but it is actually consistent with the same set of assumptions.[249] Officials must assume that potential wrongdoers also have plenty of information available to make predictions about policing, to select targets based on their vulnerabilities, and to plan accordingly. Surprise attacks by police, decoy targets, and unexpected disruptions in travel or communication can foil criminal plans, or at least significantly raise the transaction costs of executing a crime successfully. This creates a special chilling effect, different from the deterrent effect of threats.[250]

B. Profiling & Prediction

Profiling, not just racial, but also associational, has become a more pressing issue in recent years, moving from a policy concern about vestigial racism to an active debate about tradeoffs with security.[251] The debate about racial profiling has carried on for many years.[252] Before September 11, 2001, politicians spoke out against using race as a tool to fight crime.[253] Things seem to have changed since the terrorist attacks,[254] even in the courts.

The shift is clearly visible in *United States v. Arvizu*,[255] in which a border patrol agent in Arizona had stopped a vehicle that was driving on an unpaved road circumventing a border checkpoint.[256] Inside the vehicle he saw a man and woman, with three children in the back with their knees propped up on something beneath them. The driver had slowed down when he saw the agent and reacted in a stiff, rigid manner, not looking at the agent; the children waived to him in a mechanical fashion for several minutes as if being instructed

246. *See, e.g.*, Rubén Hernández-Murillo and John Knowles, *Racial Profiling or Racist Policing? Bounds Tests in Aggregate Data*, 45 INT'L ECON. REV. 959 (2004); Gross, *supra* note 61; *see also* SOLAN & TIERSMA, *supra* note 72, at 48-51.

247. *See* Jenkins et al., *supra* note 72 (advocating more intelligence-based profiling or screening at airports, rather than uniform or random measures).

248. *Cf.* HARCOURT, *supra* note 241, at 5, 237-39 (treating random police tactics as the opposite of profiling).

249. *See* Barnes, *supra* note 243, at 701-02.

250. One caveat is political support; polls indicate that Americans support uniform or consistent sacrifices of their civil liberties, like national ID cards, more than random checks of personal possessions. *See* Uddy et al, *supra* note 34, at 419.

251. *See* Hardin, *supra* note 32, at 79-82.

252. *See* SOLAN & TIERSMA, *supra* note 72, at 48-51; David Oscar Markus, *Fourth Amendment Forum: Is Profiling a Constitutionally-Permissible Weapon in the War on Terror?*, CHAMPION, Mar. 2003, at 35.

253. *See* sources *supra* note 242.

254. *See id.*

255. 534 U.S. 266 (2002).

256. *See id.* at 268-69.

to do so.[257] A registration check located the home of the vehicle in a nearby area known for human trafficking and drug smuggling.[258] The agent stopped the vehicle and asked if he could perform a search.[259] He found drugs in a bag beneath the children's feet in the backseat and in another bag behind the rear seat.[260] Arvizu argued the agent lacked reasonable suspicion to stop the vehicle.[261] The Supreme Court held that when taking into account the totality of circumstances and the agent's factual inferences, it was reasonable suspicion to believe Arvizu was engaged in illegal activity.[262] During oral argument, the Justices indicated concern about terrorism, which may have affected the outcome.[263] Some see this case as a new precedent on profiling.[264]

After September 11, in 2002, the Immigration and Naturalization Service (INS) ordered males between the ages of 16 and 45 from specific countries, including but not limited to Iran, Iraq, Syria, Libya, and Sudan, to report to their local INS office for registration, fingerprinting, photographing and interviewing.[265] The countries were those that the United States considered sponsors of terrorism.[266] The use of this special registration ended, however, after one year.[267] The USA PATRIOT Act allowed law enforcement officers to detain individuals suspected of terrorism for seven days without charges or initiation of deportation proceedings.[268] The INS rules allowed detaining individuals for 48 hours without charges. Shortly after 9/11, the Foreign Terrorist Tracking Forces arrested and detained hundreds of Middle Eastern and Muslim men, usually without releasing the detainees' names or whereabouts.[269] The focus was on men of Middle Eastern descent and those from Muslim countries, because those were the areas suspected of having connections with al-Qaeda.[270] Many of the men spent days or months in detention, and some eventually faced deportation.[271] Most faced no criminal charges, but were deported for immigration law violations or prior criminal convictions.[272] Immigration law became the method to deport individuals who

257. *See id.* at 270-71.
258. *See id.*
259. *See id.* at 271-72.
260. *See id.* at 272.
261. *See id.*
262. *See id.* at 277.
263. *See* Stuntz, *supra* note 41, at 2157-59.
264. *See* Hirsch & Markus, *supra* note 252, at 40.
265. *See id.* at 37.
266. *See id.*
267. *See* Demleitner, *supra* note 136.
268. *See id.* at 5.
269. *See id.*
270. *See id.*
271. *See id.*
272. *See id.*

were allegedly involved in terrorist activity but never charged.[273] Steps taken to secure the country after 9/11 included a focus on undocumented workers.[274]

Another change occurred after 9/11: state and local police took a more active role in immigration enforcement,[275] such as checking visas.[276] State and local law enforcement had only rarely assisted in immigration law enforcement before then,[277] despite Congressional authorization for their involvement in the late 1990s.[278] In the wake of ineffective anti-terrorism laws, immigration enforcement became the primary vehicle for incapacitating potential terrorists.[279] The definition of "national security" stretched beyond prevention of terrorism and into the prosecution and deportation of common criminals and immigration violators.[280]

Many commentators have challenged the reliability of profiling as a means of combating terrorism.[281] Reliable or not, it has currency now, is attaining greater legitimization, and is shaping the thinking of law enforcement and legislators.[282] Profiling itself seems to be following the same trends as other aspects of law enforcement, as it moves from selectiveness in arrests, prosecuting, and punishment toward pre-crime targeted surveillance and detention.

C. Uncertainty as a Weapon

Uncertainty is the terrorist's ultimate weapon, but in the new regime, it is also an effective tool to combat terrorists as well as other types of criminals. Earlier periods of criminal law, however, focused instead on the need for increased certainty: clarity of the rules and certainty of punishments.[283] In the new paradigm, uncertainty becomes a tool, manifesting itself through random policing (searches, audits, checkpoints, etc.), surprise disruptions, or decoys.[284]

273. *See id.* at 6.

274. *See id.*

275. *See id.*

276. *See id.*

277. *See id.* at 7.

278. *See id.*

279. *See id.*

280. *See* Cole, *supra* note 24, at 247-49 (describing the DOJ's "paradigm of prevention" especially in the context of immigrant detentions and deportations); Demleitner, *supra* note 136, at 8.

281. *See* HARCOURT, *supra* note 241 (disputing the efficiency of profiling and arguing that it leads to a self-exacerbating ratchet effect); SOLAN & TIERSMA, *supra* note 72, at 48-51 (arguing that profiling is connected to sociolinguistic differences between linguistic subcultures); Hardin, *supra* note 32, at 79-82.

282. *See* Cole, *supra* note 172, at 974-76; Jenkins et al., *supra* note 72.

283. *See generally* Chelst, *supra* note 132 (algorithm proposed for police enforcement).

284. *See* United States v. Battiste, 343 F. App'x 962, 964 (5th Cir. 2009); United States v. Curtin, 489 F.3d 935, 938 (9th Cir. 2007); Gleason v. U.S., No. 2:05-cr-178, 2010 WL

These tactics have both an incapacitation impact and a front-end deterrent effect. Random checks occasionally hit pay dirt, serendipitously foiling criminal plots before they are complete. Statistically speaking, random checks should bring proportional hits in terms of incapacitation. Random checks, disruptions, and decoys raise the up-front transaction costs of crime, as criminals need backup plans to ensure success, workarounds for circumventing checkpoints, higher search costs for vulnerable targets, etc. This provides an overall chilling effect on criminal planning.

Recent commentators have suggested, in fact, that uncertainty may be a better deterrent than a corresponding risk of punishment that is clearly quantifiable to would-be criminals,[285] and that uncertainty induces hesitation and reflection that steers potential offenders away from bad acts.[286] Professor Harcourt has advocated the use of randomized enforcement techniques to avoid the problem of police being predictable to potential criminals, and to avoid the "ratchet" effect of skewed profiles.[287]

The rules for police decoys are well established, but the legality of random checkpoints seems to be in flux. Before September 11, *Indianapolis v. Edmond*[288] created a general Fourth Amendment protection against random

1629943 (S.D. Ohio Apr. 20, 2010); Warren v. McDaniel, No. 2:07-cv-1186-PMP-RJJ, 2010 WL 1418212 (D. Nev. Apr. 6, 2010); Richards v. Sacramento Cnty. Prob. Dep't, No. 2:06-cv-01367-AK, 2009 WL 2253269 (E.D. Cal. July 28, 2009); Harrison v. State, No. CA CR 08-102, 2008 WL 4493427 (Ark. App. Oct. 8, 2008); Prime Gas, Inc. v. City of Sacramento, 109 Cal. Rptr. 3d 261 (Ct. App. 2010); Commonwealth v. King, 852 N.E.2d 1143 (Mass. 2006); Daniels v. State, 110 P.3d 477 (Nev. 2005); *see also* Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1398, 1420 (2004); Laura D. Hogue, *Criminal Law*, 57 MERCER L. REV. 113, 117 (2005); Elizabeth E. Joh, *Breaking the Law to Enforce it: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 164 (2009); Walden & Flanagan, *supra* note 120 (comparing entrapment rules for the United States, England, Canada, and Australia, particularly with regards to computer-crime decoys knows as "honeypots").

285. *See, e.g.*, Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443 (2004) (demonstrating the value of uncertainty about detection and the size of sanctions in both the criminal setting and the punitive damages area of torts); Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime*, 1 AM. L. ECON. REV. 276 (1999) (demonstrating that uncertainty about detection combined with well-warned sanctions creates the most efficient level of deterrence).

286. *See* Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010).

287. *See* HARCOURT, *supra* note 241, at 237-39. As an aside, Harcourt raises an interesting point about using uncertainty to combat terrorism:

> Measures that raise the price of one and only one specific activity, such as airplane hijackings, are likely to produce troubling substitution effects. Measures that raise the price of all terrorist acts, or, conversely, reduce the resources of terrorists are less problematic are likely to increase the use of nonterrorist activities as compared to illegal terrorist activities without producing unanticipated substitution. The optimal strategy to combat terrorism is to reduce the terrorists' resources across the board.

Id. at 236.

288. 531 U.S. 32, 35 (2002).

police checkpoints for vehicles, which had yielded many drug arrests. During each stop at the checkpoint, police would explain that it was a drug checkpoint and request the driver's license and registration.[289] This provided a moment for the officer to glance around the inside of the car for contraband or to detect signs of driver inebriation.[290] Narcotics-sniffing dogs would walk around each vehicle at the same time,[291] and each stop took less than five minutes if there was no reason for further searching.[292] The checkpoints were during the day with visible signs posted providing notice.[293] The Supreme Court ruled these random searches were a violation of the Fourth Amendment, because the search did not include an amount of individualized suspicion, only a general interest in crime control, as distinguished from other checkpoints it had previously upheld.[294] *Edmond* was a post-9/11 decision, but it seems to reflect pre-9/11 values; courts since then have been more likely to find exceptions to the Fourth Amendment warrant requirement.[295]

The "special needs exception" allows searches and seizures in situations where there is no warrant and/or probable cause.[296] For this exception, courts use a balancing test between the intrusion into the private life of a citizen and the promotion of a governmental interest.[297] In *Illinois v. Lidster*,[298] the Court employed a four-part balancing test, comparing the importance of the governmental interest or public concern served, the extent to which the policy advances the public concern, the severity of intrusion into a citizen's private life, and the purpose of the search as distinct from traditional law enforcement.[299] Some commentators have argued that the danger of terrorism alone could make any search reasonable under this test.[300]

In *MacWade v. Kelly*, police implemented the Container Inspection Program in the New York subways.[301] The inspections consisted of staging random checkpoints where a certain number of individuals had their belongings

289. *See id.*

290. *See id.*

291. *See id.*

292. *See id.*

293. *See id.*

294. *See id.* at 41.

295. *See* Anthony C. Coveny, *When the Immovable Object Meets the Unstoppable Force: Search and Seizure in the Age of Terrorism*, 31 AM. J. TRIAL ADVOC. 329, 336 (2007).

296. *See id.* at 343.

297. *See id.* at 345.

298. 540 U.S. 419, 420 (2004).

299. *See id.* In *Florida v. J.L.*, 529 U.S. 266 (2000), Justice Ginsburg suggested that the government's compelling interest in preventing terrorism would justify permitting such a search, stating, "[w]e do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk." *Id.* at 273-74.

300. *See* Coveny, *supra* note 295, at 369.

301. *See* MacWade v. Kelly, 460 F.3d 260, 264 (2d Cir. 2006).

searched by uniformed officers at tables near the entrance of a subway.[302] Individuals had notice of the search from a prominent sign by the table and explanations by the officers.[303] Potential subway passengers could either consent to the search or forgo riding the train.[304] Though a consensual search, police retained authority to arrest individuals who refused the search and tried to enter the station again with their belongings.[305] Random selection determined which passengers to search, and only items large enough to hold explosive devices were subject to inspection.[306] Witness testimony provided that the uncertainty of these checkpoints deters terrorists who plan attacks for long periods to make sure there will be no interruptions.[307] Unpredictable checkpoint inspection adds an uncertainty that detail-oriented terrorists prefer to avoid in planning.[308] The court determined that the random inspections met the special needs exception to the Fourth Amendment and the searches were reasonable.[309]

Similarly, *United States v. Marquez*[310] upheld random body searches by airport security personnel using hand wands.[311] A hand wand detected four bricks of cocaine strapped to the defendant.[312] The court ruled the search was reasonable and constitutional.[313] While the purpose of the screening was not to find narcotics, *Marquez* demonstrates that the policy effectively prevents other types of crimes besides terrorism. In a clear statement about the value of randomness in front-end deterrence, the court stated:

> Additionally, the randomness of the selection for the additional screening procedure arguably increases the deterrent effects of airport screening procedures because potential passengers may be influenced by their knowledge that they may be subject to random, more thorough screening procedures. . . . The procedure is geared towards detection and deterrence of airborne terrorism, and its very randomness furthers these goals.[314]

In *United States v. Green*,[315] a military base checkpoint stopped every sixth car to review the driver's license and proof of insurance. Emma Green had neither, prompting a check of the car's plates, which revealed it was not her

302. *See id.*
303. *See id.*
304. *See id.* at 265.
305. *See id.*
306. *See id.*
307. *See id.* at 266.
308. *See id.*
309. *See id.* at 270-75.
310. 410 F.3d 612 (9th Cir. 2005).
311. *See id.* at 615.
312. *See id.*
313. *See id.*
314. *Id.* at 617-18.
315. 293 F.3d 855, 862 (5th Cir. 2002).

car.[316] Green attempted to flee and was soon under arrest; police easily found drugs during their inventory search of her impounded car.[317] The court noted that checkpoints designed to check immigration status, sobriety, license, and registration have passed constitutional scrutiny in other cases,[318] and that this checkpoint was specifically to "protect national security by deterring domestic and foreign acts of terrorism."[319] In distinguishing this case from *Edmond*, the court observed that terrorists tend to use vehicles to move explosives as "car bombs" and a military base is a foreseeable target.[320]

The previous cases demonstrate the increased use of random searches to fight terrorism and other crime. In particular, it is noteworthy that courts have increasingly allowed searches after September 11, despite the *Edmond* ruling, although the facts are somewhat similar to those of *Edmond* in each case. The random element in *MacWade*, *Green*, and *Marquez* allowed police to surprise the defendants and possibly deter others.

CONCLUSION

Criminal law in the United States is undergoing a transformation. National security concerns are affecting law enforcement methods, penal legislation, and even the exclusionary rules of criminal procedure. Overall, incapacitating criminals and preventing crime are replacing deterrence and retribution as underlying policy goals. Some of these changes have been sudden, particularly those in the immediate aftermath of catastrophes such as 9/11, Hurricane Katrina, or Enron's collapse. Other changes have been occurring more subtly. Yet consistent themes run throughout these trends.

This is not to suggest that the overall shift is necessarily a wrong turn. Problems plagued earlier approaches to criminal law as well, even if the pitfalls were different in each period. Previous systems of retribution and deterrence garnered no fewer criticisms than the modern thrust of incapacitation. There are theoretical and practical flaws in each approach. In addition, every penal model includes the inherent, inevitable peril of abuse by those holding power. Fortunately, our system still permits these abuses to undergo scrutiny.

Of course, the new paradigm does pose new challenges. Meeting these challenges requires understanding the congruence of factors currently remaking criminal law as a whole. It would be misguided, for example, to assail new incapacitation-driven measures with stale arguments from an era when social engineering drove our attempts to deter vice crimes, and before the general population expected the government to guarantee (or ensure) both personal

316. *See id.* at 857.
317. *See id.*
318. *See id.* at 858.
319. *Id.*
320. *See id.* at 859.

safety and social stability. The world has changed, and the criminal justice system is adapting to the new environment.