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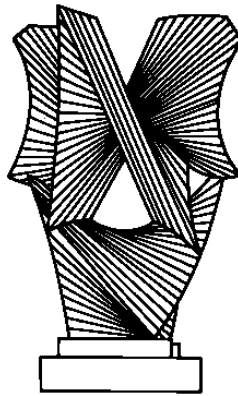
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# CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 424



## THE SOCIAL PRODUCTION OF NATIONAL SECURITY

*Aziz Z. Huq*

**THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO**

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# THE SOCIAL PRODUCTION OF NATIONAL SECURITY

Aziz Z. Huq†

*This Article analyzes a recent policy innovation offered by governments on both sides of the Atlantic as a means of mitigating one form of national security risk: the idea that private individuals and voluntary associations have an untapped capacity for combating terrorism and in particular al Qaeda. Bold assertions in recent strategy statements mooted this possibility have wanted for any supporting account of how private behavior conduces to security. Even if the claimed social production of security against terrorism is causally well-founded, it is unclear how the state can elicit desirable private conduct. Consequently, the proposal's legal and policy ramifications remain elusive. To begin to address these gaps, this Article develops a comprehensive analysis of three plausible causal mechanisms that might yield the putative security-related benefits of social action. I label these ideological competition, ethical anchoring, and cooperative coproduction. Drawing on legal, economic, and social psychology scholarship to illuminate these three mechanisms, this Article further investigates the state's role in eliciting potentially desirable private action against terrorism risk. The Article concludes by highlighting threshold legal, strategic, and ethical puzzles in designing policies to elicit counterterrorism's social production—puzzles that to date have received short shrift in American counterterrorism debates.*

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## INTRODUCTION

National security bears all the hallmarks of a quintessential public good.<sup>1</sup> Once provided, individuals cannot be excluded from its benefits. One person's enjoyment also leaves the balance undiminished for others. Susceptible to individuals' free riding, private action is likely to undersupply public goods such as national security. Hence, government production would seem the best method to achieve its supply. Indeed, the federal government has been the principal supplier of national security since the Republic's founding. The framers of the Constitution, moreover, understood security to be a central charge of the newly empowered national government. But challenges to public security morph over time. In the past decade, it has been in large measure the threat to civilian life from al Qaeda, its affiliates, and fellow travelers that has animated security policy. Concerns about non-state-sponsored terrorism have spurred institutional transformations in government,<sup>2</sup> new surveillance technologies,<sup>3</sup> novel uses of

<sup>1</sup> Cf. RUSSELL HARDIN, COLLECTIVE ACTION 17 (1982) ("Public goods are defined by two properties: jointness of supply and impossibility of exclusion." (emphasis omitted)).

<sup>2</sup> See, e.g., Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 678, 689–98 (2006) (documenting the creation of the Department of Homeland Security).

<sup>3</sup> See generally Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407 (2012) (discussing the evolution of and federal forays into new surveillance technologies).

familiar policy tools,<sup>4</sup> and controversial foreign military deployments.<sup>5</sup> Mesmerized by these transformations, legal scholars have been drawn ineluctably to the task of examining the state's responses to terrorism, including a seemingly inexorable engorgement of the national security state.<sup>6</sup> Never, it seems, has the idea that the state must monopolize responses to political violence seemed so compelling.

Yet even as new laws and practices erode the legal and institutional constraints of bygone times and the state undertakes previously unimaginable forms of surveillance with devices that were science fiction a mere generation ago, a scintilla of doubt about the government's proper role has emerged. Paradoxically, it was the state itself that first planted that seed. Governments on both sides of the Atlantic have started in recent years to suggest—tentatively, incompletely, and in piecemeal fashion—that the provision of national security should *not* be the monopoly of the state or its subcontractors.<sup>7</sup> Mutations in the threat from al Qaeda have stimulated rethinking of the production function for national security. As a result, both U.S. and U.K. official policy documents from 2010 onward have identified a necessary role for informal nonstate actors—ranging from individuals to private associations to families—in creating security against terrorism. These policy statements boldly claim that nonstate actors are likely to have a dispositive influence on both the scale of terrorism-related security threats and the effectiveness of state responses. Stated otherwise, they point toward the possibility of a *social production* of security against terrorism.

One such policy statement is the White House's May 2010 *National Security Strategy*. This document posited that among the "best defenses against [the] threat [of terrorism within the United States] are well informed and equipped families, local communities, and institutions."<sup>8</sup> In August 2011, the White House published a follow-on

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<sup>4</sup> See generally Aziz Z. Huq, *The Political Path of Detention Policy*, 48 AM. CRIM. L. REV. 1531 (2011) (narrating the development of new forms of detention power).

<sup>5</sup> For excellent synoptic histories, see generally PETER L. BERGEN, *THE LONGEST WAR: THE ENDURING CONFLICT BETWEEN AMERICA AND AL-QAEDA* (2011) (detailing the history of the war on terrorism), and JASON BURKE, *THE 9/11 WARS* (2011) (same).

<sup>6</sup> See, e.g., Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, at A1 (documenting the fiscal and institutional growth of national security bureaucracy).

<sup>7</sup> This suggestion is distinct from the claim that the military should have no monopoly on counterterrorism. Cf. J. Scott Carpenter et al., *Confronting the Ideology of Radical Extremism*, 3 J. NAT'L SECURITY L. & POL'Y 301, 301, 303–05 (2009) ("[T]he U.S. government has slowly come to realize that military force alone cannot defeat radical Islamist extremism . . .").

<sup>8</sup> THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 19 (2010) [hereinafter 2010 NATIONAL SECURITY STRATEGY], available at [www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf); see also THE WHITE HOUSE, NATIONAL STRATEGY FOR COUNTERTERRORISM 6 (2011) [hereinafter 2011 NATIONAL COUNTERTERRORISM STRATEGY],

policy paper entitled *Empowering Local Partners to Prevent Violent Extremism in the United States*, in which it reiterated that combating terrorism “is not the work of government alone.”<sup>9</sup> Three months later, the Executive issued yet another related paper, this time a “Strategic Implementation Plan,” with the professed aim of fostering increased nongovernmental participation in the production of security.<sup>10</sup> Nor is U.S. policy exceptional: British policy documents trace a similar path. The U.K.’s 2011 counterterrorism strategy, called “Contest,” underscores that “faith institutions and organisations can play a very important role in preventative activity.”<sup>11</sup> In this fashion, both the American and British governments have asserted that there is necessary space for the social production of security against al Qaeda,<sup>12</sup> even as both governments maintain the need for a dominant state role in respect to other security risks.<sup>13</sup> Moreover, this social production is something more than universal vigilance (as conveyed by the familiar slogan of “see something, say something”) and private contractors hiving off the state’s tasks. Nor is it the same as private engagement in other historical contexts, like private aid for the Continental Army or private collaboration with the Central Intelligence Agency (CIA) through the Cold War. What the U.S. and U.K. governments propose is something distinct and new for the post-9/11 era.

The notion that security against terrorism demands private as well as state action may have diffused across national boundaries and

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available at [http://www.whitehouse.gov/sites/default/files/counterterrorism\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf) (stressing the importance of “community resilience programs”).

<sup>9</sup> THE WHITE HOUSE, *EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES*, at i (2011) [hereinafter 2011 *EMPOWERING LOCAL PARTNERS*], available at [http://www.whitehouse.gov/sites/default/files/empowering\\_local\\_partners.pdf](http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf).

<sup>10</sup> THE WHITE HOUSE, *STRATEGIC IMPLEMENTATION PLAN FOR EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES 1–2* (2011) [hereinafter 2011 *SIP*], available at <http://www.whitehouse.gov/sites/default/files/sip-final.pdf>.

<sup>11</sup> SEC’y OF STATE FOR THE HOME DEP’T, *CONTEST: THE UNITED KINGDOM’S STRATEGY FOR COUNTERING TERRORISM*, Cm. 8123, at 68 (2011) [hereinafter *CONTEST: U.K.’s STRATEGY*], available at <http://www.homeoffice.gov.uk/publications/counter-terrorism/counterterrorism-strategy/strategy-contest?view=Binary>. For a reiteration of the same claim, see SEC’y OF STATE FOR THE HOME DEP’T, *PREVENT STRATEGY*, Cm. 8092, at 24–25 (U.K. 2011) [hereinafter *PREVENT STRATEGY*], available at <http://www.homeoffice.gov.uk/publications/counter-terrorism/prevent/prevent-strategy/prevent-strategy-review?view=Binary>. The focus on community production of security is not a new feature of British counterterrorism thinking. See HER MAJESTY’S (HM) GOV’T, *THE PREVENT STRATEGY: A GUIDE FOR LOCAL PARTNERS IN ENGLAND 6* (2008) [hereinafter *PREVENT GUIDE*], available at [https://www.education.gov.uk/publications/eOrderingDownload/Prevent\\_Strategy.pdf](https://www.education.gov.uk/publications/eOrderingDownload/Prevent_Strategy.pdf) (emphasizing the need to “increas[e] the resilience of communities” so they can help fight “violent extremism”).

<sup>12</sup> For a similar use of the term “social production,” see Kirk R. Williams & Robert L. Flewelling, *The Social Production of Criminal Homicide: A Comparative Study of Disaggregated Rates in American Cities*, 53 *AM. SOC. REV.* 421, 426–27 (1988).

<sup>13</sup> See, e.g., 2010 NATIONAL SECURITY STRATEGY, *supra* note 8, at 24–26 (discussing foreign policy in respect to Mideast states).

between jurisdictions, but it has not yet developed robust theoretical or evidentiary foundations. To date, official assertions about the need for social inputs into counterterrorism strategy have lacked stable anchoring in a general account of how social forces mitigate, or even increase, the risk of terrorism. It is not clear, for example, precisely what behaviors are socially desirable on national security grounds or under what circumstances they are likely to conduce to supplemental security. Nor is it clear if there are mechanisms that the state might have at hand through which it could influence the frequency or intensity of such desirable behaviors. As a result, there is no clear sense of the empirical questions that must be resolved in order to establish whether cultivating the social production of security against terrorism is worthwhile. The scholarly literature to date has yet to pick up the slack. With a handful of exceptions, scholarship remains largely concentrated on the state as the monopolistic producer of national security, addressing the legality or wisdom of policies without providing a general account of potentially complementary social action.<sup>14</sup>

This Article starts to fill those gaps. It aims to identify potential causal mechanisms of the social production of counterterrorism and to explore legal and policy implications.<sup>15</sup> Its first contribution is an investigation of *mechanisms* that could potentially facilitate counterterrorism's social production (i.e., the "set[s] of interrelated causal propositions" that link certain predicate facts to certain observed effects).<sup>16</sup> I isolate three such possible causal mechanisms. I label these *ideological competition*, *ethical anchoring*, and *cooperative coproduction*. In harmony with the Article's focus, each posited mechanism comprises only "social action" (i.e., private, "consciously intended behavior").<sup>17</sup> Core cases of the latter involve private behavior not directed or catalyzed by a government actor.<sup>18</sup> Social action nonetheless also includes action that results in contact with officials (e.g., reporting threat information) but excludes state-sponsored ac-

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<sup>14</sup> For one exception, see generally CHARLES KURZMAN, *THE MISSING MARTYRS: WHY THERE ARE SO FEW MUSLIM TERRORISTS* (2011) (discussing the increase in national security and covert operations after 9/11).

<sup>15</sup> The central focus of this Article is al Qaeda-related terrorism, in line with the current preoccupations of counterterrorism policy, although many of the arguments developed here may have applications to other forms of political extremism that precipitate terrorist violence. Despite this potential applicability, the Article's discussion of "terrorism" is with an al Qaeda focus in mind. Further, references to "national security" should be understood in a parallel sense. I do not advance any claim that private action is salient to, say, minimizing the threat of Chinese military action or the like.

<sup>16</sup> JON ELSTER, *EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 17 (2007).

<sup>17</sup> JOHN LEVI MARTIN, *SOCIAL STRUCTURES* 9 (2009).

<sup>18</sup> See *infra* Part II.

tivities (e.g., serving as an informant).<sup>19</sup> Exploring each mechanism, I take pains to identify both arguments supporting the mechanism's existence and also reasons to doubt its efficacy. My aim is not to resolve the fundamentally empirical question of whether counterterrorism's social production is ultimately substantial, but rather to specify more precisely the conditions under which the social production of security would emerge.

This Article's second contribution is an analysis of how the state might best elicit hypothetically desirable private behavior. Because empirical evidence and theory on national security policy is fragmentary, it is necessary to draw on exogenous bodies of work in law and the social sciences. Specifically, I borrow insights from deterrence and legitimacy theories of the criminal law about how the state elicits private action as lenses to illuminate core empirical, legal, and ethical questions the social production of national security raises.<sup>20</sup> I consider ethical concerns because governments presently perceive certain "suspect communities," typically defined by faith or ethnicity, both as linked to terrorism and also as privileged social producers of counterterrorism. This dual perspective can yield confused and inconsistent policies.<sup>21</sup> Reflecting this internally contradictory approach, attempts to exploit the social production of security against terrorism can end up at war with other post-9/11 doctrinal and institutional innovations. One output of this Article's analysis, therefore, is the identification of potential contradictions in current policy portfolios.

A threshold caveat is warranted. The narrow aim of this Article is to investigate conditions under which, as the U.S. and U.K. governments claim, social action mitigates terrorism risk. I offer no definitive conclusion about the existence or magnitude *vel non* of any of the underlying mechanisms discussed, each of which rests on empirical foundations that this Article can only partially elucidate.<sup>22</sup> Legal

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<sup>19</sup> I also exclude the role of private actors as subcontractors. For a careful analysis of that issue, see generally Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901 (2008) (documenting the rise of private-public partnerships in the national security domain and proposing new regulatory frameworks).

<sup>20</sup> See *infra* Part III.A-B.

<sup>21</sup> Cf. MARY J. HICKMAN ET AL., LONDON METRO. UNIV., 'SUSPECT COMMUNITIES'? COUNTER-TERRORISM POLICY, THE PRESS, AND THE IMPACT ON IRISH AND MUSLIM COMMUNITIES IN BRITAIN 14 (2011), available at [http://www.city.ac.uk/\\_\\_data/assets/pdf\\_file/0005/96287/suspect-communities-report-july2011.pdf](http://www.city.ac.uk/__data/assets/pdf_file/0005/96287/suspect-communities-report-july2011.pdf) (noting the "ambiguous position of Irish and Muslims—as victims, partners and threats"). The term "suspect communities" was not coined by Hickman et al., but first appeared in PADDY HILLYARD, *SUSPECT COMMUNITY: PEOPLE'S EXPERIENCE OF THE PREVENTION OF TERRORISM ACTS IN BRITAIN* (1993).

<sup>22</sup> To see why modest aspirations are appropriate, it is useful to look at the literature on crime control. In that far more extensively tilled field, sophisticated empirical analysis employed over several generations of scholarship has yielded only partial and controversial



scholarship commonly runs beyond the writ of available evidence, a serious mistake that I hope to avoid.<sup>23</sup> To that end, I take care to develop arguments both for and against the existence of counterterrorism's social production, as well as attending to the possibility that some mechanisms may have perverse effects or may work at cross-purposes to other interventions. As a result, the most important product of the following analysis is a general framework for the evaluation of claims about the social production of counterterrorism. My hope is that the framework enables ongoing evaluation of such claims based on existing and yet-to-emerge evidence. Hence, even if I read the available evidence to support the U.S. and U.K. governments' claim—as I tentatively do—that inference is not integral to the analysis.

This Article is organized into three Parts. Part I introduces the (concededly familiar) problem of security against terrorism, the recent arc of al Qaeda's evolution, and what might be termed the "social turn" in official counterterrorism doctrine. Having established some threshold reasons for taking that social turn seriously, Part II develops an account of the potential causal mechanisms whereby social action might generate national security. My aim is to lend the U.S. and U.K. governments' claims facial credibility, yet also to supply analytic tools for more careful judgment on the merits. Part III then proceeds on the assumption that social action does produce some security against terrorism and inquires into how the state might elicit desirable forms of private behavior. I thus do not intend to elaborate a definitive policy framework, but instead endeavor to provide a platform for deeper reflection on an important and hitherto underappreciated and undertheorized dimension of counterterrorism law and policy.

## I

### CANONICAL ACCOUNTS OF NATIONAL SECURITY AS A PUBLIC GOOD (AND THE LIMITS OF THESE ACCOUNTS)

This Part provides analytic and historical grounding for the inquiry into the causal foundations of national security's social production. It begins by developing the canonical view of national security as a public good and shows how this view seemed to obtain confirmation from post-9/11 U.S. policy changes. Counterterrorism, however, is a dynamic game. Enemies evolve instead of hewing to older, vulnerable forms of terrorism. Al Qaeda has certainly developed and adapted in response to American policy initiatives. Its developmental path, however, has indirectly engendered challenges to the conventional view

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causal accounts of rises and declines in crime. *See, e.g.*, FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE 195–209* (2007). There is little reason to expect our accounts of how to mitigate terrorism to be much more sophisticated.

<sup>23</sup> I am grateful to Steve Schulhofer for discussions on this point.

that the state has a monopoly on the production of security. Emergent official emphasis on counterterrorism's social inputs, as described in a final section of this Part, is best understood as a response to this terrorist-threat evolution.

### A. Counterterrorism as a Public Good

A public good is one that is both nonexcludable and nonrivalrous in nature, in the sense that individuals cannot be effectively excluded from its use and one individual's use does not exhaust the good's availability for others.<sup>24</sup> Public goods that have value for all or many members of society are vulnerable to decomposition under the burden of free riding: the inability of contributing members to exclude noncontributing members (who still reap benefits) will conduce to suboptimal levels of production.<sup>25</sup> The existence of underproduced public goods provides an axiomatic justification for state involvement.<sup>26</sup> By coercing contributions in the form of taxes or labor, centralized government ensures the provision of those public goods undersupplied through private action.<sup>27</sup> This justification has resonance in U.S. history: the 1787 Constitution has been glossed recently by some public law scholars as a successful solution to perceived collective action problems among the several states that induced, *inter alia*, an underproduction of national security.<sup>28</sup>

National security has long been understood to be a quintessential public good, one that is uniquely tailored to state monopolization.<sup>29</sup> Indeed, the need for first collective, and then national, security was a significant motivation for the U.S. Constitution's drafters. The former colonies' failure to act decisively in the face of threatening infringements by European powers on their interests had forcefully struck James Madison and his allies.<sup>30</sup> In the summer of 1787, the drafters

<sup>24</sup> See HARDIN, *supra* note 1, at 17.

<sup>25</sup> See *id.* at 20 (“[T]he rational incentive to an individual in a latent group is not to contribute to the group’s provision of its collective good to itself.” (emphasis omitted)). Hardin attributes this point to MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 49–51 (1965).

<sup>26</sup> See OLSON, *supra* note 25, at 15 (“A state is first of all an organization that provides public goods for its members, the citizens . . .”).

<sup>27</sup> Cf. HARDIN, *supra* note 1, at 25–30 (arguing the logic underlying the free-riding problem is one of an “*n*-person” prisoner’s dilemma).

<sup>28</sup> See Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 *STAN. L. REV.* 115, 117–18 (2010).

<sup>29</sup> OLSON, *supra* note 25, at 14 (“It would obviously not be feasible, if indeed it were possible, to deny the protection provided by the military services . . . to those who did not voluntarily pay their share of the costs of government . . .”).

<sup>30</sup> See PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814*, at 93–122 (1993) (“The move toward federal union followed from the failure of confederal arrangements to guarantee harmony among the states and Congress’s resulting inability to conduct foreign policy.”).

remained deeply concerned by persistent violations of the law of nations “in some one or other of the States” that threatened to precipitate an international incident.<sup>31</sup> These tendencies toward dangerous conflicts were hazardously coupled in the Articles of Confederation with the national government’s “inability to present a credible threat of force.”<sup>32</sup> To remedy this perilous situation, Articles I and II of the new Constitution articulated new national powers to provide for the common defense, and these constitutional authorities have been amply employed and expanded since ratification.<sup>33</sup>

The emergence of newly pressing terrorism threats in the early twenty-first century induced expansions of the national security state.<sup>34</sup> These developments seemed to confirm the state’s monopoly on national security production. Starting with the 2001 Authorization for Use of Military Force<sup>35</sup> and the USA PATRIOT Act of 2001,<sup>36</sup> Congress enacted a sequence of statutory delegations to enlarge the federal government’s regulatory reach.<sup>37</sup> As it reorganized the federal government’s intelligence and homeland security capacities,<sup>38</sup> Congress also swelled the coffers of security and intelligence agencies,<sup>39</sup>

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<sup>31</sup> JAMES MADISON, WRITINGS 69–70 (Jack N. Rakove ed., Penguin Putnam Inc. 1999) (1787); see also DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* 213–14 (2003) (explaining the role of treaty violations in motivating the Constitution’s supporters).

<sup>32</sup> Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 618 (1999).

<sup>33</sup> Disagreement persists as to the precise allocation of these powers between the branches. Compare LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 248–86 (5th ed. 2007) (discussing and cataloging war powers and emphasizing Congress’s role), with AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 140–44 (2005) (underscoring the development of “the central role of the federal executive in military and national-security matters”). For a brief survey of the rise of executive power, see Aziz Huq, *Imperial March*, *DEMOCRACY*, Winter 2008, at 44, 46–53, <http://www.democracyjournal.org/pdf/7/044-055.huq.final.pdf>.

<sup>34</sup> I do not mean to suggest that terrorism is a problem unique to the early twenty-first century. See generally MICHAEL FELLMAN, *IN THE NAME OF GOD AND COUNTRY: RECONSIDERING TERRORISM IN AMERICAN HISTORY* (2010) (providing an insightful account of terrorism’s influence across American history).

<sup>35</sup> Pub. L. No. 107-40, 115 Stat. 224.

<sup>36</sup> Pub. L. No. 107-56, 115 Stat. 272.

<sup>37</sup> These statutory changes include the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (laying out the procedure for surveillance and the collection of “foreign intelligence information”), the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (amending the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–11, 1821–29, 1841–46, 1861–62, 1871 (2006), by removing the warrant requirement for government surveillance of certain foreign intelligence targets), and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (establishing military commissions and laying out their authorized powers).

<sup>38</sup> See, e.g., Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638; see also Cohen et al., *supra* note 2, at 693–95 (describing the creation of the Department of Homeland Security).

<sup>39</sup> See, e.g., Walter Pincus, *Counterterrorism on a Budget*, WASH. POST, Aug. 9, 2011, at A13 (asserting that between fiscal year 2001 and fiscal year 2011, the Pentagon budget grew from \$432 billion to \$725 billion).

and channeled resources and training to state and local entities that already bore front-line policing responsibilities.<sup>40</sup> Although evaluations of the federal courts' role remain contested, there is at least a plausible argument that federal judges have indulged in mere symbolic objections but have not developed any particularized or effective resistance to novel policy developments.<sup>41</sup> In short, the attacks of 9/11 led to a loosening of statutory and doctrinal constraints on the national security state, even as fiscal and institutional commitments to the state's provision of national security as a public good deepened. Government as a monopolist in the provision of national security seemed never to have it so good.

### B. Al Qaeda Evolves . . .

Yet just as the national security state evolved, so too did its adversaries. The United States and its allies have racked up numerous successes in targeting the core of al Qaeda leadership at the same time as the organization has mutated, with the feverish ingenuity of a virus, into modalities and social formations that are more resilient to the American advantage in respect to pure military force. On the one hand, the organization has diversified into new locations through partnerships with local paramilitary organizations. On the other hand, it has deepened its investments in propaganda aimed at potential recruits in the United States and Europe. In setting forth this evolution, I will focus on the second strand of al Qaeda's evolution because it sets the stage for the social turn in counterterrorism policy with which this Article is concerned.

Counterterrorism policy from 2001 to 2012 defies easy summary. Two descriptive points from that history, however, are relevant to the present argument—one concerning successes and the other about failures.<sup>42</sup> On the positive side of the ledger, the United States and its allies have had large, if not uncontroversial, successes targeting the core leadership of al Qaeda, including Osama bin Laden himself, in and around the Afghanistan-Pakistan border.<sup>43</sup> Increased employ-

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<sup>40</sup> See Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 307–09 (2012). For a comprehensive survey of changes to local policing practices, see TO PROTECT AND TO SERVE: POLICING IN AN AGE OF TERRORISM *passim* (David Weisburd et al. eds., 2009).

<sup>41</sup> See Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 401–07 (2010) (using empirical data to argue the inefficacy of habeas corpus); cf. Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 236–40 [hereinafter Huq, *Against Exceptionalism*] (arguing that national security jurisprudence is not a specialized response to the domain's particular problems).

<sup>42</sup> In making these points, I do not mean to imply any positive or negative judgment about any particular aspect of counterterrorism policy.

<sup>43</sup> See 2011 NATIONAL COUNTERTERRORISM STRATEGY, *supra* note 8, at 1, 3 (noting bin Laden's death and the "many successes" in "disrupting terrorist plots, measurably reducing

ment of unmanned aerial drones to target al Qaeda's central leadership and operational capacities has resulted in the death of many within the organization's senior ranks,<sup>44</sup> such as Abu Yahya al-Libi, the organization's erstwhile second-in-command.<sup>45</sup> A larger military campaign has imposed "losses [on al Qaeda's] physical structure, including training camps and leadership," forcing dispersion across Pakistan's border into the Federally Administered Tribal Areas (FATA).<sup>46</sup> This military campaign, to be sure, has not been wholly successful—since 2003, for example, al Qaeda has been able to maintain training capabilities in the FATA<sup>47</sup>—but the damage inflicted by the campaign to the organization's core leadership has been unquestionably significant.<sup>48</sup>

The second observation concerns al Qaeda's successes. Even as it has been battered in Afghanistan and the FATA, al Qaeda has responded by shifting to a "more decentralized" form that is "far more dependent on its autonomous field commands, its affiliates, its allies, and its ability to inspire home-grown terrorists."<sup>49</sup> The result is more "movement"<sup>50</sup> or network than in a centralized entity working via command and control. The recombinant al Qaeda is more resilient to targeting by military tools that were previously effective.

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the financial support available to the group, and inflicting significant leadership losses" as a preface for further action).

<sup>44</sup> See Peter Bergen et al., *Assessing the Jihadist Terrorist Threat to America and American Interests*, 34 *STUD. CONFLICT & TERRORISM* 65, 81 (2011) ("Since the summer of 2008, U.S. drones have killed scores of lower-ranking militants and at least a dozen mid- and upper-level leaders within Al Qaeda or the Taliban in Pakistan's tribal regions."). The use of unmanned aerial drones to assassinate al Qaeda leaders is strategically, morally, and legally controversial. I do not mean to imply any position on those controversies here.

<sup>45</sup> See Declan Walsh & Eric Schmitt, *Al Qaeda's No. 2 Said to Be Killed in a Drone Strike*, *N.Y. TIMES*, June 6, 2012, at A1.

<sup>46</sup> Rohan Gunaratna & Aviv Oreg, *Al Qaeda's Organizational Structure and Its Evolution*, 33 *STUD. CONFLICT & TERRORISM* 1043, 1043–44 (2010).

<sup>47</sup> See Leah Farrall, *Forward Focus: Assessing Al-Qaeda's In-Theater Capabilities*, IHS DEF., SECURITY & RISK CONSULTING, Jan. 2012, at 14, 16; cf. Bergen et al., *supra* note 44, at 80–81 (discussing al Qaeda's continuing strengths).

<sup>48</sup> For instance, upon the death of bin Laden, Ayman al-Zawahiri—reportedly a more polarizing and less inspiring figure within al Qaeda—took the leadership but has yet to command the loyalty of his predecessor. See BRIAN MICHAEL JENKINS, RAND CORP., *AL QAEDA IN ITS THIRD DECADE: IRREVERSIBLE DECLINE OR IMMINENT VICTORY?* 4–5 (2012) [hereinafter JENKINS, *THIRD DECADE*], available at [http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2012/RAND\\_OP362.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2012/RAND_OP362.pdf); see also Farrall, *supra* note 47, at 18 (noting that al Qaeda now "lacks an authoritative self-produced internal figure to provide doctrinal and ideological guidance, and provide legitimacy to any changes in direction or focus").

<sup>49</sup> JENKINS, *THIRD DECADE*, *supra* note 48, at 4; see also Joby Warrick, *Differing Al Qaeda Images Paint a Still-Dangerous Foe*, *BOS. GLOBE*, Feb. 9, 2010, at 10 (noting decline in al Qaeda's ability "to wage mass-casualty terrorism" but an uptick in "small-scale operations that are far harder to detect and disrupt").

<sup>50</sup> Gunaratna & Oreg, *supra* note 46, at 1047.

Two strands of this mutation stand out. Only one, though, is of central relevance here. The first (less relevant for present purposes) development in al Qaeda involves the emergence and growth of new, localized terrorist organizations in weak or failed states, including the North African al Qaeda in the Magreb (AQIM), Ansar Dine in Mali, the Shabaab in Somalia, and al Qaeda in the Arabian Peninsula (AQAP) in Yemen.<sup>51</sup> These organizations' lack of geographic propinquity does not necessarily diminish the threat they pose. Successive AQAP attempts to attack the United States<sup>52</sup> as well as AQIM's recent seizure of de facto state power in parts of northern Mali<sup>53</sup> demonstrate as much. The early successes of this "resurgent tide" of al Qaeda affiliates, some analysts conclude, suggest that the United States will face serious terrorism risk for at least the medium term,<sup>54</sup> a concern only fueled by the perception that jihadist groups have successfully exploited armed conflicts that emerged from the Arab Spring.<sup>55</sup> However important these developments may be as a practical matter, they have not yet stimulated theoretical reorientation in counterterrorism strategy of the sort relevant here.<sup>56</sup>

But there is a second important development involving the decentralization of terrorist risk, one that has catalyzed an important rethinking of the roots of national security in ways central to the topic of this Article. In yet another response to military and drone campaigns, "[a] Qaeda and its allies have increased their efforts to inspire and

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<sup>51</sup> See Bergen et al., *supra* note 44, at 71–74; Gunaratna & Oreg, *supra* note 46, at 1051; see also BRUCE RIEDEL, *THE SEARCH FOR AL QAEDA: ITS LEADERSHIP, IDEOLOGY, AND FUTURE* 124–27 (2008) (describing the growth of al Qaeda “[s]afe [h]avens and [f]ranchises”). I exclude the Nigerian group Boko Haram from this analysis because serious studies of that group suggest it has a quite different etiology and, at least to date, a more localized agenda. For an excellent study on this topic, see generally INT’L CRISIS GRP., *NORTHERN NIGERIA: BACKGROUND TO CONFLICT* (2010), available at <http://www.crisisgroup.org/~media/Files/africa/west-africa/nigeria/168%20Northern%20Nigeria%20-%20Background%20to%20Conflict>.

<sup>52</sup> See JOHN ROLLINS, CONG. RESEARCH SERV., R41070, *AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY* 16–17 (2011), available at <http://www.fas.org/sgp/crs/terror/R41070.pdf>.

<sup>53</sup> See *Secession in Mali: An Unholy Alliance*, ECONOMIST, June 2, 2012, at 61 (describing the capture of state power by Ansar Eddine, an AQIM ally, in an area of northern Mali proclaimed to be the independent state of Azawad).

<sup>54</sup> See Seth G. Jones, *Think Again: Al Qaeda*, FOREIGN POL’Y, May/June 2012, at 47, 47.

<sup>55</sup> This appears to be especially so in Syria. Neil MacFarquhar & Hwaida Saad, *Jihadists Taking a Growing Role in Syrian Revolt*, N.Y. TIMES, July 30, 2012, at A1.

<sup>56</sup> The increased use of unmanned aerial drones, though, is a tactical response to these developments. See generally STANFORD LAW SCH. INT’L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC & NYU SCH. OF LAW GLOBAL JUSTICE CLINIC, *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN* (2012), available at [http://livingunderdrones.org/wp-content/uploads/2012/09/Stanford\\_NYU\\_LIVING\\_UNDER\\_DRONES.pdf](http://livingunderdrones.org/wp-content/uploads/2012/09/Stanford_NYU_LIVING_UNDER_DRONES.pdf) (providing an empirically informed and highly critical review of the use of such drones).

recruit homegrown terrorists.”<sup>57</sup> From al Qaeda’s perspective, this organizational reorientation takes the form of new investments in propaganda and recruitment using intermediaries and the Internet.<sup>58</sup> Those investments have yielded an uptick in concern about terrorist conspiracies, attempts, and attacks across the United States and Europe directed and executed by individuals or loosely knit organizations that are wholly or largely disconnected from al Qaeda central.<sup>59</sup> Providing some substantiation of this perception, a 2008 study “estimated that some 80% of new recruits to the global Salafi jihad emerge from the diaspora” originally from Muslim majority nations.<sup>60</sup>

As early as 2006, the United States’ national intelligence estimate had flagged a “growing number of radical, self-generating cells in Western countries” and an expanding “radical and violent segment of the West’s Muslim population.”<sup>61</sup> Since then, domestic-origin groups and individuals in Europe have committed a range of terrorist acts, from “unsophisticated acts of violence . . . and solitary assassinations” to “large-scale ‘spectacular’ attacks.”<sup>62</sup> The precise organizational structures at work in the commission of such terrorism seem to vary between the United Kingdom and the United States. An innovative recent study employing social networking techniques to map data accumulated from American and European prosecutions, for example,

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<sup>57</sup> JENKINS, THIRD DECADE *supra* note 48, at 7; accord BRIAN MICHAEL JENKINS, RAND CORP., WOULD-BE WARRIORS: INCIDENTS OF JIHADIST TERRORIST RADICALIZATION IN THE UNITED STATES SINCE SEPTEMBER 11, 2001, at 1–2 (2010) [hereinafter JENKINS, WOULD-BE WARRIORS], available at [http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2010/RAND\\_OP292.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP292.pdf).

<sup>58</sup> See, e.g., Richard Spencer, *Al-Qaeda Newspaper: Make a Bomb in the Kitchen of Your Mom*, TELEGRAPH (U.K.), July 1, 2010, <http://www.telegraph.co.uk/news/worldnews/7865978/Al-Qaeda-newspaper-Make-a-bomb-in-the-kitchen-of-your-mom.html> (describing al Qaeda’s online magazine *Inspire*).

<sup>59</sup> See Leah Farfall, *How Al Qaeda Works: What the Organization’s Subsidiaries Say About Its Strength*, 90 FOREIGN AFF. 128, 133, 136–37 (2011) (describing the evolution of al Qaeda into “a devolved network hierarchy, in which levels of command authority are not always clear”); Keith Johnson, *Officials Spotlight Domestic Terrorism Threat*, WALL ST. J., Feb. 10, 2011, at A5 (“[L]one-wolf extremists with little or no formal connection to al Qaeda have proliferated and are potentially plotting small-scale attacks in the U.S., officials said.”).

<sup>60</sup> Arie W. Kruglanski et al., *What Should This Fight Be Called?: Metaphors of Counterterrorism and Their Implications*, 8 PSYCHOL. SCI. PUB. INT. 97, 114 (2008).

<sup>61</sup> NAT’L INTELLIGENCE COUNCIL, NATIONAL INTELLIGENCE ESTIMATE: THE TERRORIST THREAT TO THE US HOMELAND 6 (2007) [hereinafter 2007 NIE], available at [http://dni.gov/files/documents/NIE\\_terrorist%20threat%202007.pdf](http://dni.gov/files/documents/NIE_terrorist%20threat%202007.pdf). The National Intelligence Estimate is “the Intelligence Community’s (IC) most authoritative written judgments on national security issues and [is] designed to help US civilian and military leaders develop policies to protect US national security interests.” *Id.* at 2; see also *Intelligence Reform: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 89 (2007) (statement of Charles E. Allen, Assistant Secretary for Intelligence and Analysis, Chief Intelligence Officer, Department of Homeland Security) (describing the new focus on “domestic terrorists” including “Islamic extremists (Sunni and Shia)”).

<sup>62</sup> Gunaratna & Oreg, *supra* note 46, at 1053; see also Bergen et al., *supra* note 44, at 84–85 (documenting global spread of such smaller, more self-starting groups).

found material differences in the relation of terrorist conspiracies to each other and to transnational networks.<sup>63</sup> Whereas in the United States individuals connected to recent terrorism incidents tend to be isolated from larger transnational networks, those in London appear to be much more closely connected to a small group of “sheikhs” and al Qaeda facilitators such as (the now apparently deceased) Rashid Rauf.<sup>64</sup> This study suggests that patterns of domestic-source terrorism in the United States and Europe have taken different paths, with European-focused conspiracies maintaining tighter connections to either the core of al Qaeda in the FATA region<sup>65</sup> or specific “gatekeepers”<sup>66</sup> to the larger organization who tend to act as catalysts for individuals or groups in Europe but not in the United States.

To be sure, large disagreements persist about this trend, two of which merit brief adumbration. First, academics and officials disagree about the mechanics of what has come to be labeled “violent radicalization.”<sup>67</sup> A threshold problem in this field is that careless empirics and invidious stereotyping mar many official and semi-official studies that lay foundations for the formulation of official policy.<sup>68</sup> Even setting aside empirically and normatively flawed analyses, there is still substantial disagreement in scholarly circles, exacerbated by a dearth of unbiased factual evidence, which impedes the ability to reach firm predictions (let alone conclusions) about the individual etiology of terrorism.<sup>69</sup> For the purposes of this Article, it suffices to say that the

<sup>63</sup> See Eliane Tschaen Barbieri & Jytte Klausen, *Al Qaeda's London Branch: Patterns of Domestic and Transnational Network Integration*, 35 *STUD. CONFLICT & TERRORISM* 411, 426–28 (2012).

<sup>64</sup> See *id.* at 412, 419–26 (presenting data in graphical form on both the United States and London).

<sup>65</sup> See *id.* at 427. But cf. Javier Jordan, *Analysis of Jihadi Terrorism Incidents in Western Europe, 2001–2010*, 35 *STUD. CONFLICT & TERRORISM* 382, 388 (2012) (noting evidence of group members spending time at a training camp outside Western Europe in only one-third of European terrorism cases).

<sup>66</sup> Petter Nesser, *Jihadism in Western Europe After the Invasion of Iraq: Tracing Motivational Influences from the Iraq War on Jihadist Terrorism in Western Europe*, 29 *STUD. CONFLICT & TERRORISM* 323, 326 (2006) (describing “gatekeepers” as “veteran militants who fought against the Soviets in the 1980s, or radicals who have trained in *jihad* camps”).

<sup>67</sup> For a useful overview, see Gary LaFree & Gary Ackerman, *The Empirical Study of Terrorism: Social and Legal Research*, 5 *ANN. REV. L. & SOC. SCI.* 347, 348–49 (2009).

<sup>68</sup> See Aziz Z. Huq, *Modeling Terrorist Radicalization*, 2 *DUKE F. FOR L. & SOC. CHANGE* 39, 48–60 (2010) (describing and critiquing U.K. and U.S. models of radicalization).

<sup>69</sup> See, e.g., Anja Dalgaard-Nielsen, *Violent Radicalization in Europe: What We Know and What We Do Not Know*, 33 *STUD. CONFLICT & TERRORISM* 797, 798 (2010) (describing three competing models of radicalization, one based on identarian crises, another on social movements, and a third on individual-level factors); see also John Horgan, *From Profiles to Pathways and Roots to Routes: Perspectives from Psychology on Radicalization into Terrorism*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, July 2008, at 80, 82–83 (stressing variance in radicalization models). One recent study finds more evidence of group-level than individual-level process. See Scott Matthew Kleinmann, *Radicalization of Homegrown Sunni Militants in the United States: Comparing Converts and Non-Converts*, 35 *STUD. CONFLICT & TERRORISM* 278,



diverse empirical, theoretical, and polemical literature on radicalization evinces considerable discord, such that the goal of predicting who among the pacific many will employ violence for political ends remains a remote one. Psychology, personal circumstance, social context, and ideas (some political, some religious, some just muddled) all likely play a role, but how each precisely does remains obscure.

Second, disagreement also persists as to whether the domestic-source threat is a distinctively European problem or whether it is also equally a concern for the United States. Even U.S. government officials seem to evaluate the transatlantic divide differently. On the one hand, Congress has conducted extensive investigations into (among other things) terrorist recruitment in prisons<sup>70</sup> and al Shabaab recruitment within Minneapolis's Somali community.<sup>71</sup> The ensuing congressional reports promote the view that Americans should be gravely concerned about domestic-source political violence.<sup>72</sup> Respected commentators have also concluded that such terrorism afflicts both sides of the Atlantic.<sup>73</sup> Finally, a growing emphasis on the role of the Internet as a vehicle for disseminating terrorist propaganda provides yet another reason for positing that the transatlantic divide may make little difference.<sup>74</sup> On the other hand, a 2007 National Intelligence Estimate observed that "this internal Muslim terrorist threat is not likely to be as severe [in the United States] as it is in Europe" and that other "non-Muslim terrorist groups . . . probably will

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279, 288 (2012); see also Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833, 880–90 (2011) [hereinafter Huq, *Signaling Function*] (emphasizing group-level dynamics).

<sup>70</sup> See generally *Prison Radicalization: Are Terrorist Cells Forming in U.S. Cell Blocks?: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 109th Cong. (2006) (examining American prisons and their potential role in cultivating homegrown terrorism).

<sup>71</sup> See generally *Violent Islamist Extremism: Al-Shabaab Recruitment in America: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. 100–04 (2009) (statement of J. Philip Mudd, Associate Executive Assistant Director, National Security Branch, Federal Bureau of Investigation) (discussing the American Somali community). See also *id.* at 97 (statement of Andrew M. Liepman, Deputy Director of Intelligence, National Counterterrorism Center, Office of the Director of National Intelligence) (same).

<sup>72</sup> See JEROME P. BJELOPERA & MARK A. RANDOL, CONG. RESEARCH SERV., R41416, AMERICAN JIHADIST TERRORISM: COMBATING A COMPLEX THREAT 61 (2010), available at <http://fpc.state.gov/documents/organization/153298.pdf> (“[H]omegrown jihadist terrorism remains a danger.”).

<sup>73</sup> See, e.g., Evan F. Kohlmann, “Homegrown” Terrorists: Theory and Cases in the War on Terror’s Newest Front, ANNALS AM. ACAD. POL. & SOC. SCI., July 2008, at 95, 96–97; accord Bergen et al., *supra* note 44, at 66–67.

<sup>74</sup> See BJELOPERA & RANDOL, *supra* note 72, at 2, 18–21 (arguing that the availability of propaganda on the Internet aids terrorist efforts in that individuals interested in jihad no longer need to travel for indoctrination or training); cf. *War in the Fifth Domain: Are the Mouse and Keyboard the New Weapons of Conflict?*, ECONOMIST, July 3, 2010, at 25 (discussing the Internet’s ability to aid both governments and terrorists and enable attacks at a distance).

conduct attacks . . . [, though] on a small scale.”<sup>75</sup> Supporting this conclusion are 2010 and 2012 studies of domestic-source terrorism conducted by the RAND Institute. As the first of these studies notes, “the number of terrorist recruits [in the United States] is still tiny.”<sup>76</sup> A follow-up RAND study reached a similar conclusion, albeit with some reservations; it also pointedly noted that three of the six conspiracies involving attacks in the United States involved federal stings,<sup>77</sup> arguably suggesting that even the observed threat may be a result, in part, of aggressive law enforcement tactics eliciting violence where none would otherwise arise.<sup>78</sup>

Notwithstanding these disagreements and ambiguities, government officials still seem to agree that the domestic-source strain of al Qaeda-related terrorism is a significant evolutionary response to previous counterterrorism successes.<sup>79</sup> That accord has in turn catalyzed novel kinds of official action and thinking about how to respond to the new forms and causes of al Qaeda-inspired violence, given that what previously proved most effective—assassination by aerial drone, the deployment of special forces, and other species of military force—is turning out to be increasingly ill-suited to the task at hand.

### C. . . . The State Responds

Many of the ensuing state responses are familiar. For example, governments have sought new instruments for investigation and surveillance.<sup>80</sup> They have expanded agencies’ technical and logistical capacities to engage in intelligence work, sometimes beyond that

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<sup>75</sup> 2007 NIE, *supra* note 61, at 6.

<sup>76</sup> JENKINS, WOULD-BE WARRIORS, *supra* note 57, at 4; *see also* BRIAN MICHAEL JENKINS, RAND CORP., *Stray Dogs and Virtual Armies: Radicalization and Recruitment to Jihadist Terrorism in the United States Since 9/11*, at 1 (2011) [hereinafter JENKINS, *Stray Dogs*], available at [http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2011/RAND\\_OP343.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2011/RAND_OP343.pdf) (“[D]espite al Qaeda’s intensive online recruiting campaign, their numbers remain small, their determination limp, and their competence poor.”).

<sup>77</sup> JENKINS, *Stray Dogs*, *supra* note 76, at 19.

<sup>78</sup> This is a symptom of a more general problem in terrorism policy, where much of the usable data flows from governmental practices designed not to generate accurate results but to mitigate risks without regard to the negative externalities from such precautionary action.

<sup>79</sup> *See* ROLLINS, *supra* note 52, at 1–2 (suggesting that U.S. counterterrorism strategy has caused al Qaeda to decentralize into smaller cells, which in turn may pose a domestic threat); *see also* 2007 NIE, *supra* note 61, at 6 (stating that, while worldwide counterterrorism efforts have affected al Qaeda’s ability to attack, the growth of “radical, self-generating cells” in the United States remains a threat); 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9, at 2 (“[T]hese groups are actively seeking to recruit or inspire Americans to carry out attacks against the United States, particularly as they are facing greater pressure in their safe-havens abroad.”).

<sup>80</sup> *See supra* text accompanying notes 2–4.

authorized by statute.<sup>81</sup> And they have developed diverse arrays of counterradicalization strategies.<sup>82</sup> The ensuing slate of responses has deepened the state's monopoly on security production, with one important exception. The exception to this trend—which has largely escaped sustained attention or theorization until now—turns prevailing accounts of national security as a public good on their head. Rather than seeking to monopolize security's production, governments on both sides of the Atlantic have turned to private action as a mechanism for addressing the new decentralized and dispersed variety of nonstate terrorism risk.<sup>83</sup> They have stated or implied that governments do not, and should not, have a monopoly on the production of national security. At odds with the traditional view of security as a public good, governments are conceptualizing counterterrorism in some measure as a socially produced good, in other words, one generated through the decisions and behaviors of dispersed private actors outside the control or direction of the state.<sup>84</sup>

The idea of harnessing social inputs for the production of counterterrorism has been a common thread in policy documents issued by the U.S. and U.K. governments since at least 2010.<sup>85</sup> The following section documents the emergence of this idea as a prelude to

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<sup>81</sup> See, e.g., James Bamford, *The NSA Is Building the Country's Biggest Spy Center (Watch What You Say)*, WIRED (Mar. 15, 2012, 7:24 PM), [http://www.wired.com/threatlevel/2012/03/ff\\_nsadatacenter/all/1](http://www.wired.com/threatlevel/2012/03/ff_nsadatacenter/all/1) (describing the development of a federal capacity to capture, copy, and analyze all telephone calls made in the United States).

<sup>82</sup> See Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 148–61 (2012) (documenting various counterradicalization strategies and their development).

<sup>83</sup> See, e.g., Robert Lambert & Jonathan Githens-Mazer, *Prevent Is Dead. What Next?*, GUARDIAN (U.K.), July 14, 2010, <http://www.guardian.co.uk/commentisfree/belief/2010/jul/14/prevent-counter-radicalisation-terrorism-islam?INTCMP=ILCNETTXT3487> (describing the U.K.'s Prevent strategy and its core principle of communities assuming responsibility for counterterrorism efforts); Dina Temple-Raston, *Officials Detail Plans to Fight Homegrown Terrorism*, NPR (Dec. 8, 2011), <http://www.npr.org/2011/12/08/143319965/officials-detail-plans-to-fight-terrorism-at-home> (discussing the Obama administration's counterterrorism strategy and its base in partnerships between local actors, such as schools, community boards, and law enforcement, to combat domestic terrorism).

<sup>84</sup> In any event, the common association of public goods with state production is too broad; a public good's production often does not require state intervention. See generally ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990) (providing examples of private provision of collective goods). Formal models of collective dynamics also reveal the possibility that where there is heterogeneity amongst potential contributions, the equilibrium outcome from efforts at coordinated action will not necessarily be suboptimal. See, e.g., GERALD MARWELL & PAMELA OLIVER, *THE CRITICAL MASS IN COLLECTIVE ACTION: A MICRO-SOCIAL THEORY* 10 (1993) (“Homogenous groups yield very different results from heterogeneous groups.”).

<sup>85</sup> This Article focuses on British and American policy because they are immediately accessible and of direct relevance. Other European nations have developed policy based on studies of interactions between violent and nonviolent “extremist” groups. See, e.g., GEN. INTELLIGENCE & SEC. SERV. OF THE NETH., *THE RADICAL DAWA IN TRANSITION: THE RISE OF ISLAMIC NEORADICALISM IN THE NETHERLANDS* 22–24 (2007).

more systematic exploration of its causal foundations and policy implications. Thorough analysis of formal British and American policy, as well as the available evidence of how policy works on the ground, demonstrates that whereas both governments have endorsed the utility of social production of counterterrorism, neither has developed a robust account of its causal foundations. Nor have these governments considered potential counterarguments. Further, official sources only weakly flesh out the policy implications of a social turn in counterterrorism. Accordingly, this section summarizes the relevant British and American policies as a foundation for Part II's investigation of causal mechanisms.

### 1. *The Prevent Strategy*

From 2006 onward, concerns about domestic-source terrorism have animated British responses to al Qaeda.<sup>86</sup> Early policy documents characterized counterterrorism as “a battle of ideas in which success will depend upon all parts of the community challenging the ideological motivations used to justify the use of violence.”<sup>87</sup> Building on that view, the British Home Office—which is institutionally responsible for counterterrorism—developed what came to be known as the “Prevent” strand of a four-part “Contest” counterterrorism strategy as a way of harnessing private action for counterterrorism ends.<sup>88</sup> Among its defining characteristics, Prevent has been identified with a “wider social scale” that includes “softer engagement with local entities.”<sup>89</sup> It is founded on the assumption that “community-based partners can . . . reduce th[e] appeal” of al Qaeda and its affiliates.<sup>90</sup> As early as 2007, the Home Office was allocating funds to religious “roadshows,” forums, and religious advisory councils in order to militate against individuals turning to terrorism.<sup>91</sup> In its first five years, Pre-

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<sup>86</sup> See PRIME MINISTER & SEC'Y OF STATE FOR THE HOME DEP'T, COUNTERING INTERNATIONAL TERRORISM: THE UNITED KINGDOM'S STRATEGY, Cm. 6888, at 3 (2006), available at <http://webarchive.nationalarchives.gov.uk/20060715135117/http://www.ukresilience.info/publications/countering.pdf> (noting the catalytic effect of the July 2005 train and bus bombings).

<sup>87</sup> *Id.*

<sup>88</sup> See PRIME MINISTER & SEC'Y OF STATE FOR THE HOME DEP'T, PURSUE PREVENT PROJECT PREPARE: THE UNITED KINGDOM'S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM, Cm. 7547, at 10–13 (2009), available at <http://merln.ndu.edu/whitepapers/UnitedKingdom2009.pdf>; see also PREVENT GUIDE, *supra* note 11, at 7 (working to implement “Prevent” by emphasizing the need for engagement of the community by local authorities in combating terrorism).

<sup>89</sup> Clive Walker & Javid Rehman, *‘Prevent’ Responses to Jihadi Extremism*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 242, 243 (Victor V. Ramraj et al. eds., 2d ed. 2012).

<sup>90</sup> *Id.* at 251.

<sup>91</sup> See PREVENT GUIDE, *supra* note 11, at 2, 7. More than half of this funding went to “[d]ebates, discussions and forums,” and about a third went to “[g]eneral educational activities.” PREVENT STRATEGY, *supra* note 11, at 28. Contemporaneous policy statements also reveal that tertiary education institutions were a site of particular interest and concern at

vent became a wide-ranging source of funding for diverse projects. Between 2008 and 2011, the U.K. government disbursed about £45,700,000 under the Prevent banner.<sup>92</sup> Those funds were apportioned geographically in line with the distribution of the U.K.'s Muslim population.<sup>93</sup>

Despite (or perhaps because of) its scale, the first iteration of Prevent sparked sharp criticism from both the political right—which objected to the allocation of funds to Muslim organizations that it deemed insufficiently integrated into larger British society<sup>94</sup>—and the political left—which viewed Prevent as an excuse to allow extensive government surveillance targeting only Muslim communities.<sup>95</sup> Yet others lambasted the program for becoming “as much about the government-inspired social engineering of integration as it was about stopping terrorist attacks.”<sup>96</sup> A subsequent parliamentary inquiry concurred in some of these negative assessments, although it did not endorse or find empirical support for the claim that the Prevent program had become a vehicle for surveillance.<sup>97</sup> Striking a similarly negative note, an internal government review concluded that Prevent

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this stage of Prevent's development. See U.K. DEP'T FOR EDUC. & SKILLS, PROMOTING GOOD CAMPUS RELATIONS: WORKING WITH STAFF AND STUDENTS TO BUILD COMMUNITY COHESION AND TACKLE VIOLENT EXTREMISM IN THE NAME OF ISLAM AT UNIVERSITIES AND COLLEGES 7–9 (2006), available at <http://webarchive.nationalarchives.gov.uk/20070402090550/http://www.dfes.gov.uk/hegateway/uploads/ExtremismGuidancefinal.pdf> (noting that in universities, “extremism can also be disproportionately affected by the simultaneous presence of a few like-minded individuals,” by ethnic segregation, and by charismatic outside speakers).

<sup>92</sup> PREVENT STRATEGY, *supra* note 11, at 28.

<sup>93</sup> *Id.* at 34.

<sup>94</sup> See Dominic Casciani, *Terrorism Strategy Lacks Clarity, Says Minister*, BBC (U.K.) (Dec. 8, 2009), [http://news.bbc.co.uk/2/hi/uk\\_news/8400734.stm](http://news.bbc.co.uk/2/hi/uk_news/8400734.stm) (quoting a Conservative official criticizing Prevent and suggesting that the United Kingdom should “shift the emphasis of funding to groups which bring the community together, rather than single group funding which is divisive”); Alan Travis, *Government ‘Prevent’ Strategy Widened to Combat Rightwing Racism*, GUARDIAN (U.K.), Sept. 8, 2009, <http://www.guardian.co.uk/politics/2009/sep/08/prevent-strategy-rightwing-racism> (describing the government response to criticism of Prevent, including new guidelines requiring funding “to be delivered through a wide range of local groups” instead of “a single ethnic or faith community”).

<sup>95</sup> See Vikram Dodd, *Communities Fear Project Is Not What It Seems*, GUARDIAN (U.K.), Oct. 16, 2009, <http://www.guardian.co.uk/society/2009/oct/16/prevent-counter-islamic-extremism-intelligence>; see also Jack Barclay, *The Extremist Reaction to the UK's Prevent Strategy*, CURRENT TRENDS ISLAMIST IDEOLOGY, 2011, at 73, 74–79, available at [www.currenttrends.org/research/detail/the-extremist-reaction-to-the-uks-prevent-strategy](http://www.currenttrends.org/research/detail/the-extremist-reaction-to-the-uks-prevent-strategy) (describing reactions to the United Kingdom's counterterrorism efforts among some sections of the British Muslim community).

<sup>96</sup> Lambert & Githens-Mazer, *supra* note 83.

<sup>97</sup> See COMMUNITIES AND LOCAL GOVERNMENT COMMITTEE, PREVENTING VIOLENT EXTREMISM, 2009–10, H.C. 65, at 3–4 (U.K.), available at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcomloc/65/65.pdf>. The parliamentary investigation concluded that “Prevent risks undermining positive cross-cultural work on cohesion and capacity building to combat exclusion and alienation in many communities” and that the strategy had inappropriately focused on theological explanations for radicalization. *Id.* at 3.

had failed to develop an effective counternarrative to al Qaeda propaganda<sup>98</sup> and further criticized the Home Office for “seeking to make language acceptable to some in Muslim communities, at the expense of candour.”<sup>99</sup>

Political change after the May 2010 elections invited a policy shift. The new coalition government dramatically reoriented Prevent,<sup>100</sup> creating a new strategy that was styled as “a significant departure from the previous [Prevent] strategy.”<sup>101</sup> Centrally, the coalition government emphasized that it would no longer provide Prevent funding to any “extremist organizations,” in deference to right-of-center critiques.<sup>102</sup> Reflecting left-of-center critiques, the government determined that it would also no longer allocate funding “according to a crude calculation of Muslim population density” but instead would allocate in line with assessments of “activity . . . by terrorist organisations and terrorist sympathisers.”<sup>103</sup> Moreover, it would ramp up “monitoring and evaluation” of projects to prevent the “waste [of] public funds on projects irrelevant to” counterterrorism.<sup>104</sup>

At the heart of the revamped Prevent strategy is a new focus on “[c]hallenging ideology,”<sup>105</sup> particularly “ideology which sanctions the use of violence.”<sup>106</sup> Prevent thus configures the central task of counterterrorism as ideological, pitching the government into a contest of ideas arising within domestic society.<sup>107</sup> The ideologies of gravest concern to the Prevent strategy repudiate a “cohesive, integrated,

<sup>98</sup> See CONTEST: U.K.’s STRATEGY, *supra* note 11, at 64.

<sup>99</sup> PREVENT STRATEGY, *supra* note 11, at 48.

<sup>100</sup> See Alan Travis, *Theresa May Pledges ‘Significant’ Reform of Counter-Terrorism Laws*, GUARDIAN (U.K.), Nov. 3, 2010, <http://www.guardian.co.uk/politics/2010/nov/03/theresa-may-counter-terrorism-reform>.

<sup>101</sup> PREVENT STRATEGY, *supra* note 11, at 39.

<sup>102</sup> *Id.* (“It will not be part of this strategy to use extremists to deal with the risk from radicalisation.”). Elsewhere, the Home Office explains that “some terrorist ideologies draw on and make use of extremist ideas which are espoused and circulated by apparently non-violent organisations.” CONTEST: U.K.’s STRATEGY, *supra* note 11, at 12. Not all elements of the parliamentary coalition concurred in this move. See Allegra Stratton, *Are We There Yet? Clegg and PM Agree to Disagree*, GUARDIAN (U.K.), June 2, 2011, at 11, available at <http://www.guardian.co.uk/politics/2011/jun/01/nick-clegg-david-cameron-disagree?INTCMP=SRCH> (describing Charles Farr, the head of the U.K. Office for Security and Counter-Terrorism, as “believ[ing] that to get to the really nasty guys, you have to engage with the not-so-nasty guys”).

<sup>103</sup> PREVENT STRATEGY, *supra* note 11, at 40.

<sup>104</sup> CONTEST: U.K.’s STRATEGY, *supra* note 11, at 12.

<sup>105</sup> PREVENT STRATEGY, *supra* note 11, at 44.

<sup>106</sup> *Id.* at 5; see also *id.* at 46 (noting, with regard to al Qaeda propaganda in Britain, that there are “comparatively few texts [that] circulate on the internet and in hard copy” but that these are nevertheless “carefully studied and debated”). This focus on challenging violent ideology is echoed in a recent report by the Washington Institute for Near East Policy, a Beltway advocacy group. See Carpenter et al., *supra* note 7, at 303.

<sup>107</sup> See PREVENT STRATEGY, *supra* note 11, at 24 (“Preventing people [from] becoming terrorists will require a challenge to extremist ideas . . .”).

multi-faith society.”<sup>108</sup> There is a note of irony in this: Prevent targets groups that evince a hostility to aspirations of a multicultural society in which sharply different cultures coexist rather than ebb away.<sup>109</sup> Yet this hostility is widely shared on the political right in Europe, even if it has a quite different valence from Islamist opposition to the same idea.

Even with this new, if undertheorized, focus upon the ideological, the Prevent strategy’s instruments remain substantially unchanged. The Home Office assumes that “community based organisations [have] better capability to challenge the ideology [of] Al Qa’ida.”<sup>110</sup> Rather than substituting state for private action, the government will offer these organizations “professional communication skills . . . to challenge [terrorist] ideology.”<sup>111</sup> To the same end, the Home Office commits to developing “sharper and more professional counter-narrative products” as well as new “projects in education, communities and the criminal justice system” that can act as platforms from which to counter dangerous ideologies.<sup>112</sup> Through these instruments, the Home Office’s new iteration of Prevent is intended to “effectively engage[ ] with and use[ ] the influence and reach of communities and community groups”<sup>113</sup> as a way of negating propaganda efforts by al Qaeda and its ilk.

In short, the United Kingdom has engaged in an extended and detailed debate about the social production of counterterrorism. But this debate does not necessarily provide a useful guide for American policymakers. While Prevent’s trajectory might seem to highlight a range of important disagreements that can emerge in conceptualizing counterterrorism’s social production, its lessons may perhaps be rather more subtle, parochial, and circumscribed. All of the core controversies sparked by Prevent reflect broader public debates about multiculturalism and the place of Islam in British society. These resonances at least suggest that the contents of the Prevent policy have attracted attention only to the extent they touch on points of ambient social sensitivity. Consider the debate on extremism versus modera-

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<sup>108</sup> *Id.* at 5.

<sup>109</sup> *See id.* at 27 (noting that political and social cohesion “makes communities more resilient to terrorist ideology and propagandists” despite conceding that “apparently well-integrated people have committed terrorist attacks”).

<sup>110</sup> CONTEST: U.K.’S STRATEGY, *supra* note 11, at 61. Along these lines, mosques are singled out as having “taken a leading role in challenging terrorism,” and the new Prevent strategy is intended to “support the key role of imams in reaching young Muslims and being able to engage with them.” *Id.* at 64.

<sup>111</sup> PREVENT STRATEGY, *supra* note 11, at 48; *see also id.* at 52 (stating that the new Prevent strategy will retain many of the previous counternarrative strategies).

<sup>112</sup> *Id.* at 51–52; *see also id.* at 75 (exploring the “important role” that tertiary educators play in preventing their students from being willing to employ terrorist violence).

<sup>113</sup> *Id.* at 7.

tion. The relevant scholarship on this topic is hardly clear, but it certainly does not support the sort of dichotomies assumed in the debates around Prevent. For example, scholarship about Salafism, the religious current from which al Qaeda emerged, describes linkages between religious extremism and political action as “puzzling, slippery and fascinating,”<sup>114</sup> with “complex” and “hybrid” linkages of religious tradition and political action<sup>115</sup> that resist facile dichotomization of the sort witnessed around the Prevent strategy. Rather than reflecting a central distinction for counterterrorism choice, the debate about extremists versus moderates that is so salient in the United Kingdom may reflect a deeper, abiding discomfort in some quarters about the more general direction of British society. Hence, the categories generated in debates over Prevent may have local salience but may not be useful keys to grasp the core problems in the general social production of counterterrorism.

## 2. *Empowering Local Partners*

A useful starting point in considering the American approach to national security’s social production is the Obama administration’s first National Security Strategy (NSS).<sup>116</sup> The NSS is not the first official effort to grapple with the social production of counterterrorism. Soon after 9/11, local law enforcement agencies in places such as Dearborn, Michigan, realized the value of harnessing social action for public safety ends and began working to deepen their existing relations with Arab-American communities.<sup>117</sup> But such local efforts have been atypical and undertheorized,<sup>118</sup> making them a weak foundation

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<sup>114</sup> Roel Meijer, *Introduction to GLOBAL SALAFISM: ISLAM’S NEW RELIGIOUS MOVEMENT* 1, 17 (Roel Meijer ed., 2009). The Salafist movement has generated both quietist and politically active currents. See Quintan Wiktorowicz, *Anatomy of the Salafi Movement*, 29 *STUD. CONFLICT & TERRORISM* 207, 208, 225–28 (2006). Consequently, there is no simple or mechanistic mapping of religious sentiments into political action.

<sup>115</sup> Thomas Hegghammer, *Jihadi-Salafis or Revolutionaries?: On Religion and Politics in the Study of Militant Islamism*, in *GLOBAL SALAFISM: ISLAM’S NEW RELIGIOUS MOVEMENT*, *supra* note 114, at 244, 264.

<sup>116</sup> 2010 NATIONAL SECURITY STRATEGY, *supra* note 8.

<sup>117</sup> See David Thacher, *The Local Role in Homeland Security*, 39 *LAW & SOC’Y REV.* 635, 647–50 (2005) (developing an insightful account of the Dearborn Police Department’s efforts to maintain the support of the Arab community in counterterrorism efforts).

<sup>118</sup> Many other local police departments took the opposite approach and targeted whole groups based solely on religious or ethnic identity for heightened surveillance and investigation. For example, the Associated Press has revealed an extensive surveillance and intelligence effort by the New York Police Department (NYPD) directed at both Muslim Americans and those perceived to be Muslim in both New York City and throughout the Northeastern states. See, e.g., Matt Apuzzo & Adam Goldman, *NYPD Keeps Files on Muslims Who Change Their Names*, *ASSOCIATED PRESS*, Oct. 26, 2011, available at <http://www.ap.org/Content/AP-In-The-News/2011/NYPD-keeps-files-on-Muslims-who-change-their-names>; Matt Apuzzo & Adam Goldman, *NYPD Monitored Where Muslims Ate, Shopped, Prayed*, *HUFFINGTON POST* (Aug. 31, 2011), <http://www.huffingtonpost.com/huff-wires/20110831/us>



for analysis. In any event, there is little indication that they directly informed the 2010 NSS. The NSS was instead touted as a dramatic reorientation of American strategic priorities away from directions preferred by President George W. Bush's administration.<sup>119</sup> Although its focus on economic strength captured more public attention,<sup>120</sup> the 2010 NSS's concession that government lacks a monopoly on the production of security against terrorism was also noteworthy. While it references the private production of national security only briefly, even this fleeting mention was sufficient to set the stage for subsequent policy elaboration.

In prefatory comments, the 2010 NSS referred ambiguously to "prepared, vigilant, and engaged communities," and then, in a paragraph entitled "Empowering Communities to Counter Radicalization," it expressly posited that "well informed and equipped families, local communities, and institutions" are among the "best defenses" against domestic-source terrorism.<sup>121</sup> The NSS also anticipated investments in both "intelligence" and "community engagement and development programs" to expedite those defenses.<sup>122</sup> As a general statement of administration policy, the NSS does not provide specifics to justify assigning "communities" a role in counterterrorism or to explain how particular projected investments would mitigate terrorism risks.<sup>123</sup>

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nypd-intelligence/; Adam Goldman et al., *AP Impact: NYPD Ethnic Tracking Included Citizens*, YAHOO! NEWS, Sept. 22, 2011, available at <http://news.yahoo.com/ap-impact-nypd-ethnic-tracking-included-citizens-173717936.html>; Chris Hawley, *NYPD Monitored Muslim Students All over Northeast*, ASSOCIATED PRESS, Feb. 18, 2012, available at <http://www.ap.org/Content/AP-In-The-News/2012/NYPD-monitored-Muslim-students-all-over-Northeast/>; Eileen Sullivan, *NYPD Spied on City's Muslim Anti-Terror Partners*, ASSOCIATED PRESS, Oct. 6, 2011, available at <http://www.ap.org/Content/AP-In-The-News/2011/NYPD-spied-on-citys-Muslim-anti-terror-partners>. I do not address here the important issues under the Equal Protection and Religion Clauses of the Constitution raised by the singling out of specific religious groups on the sole basis of a faith affiliation.

<sup>119</sup> See David E. Sanger & Peter Baker, *Obama Reorients Approach of National Security Strategy*, N.Y. TIMES, May 28, 2010, at A8 (quoting Obama administration officials' desire for "a document that recognizes the world as it is and ends a[n] era of illusion in which Washington confused projecting power with achieving results").

<sup>120</sup> See, e.g., Karen DeYoung, *National Security Strategy Looks Beyond Military Might*, WASH. POST, May 27, 2010, at A4.

<sup>121</sup> 2010 NATIONAL SECURITY STRATEGY, *supra* note 8, at 16, 19. The NSS speaks in a different paragraph to the more general topic of "individual and community preparedness." *Id.* at 19.

<sup>122</sup> *Id.*

<sup>123</sup> Several observers have voiced similar criticism. See, e.g., Stephen Biddle et al., *Obama's NSS: Promise and Pitfalls*, COUNCIL ON FOREIGN REL. (May 28, 2010), <http://www.cfr.org/defensehomeland-security/obamas-nss-promise-pitfalls/p22240> ("[T]he NSS goal of empowering communities to immunize them against radicalization may prove difficult to carry out, if only because the U.S. government is not organized for this purpose."); Anna Gawel, *Obama's National Security Strategy Clarifies Vision, but Blueprint Fuzzy*, WASH. DIPLOMAT (Aug. 2010), [http://www.washdiplomat.com/index.php?option=com\\_content&view=article&id=6843:obamas-national-security-strategy-clarifies-vision-but-blueprint-fuzzy&](http://www.washdiplomat.com/index.php?option=com_content&view=article&id=6843:obamas-national-security-strategy-clarifies-vision-but-blueprint-fuzzy&)

A year later, the National Strategy for Counterterrorism (NSC) furnished more details.<sup>124</sup> That document identified as a policy desideratum communities' resilience "against al-Qa'ida inspired radicalization, recruitment, and mobilization to violence."<sup>125</sup> It explained that "engagement and partnership with communities" would augment that resilience but also cautioned that community relations could not be "reduced to a one-size-fits-all approach" and that specific "local stakeholders [would be permitted to] develop solutions tailored to their own particular circumstances."<sup>126</sup> The 2011 NSC developed the NSS's opening bid by linking social action to a particularized—and, in mid-2011, highly salient—al Qaeda tactic: the efforts by the (now-deceased) American national Anwar al-Awlaki and others to propagandize Americans through the Internet.<sup>127</sup> What remains opaque in the 2011 NSC, however, is precisely how "communities" interpose themselves between the al-Awlakis of the world and their targets, and how governmental action has the potential to augment the effectiveness of such private interventions.

Perhaps demanding detailed microfoundations in statements of general administration policy is unrealistic. In many domains of national security law, the government works out details but never articulates them in public formats. In August and December 2011, nevertheless, the White House published two policy documents, *Empowering Local Partners to Prevent Violent Extremism in the United States* and a *Strategic Implementation Plan* for achieving that goal, which promised more details.<sup>128</sup> Indeed, this pair of documents provides a thicker account of how social action might translate into improved security. But the documents still leave unresolved important questions about causal foundations and policy consequences. They thus leave open the possibility that even the government remains confused about the relevant mechanisms of risk reduction.

Consider first the roles *Empowering Local Partners* assigned to private actors and the federal government. Both the related policy docu-

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catid=209:august-2010&Itemid=235 ("[T]he NSS offers few specifics on the many issues it raises, particularly Obama's sweeping domestic agenda.").

<sup>124</sup> 2011 NATIONAL COUNTERTERRORISM STRATEGY, *supra* note 8.

<sup>125</sup> *Id.* at 11.

<sup>126</sup> *Id.*

<sup>127</sup> By then, it was well known that al-Awlaki's lecture, "The Constants of Jihad," had helped inspire a 2007 attempt on a Fort Dix, New Jersey army base and that al-Awlaki himself had corresponded with Major Nidal Hassan, who in November 2009 had been responsible for the only homeland deaths from al Qaeda-related terrorism. See SETH G. JONES, HUNTING IN THE SHADOWS: THE PURSUIT OF AL QA'IDA SINCE 9/11, at 287–97, 360–61 (2012); see also Aamer Madhani, *What Makes Cleric al-Awlaki So Dangerous; Terrorist Wears Mask of Scholar, Knows His Foe*, USA TODAY, Aug. 25, 2010, at 1A (discussing al-Awlaki's career).

<sup>128</sup> 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9; 2011 SIP, *supra* note 10.

ments begin by positing that al Qaeda's targeting of potential recruits within the United States through various media is the relevant operational concern.<sup>129</sup> According to *Empowering Local Partners*, targeting recruits in this way is a threat not only because it increases the risk of a terrorist attack directly, but also because it may "create a backlash" (presumably, but not explicitly, against Muslim American communities) that "would feed al-Qa'ida's [domestic] propaganda."<sup>130</sup> The documents emphasize the state's relative disadvantage, as compared to communities, in identifying and speaking to recruiters' targets in ways that mitigate domestic-source violence.<sup>131</sup> Neither document, however, explores the identity of those being targeted for recruitment by terrorists. On occasion, *Empowering Local Partners* mentions Muslim Americans in particular, but these references are fleeting.<sup>132</sup> (This reticence has prompted accusations of "political[ ] correct[ness]"<sup>133</sup> from critics on the political right.) The documents also make no distinction between extremist and moderate groups in the manner of the Prevent strategy. Nor do they discuss the distinction, again important to the development of U.K. policy, between theology and ideology.

The *Empowering Local Partners* documents nevertheless render the state's role with more precision than the 2011 NSC managed. They speak of the federal government as "a facilitator, convener, and source of information," although they also note that it is "ill-suited to intervene in the niches of society where radicalization to violence takes place."<sup>134</sup> Precisely how the federal government serves these roles, however, remains opaque. On the one hand, the government is

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<sup>129</sup> See 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9, at 2–3 ("[A]l-Qa'ida and its affiliates and adherents are openly and specifically inciting Americans to support or commit acts of violence—through videos, magazines, and online forums . . ."); accord 2011 SIP, *supra* note 10, at 2.

<sup>130</sup> 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9, at 2.

<sup>131</sup> See *id.* at 3 ("Communities are best placed to recognize and confront the threat . . .").

<sup>132</sup> See, e.g., 2011 SIP, *supra* note 10, at 8 ("As President Obama emphasized, when discussing Muslim Americans in the context of al-Qa'ida's attempts to divide us, 'we don't differentiate between them and us. It's just us.'").

<sup>133</sup> Press Release, Rep. Peter T. King, Chairman, H. Comm. on Homeland Sec., Statement on Obama Administration Violent Extremism Strategy (Aug. 3, 2011), *available at* <http://homeland.house.gov/press-release/king-statement-obama-administration-violent-extremism-strategy>. There is some irony to this accusation given the Obama White House's consistent and conspicuous distancing of the President from Muslim Americans.

<sup>134</sup> 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9, at 3; see also *id.* at 5 ("[The federal government will] convene forums, develop brochures, respond to correspondence, [and] post information on websites . . ."); 2011 SIP, *supra* note 10, at 2 (envisaging "platforms throughout the country for including communities that may be targeted by violent extremists"). For another federal authority echoing this theme, see Janet Napolitano, *Partnering with Communities to Counter Violent Extremism*, BLOG @ HOMELAND SECURITY (Mar. 6, 2011, 3:45 PM), <http://blog.dhs.gov/2011/03/partnering-with-communities-to-counter.html> (framing "countering violent extremism as both a 'whole of government' and 'whole of nation' effort").

to “raise awareness about the threat of violent extremism,”<sup>135</sup> intimating (perhaps oddly and counterfactually) a lack of awareness among some Americans of al Qaeda’s persistence. On the other hand, the White House stresses that *Empowering Local Partners* will produce information to be “shared with those assessed to need it.”<sup>136</sup> This statement suggests that information will flow from the public to the government as a result of *Empowering Local Partners*. Yet other strands of the policy stand in some tension with notional goals of “mutual trust, respect, and understanding.”<sup>137</sup> For example, the federal government commits to “continue to closely monitor the important role the internet and social networking sites play in advancing violent extremist narratives”—a nicely worded commitment that avoids an overt admission of suspicionless or blanket surveillance of specific communications modalities, but which might be read to intimate precisely that.<sup>138</sup>

The government has also left the precise modalities of policy delivery opaque. The Federal Bureau of Investigation (FBI), for example, maintains that it is committed to “upholding and enhancing the community’s trust [so as to allow] law enforcement [to] counter the spread of this extremist ideology,”<sup>139</sup> yet how it will do so is not specified. In *Empowering Local Partners* policy documents, historical and contemporary models of community engagement employed respecting criminal gangs and schooling are touted as examples.<sup>140</sup> But how these examples are to be translated to the distinct, arguably more fraught, context of counterterrorism is not clear at all. Moreover, whereas the cited exemplars from existing programs are subject specific, the White House insists that it will not “narrowly build relationships around national security issues alone.”<sup>141</sup> This statement

<sup>135</sup> 2011 SIP, *supra* note 10, at 8.

<sup>136</sup> *Id.* at 2.

<sup>137</sup> 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9, at 8.

<sup>138</sup> *Id.* at 6.

<sup>139</sup> Cf. Carol Dyer et al., *Countering Violent Islamic Extremism: A Community Responsibility*, FBI L. ENFORCEMENT BULL., Dec. 2007, at 3, 8 (discussing Muslim and Arab Americans’ feelings that “government agents treat them as suspects and view all Muslims as extremists”).

<sup>140</sup> 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9, at 4. The comparison to antigang programs is especially common. See *DHS’s Approach to Countering Violent Extremism*, DEP’T HOMELAND SECURITY, <http://www.dhs.gov/dhss-approach-countering-violent-extremism> (last visited Jan. 21, 2013) (announcing Department of Homeland Security (DHS) strategy to combat terrorism by “strength[ening] . . . local communities”); see also Press Release, Dep’t Homeland Security, Readout of Secretary Napolitano’s Remarks at the West Virginia Homeland Security Summit (June 1, 2011), [http://www.dhs.gov/ynews/releases/pr\\_1306977568776.shtm](http://www.dhs.gov/ynews/releases/pr_1306977568776.shtm) (describing DHS efforts to “implement community-oriented policing strategies”).

<sup>141</sup> 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9, at 5; accord 2011 SIP, *supra* note 10, at 7 (arguing for “engage[ment] on the full range of community interests and concerns”).

suggests that the government will bundle *Empowering Local Partners* with existing federal efforts. Yet in setting forth the interagency process to give effect to the policy, the White House allocates primary responsibility to the National Counterterrorism Center, with an interagency task force largely comprised of security agencies.<sup>142</sup> The policy also builds on efforts by national security agencies, such as the Department of Justice and the Department of Homeland Security.<sup>143</sup> Finally, it merits notice that much of the operational detail supplied in the *Empowering Local Partners* documents might imply that the government is focused on improving its internal stock of knowledge concerning the psychological and social dynamics of terrorism instead of cultivating the social production of counterterrorism.<sup>144</sup> If true, this would render the relevant communities mere instruments in a larger strategy that had little space for their interests and perspectives.

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In summary, even if *Empowering Local Partners* has, to date, lacked the detail—or the controversy—of the Prevent strategy, it nonetheless shares two core assumptions with its British analog: first, that diffused social action impacts the rate of terrorism, and second, that government can positively influence social action in order to lower net terrorist risk.<sup>145</sup> At the same time, both policies are either silent or opaque on two key questions. The most critical lacuna in *Empowering Local Partners*, as in the Prevent strategy, is the absence of any robust account of how social action *causes* security against terrorism. Precisely what the social role involves is unclear. I have argued above that the policies' focus on the comparative disadvantage of government in the ideological domain is suggestive, rather than clarifying, of the social role. The second gap is the absence of any clear account of how the state can elicit desirable public behaviors or how such efforts interact with other extant policies.

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<sup>142</sup> See 2011 SIP, *supra* note 10, at 3. In addition, the White House suggests that prevention efforts will follow through “current programs” given the “increased fiscal constraints.” *Id.* at 5.

<sup>143</sup> See *id.* at 11–12. The Washington Institute for Near East Policy also identifies the promotion of Muslim Americans' civil rights and civil liberties as a potential tool in the kit. See Carpenter et al., *supra* note 7, at 325.

<sup>144</sup> Consistent with this concern, documents produced through Freedom of Information Act litigation filed by the American Civil Liberties Union suggest that the FBI views and uses its program of community consultation as a mechanism for gathering information. See *FOIA Documents Show FBI Illegally Collecting Intelligence Under Guise of “Community Outreach,”* AM. CIV. LIBERTIES UNION (Dec. 1, 2011), <http://www.aclu.org/national-security/foia-documents-show-fbi-illegally-collecting-intelligence-under-guise-community>.

<sup>145</sup> See PREVENT STRATEGY, *supra* note 11, at 5–7; 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9, at 2–3.

## II

## DEFINING THE SOCIAL ROLE IN COUNTERTERRORISM

This Part begins the task of developing potential causal foundations for the social production of counterterrorism. To motivate this enterprise, I first develop examples from the counterterrorism domain and parallels in the crime control and counterinsurgency contexts to show how social action can mitigate risks of violence. The central section of this Part—and indeed of this Article—posits three mechanisms through which private behavior might in certain contexts contribute to security. I label them *ideological competition*, *ethical anchoring*, and *cooperative coproduction*. In developing these mechanisms, my aim is not to endorse any one as particularly important or efficacious, but instead to offer arguments both for and against their efficacy. The net result is a general framework for better determining whether to credit the causal claims of the Prevent strategy and *Empowering Local Partners*.

## A. Counterterrorism's Social Production on the Ground

To grasp the social role in counterterrorism, I begin with some examples of the forms of private action that the Prevent strategy and *Empowering Local Partners* might aim to elicit:

- In 2008, British police arrested a man named Isa Ibrahim (né Andrew Philip), a convert to Islam, in Bristol, England, on the basis of information from the city's Muslim community.<sup>146</sup> When Ibrahim was arrested, he had in his home “two homemade suicide vests, homemade explosives, a quantity of ball bearings and air gun pellets.”<sup>147</sup> Evidence also emerged that he had planned an attack on a local mall.<sup>148</sup> The detective superintendent leading the investigation stated, “[h]e was an unknown. Without the information from the community we may not have got to him. Without the community's help he could have killed dozens of people.”<sup>149</sup> The Bristol incident is not the first in which a community-based tip has induced British police to make a terrorism arrest.<sup>150</sup>
- In the United States, the voluntary provision of information by a suspect's coreligionists or peers has similarly catalyzed several highly publicized terrorism investigations. The so-called Lack-

<sup>146</sup> Steven Morris, *Turned in by His Community, the Extremist Who Wanted to Belong*, GUARDIAN (U.K.), July 17, 2009, <http://www.guardian.co.uk/uk/2009/jul/17/isa-ibrahim-profile-muslim-community>.

<sup>147</sup> CONTEST: U.K.'s STRATEGY, *supra* note 11, at 68.

<sup>148</sup> See MORRIS, *supra* note 146.

<sup>149</sup> *Id.*; see also CONTEST: U.K.'s STRATEGY, *supra* note 11, at 68 (mentioning that Ibrahim was arrested “after members of the Muslim community in [his town] alerted the police”).

<sup>150</sup> See, e.g., Tom Savage, “Bomb Plot” Five Banned by Mosque, DAILY STAR (U.K.), Dec. 22, 2010, at 13, available at 2010 WLNR 25214130.

awanna Six investigation began when the FBI received a “handwritten missive” in June 2001 warning of al Qaeda efforts to “recruit[ ] the Yemenite youth” in upstate New York.<sup>151</sup> Lackawanna is not an isolated example.<sup>152</sup> In 2009, information from a Muslim community organization led to the arrests of five Virginia men who had traveled to Pakistan allegedly seeking terrorism training.<sup>153</sup> And in 2010, a “tip” from the local Muslim community led the FBI to investigate another Virginia resident, Farooque Ahmed, and later arrest him based on his plan to commit attacks on the capitol’s public transportation network.<sup>154</sup> Additionally, another community tip led to the arrest of a Portland, Oregon, Somali man for planning a car-bomb attack.<sup>155</sup>

- In 2004, a Jamaican-born imam, Abdullah el-Faisal, was convicted in London of solicitation to murder and provocation of racial hatred.<sup>156</sup> El-Faisal had allegedly played a role in persuading one of the four July 2005 attackers of London Underground trains and buses to adopt violence for political ends.<sup>157</sup> Yet a group of Brixton Salafists had already brought el-Faisal’s propaganda in favor of terrorism to the attention of London police several years earlier.<sup>158</sup> The police reaction had been to show “no real interest,”<sup>159</sup> perhaps because of the disfavor with which Salafists are typically viewed. At the same time, the same Brixton Salafist group had attempted to persuade the English-born Richard Reid to reject teachings that encouraged violence, but their efforts were unavailing.<sup>160</sup>

- In November 2009, a Nigerian businessman approached the CIA station in Lagos to report concerns about his son’s “radicalization” in Yemen; the resulting report was filed and “largely forgot-

<sup>151</sup> DINA TEMPLE-RASTON, *THE JIHAD NEXT DOOR: THE LACKAWANNA SIX AND ROUGH JUSTICE IN THE AGE OF TERROR* 124–25 (2007).

<sup>152</sup> For a list of instances in which community coreligionists or peers provided information that triggered investigations and arrests, see Editorial, *Muslims Are Helping Thwart Terrorism*, *AUGUSTA CHRON.*, Mar. 16, 2011, at A8.

<sup>153</sup> See Mark Guarino, *Five Americans Arrested in Pakistan Don’t Fit Typical Profile*, *CHRISTIAN SCI. MONITOR*, Dec. 10, 2009, at 2.

<sup>154</sup> See Alicia A. Caldwell & Matt Apuzzo, *Subway Bomb Suspect Hoped to Be Martyr; Pakistani-Born Man Wanted to Go to Afghanistan to ‘Kill Americans,’* *HOUS. CHRON.*, Oct. 29, 2010, at A3.

<sup>155</sup> See Bob Drogin & April Choi, *Oregon Man, 19, Is Held in Plan to Bomb Tree-Lighting*, *L.A. TIMES*, Nov. 28, 2010, at A1.

<sup>156</sup> See *R. v. El-Faisal*, [2004] EWCA (Crim) 456, [3]–[9], [47]–[48] (Eng.).

<sup>157</sup> See Alan Cowell, *Britain Departs Man Accused of Ties to Attacker in ‘05 Bombing*, *N.Y. TIMES*, May 26, 2007, at A7.

<sup>158</sup> ROBERT LAMBERT, *COUNTERING AL-QAEDA IN LONDON: POLICE AND MUSLIMS IN PARTNERSHIP* 191 (2011) [hereinafter LAMBERT, *COUNTERING AL-QAEDA*] (quoting Abdul Haq Baker). Note that Brixton is a neighborhood in South London.

<sup>159</sup> *Id.*

<sup>160</sup> See *id.* at 205–06; accord Robert Lambert, *Salafi and Islamist Londoners: Stigmatised Minority Faith Communities Countering al-Qaida*, *ARCHES Q.*, Summer 2008, at 35, 40, available at [http://www.thecordobafoundation.com/attach/Arches\\_issue\\_02x\\_Web.pdf](http://www.thecordobafoundation.com/attach/Arches_issue_02x_Web.pdf).

ten.”<sup>161</sup> A month later, the son, Umar Farouk Abdulmutallab, boarded an Amsterdam-to-Detroit flight and attempted to detonate a bomb while on board.<sup>162</sup>

In each of these examples, a nongovernmental actor with ties of some sort to a potential or future terrorism suspect independently took an action that mitigated the threat of terrorism without either priming or prompting by the state. In each case, the fact of daily interaction endowed the relevant actor with an advantage in comparison to the government. The resulting intervention was not always a success—either because it was not forceful enough or because the state failed to follow through—but nonetheless made the terrorist act less likely. Hence, these examples provide a basis for positing that the social production of counterterrorism merits investigation.

## B. Counterinsurgency and Crime Control Parallels

Beyond these suggestive anecdotes, parallels to analogous domains of policy, such as counterinsurgency and crime control, can help develop foundations for crediting claims of a social role in counterterrorism. Both counterinsurgency and crime control involve state efforts to mitigate violence, and both suggest that social action matters.

Consider first evidence from the counterinsurgency context. Because there are undeniably large differences between a foreign occupation and local policing, the theoretical basis of counterinsurgency cannot be transposed mechanically into the domestic terrorism context.<sup>163</sup> Nevertheless, it is instructive, if not dispositive, that even in the counterinsurgency context—where the state possesses overwhelming and asymmetrical force—the government tends to rely on diffuse social support to staunch terrorist-like violence.<sup>164</sup> Recent counterinsurgency texts underscore the centrality of diffuse support in suppressing any insurgency.<sup>165</sup> In a break from longstanding approaches

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<sup>161</sup> Karen DeYoung & Michael Leahy, *Warning on Detroit Suspect Didn't Rise Above the Noise*, WASH. POST, Dec. 28, 2009, at A1.

<sup>162</sup> See Press Release, White House, White House Review Summary Regarding 12/25/2009 Attempted Terrorist Attack (Jan. 7, 2010), available at <http://www.whitehouse.gov/the-press-office/white-house-review-summary-regarding-12252009-attempted-terrorist-attack>.

<sup>163</sup> See Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1771 (2009) (emphasizing the differences between counterinsurgency and counterterrorism).

<sup>164</sup> See THE U.S. ARMY & MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL: U.S. ARMY FIELD MANUAL NO. 3-24, MARINE CORPS WARFIGHTING PUBLICATION NO. 3-33.5, at xxx (2007).

<sup>165</sup> See *id.* (noting that “[t]he civilian population is . . . the deciding factor in the struggle,” with the key issue being the ability to secure their support); accord DAVID J. KILCULLEN, COUNTERINSURGENCY 3–5 (2010).



to war making, these texts propose that “the focus of counterinsurgency is building the population’s trust, confidence, and cooperation with the government,” in part through the use of “political, legal, economic, and social reconstruction in order to develop a stable, orderly society, in which the population itself prevents the emergence or success of the insurgency.”<sup>166</sup> The relevant point here is not that the same strategies should be used in the domestic terrorism context, but that if the state does not have a monopoly on security production under exigent circumstances and must instead rely on segments of the population at large, it may also wield no monopoly in the domestic counterterrorism domain.

Perhaps the closer analogy to the counterterrorism context, though, is crime control. Political scientists, sociologists, and criminologists who study the problem of crime long ago concluded that “[p]rivate actors have a pervasive role in crime prevention and control.”<sup>167</sup> This kind of involvement is not simply a matter of private precautions, such as installing fences and using locks.<sup>168</sup> Rather, a growing body of literature suggests that “the differential ability of neighborhoods to realize the common values of residents and maintain effective social controls is a major source of neighborhood variation in violence”—particularly for homicide.<sup>169</sup> In the leading empirical works in this tradition, sociologist Robert Sampson has conceptualized and developed survey instruments to measure a quality he and collaborators have termed “collective efficacy,” or “the linkage of mutual trust and the shared willingness to intervene.”<sup>170</sup> This quality

<sup>166</sup> Sitaraman, *supra* note 163, at 1771.

<sup>167</sup> Philip J. Cook & John MacDonald, *The Role of Private Action in Controlling Crime*, in *CONTROLLING CRIME: STRATEGIES AND TRADEOFFS* 331, 331 (Philip J. Cook et al. eds., 2011).

<sup>168</sup> Although this matters too. See *id.* at 337–44 (discussing the pros and cons of various kinds of private precautionary actions).

<sup>169</sup> Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *SCIENCE* 918, 918 (1997); see also Jeffrey D. Morenoff et al., *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 *CRIMINOLOGY* 517, 551 (2001) (finding that measures of lower collective efficacy in a neighborhood independently predict increased homicide risk). See generally ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 149–78 (2012) [hereinafter SAMPSON, *GREAT AMERICAN CITY*] (describing the concept of collective efficacy); ROBERT J. SAMPSON et al., *Assessing “Neighborhood Effects”: Social Processes and New Directions in Research*, 28 *ANN. REV. SOC.* 443, 457–65 (2002) [hereinafter Sampson, *Assessing “Neighborhood Effects”*] (same).

<sup>170</sup> Robert J. Sampson, *Neighborhood Effects, Causal Mechanisms and the Social Structure of the City*, in *ANALYTICAL SOCIOLOGY AND SOCIAL MECHANISMS* 227, 232 (Pierre Demeulenaere ed., 2011) [hereinafter Sampson, *Neighborhood Effects*]. Similar findings have been reported with respect to social capital, which is a slightly different concept in operation. See Daniel Lederman et al., *Violent Crime: Does Social Capital Matter?*, 50 *ECON. DEV. & CULTURAL CHANGE* 509, 511 (2002) (“[T]he prevalence of trust on community members seems to have a significant and robust effect of reducing the incidence of violent crimes.”); Richard Rosenfeld et al., *Social Capital and Homicide*, 80 *SOC. FORCES* 283, 294 (2001) (“[G]eographic areas with higher levels of social capital exhibit lower homicide rates.”).

is an accumulation of behaviors and decisions by groups of *private* actors who interact independently of a state-initiated instrument or goal. Collective efficacy is, as its name suggests, a characteristic of a specific (in Sampson's work, geographically defined)<sup>171</sup> community, but it has a statistically significant effect on individual-level outcomes related to criminality.<sup>172</sup> This research hence tends to demonstrate that "social ties and social control help to lower neighborhood crime rates."<sup>173</sup> Furthermore, although larger socioeconomic forces from "racial and economic exclusion" to immigration influence collective efficacy, Sampson's work shows that it is nonetheless independently causally efficacious.<sup>174</sup> That is, the conceptualization and empirical testing of collective efficacy demonstrate that social context—as distinct from either government action or individual decisions—can have a direct and significant influence on the frequency of private violence quite distinct from the array of broader socioeconomic and cultural forces typically called upon to explain changes in crime levels.

The core of collective efficacy—that social context is a significant causal predicate of socially valuable action—finds echoes and support in many other contexts, including studies of electoral participation,<sup>175</sup> protest movements such as the civil rights movement,<sup>176</sup> and revolutionary actions such as the Paris Commune.<sup>177</sup> These studies point toward the social mechanisms beneath these events. Social networks

<sup>171</sup> See Sampson, *Assessing "Neighborhood Effects," supra* note 169, at 445 (noting the persistent use of geographic boundaries to define neighborhoods).

<sup>172</sup> Sampson, *Neighborhood Effects, supra* note 170, at 236. For evidence that "neighborhoods remain a viable policy option to building allegiance to community," see, for example, Mark A. Glaser et al., *The Paradox Between Community and Self-Interest: Local Government, Neighborhoods, and Media*, 23 J. URB. AFF. 87, 100 (2001).

<sup>173</sup> Charis E. Kubrin & Ronald Weitzer, *New Directions in Social Disorganization Theory*, 40 J. RES. CRIME & DELINQ. 374, 376 (2003) (citing Paul E. Bellair, *Social Interaction and Community Crime: Examining the Importance of Neighbor Networks*, 35 CRIMINOLOGY 677 (1997); Delbert S. Elliott et al., *The Effects of Neighborhood Disadvantage on Adolescent Development*, 33 J. RES. CRIME & DELINQ. 389 (1996); Fred E. Markowitz et al., *Extending Social Disorganization Theory: Modeling the Relationships Between Cohesion, Disorder, and Fear*, 39 CRIMINOLOGY 293 (2001)); see also DAVID M. KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 15 (2011) ("The core of the problem [of crime-related violence], the key to the way out, lies in community . . ."); Bellair, *supra*, at 697 (finding through an empirical study that "both frequent and infrequent social interaction among neighbors is important for establishing community controls" and thus mitigating crime risk).

<sup>174</sup> SAMPSON, *GREAT AMERICAN CITY, supra* note 169, at 154–55.

<sup>175</sup> See Robert Huckfeldt, *The Social Communication of Political Expertise*, 45 AM. J. POL. SCI. 425, 425 (2001); Scott D. McClurg, *The Electoral Relevance of Political Talk: Examining Disagreement and Expertise Effects in Social Networks on Political Participation*, 50 AM. J. POL. SCI. 737, 737 (2006).

<sup>176</sup> See DOUG McADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970*, at 98–106 (2d ed. 1999) (exploring the role of churches, schools, and the NAACP in the postwar Southern civil rights movement).

<sup>177</sup> See Roger V. Gould, *Multiple Networks and Mobilization in the Paris Commune, 1871*, 56 AM. SOC. REV. 716, 716 (1991).

not only facilitate political action directly by lowering collective action costs<sup>178</sup> but also “transmit direct influence, changing one’s interests in and inherent motivations toward participation” in any collective action.<sup>179</sup> As a result, whether an individual engages in a form of risky conduct that is either socially undesirable or beneficial will turn often on the contingencies of social context.<sup>180</sup>

Given the role of social action in fostering and mitigating other forms of desirable or undesirable private behaviors, including violence, it would indeed be surprising if the political violence of the sort that concerns policymakers today did not have a social etiology. At a minimum, it seems at least worth taking seriously the possibility, limned by Prevent and *Empowering Local Partners*, that social action can affect the risk of other kinds of violence, such as harmful acts committed for political rather than personal reasons.

### C. Positing a Causal Foundation for the Social Production of Counterterrorism

The aim of this section is to develop a more detailed account of the possible causal mechanisms that could underwrite a social role in counterterrorism. Loosely drawing inspiration from the examples with which this Part began, I identify three potential causal mechanisms, which I term *ideological competition*, *ethical anchoring*, and *cooperative coproduction*. To be clear, my modest claim is that these are *potential* explanations for the effect of social action on terrorism risk—I do not intend in this Article to estimate the magnitude of their effect empirically, but instead to offer a framework that might be used to orient later empirical investigations. Before developing those three mechanisms, I first offer a more general overview of the questions raised by connecting social action with the mitigation of terrorism risk.

#### 1. *Social Action and Terrorism: Threshold Questions*

Any causal account of counterterrorism’s social production can profitably start from the intuition that the commission of terrorism involves at least two kinds of costs.<sup>181</sup> First, there are costs associated

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<sup>178</sup> See McADAM, *supra* note 176, at 45–46.

<sup>179</sup> David A. Siegel, *Social Networks and Collective Action*, 53 AM. J. POL. SCI. 122, 124 (2009).

<sup>180</sup> See, e.g., *id.*

<sup>181</sup> The following paragraph employs rational choice tools to model the commission of terrorism. Cf. Robert Powell, *Defending Against Terrorist Attacks with Limited Resources*, 101 AM. POL. SCI. REV. 527, 527 (2007) (“[S]trategic actors do try to strike where the defense is weak and the expected gains are high.”).

with recruitment.<sup>182</sup> At this stage, the terrorist organization seeks to disseminate its ideas and maximize its exposure to an audience of potential followers.<sup>183</sup> As a result, social action that constrains or impedes such dissemination is socially valuable. Second, there are costs associated with the commission of terrorist attacks.<sup>184</sup> Although matériel and personnel figure large at this second operational stage, many of its attendant costs are likely to be associated with concealing a planned attack and otherwise evading detection.<sup>185</sup> Accordingly, in this second stage, the organization seeks to minimize exposure of its operations.<sup>186</sup> And, correspondingly, social action that increases transparency or that otherwise raises the probability of exposure and detection is now desirable.

Even this simple taxonomy provides a useful insight: different kinds of social action will be desirable in the production of counterterrorism. Because the frequency of terrorist attacks will decrease as the cost of their commission rises,<sup>187</sup> both promoting action that drowns out terrorist organizations' recruitment efforts and also eliciting private behavior that renders operations more transparent will be useful approaches.<sup>188</sup> The social production of counterterrorism is thus plural and not unitary.

This analysis suggests that claims of a social role in counterterrorism can be reframed as questions about how private actors either raise the cost of recruiting for terrorist organizations or impose transaction costs on opacity. In general, responses to those questions entail a "who" component and a "how" component. Consider first the "who"

<sup>182</sup> Terrorist groups also bear costs associated with the mundane tasks of managing complex organizations. For an insightful analysis of these costs, see Mariano-Florentino Cuéllar, *The Untold Story of Al Qaeda's Administrative Law Dilemmas*, 91 MINN. L. REV. 1302, 1354–56 (2007).

<sup>183</sup> Indeed, terrorist attacks themselves constitute a form of marketing for terrorist groups competing against other political organizations for the allegiances of a pool of potential recruits. See MIA BLOOM, *DYING TO KILL: THE ALLURE OF SUICIDE TERROR* 43–44 (2005) (emphasizing the role of intergroup competition in the production of terrorism).

<sup>184</sup> See Cuéllar, *supra* note 182, at 1326, 1345–47.

<sup>185</sup> Cf. *id.* at 1332–33 (analogizing terrorist organizations to administrative bureaucracies and pointing out the need for management capabilities before action has taken place).

<sup>186</sup> Cf. *id.* at 1336 n.143 (discussing the parallels between terrorist organizations and administrative agencies in terms of needing secrecy and security).

<sup>187</sup> See Claude Berrebi & Darius Lakdawalla, *How Does Terrorism Risk Vary Across Space and Time? An Analysis Based on the Israeli Experience*, 18 DEF. & PEACE ECON. 113, 130 (2007) (reporting empirical evidence that suggests elasticity of attack frequency with respect to cost).

<sup>188</sup> This assumes the terrorist organization does not have substitutes available at a similar cost. Cf. Walter Enders & Todd Sandler, *The Effectiveness of Antiterrorism Policies: A Vector Autoregression-Intervention Analysis*, 87 AM. POL. SCI. REV. 829, 842 (1993) (finding, for example, that "[m]etal detectors decreased skyjackings and threats but increased assassinations and other kinds of hostage incidents not protected by the detectors").

question. Both the Prevent strategy and *Empowering Local Partners* are (perhaps strategically) ambiguous about the identity of the causally efficacious social actor. The development of the Prevent strategy has been marked by debates about the role of extremists versus moderates—although neither term is defined—and the centrality *vel non* of the British Muslim community.<sup>189</sup> *Empowering Local Partners* is even more opaque. White House policy documents focus on the “community” as a coherent efficacious social actor.<sup>190</sup> But which community?<sup>191</sup> The White House is careful not to identify a specific ethnic or religious group as a privileged actor in the social production of terrorism.<sup>192</sup> In discussing recruitment by the latter, it explains that “[s]upporters . . . come from different socioeconomic backgrounds, ethnic and religious communities,”<sup>193</sup> which may be a touch disingenuous. All know that these programs are not rolled out for the whole population. The track record of post-2001 counterterrorism plainly evinces a heightened focus on individuals or groups perceived to be Muslim or of an ethnicity (such as Arab or South Asian) that proxies for a Muslim identity.<sup>194</sup>

By contrast, over the past four years, the Department of Homeland Security has “cut the number of personnel studying domestic terrorism unrelated to Islam, canceled numerous state and local law enforcement briefings, and held up dissemination of nearly a dozen reports on extremist groups” under pressure from politically conservative groups who object to any federal attention on right-wing militias.<sup>195</sup> There is no reported indication that this approach to the allocation of domestic counterterrorism resources has changed, even in the wake of 2012 shootings at a Sikh *gurdwara* in Oak Creek, Wisconsin.<sup>196</sup> Federal attention to domestic terrorism threats, in short, is

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<sup>189</sup> See *supra* text accompanying notes 100–13.

<sup>190</sup> See, e.g., 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9, at 2–3.

<sup>191</sup> The puzzle of how to define “community” is an abiding one. See generally Stuart A. Queen, *What is a Community?*, 1 J. SOC. FORCES 375 (1923) (investigating the essential characteristics of communities as distinguished from the cities or organizations which may house communities).

<sup>192</sup> See 2011 NATIONAL COUNTERTERRORISM STRATEGY, *supra* note 8, at 11 (“[T]he terrorist threat we face in the United States is multifaceted and cannot be . . . reduced to a one-size-fits-all approach.”).

<sup>193</sup> See 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9, at 1.

<sup>194</sup> See Aziz Huq, *The New Counterterrorism: Investigating Terror, Investigating Muslims, in LIBERTY UNDER ATTACK: RECLAIMING OUR FREEDOMS IN AN AGE OF TERROR* 167, 168, 171–77 (Richard C. Leone & Greg Anrig, Jr. eds., 2007).

<sup>195</sup> R. Jeffrey Smith, *Homeland Security Department Curtails Home-Grown Terror Analysis*, WASH. POST, June 7, 2011, [http://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH\\_story.html](http://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH_story.html); see Spencer Ackerman, *DHS Crushed This Analyst for Warning About Far-Right Terror*, WIRED (Aug. 7, 2012, 5:04 PM), <http://www.wired.com/dangerroom/2012/08/dhs/all/>.

<sup>196</sup> At the time of this writing, there is some indication that Congress will hold hearings on hate crimes. See Chris Lisee, *Faith and Rights Groups Call for Hate Crime Hearings*,

not a product of neutral analysis of past harms or objective indicia of risk, but instead a function of political mobilization and lobbying. Understood in this light, the continuing, apparently nearly exclusive, focus on Muslim American groups is perhaps not so surprising.

The identification of the relevant social actor also implicitly assumes a theory of *how* social action produces national security. Neither the American nor the British documents, though, provide a clear description of the causal mechanism whereby private action translates into diminution of a terrorist threat. Both policies aver or imply that the social role has an ideological or a persuasive dimension. But what is it about terrorism that renders the state incapable of pedagogical efficacy? Government, after all, expends funds on speech with a clear viewpoint all the time. Think of antismoking campaigns, particularly those focused on risks to others.<sup>197</sup> And why should it be assumed that substitute private speech would necessarily have a desirable effect? For example, the appeal of al Qaeda propaganda might possibly lie in its countercultural aura.<sup>198</sup> If that is so, the statements of authoritative figures within families, religious organizations, or larger community structures—as much as the pronouncements of the state—may well have the perverse and undesirable effect of increasing terrorism's allure. Alternatively, partnerships with groups with marginal (or “extreme”) views might be harmful if, to borrow a particularly colorful metaphor, such entities “provide[ ] the mood music to which suicide bombers dance.”<sup>199</sup> Quite apart from such perverse effects, the private actors elicited to execute the social role in counterterrorism must be directed toward the appropriate groups within society. For example, terrorist recruiters may target certain demographic slices—men rather than women, or youth rather than older persons. Another key question then is who among the wide range of conceiva-

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WASH. POST, Aug. 24, 2012, [http://www.washingtonpost.com/national/on-faith/faith-and-rights-groups-call-for-hate-crime-hearings/2012/08/24/bd141642-ee27-11e1-b624-99dee49d8d67\\_story.html](http://www.washingtonpost.com/national/on-faith/faith-and-rights-groups-call-for-hate-crime-hearings/2012/08/24/bd141642-ee27-11e1-b624-99dee49d8d67_story.html).

<sup>197</sup> See, e.g., *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561–64 (2005) (describing the scope of permissible government viewpoint discrimination in its own speech). To be sure, antismoking campaigns also might be less effectual than believed for reasons that parallel those developed in this Article.

<sup>198</sup> Accord Olivier Roy, *Al Qaeda in the West as a Youth Movement: The Power of a Narrative* 15–16 (MICROCON, Policy Working Paper No. 2, 2008) [hereinafter Roy, *Al Qaeda as a Youth Movement*], available at [http://www.microconflict.eu/publications/PWP2\\_OR.pdf](http://www.microconflict.eu/publications/PWP2_OR.pdf); cf. OLIVIER ROY, *THE POLITICS OF CHAOS IN THE MIDDLE EAST* 144–45 (Ros Schwartz trans., 2008) (noting the possibility of increasing cycles of alienation among Muslim youth in Europe).

<sup>199</sup> QUILLIAM FOUND., *PULLING TOGETHER TO DEFEAT TERROR 3* (2008), available at <http://www.quilliamfoundation.org/wp/wp-content/uploads/publications/free/pulling-together-to-defeat-terror.pdf>.

ble “community” actors is best positioned to reach, let alone persuade, that specific demographic.<sup>200</sup>

And, if these puzzles are not sufficient, the question of motive also looms large and remains unanswered: Why would voices from the “community” who can oppose the al-Awlakis of the world expend time and effort negating malignant external influences? What incentive do these actors have to undertake such unpopular and likely burdensome tasks whose benefits—in the form of increased security—are dispersed across a wider society? In most instances, the presence of uncaptured positive externalities will entail that the relevant activity will occur at suboptimal levels (at least given certain common assumptions about the rationality of individual behavior). Consistent with this concern about incentives, it is hard to infer anything about the conditions under which individuals or organizations will expend either more or less effort on actions believed to mitigate the risk of terrorism. By extension, it is unclear how governments can design official policy to increase desirable forms of private action while decreasing undesirable forms. If policymakers have no account of why changes in policy improve or degrade the social production of counterterrorism, of course, they will not know whether and when to intervene in socially desirable ways. But the anodyne encomiums to “engagement” lacing *Empowering Local Partners* cast little or no light on precisely how government intervention into autonomous social processes either promotes or harms the social production of counterterrorism.

## 2. *Social Action and Terrorism: Three Potential Mechanisms*

The balance of this Part offers a first cut at answers to those puzzles. More specifically, I identify three potential causal mechanisms that might underwrite the social production of counterterrorism: *ideological competition*, *ethical anchoring*, and *cooperative coproduction*. The first two would raise the cost to terrorists of transparency at the moment of recruiting; the last would raise the cost of opacity further downstream. Further, I advance counterarguments against each proposed mechanism. The net result is a more specific framework for empirical and theoretical consideration of the basic causal foundations of Prevent and *Empowering Local Partners*.

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<sup>200</sup> See LORENZO VIDINO, U.S. INST. OF PEACE, COUNTERING RADICALIZATION IN AMERICA: LESSONS FROM EUROPE 6–9 (2010), available at [http://www.usip.org/files/resources/SR262%20-%20Countering\\_Radicalization\\_in\\_America.pdf](http://www.usip.org/files/resources/SR262%20-%20Countering_Radicalization_in_America.pdf) (describing debates on these questions).

a. *Ideological Competition*

“Ideological competition” is the possibility that social action can raise the cost of terrorism by providing substitute forms of social solidarity and vehicles of collective political action. By more densely populating the marketplace of ideas, ideological competition raises terrorism’s propagandizing and recruitment costs.

The case of Richard Reid, sketched above, is useful as an example of how ideological competition might work.<sup>201</sup> Reid had longstanding objections to American foreign policy decisions, and he had been searching for a social milieu that endorsed those objections.<sup>202</sup> In very simplified terms, the London of the late 1990s offered Reid two options that were consistent with his religious view: a group of quietist Salafists in Brixton and the Jamaican-born imam Abdullah el-Faisal, who endorsed the commission of violent actions to challenge U.S. foreign policy.<sup>203</sup> Even though the former failed where the latter succeeded, Reid’s case is still consistent with the view that an absence of alternative forms of political mobilization close to a potential recruit’s ideal policy point lowers the expected costs of recruitment.

The ideological competition mechanism works through the disciplining effect of competition, which, as in many other domains, conduces to higher operating costs and smaller margins. A terrorist organization seeking to attain certain policy goals or appealing on the basis of particular points of foreign policy must compete in a “market of social movements, both political and religious,” and the greater the competition, the tougher its task.<sup>204</sup> In the course of competing, the organization will find that recruiting is more costly in circumstances where other groups are pursuing the same policy goals, albeit without violence. Those other groups may be more appealing because they provide a vehicle for antiauthoritarian preferences without the severe costs of social ostracism and legal sanctions that are attached to endorsement or pursuit of violence. All things being equal, it seems plausible to think that the terrorist organization facing a more crowded ideological marketplace will have to expend more of its limited resources in attracting recruits, leaving fewer resources for the commission of violence.<sup>205</sup>

<sup>201</sup> See *supra* text accompanying note 160.

<sup>202</sup> See LAMBERT, COUNTERING AL-QAEDA, *supra* note 158, at 205–06.

<sup>203</sup> See *id.* at 204–05. For a discussion of the influence of London’s so-called “sheikhs,” see Barbieri & Klausen, *supra* note 63, at 421–23.

<sup>204</sup> SCOTT ATRAN, TALKING TO THE ENEMY: FAITH, BROTHERHOOD, AND THE (UN)MAKING OF TERRORISTS 471 (2010).

<sup>205</sup> The effects of competition on terrorist organizations are also perceptible in two other contexts. First, a similar kind of ideological competition to the one hypothesized in the main text can be observed in a recent account of political struggles in the Palestinian refugee camp of Ain al-Hilweh, where a violent Salafist group struggles for influence with



Competition may also be less effective when there is a larger space between the ideal policy points of a terrorist organization and its next closest competitor.<sup>206</sup> This mechanism explains why a focus on ideology, such as that found in the Prevent strategy and *Empowering Local Partners*, is indeed warranted.<sup>207</sup> But contrary to the current Prevent strategy's aversion to "extremist" movements,<sup>208</sup> this ideological competition mechanism implies that having a plurality of ideologically proximate alternatives to violent social movements is desirable because of the state's comparative disadvantage as a platform for countercultural, oppositional speech.<sup>209</sup> Rather than denouncing marginal political voices, the state might at least tolerate, if not cultivate, them for their net positive security externalities.

The uses of ideological competition have not escaped government attention. In the United Kingdom, the Special Branch of London's Metropolitan Police has created the Muslim Contact Unit (MCU) for cultivating relations with the London Salafist and Islamist communities, precisely in order to help them identify and dissuade potential recruits to violence early.<sup>210</sup> The MCU was established in the days immediately after Richard Reid's arrest as a way to "enter into dialogue on a partnership footing" with Salafist and other politically extreme groups as a way of ensuring that police did not "lose their critical support in combating al-Qaeda's established influence in the capital."<sup>211</sup> Accounts of the MCU emphasize specific Salafist successes in competing with al-Qaeda proxies such as Abdullah el-Faisal<sup>212</sup> and Abu Hamza.<sup>213</sup>

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nationalist and other groups. See BERNARD ROUGIER, *EVERYDAY JIHAD: THE RISE OF MILITANT ISLAM AMONG PALESTINIANS IN LEBANON* 143–46 (2007). Second, some analysts have suggested that the fragmentation of al-Qaeda could induce increased competition between ensuing factions. See Clint Watts, *What If There Is No Al-Qaeda? Preparing for Future Terrorism*, FOREIGN POL'Y RES. INST. (July 2012), <http://www.fpri.org/enotes/2012/201207.watts-al-qaeda.html>.

<sup>206</sup> See Bernard Haykel, *Threat Level*, N.Y. TIMES, Sept. 11, 2011, at BR13 (discussing Kurzman's work, which notes that "al-Qaeda faces competition from liberal Islamic groups").

<sup>207</sup> See PREVENT STRATEGY, *supra* note 11, at 44; 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9, at 3, 6–7.

<sup>208</sup> See PREVENT STRATEGY, *supra* note 11, at 39.

<sup>209</sup> See, e.g., KURZMAN, *supra* note 14, at 39–42 ("[T]he Tablighi Jamaat[—a group sometimes criticized as a conveyor-belt organization—]may be seen as part of the crowded ideological field that terrorists face as they compete for Muslims' support.").

<sup>210</sup> See LAMBERT, COUNTERING AL-QAEDA, *supra* note 158, at 35–36, 57–62 (describing the birth and early activities of the MCU).

<sup>211</sup> *Id.* at 58–59.

<sup>212</sup> See *id.* at 180–81 (describing how Brixton Salafists prevented el-Faisal from entering and preaching in a local mosque).

<sup>213</sup> *Cf. id.* at 148–49 ("[The Finsbury Park Islamists] reclaimed the notorious Finsbury Park Mosque . . . from a bunch of dangerous thugs who brazenly supported and promoted al-Qaeda ideology.").

Perhaps predictably, the MCU has been a controversial innovation, attacked for its perceived proximity to Salafists.<sup>214</sup> Its critics might contend more generally that ideological competition will have predictable undesirable effects. Perhaps a plurality of private associations that share the liminal political views—but not the penchant for violence—of terrorist organizations might instead hinder efforts to minimize terrorism risk. As historical precedent, such critics might invoke the development of violent splinter groups out of an Israeli settler milieu that were at a remove from larger Israeli society in the 1980s.<sup>215</sup> Echoing this concern, one critique of the Prevent strategy and its ilk has been that some of the groups included therein operate as “conveyor belt[s]” toward violent political action, even if such groups themselves do not practice or espouse violence.<sup>216</sup> Beyond this enabling effect, an increase in the frequency of antiestablishment messaging by quietist but politically radical organizations may have the effect of legitimating terrorist organizations’ calls to arms. Again, the fear has historical support. Recent sociological work on early twentieth-century Italy, for example, has identified the mediating role that cooperatives and mutual aid societies played in providing a platform for fascist parties.<sup>217</sup>

Nevertheless, many of the arguments lodged against the inclusion of extremist but nonviolent groups within the scope of state efforts to mitigate terrorism risk at minimum suffer from a causal attribution problem in practice. Consider the “conveyor belt” metaphor, which suggests that groups close to a terrorist organization in policy preferences (but not in the use of violence) have an undesirable causal effect on the development of terrorist recruits.<sup>218</sup> The fact that individuals move from a nonviolent but extreme organization to a violent organization seems to imply a causal effect. But the inference of

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<sup>214</sup> Cf. Vikram Dodd, *List Sent to Terror Chief Is a Smear Tactic, Say Peaceful Islamic Groups*, GUARDIAN (U.K.), Aug. 5, 2010, at 4 (describing accusations against a list of British Muslim groups to be connected to terrorism that was prepared by the Quilliam Foundation, a government-funded counterextremist think tank in the United Kingdom, for British officials). No doubt care must be taken in drawing inferences from allegations by one potential recipient of government funds against its competitors for state dollars.

<sup>215</sup> See generally Ehud Sprinzak, *From Messianic Pioneering to Vigilante Terrorism: The Case of the Gush Emunim Underground*, 10 J. STRATEGIC STUD. 194 (1987) (developing a history of radicalization within Gush Emunim). I am grateful to Ben Wittes for drawing this example to my attention.

<sup>216</sup> See Carpenter et al., *supra* note 7, at 307–09; see also ANGEL RABASA ET AL., RAND CORP., DERADICALIZING ISLAMIST EXTREMISTS 129 & n.21 (2010) (noting the possibility of quietist but radical groups serving as either “conveyor belts” or “firewall[s]”); Marc Lynch, *Islam Divided Between Salafi-Jihad and the Ikhwan*, 33 STUD. CONFLICT & TERRORISM 467, 468 (2010) (same).

<sup>217</sup> Dylan Riley, *Civic Associations and Authoritarian Regimes in Interwar Europe: Italy and Spain in Comparative Perspective*, 70 AM. SOC. REV. 288, 298–301 (2005) (presenting evidence to this effect).

<sup>218</sup> See Carpenter et al., *supra* note 7, at 307–08; Lynch, *supra* note 216, at 480.

causation does not follow: those same individuals may have moved directly to terrorism in the absence of the nonviolent organization, while other individuals who would have adopted terrorist means may have chosen not to do so because they found an ideologically sympathetic environment. It is fallacious to reason from the mere casual observation of individual migrations into terrorism to the conclusion that extremist but nonviolent groups increase the rate of terrorism. Moreover, the conveyor belt model assumes that quietist and politicized extremist groups are ideological kith and kin.<sup>219</sup> But this may not be so: at least one comparative study identifies different indicators, including divergent readings of religious texts, between quietist and political Salafists.<sup>220</sup>

Further, the legitimating effect of ideological competition may well vary between national, and even local and municipal, contexts. Thus, in an otherwise diverse metropole such as London or New York, the presence of one or two politically radical but quietist groups may have little enabling or legitimating effects on terrorism, but they may serve as effective ideological competitors for the small number of individuals attracted to terrorism.<sup>221</sup> On the other hand, in the very different context of, say, a refugee camp milieu where there are many radical groups, only some of which are violent, the legitimating and enabling effects of ideological competition may well overwhelm any ameliorative effect it has on terrorism rates.<sup>222</sup>

Ultimately, the net effect of ideological competition is an empirical question. The important conclusion here is that ideological competition is at least a plausible candidate mechanism through which the social production of terrorism might work, even if its sign and magnitude are likely to vary according to circumstance.

#### b. *Ethical Anchoring*

The second way social action can prevent a person from even considering the possibility of violent political action is through the “ethical anchoring” effect of close affiliations. This mechanism hinges on the manner in which a network of friends, colleagues, and kin members can impose social pressure on an individual to eschew the use of violence for political ends.

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<sup>219</sup> See Lynch, *supra* note 216, at 480 (noting the emphasis conveyor-belt theorists place on the ultimate goals of organizations rather than their means).

<sup>220</sup> JAMIE BARTLETT ET AL., DEMOS, *THE EDGE OF VIOLENCE* 87–88, 97, 112–13 (2010), available at [http://www.demos.co.uk/files/Edge\\_of\\_Violence\\_-\\_full\\_-\\_web.pdf?1291806916](http://www.demos.co.uk/files/Edge_of_Violence_-_full_-_web.pdf?1291806916).

<sup>221</sup> See *id.* at 118, 134 (raising the possibility that expressions of “radical views [are] a healthy and natural part of airing issues”).

<sup>222</sup> See, e.g., BLOOM, *supra* note 183, at 43–44 (pointing to intergroup competition as a catalyst for the use of suicide terrorism).

To see the possibility of ethical anchoring, consider the role of parents and families in the example of the Nigerian suicide-bomber-manqué recited above.<sup>223</sup> Had Umar Farouk Abdulmutallab's father exercised effective suasion through his example and emotional proximity to his son, Abdulmutallab may never have had occasion to approach the Lagos CIA station. Less hypothetically, 19-year-old Somali American Mohamed Osman Mohamud, who was alleged to have planned a car-bomb attack against public holiday celebrations in Portland, Oregon, later acknowledged that his "parents . . . held [him] back from jihad in the cause of Allah," at least until they divorced, leaving him to drift toward violence.<sup>224</sup> These examples point to the importance of strong, normatively informed social ties, or ethical anchoring, in the mitigation of terrorism risk. Stated more generally, political violence necessitates the violation of generally shared ethical commitments,<sup>225</sup> which in turn can lead to breaches with otherwise close members of familial and social networks. To the extent that members of tight social networks reiterate and reinforce those ethical norms, with the implicit threat of ostracism and social sanction in the background, recruitment costs will be higher. And to the extent that these networks furnish affirmative role models, individuals will feel less need to seek out violent forms of social action in the first place.<sup>226</sup>

The basic idea of ethical anchoring—that informal, social sanctions can impose a frictional barrier to illegal behavior—has a kinship with, and might be justified by analogy to, the concept of collective efficacy.<sup>227</sup> Studies of the latter identify a positive correlation between effective social ties within a given community and the reduction of criminal violence.<sup>228</sup> If "community-level variations in social control contribute to varying crime rates,"<sup>229</sup> then it stands to reason that such variations could also induce reductions in other forms of violence.

<sup>223</sup> See *supra* notes 161–62 and accompanying text.

<sup>224</sup> FAWAZ A. GERGES, *THE RISE AND FALL OF AL-QAEDA* 161–63 (2011). To be clear, in both cases there was a potentially significant *failure* of ethical anchoring.

<sup>225</sup> See Huq, *Signaling Function*, *supra* note 69, at 883–85 (exploring the collective action issue of ethical impediments to committing terrorism).

<sup>226</sup> Anwar al-Awlaki's popularity has been explained in terms of his functioning as a role model. See Jarret M. Brachman & Alix N. Levine, *You Too Can Be Awlaki!*, *FLETCHER F. WORLD AFF.*, Winter 2011, at 25, 29–31 ("Youth who are seeking role models need someone who is easier to emulate, a figure that they can become without too much work or thought, and who makes them feel as if they are producing something meaningful and relevant.").

<sup>227</sup> See FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 174 (1973) ("Official actions can set off societal reactions that may provide potential offenders with more reason to avoid conviction than the officially imposed unpleasantness of punishment." (emphasis omitted)). For a survey of related empirical studies, see Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 *LAW & SOC'Y REV.* 545, 549–53 (1986).

<sup>228</sup> See *supra* text accompanying notes 169–74.

<sup>229</sup> SAMPSON, *GREAT AMERICAN CITY*, *supra* note 169, at 150 (emphasis omitted).

“[I]nformal control strategies [for criminal violence] include the monitoring of . . . play groups among children, sharing information about other children’s behavior, willingness to intervene in preventing acts such as truancy . . . , and doing something about persons who are exploiting or disturbing public space,”<sup>230</sup> and there may be parallel informal control strategies that dampen the success of terrorist recruitment efforts. Specific analogies might include the regulation of discussions in shared religious spaces, the expulsion of itinerant agents of radicalization,<sup>231</sup> and the promotion of more constructive forms of opposition to disfavored national policies. In these ways, ethical anchoring can impede terrorist organizations from developing the social networks that may otherwise have proven critical in radical organizations’ efforts to reach potential recruits.<sup>232</sup> By contrast, as studies of private vigilantism in Israeli settler communities have demonstrated, support for political violence within a social cohort likely increases positive evaluations of such violence.<sup>233</sup>

Case studies of disengagement from terrorist groups support the extension of collective efficacy theory *mutatis mutandi* to the terrorism context. A recent series of such case studies of individuals who have left terrorist groups, for example, emphasizes the “role of civil society” in promoting “psychological disengagement.”<sup>234</sup> Those studies suggest that even individuals who appeared to be committed to a terrorist organization could be swayed, but that “people generally tend to be more trusting of the communicator if they do not perceive that the communicator has something to gain or has the explicit intention to persuade.”<sup>235</sup> For obvious reasons, this list of qualifications rules out the state as an effective anchoring voice. The same study found that interlocutors who are similar in social background, but older and per-

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<sup>230</sup> *Id.* at 152.

<sup>231</sup> In the well-known Lackawanna Six case, the radical preacher responsible for catalyzing the alleged conspiracy had to seek permission from community “elders” when he first began preaching. *Cf.* TEMPLE-RASTON, *supra* note 151, at 86 (“[I]t didn’t take much convincing to get the elders to agree.”).

<sup>232</sup> *See* FARHAD KHOSROKHAVAR, *INSIDE JIHADISM: UNDERSTANDING JIHADI MOVEMENTS WORLDWIDE* 9–10 (2009) (noting evidence that “Jihadist cells are formed in relation to ties of family, friendship, local residence, and kinship relations”); Max Taylor & John Horgan, *A Conceptual Framework for Addressing Psychological Process in the Development of the Terrorist*, 18 *TERRORISM & POL. VIOLENCE* 585, 589–91, 597 (2006) (noting the importance of group context and emphasizing gradual socialization into committing terrorist acts); *cf.* QUINTAN WIKTOROWICZ, *RADICAL ISLAM RISING: MUSLIM EXTREMISM IN THE WEST* 14–15 (2005) (describing the importance of social networks to recruitment for Islamist groups).

<sup>233</sup> *See* David Weisburd, *Jewish Settler Violence: Deviance as Social Reaction* 91–92 (1989).

<sup>234</sup> JOHN HORGAN, *WALKING AWAY FROM TERRORISM: ACCOUNTS OF DISENGAGEMENT FROM RADICAL AND EXTREMIST MOVEMENTS* 149–50 (2009). Care must be taken in drawing inferences from these studies, however, since they involve only small samples.

<sup>235</sup> *Id.* at 149.

ceived as “experience[d],” are also likely to be effective.<sup>236</sup> Such voices are most likely to be drawn from the immediate social context in which a potential recruit to or potential defector from a terrorist organization is already embedded.

Rather than creating substitutes for violent political mobilization, ethical anchoring depends on the extant presence of close, strong ties, the rupturing of which an individual will perceive as a cost.<sup>237</sup> Determining whether the same agent can accomplish both tasks presents an empirical challenge. On one view, groups with politically and religiously moderate views are in the best position to engage in ethical anchoring. Hence, the Singapore government works with an association of mainstream Islamic scholars, Pergas, in a reportedly successful effort to “discredit radical Islamism.”<sup>238</sup> On the other hand, politically radical groups may have more credibility to engage in ethical anchoring with respect to political violence, if not other policy issues.<sup>239</sup> For example, a lauded example of ethical anchoring is the Active Change Foundation (ACF) in North London, founded by a former al Qaeda sympathizer, which “encourages youth to express their rage about the mistreatment of Muslims in Iraq, Palestine, and elsewhere and channel it into peaceful political action.”<sup>240</sup> ACF also provides social services and engages in outreach, in part to identify those vulnerable to al Qaeda recruitment efforts, and then holds “targeted intervention[s]” to challenge that process.<sup>241</sup> Another survey of quietist Islamist groups in the West found that members of those groups had actively discouraged individuals from terrorism and “personally counselled young people against fighting overseas.”<sup>242</sup>

Private disapprobation and informal social restraints arguably already play a significant role in determining the relative infrequency of domestic terrorism related to al Qaeda. Sociologist Charles Kurzman has developed the most elaborate argument to this effect, positing that al Qaeda efforts to persuade coreligionists in the United States have been almost wholly unavailing.<sup>243</sup> Somewhere between

<sup>236</sup> See *id.*

<sup>237</sup> Notice that this is in contrast to the “weak” ties employed in the ideological competition mechanism. Cf. Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 SOC. THEORY 201, 201, 207 (1983) (explaining the distinction between strong and weak ties).

<sup>238</sup> RABASA ET AL., *supra* note 216, at 100.

<sup>239</sup> For an example of this kind of ethical anchoring among Egyptian Islamists, see Peter Bergen & Paul Cruickshank, *The Unraveling: Al Qaeda's Revolt Against Bin Laden*, NEW REPUBLIC, June 11, 2008, at 16, 18 (describing the repudiation of al Qaeda by Sayyid Imam Al Sharif, the organization's “ideological godfather”).

<sup>240</sup> Jessica Stern, *Mind over Martyr: How to Deradicalize Islamist Extremists*, 89 FOREIGN AFF. 95, 107–08 (2010). See generally RABASA ET AL., *supra* note 216, at 133–36 (describing ACF).

<sup>241</sup> See RABASA ET AL., *supra* note 216, at 133–34.

<sup>242</sup> BARTLETT ET AL., *supra* note 220, at 120–21.

<sup>243</sup> See KURZMAN, *supra* note 14, at 13–14.

1,100,000 to 7,000,000 Muslim Americans reside in the United States.<sup>244</sup> Yet, “in the five years after 9/11,” notes Kurzman, “fewer than 40 Muslim-Americans planned or carried out acts of domestic terrorism.”<sup>245</sup> If “the number of disrupted plots is relatively small—fewer than 200 Muslim-Americans have been involved in violent plots since 9/11, most of them overseas— . . . credit for the low level of violence must be due primarily to the millions of Muslims who have refrained from answering the call to terrorism.”<sup>246</sup> Had al Qaeda been able to increase this tenfold, it would have added another 1,800 recruits to its ranks, but still left unmoved 99.9998 percent of American Muslims. According to Kurzman, the brute fact that absolute levels of observed domestic-source terrorism attacks are not orders of magnitude larger, as they would be were al Qaeda recruitment more effective, suggests that the low rate of successful terrorist recruitment—and not any sort of state action—has independently produced much security after 9/11.<sup>247</sup>

To be sure, there are also reasons to doubt the efficacy of ideological anchoring. A counterargument would begin with French sociologist Olivier Roy’s observation that recent Islamist terrorism has been a countercultural movement animated by individuals’ desires to position themselves in opposition to the political and cultural mainstream.<sup>248</sup> Ethical anchoring by family or community leaders will by hypothesis fail because “most of the radicals have broken with their families or become estranged.”<sup>249</sup> Terrorism is “a revolt not only against the new world that offers only dead-end jobs and discrimination but also against the folk Islam of the old world.”<sup>250</sup> State efforts to consult with official representatives of a Muslim community may accordingly have the effect of legitimating more radical voices.<sup>251</sup>

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<sup>244</sup> See PEW RESEARCH CTR., MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 9–13 (2007), available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>.

<sup>245</sup> KURZMAN, *supra* note 14, at 13.

<sup>246</sup> *Id.* at 14.

<sup>247</sup> Notice that these proportions, as well as the inferred importance of ethical anchoring, have significance for the doctrinal question of whether counterterrorism measures that focus on race or religion are closely tailored to further the compelling goal of promoting security.

<sup>248</sup> See Roy, *Al Qaeda as a Youth Movement*, *supra* note 198, at 15–18 (describing al Qaeda as a “youth movement” akin to the now-defunct Red Brigades); accord OLIVIER ROY, GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH 43 (2004) (“The real genesis of Al Qaeda violence has more to do with a Western tradition of individual and pessimistic revolt for an elusive ideal world than with the Koranic conception of martyrdom.”).

<sup>249</sup> Roy, *Al Qaeda as a Youth Movement*, *supra* note 198, at 15.

<sup>250</sup> ROBERT S. LEIKEN, EUROPE’S ANGRY MUSLIMS: THE REVOLT OF THE SECOND GENERATION 75 (2012).

<sup>251</sup> For an argument that this has happened in France and elsewhere in Europe, see JONATHAN LAURENCE, THE EMANCIPATION OF EUROPE’S MUSLIMS: THE STATE’S ROLE IN MI-

Worse, such efforts may have the perverse effect of increasing the allure of terrorism as a countercultural act.

Alternatively, the relatively low incidence of al Qaeda-inspired terrorism in the United States may be a result not of collective efficacy among Muslim Americans but of effective policing along traditional lines. On this view, a specter of state retaliation, not the ethical restraints immanent in private ordering, is central to the production of public safety.<sup>252</sup>

The force of such criticisms, of course, turns on empirical evaluations. It is necessary first of all to be able to measure the net restraining or motivating effect of collective efficacy against terrorism. And second, any evaluation must account for the proportion of those targeted for terrorist recruitment that reject political violence on shared normative or ethical grounds versus the proportion that are dissuaded by the threat of state force. On both points, there is some reason to believe the evidence supports claims on behalf of ethical anchoring.

First, Roy's argument that al Qaeda appeals to countercultural instincts does not contradict the possibility of ethical anchoring. The appeal of al Qaeda among its European recruits may lie in its countercultural flavor, but stronger social networks may nonetheless reduce the volume of individuals seeking countercultural options in the first instance. Second, the available evidence suggests that the failure of terrorist recruitment, not the success of criminal deterrence, has produced a relatively low rate of post-9/11 attacks. On the one hand, an August 2011 Gallup poll found that Muslim Americans were more likely than any other faith group to reject the use of violence against civilians either by states' armies or terrorist groups, with 89 percent of those polled categorically rejecting the use of terrorist violence.<sup>253</sup> On the other hand, an alternative explanation relying on the deterrent effect of counterterrorism criminal laws would have to explain why harsh penalties in other regimes, such as the antinarcotic-trafficking laws, have failed to produce consistent deterrence. Although I develop more general reasons to be skeptical of deterrence

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NORITY INTEGRATION 221–23 (2012) (describing consultative efforts of the French and Italian governments and the reactions they engendered).

<sup>252</sup> I am again grateful to Steve Schulhofer for pressing this point in correspondence.

<sup>253</sup> ABU DHABI GALLUP CTR., MUSLIM AMERICANS: FAITH, FREEDOM, AND THE FUTURE: EXAMINING U.S. MUSLIMS' POLITICAL, SOCIAL, AND SPIRITUAL ENGAGEMENT 10 YEARS AFTER SEPTEMBER 11, at 30–31 (2011), available at <http://www.gallup.com/se/148805/Muslim-Americans-Faith-Freedom-Future.aspx>; accord PEW RESEARCH CTR., *supra* note 244, at 49–56 (describing similar results). It is possible to argue that the Gallup and Pew results merely reflect Muslim Americans' comparatively greater unwillingness to voice support for terrorist violence. But if individuals are unwilling to even voice such support in the context of a confidential survey, it seems very unlikely that they would be willing to act publicly, at the risk of life and liberty, to vindicate the same view.



explanations below, it suffices here to say that such accounts fail to explain the observed attitudes of Muslim Americans and fit poorly with observed experience in other fields of social control.

In sum, the value of ethical anchoring, like the value of ideological competition, is at bottom an empirical question. Nevertheless, I tentatively suggest that there is at least some initial ground to believe the mechanism is an effectual one.

c. *Cooperative Coproduction*

The idea of “cooperative coproduction” focuses on the manner in which private individuals can substitute more fine-grained epistemic instruments for the blunter investigative methods government otherwise employs. Whereas ideological competition and ethical anchoring raise terrorist organizations’ front-end recruitment costs by increasing the price of effective publicity, this third kind of social action against counterterrorism is valuable because it increases the cost of opacity during the period in which a terrorist group seeks to render its activities immune from public, and in particular official, scrutiny. In both the Abdulmutallab and Ibrahim cases,<sup>254</sup> for example, persons with close knowledge of an alleged terrorism suspect leveraged their epistemically privileged positions by providing information to law enforcement. In the first of these cases, the sheer volume of information gathered by the U.S. government meant that it did not act upon the lead.<sup>255</sup> That lives were not lost was not a result of official action but of the bravery and quick thinking of private actors.<sup>256</sup> In the second instance, U.K. police were able to take timely action, potentially saving many lives.<sup>257</sup> These examples, in addition to the other cases listed at the beginning of this Part, suggest that the public’s advantage over government is not merely ideological, but also epistemic.

The argument on behalf of a community epistemic advantage proceeds as follows. Almost inevitably, members of the public will be better able than the state to interpret ambiguous and fragmentary social cues from otherwise scattered and disconnected individuals.<sup>258</sup> Even if the state can develop an extensive and deep system of intelligence collection through electronic surveillance, data mining, undercover agents, and paid informants, it is still unclear whether these sources can gain the same epistemic competences in situating

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<sup>254</sup> See *supra* notes 146–49, 161–62 and accompanying text.

<sup>255</sup> See *supra* note 161 and accompanying text.

<sup>256</sup> See Press Release, White House Review Summary Regarding 12/25/2009 Attempted Terrorist Attack, *supra* note 162, at 1 (“The flight crew restrained Mr. Abdulmutallab and the plane safely landed.”).

<sup>257</sup> See Morris, *supra* note 146.

<sup>258</sup> The same will often also be true for crime. See Cook & MacDonald, *supra* note 167, at 346.

nuanced social actions in their context.<sup>259</sup> Arguably, neither technology nor infiltration wholly solves the problem of contextual interpretation, for neither is as sensitive to the nuances and subtleties of social interaction as the immediate cadre of a person's peers and coreligionists. Moreover, it is also not enough to posit that confidential informants can serve as substitutes. Informants are most often recruited from outside a given community, and the available case studies of the behavior of federal informants suggest they do not operate with a detailed knowledge of the relevant community. Instead, they tend to target the psychologically vulnerable or immature in order to ensure a continued revenue stream from their government employer.<sup>260</sup> In some cases, alleged terrorist conspiracies seem to be as much the product of an informant's perfervid imagination as a suspected terrorist's intentions.<sup>261</sup> Hence, even if informants can solve the epistemic problem that terrorism investigators face, practical experience suggests they do so only at the cost of introducing a new source of distorting bias into counterterrorism policing efforts.

Cooperative coproduction, like ethical anchoring, may be more significant in determining the present rate of terrorism incidents than is generally recognized.<sup>262</sup> At the moment, few details are available about the extent to which police rely on information voluntarily supplied by members of the public. This is hardly surprising. Federal and state law enforcement have little incentive to portray terrorism-related arrests as the result of unilateral private action as opposed to skilled police work, if only because they must be mindful of maintaining their future funding streams. Nevertheless, a recent study of terrorism-related prosecutions as reported by the FBI asserts that 48 of 161 arrests involving Muslim Americans involved "initial information" that came to law enforcement via "tips from the Muslim-American

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<sup>259</sup> One reason for the state's particular epistemic disadvantage in this context is the role of religious speech and the longstanding absence of deep reservoirs of religious knowledge in American government. See Huq, *Signaling Function*, *supra* note 69, at 870–71.

<sup>260</sup> See, e.g., Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 715–22 (2010) (discussing the questionable basis of several informant-triggered prosecutions). For detailed case studies regarding federal informants, see Petra Bartosiewicz, *The FBI Stings Muslims*, NATION, July 2/9, 2012, at 17, available at <http://www.thenation.com/article/168380/deploying-informants-fbi-stings-muslims>; Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, HARPER'S MAG., Aug. 2011, at 37.

<sup>261</sup> See Said, *supra* note 260, at 715–32 (providing a detailed history of several federal informant-based cases); Robin Shulman, *The Informer: Behind the Scenes, or Setting the Stage?*, WASH. POST, May 29, 2007, at C1 (canvassing similar doubts about informant usage).

<sup>262</sup> Following Elinor Ostrom's terminology, Samuel Rascoff has labeled this the "coproduction of intelligence" to draw attention to the cooperative nature of the enterprise. See Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV. 1715, 1720 (2010) (internal quotation marks omitted). I use Ostrom's terminology to refer to this most state-centered of the three mechanisms. I also use the term to belie any inference that "self-help" on the part of community members is desirable.

community.”<sup>263</sup> Although ascertaining how accurate this snapshot assessment is in global terms is difficult, the study provides a threshold reason to believe that cooperation with law enforcement is in practice often a first, rather than last, resort in the United States.

The obvious objection to the possible employment of cooperative coproduction is that the technological prowess and deep human resources available to local and federal police have rendered it obsolete. What law enforcement cannot glean by trawling the Internet and other communication channels, they can gain by employing confidential informants or covert infiltration. But the trajectory of the Abdulmutallab case may also imply that the allure of technological fixes can foster hazardous complaisance given the state’s highly constrained ability to process and accurately interpret data about the social landscape. Further, cooperative coproduction may have fewer costs than the alternatives. At the very least, “an approach that promises to reduce groups’ and individuals’ motivation to pursue violence and to discourage potential recruits from joining terrorism-using groups in the first place may seem superior in the long run to an approach that aims to foil plans for specific acts of violence” on pure fiscal and efficiency grounds.<sup>264</sup> Further, cultivation of voluntary cooperation implicates fewer of the nettlesome legal and constitutional questions that arise from aggressive homeland use of electronic surveillance and human sources.<sup>265</sup> This is not to say that cooperative coproduction cannot be criticized on ethical grounds—indeed, the following Part develops some such criticisms—but rather that the magnitude of the concerns implicated by its cultivation may be less than for its most obvious substitutes.

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This section has aimed to move beyond the generic and unhelpful formulations of official documents by specifying three causal pathways through which private behavior yields the social good of national security. To that end, I have suggested that terrorist organiza-

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<sup>263</sup> See CHARLES KURZMAN, TRIANGLE CTR. ON TERRORISM & HOMELAND SEC., *MUSLIM-AMERICAN TERRORISM SINCE 9/11: AN ACCOUNTING* 5 (2011), available at [http://tcths.sanford.duke.edu/about/documents/Kurzman\\_Muslim-American\\_Terrorism\\_Since\\_911\\_An\\_Accounting.pdf](http://tcths.sanford.duke.edu/about/documents/Kurzman_Muslim-American_Terrorism_Since_911_An_Accounting.pdf). Note that this study contains no coding protocol and uses ambiguous categories such as “tips” and “initial information.” See *id.*

<sup>264</sup> Kruglanski et al., *supra* note 60, at 99.

<sup>265</sup> For example, the targeting of a distinct ethnic or religious group for heightened burdens on the basis of the criminal actions of a small subset therefore raises significant, and likely fatal, constitutional concerns. Cf. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring) (“Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.”).

tions seek publicity or opacity depending on whether they are recruiting or planning attacks. Social action matters when it renders recruiting more costly and operations more expensive. *Ideological competition*, *ethical anchoring*, and *cooperative coproduction* are three causal vectors through which private action potentially generates security against terrorism. The first two work by raising the cost of recruitment, and the third works by increasing the price of violent action.

To reiterate, my aim in this Article is not to prove definitively that any one of these mechanisms is necessarily efficacious. Rather, I have developed both reasons to credit and discount each mechanism in an effort to limn a framework for analyzing policies such as Prevent and *Empowering Local Partners*. Nevertheless, my tentative view on balance is that the mechanisms are plausible, such that governments should make some effort to investigate and even to promote the social production of counterterrorism.

### III

#### HOW DOES THE STATE ELICIT COUNTERTERRORISM'S SOCIAL PRODUCTION?

Even assuming that the causal mechanisms limned in Part II are fruitful, how should the state go about promoting them? Is there a theoretical framework to guide state actions and investments aimed at promoting the social production of counterterrorism? That both the Prevent and *Empowering Local Partners* documents<sup>266</sup> lack any clear account of how state action influences the social production of counterterrorism in either positive or negative ways points toward yet another large gap in existing policy analysis: States have not considered in public how efforts to promote beneficial social action would in practice work. Moreover, they seem not to have seriously reflected on how efforts to promote counterterrorism's social production might interact with other security-related policies. Any government's security strategy has numerous elements, including a policing function and an expressive function. At times, these may work at cross-purposes to each other. Without a clear understanding of potentially complex interaction effects, it is hard to see how to optimize overall policy.

To begin answering these questions, this Part moves outside the literature on national security to identify a theoretical basis upon which state interventions might be designed. Its primary aim is not to determine specific policies the state might adopt, but rather to develop a general account of mechanisms the state might use to elicit desirable social action. This Part begins by drawing on two widely credited accounts of how the state elicits socially valuable private con-

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<sup>266</sup> See *supra* Part I.C.

duct developed in the context of criminal law: deterrence theory and legitimacy theory. Drawing some concededly selective lessons from both of these bodies of theory, I then identify a series of threshold problems the state ought to consider when designing policies to foster the social production of counterterrorism.

Again, a threshold caveat is warranted. This Part focuses largely on only one of the three mechanisms developed in Part II: cooperative coproduction. This emphasis is warranted because the need to find ways to promote desirable social action is likely greater in respect to cooperative coproduction than for the other posited mechanisms for three reasons. First, individuals already obtain large benefits from the diverse weak and strong social ties implied by the ideological competition and ethical anchoring mechanisms.<sup>267</sup> As a result, there is less reason to be concerned about their underproduction. Second, a government may not be able to do much in the short term to remedy the absence of civil society, especially if it acts under the banner of national security.<sup>268</sup> Hence, discussion of the state's role in this domain is necessarily abbreviated.

Third, there are freestanding reasons to believe that cooperation with the state will occur at deficient levels. In particular, cooperation in counterterrorism efforts involves undertaking some risks to self and imposes harm on others. At a minimum, reporting suspicions of terrorism is quite unlike reporting other crimes, which insurance companies may require or which may be motivated by the prospect of recovering stolen property.<sup>269</sup> More generally, there are particularly steep "private costs of reporting and cooperating with an investigation" quite beyond the sheer time they take.<sup>270</sup> These costs range from concerns about immigration status to unrelated illicit activities, both of which might be inadvertently aired through contact with police. It is also important to recognize the "general distrust or disaffection of the police, coupled with a 'no snitching' norm," that prevails in many American and British Muslim communities as a consequence

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<sup>267</sup> On the general benefits of a robust civil society, see generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000) (defining civil society as "social networks and the norms of reciprocity and trustworthiness that arise from them" and calling for renewed investments in its production); THE NAT'L COMM'N ON CIVIC RENEWAL, *A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT*, at i (1998) ("gathering and assessing information and advice" regarding a believed "period of pervasive moral decline").

<sup>268</sup> For instance, Robert Putnam's work suggests that changes in levels of social capital are largely generational. See PUTNAM, *supra* note 267, at 241–54.

<sup>269</sup> See Cook & MacDonald, *supra* note 167, at 349.

<sup>270</sup> *Id.*

of past policing practices.<sup>271</sup> Further, the potential costs to cooperation are likely to be more acute in the terrorism context than in the crime control context. To cooperate with police in a counterterrorism matter is to create the possibility that the suspected target—who is likely to be a member of one’s cohort or social milieu—will be subject to an especially onerous kind of investigation. As criminologists observed long ago, the duration and uncertainty of the American criminal process can sometimes make “the process . . . the punishment.”<sup>272</sup> Something somewhat akin to this “process as punishment” effect is likely present in an amplified form in the national security domain, where the social sanctions triggered by mere suspicion are an order of magnitude greater than in the criminal domain.<sup>273</sup>

With that in mind, I turn first briefly to two general accounts of how the state can elicit desirable private action before developing, in a more granular fashion, some potential sticking points in policy development.

### A. Deterrence Theory

Anglo-American thinking about state responses to private violence is dominated presently by deterrence, “a social psychological theory of threat communication in which the causal chain runs from the objective properties of punishment through the perceptual properties of punishment to crime.”<sup>274</sup> Rather than turning on the actual expenditure of state resources and effort, deterrence theory focuses on the way *perceptions* of the state’s expected actions influence private behavior.<sup>275</sup> Although the magnitude of deterrence effects

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<sup>271</sup> *Id.*; see also Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 690–92 (2004) (arguing that there are psychological harms attached to serving as a police informant).

<sup>272</sup> The phrase is drawn from MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 199–243 (1979), which focuses on the distinct context in which pretrial process imposes large costs in relation to trivial postconviction sanctions. I adopt the phrase but use it in a different sense.

<sup>273</sup> See Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1475–76 (2012) [hereinafter Huq, *Forum Choice*] (extending the “process as punishment” point to the national security context).

<sup>274</sup> Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 785 (2010).

<sup>275</sup> See *id.* at 780; accord JACK P. GIBBS, *CRIME, PUNISHMENT, AND DETERRENCE* 175 (1975). In contrast to Gibbs’s path-marking work in sociology, the seminal economic text on deterrence did not address the role of perception in deterrence theory. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (discussing deterrence theory and the optimal levels of enforcement in terms of cost, nature of punishment, and changes in environment).

turns on both the certainty and severity of state action,<sup>276</sup> certainty has long been thought to have a higher coefficient than severity.<sup>277</sup>

Deterrence theory provides a mechanism to connect state action to the minimization of certain kinds of private behavior; it is typically about prohibitions, not permissions. The theory thus requires surgery if employed in the service of *promoting* specific desired private behaviors.<sup>278</sup> To achieve that end, deterrence theory *mutatis mutandi* instructs the state to impose sanctions on the failure to engage in socially beneficial behavior that amplifies collective security.<sup>279</sup> Two kinds of deterrence are relevant. First, the state might achieve deterrence by penalizing individual failures to cooperate, such as the intentional decision not to report suspicious information. Individualized reporting obligations already exist in the financial sector,<sup>280</sup> but they might be extended to the general populace. Second, a number of commentators writing post-9/11 have identified the possibility of securing collective deterrence by threatening to impose a sanction on the group from which a terrorist organization attempts to recruit if such recruitment efforts are successful.<sup>281</sup> One group of commentators has also suggested that the state could impose penalties on a whole group in the event of a successful attack by one of its members, either on the theory that the members of the group are passive supporters of terrorism or that they “are in [a] better position to deter terrorism [than the state] and fail[ed] to do so.”<sup>282</sup>

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<sup>276</sup> See Paternoster, *supra* note 274, at 783; accord Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 7 (1998).

<sup>277</sup> For a leading empirical test, see Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865, 874–75 (2001).

<sup>278</sup> Cf. Daniel G. Arce M. & Todd Sandler, *Counterterrorism: A Game-Theoretic Analysis*, 49 J. CONFLICT RESOL. 183, 184 (2005) (using the traditional notion of deterrence in an analysis of counterterrorism policies).

<sup>279</sup> Alternatively, deterrence theory might conduce to the use of prizes for cooperative conduct. See Cook & MacDonald, *supra* note 167, at 350–51 (discussing the use of conditional cash transfers in crime prevention).

<sup>280</sup> See, e.g., 31 U.S.C. § 5318 (2006) (authorizing the Secretary of the Treasury to require financial institutions to report suspicious transactions); 12 C.F.R. § 21.11 (2012) (executing such authority); 31 C.F.R. § 103.122, .131 (2010).

<sup>281</sup> For a general endorsement of this species of sanction, see Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 348 (2003) (“Group members might be punished not because they are deemed collectively responsible for wrongdoing but simply because they are in an advantageous position to identify, monitor, and control responsible individuals, and can be motivated by the threat of sanctions to do so.”).

<sup>282</sup> Nuno Garoupa et al., *A Law and Economics Perspective on Terrorism*, 128 PUB. CHOICE 147, 149 (2006). Garoupa et al. suggest that “groups and families [be] held (strictly) liable for their members’ actions” such that “[w]ithin this framework of group-wide liability, family or group members of a terrorist become quasi-enforcers.” *Id.* (footnote omitted); see also Levinson, *supra* note 281, at 388–91 (discussing potential consequences to collective punishment of all members of a terrorist organization for an individual member’s actions). It should go without saying that this proposal, which is pressed seriously by Garoupa et al.,

The empirical evidence suggests, however, that deterrence of neither the individualized nor the collective variety would be an effective prompt for the social production of counterterrorism.<sup>283</sup> Deterrence theory nevertheless yields an important lesson about the centrality of attitudes and beliefs to the efficacy of state efforts to elicit changes in private behavior. To draw out that lesson, I first examine the case against deterrence mechanisms.

A first cluster of objections to both kinds of deterrence rests on evidence that while the criminal justice system as a whole has a deterrence effect, individual penalties may not. Deterrence is more often a molar, not a granular, institutional attribute, and the evidence that specific changes to laws or policies have even a small marginal effect is surprisingly weak.<sup>284</sup> Because public knowledge of specific criminal laws, and a fortiori of marginal changes to criminal law, is fragile and often vulnerable to hyperbolic discounting,<sup>285</sup> it will often be implausible to conclude securely that a specific law has a stand-alone marginal deterrent effect when enacted against the backdrop of an otherwise robust set of criminal regulations. This situation means that increases at the margin in criminal penalties (especially at the high-sentence end) will not necessarily translate into equivalent changes in levels of perceived deterrence. In the ordinary run of criminal law, therefore, the behavioral consequences of recalibrating specific punishments is uncertain.<sup>286</sup>

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also raises substantial normative concerns. In examining the proposal from a relatively consequentialist perspective, I do not mean to minimize or undermine those normative concerns, which for many will be wholly dispositive without regard to more narrowly defined security-related consequences.

<sup>283</sup> See, e.g., Gary LaFree & Laura Dugan, *Research on Terrorism and Countering Terrorism*, 38 CRIME & JUST. 413, 413 (2009) (noting that threats of severe consequence for terrorist acts in general show little promise).

<sup>284</sup> See Nagin, *supra* note 276, at 3; cf. Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, 32 CRIME & JUST. 373, 378 (2005) (concluding on the basis of a meta-analysis of studies that “with the exception of the effect of incarceration, predictors related to the criminal justice system . . . are consistently among the weakest predictors of crime”).

<sup>285</sup> See, e.g., Kent A. McClelland & Geoffrey P. Alpert, *Factor Analysis Applied to Magnitude Estimates of Punishment Seriousness: Patterns of Individual Differences*, 1 J. QUANTITATIVE CRIMINOLOGY 307, 311 (1985) (finding hyperbolic discounting in estimates of punishment’s effect). In addition, empirical studies identify only a “consistently weak” correlation between perceived and actual levels of punishment. Paternoster, *supra* note 274, at 807. The most important study in this area is Gary Kleck et al., *The Missing Link in General Deterrence Research*, 43 CRIMINOLOGY 623, 642 (2005). For another, similar study, see Lance Lochner, *Individual Perceptions of the Criminal Justice System*, 97 AM. ECON. REV. 444, 450–51 (2007) (finding no correlation); see also Steven D. Levitt, *Why Do Increased Arrest Rates Appear to Reduce Crime: Deterrence, Incapacitation, or Measurement Error?*, 36 ECON. INQUIRY 353, 353 (1998) (warning that “criminals may be poorly informed about the likelihood of detection”).

<sup>286</sup> See Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279, 280 (2008) (“[Deterrence] research is incapable of taking into account whether



This difficulty counsels against increased reliance upon individualized deterrence to promote cooperation. Even in the financial context, recent congressional investigations suggest that the relevant disclosure laws have failed to deter,<sup>287</sup> and evidence of negative externalities from financial disclosure regulation grows.<sup>288</sup> And even assuming that individualized penalties for failures to report suspicious activity could be effective, it is unclear whether a duty to report suspicious activities would have a sufficiently predictable effect outside of the highly structured financial domain. The range of potential triggers of such a duty may be so vast and the contextual justifications for not reporting based on plausible innocent explanations so open-ended that formulating a verbal rule imposing a sufficiently clearly defined duty may be very difficult. Further, expanding the duty to report by attaching criminal penalties would impose a heavy burden of self-policing and blame on a discrete religious group in a way that, for many, would raise substantial ethical concerns.<sup>289</sup>

A second cluster of objections bears on proposals for collective deterrence. Empirical evidence suggests that deterrence effects are only partly a function of the formal sanctions associated with punishment; they are more importantly a consequence of informal social stigmatization sanctions.<sup>290</sup> The social intermediation of deterrence effects means that as the use of punitive sanctions increases, the greater frequency of punishment “may erode the very basis for [the punishment’s] effectiveness” and degrade the marginal impact of new offenses.<sup>291</sup> If the main conduit of deterrence effects is social (i.e., mediated through the normative views of peers and other members of society), it may be especially perverse and counterproductive to

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and to what extent purported policy changes are implemented, whether and to what extent their adoption or implementation is perceived by would-be offenders, and whether and to what extent offenders are susceptible to influence by perceived changes in legal threats.”).

<sup>287</sup> See *HSBC Exposed U.S. Financial System to Money Laundering, Drug, Terrorist Financing Risks*, HOMELAND SEC. & GOVERNMENTAL AFFAIRS PERMANENT SUBCOMM. ON INVESTIGATIONS (July 16, 2012), <http://www.hsgac.senate.gov/subcommittees/investigations/media/hsbc-exposed-us-finacial-system-to-money-laundering-drug-terrorist-financing-risks> (documenting both repeated circumvention of terrorism-financing restrictions and active disregard for violations).

<sup>288</sup> See Khalid M. Medani, *Financing Terrorism or Survival?: Informal Finance and State Collapse in Somalia, and the US War on Terrorism*, MIDDLE E. REP., Summer 2002, at 2, 9 (arguing that the application of terrorism-financing rules to traditional *hawwalat* systems for sending remittances internationally have “precipitat[ed] a humanitarian disaster in Somalia”).

<sup>289</sup> See *infra* Part III.C.3.

<sup>290</sup> See Nagin, *supra* note 276, at 4 (“[S]tudies suggest that the deterrent effect of formal sanctions arises principally from fear of the social stigma that their imposition triggers.”); accord Paternoster, *supra* note 274, at 781; Williams & Hawkins, *supra* note 227, at 562–66.

<sup>291</sup> Nagin, *supra* note 276, at 5.

broaden the scope of the state's punitive brush to reach a potential offender's community.<sup>292</sup> Criminalizing a whole community is likely to make singling out certain behavior as undesirable more difficult.

Finally, a third reason for questioning deterrence's application is specific to the counterterrorism context. A series of empirical studies, focusing upon the experiences of Muslims and non-Muslims in London and New York who have been the focus of recent counterterrorism policing, examined the effect of deterrence-like mechanisms. To that end, the studies analyzed panel data concerning expected levels of cooperation with law enforcement to address potential terrorism threats.<sup>293</sup> These studies conceptualized deterrence as a correlation between expected law enforcement attention on Muslim communities for counterterrorism purposes and cooperation with law enforcement in various forms.<sup>294</sup> No correlation emerged, however, from regressions testing for the predictors of cooperation.<sup>295</sup> This result suggests that efforts to induce communities to serve as informants under penalty of prison time will not be effective. That inference is further supported by findings from other studies of deterrence-based strategies in the counterterrorism context. A study of British efforts against the Irish Republican Army (IRA), for example, found only weak correlation between military deployments (the analog of punishment) and levels of terrorism.<sup>296</sup> That is, the use of force did not deter IRA terrorism. Because that study focused on military, rather than police, interventions, its findings must be used with care. Nevertheless, the study at least suggests that the deployment of force does not mitigate the rate of terrorism recruitment to the degree that advocates of deterrence might hope.

In sum, the lesson of deterrence theorizing may *not* be that the state should pile penalties upon penalties in the hope of stimulating security's social production. If there is a lesson to be drawn, it is in-

<sup>292</sup> Symptomatic of much economic work on deterrence in criminal law, Garoupa et al. evince no awareness at all of the extensive empirical and theoretical literature on the role of sanction perception in deterrence theory. See Garoupa et al., *supra* note 282.

<sup>293</sup> These studies include Aziz Z. Huq et al., *Mechanisms for Eliciting Cooperation in Counterterrorism Policing: Evidence from the United Kingdom*, 8 J. EMPIRICAL LEGAL STUD. 728 (2011) [hereinafter Huq et al., *Mechanisms*]; Aziz Z. Huq et al., *Why Does the Public Cooperate with Law Enforcement?*, 17 PSYCHOL. PUB. POL'Y & L. 419 (2011); Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365 (2010).

<sup>294</sup> That is, they tested the correlation between an expectation of heavy law enforcement attention on a specific community and a willingness to cooperate. For details of the methodology, see, for example, Tyler et al., *supra* note 293, at 377–78.

<sup>295</sup> See, e.g., *id.* at 379–80.

<sup>296</sup> See Gary LaFree et al., *The Impact of British Counterterrorist Strategies on Political Violence in Northern Ireland: Comparing Deterrence and Backlash Models*, 47 CRIMINOLOGY 17, 25–27, 34 (2009) (analyzing six high-visibility crackdown initiatives and concluding that only one had any observable deterrent effect).

stead more indirect: The deterrence literature points to “informal sanctions” and in particular to concerns about “conventionality” and the views of social peers as necessary intermediaries of deterrence effects.<sup>297</sup> This suggests that shared expectations and endogenous norms within specific populations have an effect upon rates of private violence—a possibility that echoes the results of collective efficacy studies. If deterrence theory has a tentative lesson then, it may be that social context—comprising beliefs, attitudes, and associations—is an important locus for the production of public security from terrorism.

## B. Legitimacy Theory

The leading alternative to deterrence theory as an account of how the state elicits desirable behavior from private individuals is organized around the concept of “legitimacy.”<sup>298</sup> Like deterrence theory, legitimacy theory can be understood as a series of theses about how state action alters individual perceptions and judgment, which in turn influences individuals’ behaviors.<sup>299</sup> Rather than focusing on perceptions of expected costs or benefits, however, legitimacy theory directs attention to individuals’ normative perceptions of the state. Its core claim is that the perceived *quality* of state action, rather than the *quantity* of ensuing costs or benefits, most accurately predicts individual decisions concerning compliance with legal rules and cooperation with law enforcement.<sup>300</sup> Of special relevance here, recent empirical studies have identified legitimacy-related variables as statistically significant predictors of diverse forms of cooperation with law enforcement counterterrorism efforts both in the United Kingdom and the United States.

“Legitimacy is [a] property that a rule or an authority has when others feel obligated to voluntarily defer to that rule or authority.”<sup>301</sup> It arises as a consequence of “the belief that some decision made or rule created by . . . authorities is valid in the sense that it is entitled to

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<sup>297</sup> See Nagin, *supra* note 276, at 19–21; accord ZIMRING & HAWKINS, *supra* note 227, at 174–75. For further evidence of the effect of social interactions (writ large) on criminality, see generally Edward L. Glaeser et al., *Crime and Social Interactions*, 111 Q.J. ECON. 507 (1996) (presenting a model of social interactions in relation to rates of different types of crimes).

<sup>298</sup> See, e.g., Tyler et al., *supra* note 293, at 366–67.

<sup>299</sup> See Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 377–78 (2006).

<sup>300</sup> See Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 233–35 (2008).

<sup>301</sup> NAT’L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 297 (Wesley Skogan & Kathleen Frydl eds., 2004) (“In other words, a legitimate authority is one that is regarded by people as entitled to have its decisions and rules accepted and followed by others . . .”).

be obeyed by virtue of who made the decision or how it was made”<sup>302</sup> rather than the substance of the decision. Studies of policing suggest that the legitimacy of a law enforcement entity is a function of the fairness of the process used to make or apply rules and the quality of the personal treatment people receive from authorities; together, these make up the “procedural justice” of police action.<sup>303</sup> A large body of empirical work demonstrates that experiencing procedural justice increases compliance with legal rules.<sup>304</sup> For example, a belief that the police engage in racial profiling will dampen public willingness to cooperate with law enforcement even among nonprofiled segments of the population.<sup>305</sup> Studies suggest that procedural justice effects are neither ephemeral nor trivial in magnitude. Rather, available evidence from the crime control context shows that legitimacy-related reasons dominate deterrence effects.<sup>306</sup> Moreover, studies find that procedural justice predicts voluntary cooperation with policing efforts better than belief in the efficacy of the police or the risk of crime.<sup>307</sup> Police legitimacy, nevertheless, is not the only relevant factor these studies identify. Echoing the arguments of the collective efficacy literature, empirical studies also identify social cohesion as a better predictor of crime victims’ willingness to approach the police

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<sup>302</sup> Tyler, *supra* note 299, at 377; cf. HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* 16 (1989) (identifying legitimacy with a felt “duty to obey superior orders”).

<sup>303</sup> See TOM R. TYLER, *PSYCHOLOGY AND THE DESIGN OF LEGAL INSTITUTIONS* 37–41 (2007) (defining procedural justice).

<sup>304</sup> See generally TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 49–58 (2002) (discussing the role of procedural justice in causing people to accept third-party decisions); Ben Bradford et al., *Contact and Confidence: Revisiting the Impact of Public Encounters with the Police*, 19 *POLICING & SOC’Y* 20 (2009) (finding that positively received contacts, feeling informed about police activities, and procedural justice-type factors increase communities’ perceptions of fairness); Stephen D. Mastrofski et al., *Compliance on Demand: The Public’s Response to Specific Police Requests*, 33 *J. RES. CRIME & DELINQ.* 269 (1996) (finding that legitimating factors most increased compliance with police requests).

<sup>305</sup> See Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 *CRIMINOLOGY* 253, 276 (2004).

<sup>306</sup> See, e.g., Clemens Kroneberg et al., *The Interplay of Moral Norms and Instrumental Incentives in Crime Causation*, 48 *CRIMINOLOGY* 259, 283–84 (2010) (“[I]nstrumental incentives were taken into account only if respondents did not feel bound by strongly internalized norms.”). In a recent meta-analysis, Travis Pratt and Francis Cullen also found that deterrence has only weak support, while “social disorganization” theory, which employs concepts such as collective efficacy, has “strong empirical support.” Pratt & Cullen, *supra* note 284, at 427–30. For an argument that legitimacy-based measures in fact succeed in crime control where deterrence-based measures have persistently failed, see KENNEDY, *supra* note 173, at 207–10, 219–31.

<sup>307</sup> See Tyler & Fagan, *supra* note 300, at 262–63; see also Tom R. Tyler, *Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police*, 8 *POLICE Q.* 322, 333–36 (2005) [hereinafter Tyler, *Policing in Black and White*] (finding a relationship between trust and cooperation with the police in a survey of racial minorities in New York).

than police effectiveness.<sup>308</sup> In short, plural forms of trust of social peers and of police seem to motivate the social production of security against crime.

The aforementioned surveys of London and New York Muslim and non-Muslim communities have extended these findings to the counterterrorism domain.<sup>309</sup> Those studies found a strong association between willingness to cooperate with antiterrorism policing and perceptions of procedural justice in both the U.S. and the U.K. contexts.<sup>310</sup> Among both Muslim and non-Muslim samples in the study, individual judgments about the procedural justice of police action against terrorism provided the most powerful predictor of expressed willingness to cooperate, either by reporting information about the possibility of a planned terrorist attack, by attending meetings called by the police, or by performing neighborhood-watch-like functions as a way of easing the burden that the police must shoulder.<sup>311</sup> British and American Muslim samples, however, identified different components of procedural justice as salient. Whereas American Muslims appeared most concerned with measures that overtly singled them out for different, harsher treatment (and hence, potential stigmatization by others), British Muslims indicated that what they found most objectionable was the fact of being classified on the basis of a group trait (religion) rather than being judged based on individual characteristics.<sup>312</sup>

Procedural justice effects also spill over from populations most often impacted by policing. Echoing findings from earlier empirical

<sup>308</sup> See Heike Goudriaan et al., *Neighborhood Characteristics and Reporting Crime: Effects of Social Cohesion, Confidence in Police Effectiveness and Socio-Economic Disadvantage*, 46 BRIT. J. CRIMINOLOGY 719, 737–38 (2006) (reporting results from a hierarchical linear model of data gathered from a nationwide survey of the Netherlands).

<sup>309</sup> See *supra* text accompanying notes 293–95.

<sup>310</sup> The following paragraph summarizes data and analysis in Huq et al., *Mechanisms*, *supra* note 293, and Tyler et al., *supra* note 293.

<sup>311</sup> A collateral benefit of procedural justice may be that it dampens individuals' approval of private violence for either political or private ends. See Jonathan Jackson et al., *Police Legitimacy and Public Attitudes Toward Private Violence* 13 (Univ. of Chi., Public Law Working Paper No. 372, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1984957](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984957) (identifying “a persistent negative correlation between normative judgments about the police and the public’s attitudes to diverse kinds of private violence”).

<sup>312</sup> Compare Huq et al., *Mechanisms*, *supra* note 293, at 748 (“[T]argeting *individuals* is evaluated as fair, while targeting *communities* is regarded as being illegitimate and unfair.”), with Tyler et al., *supra* note 293, at 387 (“The one issue related to having a Muslim background [that influenced cooperation with police] identified as important was the feeling that Muslims are discriminated against by the society at large.”). These findings contrast with what for many would be obvious priors about Americans and British: That is, they suggest that American Muslims are more concerned with the positional good of relative social standing, whereas British Muslims are concerned with the absolute good of antidiscrimination. Given the greater acknowledgement of class distinctions in British society, this result is especially interesting. It may suggest that dynamics in the process of immigrant assimilation in these two national contexts warrant some further exploration.

work on crime control policing,<sup>313</sup> these studies of counterterrorism policing suggest that the quality of counterterrorism police action affects not only its direct objects, but also the general population. Members of non-Muslim American populations evinced less willingness to cooperate in counterterrorism policing efforts when they believed that police violated norms of procedural justice in dealing with minority communities.<sup>314</sup> This suggests that the procedural justice effects on cooperative behavior are grounded not on self-focused expectations but more on evaluations of an institution's behavior toward all members of the public.

These studies are, of course, not conclusive, even if they provide powerful evidence. It is important to emphasize that they contain correlational evidence alone rather than direct proof of causation. Further, the survey instrument used in these studies measured only *expressed* willingness to cooperate—as *observed* willingness to cooperate is resistant to easy measurement in the counterterrorism context. Nevertheless, evidence from other panel studies suggests that expressed procedural justice judgments correlate not only with individuals' expressed willingness to follow the law but also with their subsequently observed compliance with legal rules.<sup>315</sup>

Legitimacy theory thus has a straightforward application to the design of state efforts to elicit cooperation: respectful policing yields cooperation on security matters as in matters of crime control. Although often presented in contradistinction to deterrence theory, legitimacy theory in fact echoes deterrence theory's emphasis on the public's beliefs and attitudes about the law as mediating mechanisms.<sup>316</sup> Echoing the lesson of deterrence theory, a central take-away here is that designers of policies to elicit counterterrorism's social production cannot merely decree private behavior, but must focus on in-

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<sup>313</sup> See Tyler & Wakslak, *supra* note 305, at 275–77 (discussing effects of racial profiling on nonprofiled populations); accord Tyler, *Policing in Black and White*, *supra* note 307, at 336–37 (finding similar effects). The same spillover effect has been identified in studies of the Israeli population. See Tal Jonathan & David Weisburd, *How Do Majority Communities View the Potential Costs of Policing Terrorism? Findings from a Community Survey in Israel*, 4 POLICING 169, 178 (2010).

<sup>314</sup> Note that the studies did not include samples of non-Muslim Londoners, who could serve as a comparator group.

<sup>315</sup> See, e.g., Tom R. Tyler et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment*, 41 LAW & SOC'Y REV. 553, 578 (2007). It is, to be sure, a major weakness in many legitimacy studies that data can be gathered only on *expressed* willingness to act and not on *actual* actions. I am not persuaded that this alone is reason to reject their findings. As a matter of my first-order intuitions, I find it much more plausible to posit that individuals tend to operate more on the basis of reciprocity and fairness norms than on the narrowly nonaltruistic predicates of rational-choice analysis.

<sup>316</sup> Again, it is important to emphasize that economists' models assume away the problem of mediating cooperation to create models that are less "complex and contingent" but also, in my view, less reliable. Tonry, *supra* note 286, at 303.

dividuals' attitudes, beliefs, and associations, especially a cluster of normative judgments concerning the state.

### C. Policies to Empower Local Partners

Attention to deterrence and legitimacy theories alike suggests that beliefs, attitudes, and associations play a large role in determining levels of welfare-enhancing social actions against terrorism. The state cannot simply decree what it wants. Rather, it must work with the "cognitive structures which social agents implement in their practical knowledge of the social world."<sup>317</sup> That focus in turn draws attention to design decisions embedded in domestic counterterrorism policy that rely on social action respecting the choice of policing strategies and the state's approach to associational pluralism. My aim in this Part is to provide a context for thinking about counterterrorism's social production. I focus on the United States, where the *Empowering Local Partners* strategy is at a more ductile stage than the Prevent strategy. Where relevant, I also identify and discuss relevant legal, doctrinal, and constitutional rules. After raising those policy questions, I close by identifying an important normative question that currently risks being answered through drift and inattention rather than through careful consideration.

#### 1. Counterterrorism Policing's Internal Tension

Legal scholarship about counterterrorism policing to date has addressed the allocation of responsibilities between federal agencies on the one hand, and state and local police agencies on the other.<sup>318</sup> Exploration of the social production of counterterrorism, however, raises another tension that is implicit to policing terrorism, albeit one that does not map crisply on to the local-national dichotomy: when police believe they have identified a community of interest for national security purposes, they have two tactical options to pursue, which map very roughly onto two of the most important recent styles of contemporary policing: intelligence-led policing and community policing. These policing approaches may well be in tension, at least given current American approaches to counterterrorism.

Since the mid-twentieth century, American policing has undergone several waves of reform, starting with a heightened attention to "professionalism" in the 1950s, going through a vogue for "community policing" in the late 1980s, and moving most recently toward a

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<sup>317</sup> PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* 470 (Richard Nice trans., 2010).

<sup>318</sup> See generally Waxman, *supra* note 40, at 310–23 (describing common framings of the debate).

fascination with “intelligence-led policing” (ILP).<sup>319</sup> Community policing is a loosely related set of policing strategies that tend to emphasize trust building between police and local communities.<sup>320</sup> Such approaches thus highlight proximity to a policed population, consultation, and cooperative modalities of policing. By contrast, ILP “emphasizes the use of intelligence collection and data analysis to guide the selection and implementation of police policies”<sup>321</sup> and bears some kinship to the earlier professionalism ideal. Both community policing and ILP have intuitive appeal in the counterterrorism context. On the one hand, the kind of partnerships community policing fosters appear to be well tailored to mitigate the epistemic problem in confronting domestic-source terrorism.<sup>322</sup> On the other hand, policing strategies that turn on aggregated data and algorithmic predictive tools seem to address the same epistemic deficit without the frictions of actual interactions with fickle community members.<sup>323</sup> At least at one level, there is some space between the two approaches.

Experiences in both the United Kingdom and the United States suggest tensions between these two approaches, at least in the specific policies adopted in the counterterrorism context.<sup>324</sup> As implemented to date, some forms of ILP may undermine causal mechanisms of counterterrorism’s social production that community policing might

<sup>319</sup> See David Alan Sklansky, *The Persistent Pull of Police Professionalism*, NEW PERSP. POLICING, Mar. 2011, at 1, 1–3, available at <https://ncjrs.gov/pdffiles1/nij/232676.pdf>.

<sup>320</sup> See JEREMY M. WILSON, COMMUNITY POLICING IN AMERICA 8 (2006) (“The basic philosophy of [community-oriented policing] is that increasing the quality and quantity of contacts between citizens and police to resolve community concerns can enhance community life.”); see also JEROME H. SKOLNICK & DAVID H. BAYLEY, THE NEW BLUE LINE: POLICE INNOVATION IN SIX AMERICAN CITIES 10–11 (1986) (describing the emergence of community policing). For a sense of the variations within community policing, see Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1596–600 (2002) (discussing varieties of community policing) and Michael D. Reisig, *Community and Problem-Oriented Policing*, 39 CRIME & JUST. 1, 2–3 (2010) (same).

<sup>321</sup> Sklansky, *supra* note 319, at 3.

<sup>322</sup> See William Lyons, *Partnerships, Information and Public Safety: Community Policing in a Time of Terror*, 25 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 530, 532–33 (2002) (identifying an “information gap” in current policing and suggesting that “this means partnering with those citizens who have the information we need”); accord Michael P. Downing, *Policing Terrorism in the United States: The Los Angeles Police Department’s Convergence Strategy*, POLICE CHIEF, Feb. 2009, at 28, 29, available at [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=1729&issue\\_id=22009](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1729&issue_id=22009) (“The strengths of U.S. local law enforcement agencies are drawn from[, among other things,] . . . a community policing infrastructure . . . . These strengths all make local police supremely capable of being valuable contributors to U.S. counterterrorism efforts.”).

<sup>323</sup> For endorsements of intelligence-led policing’s use, although not in these terms, see George L. Kelling & William J. Bratton, *Policing Terrorism*, CIVIC BULL., Sept. 2006, at 1, 5–7, available at [http://www.manhattan-institute.org/pdf/cb\\_43.pdf](http://www.manhattan-institute.org/pdf/cb_43.pdf) and Edmund F. McGarrell et al., *Intelligence-Led Policing as a Framework for Responding to Terrorism*, 23 J. CONTEMP. CRIM. JUST. 142, 147 (2007).

<sup>324</sup> This tension is distinct from the line drawn by David Thacher between “community protection” and “offender search.” See Thacher, *supra* note 117, at 637–38.



cultivate.<sup>325</sup> This possibility particularly arises in those instances where a state implements ILP in a way that singles out a specific population for heightened scrutiny. In many instances, the targeted population will be defined by faith (typically Islam).<sup>326</sup> To isolate a specific group based on a religious identity and then to allocate investigative resources to that group alone is to invite opposition and distrust from that group. Even measures that superficially seem to impose no burden, such as federal and state efforts to “map” Muslim communities, have been perceived as imposing dignitary harms and communicating group stigma.<sup>327</sup> The same measures may also raise substantial constitutional concerns that are beyond the scope of this Article.<sup>328</sup> In addition, specific intelligence-gathering tools often employed in the counterterrorism context may impose particularized harms on the very individuals and voluntary associations central to counterterrorism’s social production. For instance, “heavy informant use” that might be part of an ILP strategy can “impose[ ] collateral harms,” in-

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<sup>325</sup> To be clear, the claim here is that counterterrorism ILP has been implemented in cities such as New York and Los Angeles in ways that undermine collective efficacy and other predicates of counterterrorism’s social production. I make no claim that it is impossible to craft a form of ILP that is sensitive to such conflicts. Cf. McGarrell et al., *supra* note 323, at 142 (“[T]here does not appear to be a commonly accepted definition of ILP nor of the practical implications for police agencies’ mission, structure, and processes.”).

<sup>326</sup> See, e.g., Richard Winton et al., *Outcry over Muslim Mapping*, L.A. TIMES, Nov. 10, 2007, at A1.

<sup>327</sup> See FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 4 (2008), available at <http://graphics8.nytimes.com/packages/images/nyintnt/docs/the-new-operations-manual-from-the-f-b-i/original.pdf> (envisaging mapping communities based on race or ethnicity and the issues that police would need to be mindful of in undertaking that activity); Winton et al., *supra* note 326 (discussing controversial Los Angeles Police Department plans to map Los Angeles’s Muslim community). Even though local police departments have epistemic and personnel advantages that conduce to stronger reliance on them in counterterrorism efforts, Waxman, *supra* note 40, at 321–22, such police forces can clearly still adopt strategic frameworks drawn from intelligence-led policing that trigger tension with local communities. Stated otherwise, there is no reason to believe that local police are more likely to be sensitive to community concerns simply because they have local roots.

<sup>328</sup> In the Court’s recent decision in *United States v. Jones*, Justice Sonia Sotomayor’s and Justice Samuel Alito’s concurring opinions posited that Justices may recognize the possibility that long-term surveillance, even when confined to locations to which police have lawful access, can nonetheless “chill[ ] associational and expressive freedoms . . . by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track.” 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring); see also *id.* at 961–62, 964 (Alito, J., concurring in the judgment) (focusing the Fourth Amendment analysis on “the use of a GPS for the purpose of long-term tracking” (emphasis omitted)). Although the analogy is not precise, *Jones* is salient here because it shows that concerns of constitutional magnitude are triggered by temporally durable investigations in the absence of a warrant (let alone reasonable suspicion). It suggests that temporally extensive surveillance within public spaces, especially when enabled by novel technologies that would not have been available at the time of the Bill of Rights’ ratification, trigger Fourth Amendment scrutiny to a degree that only recently would have been thought unlikely.

cluding the “erosion of personal relationships and trust” within a community that is otherwise under economic or societal pressures.<sup>329</sup> Such harms are likely amplified when the surveiled space is religious, as many believe that formal religious institutions ought to be thoroughly insulated from state intrusions.<sup>330</sup>

The U.K. experience provides one example of undesirable interaction effects between different counterterrorism strategies. There, perceived overlap between Prevent and terrorism investigative efforts fostered opposition to the former and public protests over “excessive policing.”<sup>331</sup> In response to these objections, the Home Office has committed to maintaining a firewall between the two kinds of state action.<sup>332</sup> While the United States has not rolled out *Empowering Local Partners* to the same degree, similar conflicts with other elements of current law enforcement strategy might be anticipated. For example, immediately after the White House proclaimed in *Empowering Local Partners* its “robust training program with rigorous curriculum standards” designed to “facilitate local partnerships to prevent violent extremism,”<sup>333</sup> news organizations released evidence of the FBI’s use of training materials about Muslim Americans that portrayed them as terrorists in a categorical and derogatory fashion.<sup>334</sup> Whatever positive expressive effects might have flowed from *Empowering Local Partners* were likely extinguished as a result of a policing mentality that views Muslim Americans solely as objects of suspicion and sources of threat. Or consider the now well-publicized case in which a California Muslim community not only reported a mosque attendee to the FBI but also obtained a restraining order against the attendee, only then to learn that he was an informant and agent provocateur for the federal government.<sup>335</sup> It seems safe to presume that this incident did not increase that mosque’s willingness to report suspicious activity.

<sup>329</sup> Natapoff, *supra* note 271, at 684.

<sup>330</sup> See Jerry Markon, *Mosque Infiltration Feeds Muslims’ Distrust of FBI*, WASH. POST, Dec. 5, 2010, at A1; Thomas Watkins, *Suit Claims FBI Violates Muslims’ Rights at Mosque*, HUFFINGTON POST (Feb. 23, 2011), <http://www.huffingtonpost.com/huff-wires/20110223/us-mosque-spy-lawsuit/> (“Plaintiffs in a lawsuit against the FBI said . . . that the agency’s use of a paid informant to infiltrate California mosques has left them and other Muslims with an enduring fear that their phones and e-mails are being screened and their physical whereabouts monitored.”).

<sup>331</sup> See Walker & Rehman, *supra* note 89, at 266–67 (describing “the dissonance between the community approaches [of Prevent] and other aspects of government policy”).

<sup>332</sup> PREVENT STRATEGY, *supra* note 11, at 31–32 (committing to a separation of “Prevent” from “Pursue” activities).

<sup>333</sup> 2011 EMPOWERING LOCAL PARTNERS, *supra* note 9, at 6.

<sup>334</sup> See Lisa Fernandez, *Local Groups Allege Biased Training Colors FBI Dealings with American Muslims*, SAN JOSE MERCURY NEWS, Oct. 15, 2011, [http://ca.cair.com/sfba/news/local\\_groups\\_allege\\_biased\\_training\\_colors\\_fbi\\_dealings\\_with\\_american\\_muslims](http://ca.cair.com/sfba/news/local_groups_allege_biased_training_colors_fbi_dealings_with_american_muslims).

<sup>335</sup> See Paul Harris, *The Ex-FBI Informant with a Change of Heart: ‘There Is No Real Hunt. It’s Fixed.’* GUARDIAN (U.K.), Mar. 20, 2012, <http://www.guardian.co.uk/world/2012/mar/20/fbi-informant> (“[T]he FBI . . . told Monteilh to act like a radical himself to lure out

The point is not that ILP is conceptually impossible to reconcile with the social production of counterterrorism, but rather that the prevailing modalities of investigation that now characterize counterterrorism ILP are hard to square with the cultivation of counterterrorism's social production given the causal mechanisms that have been herein identified.<sup>336</sup> At a minimum, some ILP methods invite accusations that cooperation efforts are sub rosa spying tools; such accusations plagued early iterations of the Prevent strategy.<sup>337</sup> At worst, ILP methods undermine police legitimacy and are thereby likely to diminish the flow of voluntary information to law enforcement.<sup>338</sup> Investigative agencies, whether local or national, thus must choose between the social production of counterterrorism and extant policies that alienate relevant communities,<sup>339</sup> prioritizing either "intelligence" or "community engagement."<sup>340</sup>

## 2. *Multis e Gentibus Vires*<sup>341</sup>

The social production of counterterrorism is reasonably understood to be plural in nature. It may involve multiple mechanisms, diverse mediating social actors, and distinct beliefs or attitudes toward values, the state, and peers. The ideological competition and ethical anchoring mechanisms described in Part II, for example, may operate through wholly disparate modalities of social action without any overlap. Or the same social actors may turn out to play key roles in each of these mechanisms. Given this foundational pluralism, it would seem desirable, at least in the absence of compelling countervailing evidence, to encourage a civil society with many forms of associations. Strength, that is, may emerge not from the homogeneity of preferences and beliefs but from diversity. Accordingly, assuming that the state must select one sole set of interlocutors as the vehicle for the production of national security—as participants in the debates around the Prevent strategy in particular have done—is likely a mistake. Nor

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Islamist sympathizers" by "befriending Muslims and blanket recording their conversations.")

<sup>336</sup> For one example of this tension arising in practice, see Charlie Savage, *F.B.I. Scrutinized for Amassing Data on Ethnic and Religious Groups*, N.Y. TIMES, Oct. 21, 2011, at A20.

<sup>337</sup> See generally Barclay, *supra* note 95 (discussing the reactions of various Muslim groups, including extremists, to the British government's decision to reinstate the Prevent program).

<sup>338</sup> The New York Police Department appears to have engendered such a result. See Joe Coscarelli, *NYPD Even Spied on the Muslim Leaders Who Were Helping Them*, N.Y. MAG. (Oct. 6, 2011, 10:36 AM), [http://nymag.com/daily/intel/2011/10/nypd\\_even\\_spied\\_on\\_the\\_muslim.html](http://nymag.com/daily/intel/2011/10/nypd_even_spied_on_the_muslim.html).

<sup>339</sup> It is not inevitable that police will adopt the more technology-heavy approach. See, e.g., Laurie Goodstein, *Police in Los Angeles Step Up Efforts to Gain Muslims' Trust*, N.Y. TIMES, Mar. 10, 2011, at A17.

<sup>340</sup> 2010 NATIONAL SECURITY STRATEGY, *supra* note 8, at 19.

<sup>341</sup> In Latin, from many peoples, strength.

does the state need to articulate an “official Islam,” with any potential First Amendment issues that this might entail.<sup>342</sup> Rather than identifying a unique target for subvention, the state may wish to design its support with an eye to ensuring a spectrum of perspectives.<sup>343</sup>

How the state fosters a diverse civil society is too large a question with too complex a set of answers to answer fairly here.<sup>344</sup> It is nevertheless worth noting that policing policies and strategies can play a role. Advocates of community policing strategies have long argued that their proposals are a means for communities “to shape their own norms” so as to yield political “empowerment.”<sup>345</sup> This claim rests on a notion that shared norms can support actions that are individually risky but collectively beneficial, a notion that finds empirical support in other instances of risky collective action, such as the civil rights movement.<sup>346</sup> The resulting accrual of collective efficacy can catalyze virtuous circles, some argue, in which the state’s recognition and reliance on beneficial immanent social norms has the effect of reinforcing those norms.<sup>347</sup> To the extent that these claims find empirical

<sup>342</sup> See generally Rascoff, *supra* note 82, at 162–79 (analyzing Establishment Clause issues raised by “official Islam” efforts). In my view, the most salient strand of Establishment Clause doctrine in regard to such efforts is the rule against denominational preferences, which has been applied to gerrymandered-exemption regimes but not to funding decisions. See, e.g., *Larson v. Valente*, 456 U.S. 228, 255 (1982) (invalidating an exception regime with denominational preferences).

<sup>343</sup> Broad support across the ideological spectrum, unlike efforts to sort between desirable and undesirable versions of a faith, is not just permitted but is sometimes required pursuant to the First Amendment. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (discussing the constitutional prohibition on viewpoint discrimination).

<sup>344</sup> For a useful study of how the state can foster “social networks that bridge the various splits in contemporary American communities,” see ROBERT D. PUTNAM ET AL., *BETTER TOGETHER: RESTORING THE AMERICAN COMMUNITY* 3 (2003).

<sup>345</sup> Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 *LAW & SOC’Y REV.* 805, 830 (1998); see also Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 *CALIF. L. REV.* 1513, 1515 (2002) (“Most of the New Community Policing strategies, in contrast, do foster reciprocal cooperation across one or more of these collective-action settings.”). An alternative dynamic is worth noting. Rather than cooperating with the state when they expect others to cooperate, people might cooperate when they expect others *not* to cooperate. This possibility can be modeled in game-theoretic terms as a “chicken” game—so called because its payoffs track a scenario in which two teenage drivers career headlong into one another hoping the other will blink first. See Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 *S. CAL. L. REV.* 209, 223–30 (2009). If this dynamic takes hold, then community members will be moved to aid police precisely when they believe that no one else will. The chicken game, however, seems to rest on an adversarial relationship between participants that does not have a clear parallel in the policing context. *Id.* As such, it is unlikely to provide useful guidance.

<sup>346</sup> See DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* 112–40 (1991).

<sup>347</sup> Cf. KENNEDY, *supra* note 173, at 230–31 (noting the potential for self-reinforcing positive dynamics through growing interactions between communities and police in the crime control context).

support, they support a migration of successful community policing measures into the counterterrorism context.

In addition to positive policy innovations, the state may also need to avoid certain steps that would destroy existing social infrastructure of value in the national security context. This caution may have some bite given recent changes in First Amendment doctrine. Although it is typically believed that the First Amendment's rights of free speech and association effectively shelter the private associational ecosystem from intrusive state interference or direction,<sup>348</sup> recent redrawings of the First Amendment's doctrinal boundaries have substantially eased restrictions upon the state's ability to punish (and, a fortiori, chill) speech directed at a terrorist group. One side effect of this change will likely be a reduction in the observed diversity of perspectives in suspect communities most relevant to the social production of counterterrorism.

Longstanding First Amendment doctrine instructed that the state cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>349</sup> The recent Supreme Court decision in *Holder v. Humanitarian Law Project*, however, enables the imposition of criminal sanctions on speech based on a mere possibility, rather than a certainty, that violence will occur.<sup>350</sup> Notwithstanding the Court's insistence in that case that it was not changing longstanding doctrine, the resulting ruling seems to give the state a free hand in regulating pure speech, even absent a threat of violence, provided that a designated terrorist group is somehow implicated. Although less noted, the *Humanitarian Law Project* decision's footprint has effects beyond the First Amendment domain. It also extends the domain of instances in which a criminal prosecution is conceivable, because the limits on the FBI's investigative authority are keyed to First Amendment limits.<sup>351</sup> That is, the ju-

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<sup>348</sup> See, e.g., CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 11, 241–43 (1993) (emphasizing the First Amendment's role in sheltering spaces for private deliberation and discussion).

<sup>349</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Furthermore, advocacy of violence "at some indefinite future time" is not sufficient to take speech outside First Amendment shelter; only a "rational inference" of "imminent disorder" will suffice. *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (emphasis omitted).

<sup>350</sup> See 130 S. Ct. 2705, 2730–31 (2010) (upholding the application of 18 U.S.C. § 2339B (2006), a criminal-material-support provision, to pure speech without advocacy of violence if directed at a designated terrorist organization); see also Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, COLUM. L. REV. SIDEBAR (Jan. 20, 2012), at 16, 19–23, [http://www.columbialawreview.org/wp-content/uploads/2012/01/16\\_Huq.pdf](http://www.columbialawreview.org/wp-content/uploads/2012/01/16_Huq.pdf) (criticizing the result in *Humanitarian Law Project* on doctrinal grounds and exploring its effects on First Amendment protections).

<sup>351</sup> See OFFICE OF THE ATTORNEY GEN., THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 13 (2008), available at <http://www.justice.gov/ag/readingroom/>

dicial loosening of First Amendment protections was, in effect, simultaneously an expansion of federal investigative authority. Even if the number of criminal prosecutions remains the same, therefore, civic associations that hold convergent views as designated terrorist organizations on, say, foreign policy or religious dogma have sound reasons for trimming their rhetoric and undertaking precautions against intrusive state scrutiny.<sup>352</sup> They are now at risk of incurring penalties based on weak speech-based associations with designated terrorism organizations. In effect, just as a diversity of perspectives encompassing robust ideological competition potentially takes on new social value, it is coming under increasing legal pressure.

Finally, states might also be attentive to the collateral costs of increasing the diversity of civil society. That is, the state's endorsement and support of entities might have spillover effects, for example, by enabling those associations to engage in other practices or promulgate other views that impose harms on subpopulations of the group.<sup>353</sup> Yet the mere existence of such spillover does not in itself establish the undesirability of such groups' inclusion.<sup>354</sup> Rather, the identification of such spillover provokes the further question of whether the marginal gain in security is greater than any marginal cost along other social desiderata.

### 3. *The Ethics of Counterterrorism's Social Production*

In the course of instrumentalizing counterterrorism's social production, the state is likely to confront a normative dilemma, one that I have intimated but have not yet cleanly surfaced. In American legal circles, that dilemma is typically framed in terms of constitutional antidiscrimination norms pursuant to the First, Fifth, and Fourteenth

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guidelines.pdf (prohibiting the FBI from "investigating or collecting or maintaining information on United States persons solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States").

<sup>352</sup> The hypothesis that increased surveillance and "stepped-up control efforts" reduce organizational activity is supported by studies of the civil rights movement, which found that "the recruitment of new members [was] especially difficult as repression against insurgents intensified." McADAM, *supra* note 176, at 219.

<sup>353</sup> An obvious and highly significant example here is beliefs about gender norms. See generally Mona Eltahawy, *Why Do They Hate Us?: The War on Women in the Middle East*, FOREIGN POL'Y, May/June 2012, at 64 (discussing Arab countries' government endorsements of male-dominated societies and the endorsements' effects on women's quality of life). It is an important question whether any gains in security from reliance on some religious groups are worth the cost in lost gender equality from the implicit endorsement of those groups' hierarchical views in respect to gender, one that merits more attention than I can give here.

<sup>354</sup> For a polemic that assumes any such spillover cannot be justified, see Douglas Murray, *Britain's Islamist Split: The Government Is Divided on Whether Muslims and Non-Muslims Should Be Subject to the Same Standards*, WALL ST. J. (June 8, 2011), <http://online.wsj.com/article/SB10001424052702304432304576371551974233360.html>.

Amendments. My aim here is to sketch that dilemma without the encumbering apparatus of constitutional doctrine, since a legal framing pushes toward binary decisions that suppress, rather than acknowledge, complexity.

Counterterrorism involves the identification of specific communities both as objects of suspicion and as resources to address risk. Today, the targeted community—Muslim Americans and ethnic identity proxies—is largely, if informally, defined by minority religious identity; the community is also subject to nontrivial levels of private discrimination.<sup>355</sup> Governments, as a result, view Muslims as simultaneously “victims, partners and threats.”<sup>356</sup> States impose burdens and responsibilities not on the basis of individual actions, but on the basis of coreligionists’ claims for which members of the community have scant sympathy and no control. Both the imposition of burdens and the adumbration of responsibilities ought to trigger normative reflection. That the state does both at the same time—in effect, placing uniquely contradictory demands on one minority community—should provoke a longer pause.

On the one hand, states subject Muslim American communities to heightened levels of scrutiny and intrusion on the ground that the statistical probability of identifying a potential terrorist is higher when targeting that community than when targeting the general population. In the contemporary context, the state is drifting, albeit without focused attention, toward the view that reliance on religious identity as a proxy for terrorist risk is acceptable.<sup>357</sup> Accordingly, judges, like other official actors, may similarly drift to the view that certain groups merit less constitutional solicitude on loosely reasoned, inarticulate, but deeply felt assumptions about the dynamics of counterterrorism.<sup>358</sup>

Yet at the same time, policies such as *Prevent and Empowering Local Partners* seek to impose responsibilities on those same communities for the production of collective security. Alone among ethnic, relig-

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<sup>355</sup> See Aziz Z. Huq, *Private Religious Discrimination, National Security, and the First Amendment*, 5 HARV. L. & POL'Y REV. 347, 350–57 (2011) (collecting data showing trends in discrimination and examining possible explanations for those trends).

<sup>356</sup> HICKMAN ET AL., *supra* note 21, at 14.

<sup>357</sup> Official actors can also focus on cultural traits rather than religious traits to the same effect. See Murad Hussain, Note, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920, 926 (2008) (defining post-9/11 “cultural profiling” as law enforcement policies that specifically target expressions of cultural identity as proxy criteria thought to be correlated with criminality, terrorist connections, or other subversive propensities”).

<sup>358</sup> A similar dynamic operated during the 1950s with respect to communism. See, e.g., William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v United States*, 2001 SUP. CT. REV. 375, 377 (“[T]he Court imposed on Communists a special and diminished status under the Constitution.”).

ious, and racial groups, American and British Muslims are asked to shoulder a particularized responsibility for national security that is not shared by other groups—again, not as a consequence of what all members of those communities have done, but as a consequence of their coreligionists' actions. Burdens of suspicion are thus compounded by obligations to organize communal life in a way that benefits the larger society even if it compromises shared confessional life. What might have been an autonomous domain of civil society becomes a grossly functional appendage of the state. In this fashion, religious communities already stigmatized and corroded by suspicion undergo a second, additional kind of loss that sounds in autonomy and equality. Further, the state claims that the actions of a very small subset of that minority group have triggered a collective responsibility that applies to all members of the group. Yet this kind of shared attribution based on a common racial, ethnic, or religious identity is typically thought to raise pressing normative concerns. Just as labeling one minority religious or ethnic group in categorical and derogatory terms seems problematic, so too labeling a specific minority as especially responsible for the production of security against terrorism may be cause for normative concern.

One way to resolve these tensions would be more for governments to explicitly recognize the heightened burdens and expectations imposed on certain ethnic and religious groups. To the extent there is a risk that government externalizes inefficient costs on such communities—either in the form of asymmetrical policing attention or expectations of cooperation—one possible compensating mechanism would use constitutional and statutory tort actions.<sup>359</sup> Across the board, however, courts have been chary of allowing any money payouts from flawed national security actions.<sup>360</sup> Reasoning back from hypothesized (but empirically unsubstantiated) concerns that related litigation risk will deter officials from vigorous actions, federal judges have typically declined to attach any fiscal penalties even in cases of obvious error and large harms.<sup>361</sup> Nor has the federal government acted *sua sponte* to remedy its own numerous and well-documented mistakes.

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<sup>359</sup> This assumes that damages awards against government officials have a deterrent effect, but that assumption is debated. Compare Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 370–71 (2000) (arguing that damages awards against government officials do not have a deterrent effect), with David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1225 (arguing the opposite). This also assumes that identification of the correct recipients of compensatory awards would be a straightforward endeavor—which is also far from clear.

<sup>360</sup> See Huq, *Against Exceptionalism*, *supra* note 41, at 242–48 (documenting the absence of damages awards in cases challenging national security-related policies).

<sup>361</sup> See *id.*



Constitutional violations in the specific context of counterterrorism policing have not proved to be an exception to this pattern. Rather, such challenges have revealed that federal judges have been extremely unwilling to furnish any meaningful response to harms imposed by excessive or unjustified policing measures.

In the August 2012 case of *Fazaga v. FBI*, for example, a federal district court in southern California dismissed a constitutional challenge to the FBI's alleged aggressive use of informants and "an indiscriminate 'dragnet' investigation [of] . . . Muslims in Southern California based on their religion" because allowing the suit to proceed would reveal "state secrets."<sup>362</sup>

In refusing to allow the allegations to be tested, the court relied on the fact that the government would be forced to reveal details of its domestic investigative strategies in course of defending such claims.<sup>363</sup> Both the government's argument and the court's endorsement thereof are puzzling. Assuming *arguendo* that a challenged investigation had legitimate ends, it follows that one potential, and perhaps even dominant, goal of the investigation was the criminal prosecution of those identified as posing a security risk. Notwithstanding much attention to alternatives to Article III proceeding, there is still a large subset of cases in which criminal prosecution is the sole practically available option when a terrorism suspect is identified in the United States.<sup>364</sup> If a legitimate investigation is one that necessarily must include criminal prosecution as a potential endgame, the *Fazaga* court's logic comes under some considerable strain. After all, if it wishes to

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<sup>362</sup> *Fazaga v. FBI*, No. 8:11-cv-00301-CJC (VBKx), 2012 WL 3327092, at \*10, \*13–14 (C.D. Cal. Aug. 14, 2012) ("[B]ecause further litigation of this action would require or, at the very least, create an unjustifiable risk of disclosure of state secrets, the Court finds that dismissal of Plaintiffs' claims, aside from their [Foreign Intelligence Surveillance Act (FISA)] claim, is required . . ."). In a related action, the same judge allowed claims under FISA, 50 U.S.C. §§ 1801–1811, 1821–1829, 1841–1846, 1861–1862, 1871 (2006), to proceed against the Agent defendants. See *Fazaga v. FBI*, No. 8:11-cv-00301-CJC (VBKx), 2012 WL 3541711, at \*7 (C.D. Cal. Aug. 14, 2012).

<sup>363</sup> See *Fazaga*, 2012 WL 3327092, at \*13 ("[T]he Government will inevitably need the privileged information to defend against Plaintiffs' core allegation [of religious profiling] . . .").

<sup>364</sup> To be sure, criminal prosecution is not the only device in the government's possession for incapacitating terrorism suspects; the government can also employ military or immigration detention. See Huq, *Forum Choice*, *supra* note 273, at 1434–43 (discussing noncriminal civil and military detention as alternatives to Article III criminal prosecution). But the Obama administration has eschewed the highly controversial use of military authority in the United States, and immigration authority would not avail where a suspect proves to be a U.S. citizen. In any case, senior policymakers attest to the considerable practical advantages of an Article III forum for criminal charges. See generally John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Address at the Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (praising Article III forums).

secure a conviction or even maintain its credibility through plea bargaining, the government must necessarily be willing to air details of its investigative strategy as a consequence of constitutionally imposed disclosure obligations in any criminal proceeding.<sup>365</sup> The Court's conclusion thus rests on the assumption that an investigation necessarily designed to terminate in an Article III criminal process could not be interrogated via an Article III civil process. This is a confused and unjustified result. There is no sound reason to distinguish between the civil and criminal processes in this fashion. To be sure, Congress has enacted a general framework statute to facilitate criminal prosecution and convictions<sup>366</sup> and has not done the same for civil proceedings. But it is not at all clear that federal judges lack the discretion to adopt, *mutatis mutandi*, procedural devices from the criminal context for use in civil actions.<sup>367</sup> Nor is it clear why the government should be the sole beneficiary of litigation technologies for the management of classified information. It may be that a better, more accurate explanation of the result in *Fazaga*, given the sweeping, unreflective nature of the district court's analysis, is the unspoken, implicit, yet widely shared sentiment that those harmed by national security actions—a class, recall, that is defined largely in terms of protected characteristics such as faith or ethnicity—must simply bear the losses that fall on them as the price of their religion or skin color.

Perhaps all this is worth the candle. Without comparative statics of diverse counterterrorism strategies and a theory of the moral harms from official discrimination, it is hard to reach a definitive conclusion without recourse to one's own normative and empirical intuitions. At a minimum, however, the complex normative questions raised by pursuing the social production of counterterrorism should be understood and acknowledged. To pass upon them in an ill-informed and careless fashion, as current policy risks, seems at best irresponsible.

#### CONCLUSION

It is conventional wisdom that in the past few decades, debates about the appropriate roles of the state and private ordering across a spectrum of policy issues outside the national security domain have turned against the state and in favor of private ordering.<sup>368</sup> Yet even among the most ardent of Hayekians, the belief persists that the state's dominance over matters of public order and security is sensi-

<sup>365</sup> See *Brady v. Maryland*, 373 U.S. 83, 86–88 (1963).

<sup>366</sup> Classified Information Procedures Act (CIPA), 18 U.S.C. app. § 3 (2006).

<sup>367</sup> Indeed, measures modeled on CIPA have been adopted in some (civil) habeas proceedings. See, e.g., *Al Odah v. United States*, 559 F.3d 539, 544–47 (D.C. Cir. 2009); *In re Guantanamo Bay Detainee Litig.*, 634 F. Supp. 2d 17, 24 (D.D.C. 2009).

<sup>368</sup> For a brisk account, see Jennifer Schuessler, *Hayek: The Back Story*, N.Y. TIMES BOOK REV., July 11, 2011, at 27.

ble.<sup>369</sup> The Prevent strategy and *Empowering Local Partners* destabilize this dichotomy, introducing a set of new questions about causes, mechanisms, and policies. Perhaps discomfited by this ideological confusion, neither the U.S. nor the U.K. government has pursued those policies' underlying causal mechanisms or downstream policy consequences.

To address these gaps, this Article has aimed to place fragile and undertheorized claims about a social role in counterterrorism on more secure social-scientific footing. To that end, I have posited three specific causal mechanisms by which private behavior might conduce to collective security, which I have labeled *ideological competition*, *ethical anchoring*, and *cooperative coproduction*. The first two operate on the front end of terrorism conspiracies by making the cost of effective publicity for terrorist groups higher. The last one operates at the back end by raising the costs of surreptitious violence. My aim in this Article, to reiterate, has not been to referee conclusively between these divergent concepts. Instead, by articulating a plausible causal framework for governments' currently diffuse and inchoate assertions about counterterrorism's social provenance, I hope to have provided a more substantial basis for future policymaking in addition to something of an agenda for further empirical work.

Drawing on work outside the national security domain, I have further elaborated theoretical templates for state intervention using deterrence and legitimacy theory, and I have also identified threshold practical and normative dilemmas. No doubt this is only a start. To reach a deeper consensus on precisely which policies are most desirable to pursue, further empirical work, policy experimentations, and policy reevaluations are required. Even in the interim, the analyses in this Article suggest that advocates of a state monopoly on the production of national security should tread with care: the sources and origins of safety, it seems, are more diverse, more complex, and more fragile than previously believed.

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<sup>369</sup> This idea might be summarized as follows: “[T]he market is efficient, and within that space there is no need for government intervention,” whereas outside the “orderly market,” where disorder trumps voluntary exchange, “government intervention is necessary, legitimate, and competent.” BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 38 (2011).

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