A Transformational Agenda for National Security

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ABSTRACT

Past efforts to "reimagine" national security in legal scholarship have largely avoided systematic engagement with the foundational assumptions and presumptions of the field. Challenging and critiquing those assumptions is, however, necessary to producing scholarly work that reimagines, rather than reproduces, status quo approaches to U.S. national security. This Article presents an agenda for reimagining national security through legal scholarship, which is premised on the view that challenging the national security status quo should be part of those efforts. In doing so, this agenda explores seven premises central to how U.S. national security is currently conceived of, practiced, and implemented. Moving beyond the law, the agenda presented in this Article examines the structural power dynamics and political economy of national security, demonstrating why these issues are important to reimagining and transforming how we approach the discipline of national security as legal academics and advocates.

I. INTRODUCTION

In their announcement for this volume of *The University of Chicago's Legal Forum*, the journal's editors ask its invited contributors to "reimagine" national security.[1] But what does that mean? Does it mean embracing efforts to "reform" existing national security policies, practices, and tools? Does it mean developing new strategies and technologies to address national security concerns? Or does it mean expanding national security itself to deal with new "threats"? The editors' announcement suggests that some, if not all, of these approaches may qualify as "reimagining" national security.[2]

[1] *The University of Chicago Legal Forum Announces Its 2024 Volume: Reimaging National Security* (on file with author).

[2] *See id.* ("Unconventional threats call for reimagining conventional approaches to national security . . . We aim to explore how the law solves, regulates, and responds to [those] threats to

Past efforts to "reimagine" or "rethink" U.S. national security—though not always framed in those terms[3]—have trod a similar path in legal scholarship. Many of those endeavors have, for instance, focused on reforming U.S. national security policies and practices by addressing rule of law, racial discrimination, and other civil liberties issues, as well as separation of powers and institutional design concerns raised by existing national security structures.[4] Other efforts have reimagined national security by exploring how national security laws and policies should expand to address new and evolving concerns and threats.[5]

While many of these projects have made important contributions to legal scholarship, they have often overlooked the fundamental premises and structural tendencies of U.S. national security. These foundational trends include the social, political, and economic forces that have historically shaped U.S. national security interests; the motivations behind defining certain events or actors as "threats" and "enemies"; issues surrounding who is involved in and excluded from participating in U.S. national security; and the pervasive reach of national security-related regulations, both at home and abroad, among other issues.

Given their less-than-obvious relationship to the doctrinal and governance questions that are a lawyer's bread and butter, it makes sense perhaps that most legal scholars have avoided engaging with these and other extra-legal aspects of U.S. national security. Any effort to "reimagine" the discipline must, however, make room for these more radical inquiries. After all, to "reimagine" means to "form a new conception" or to "re-create."[6] Radical efforts—that break with, challenge, or question the central premises of U.S. national security—are self-

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the nation . . .").

[3] In discussing existing scholarship that "rethinks" or "reimagines" national security, this Article does not limit itself to efforts that are self-conscious in their "rethinking" or "reimagining" of the field. Instead, this Article considers attempts to challenge what national security means or how it is practiced as engaged in a "rethinking" or "reimagining" of the discipline.

[4] *See generally, e.g.,* REIMAGINING THE NATIONAL SECURITY STATE: LIBERALISM ON THE BRINK (Karen Greenberg ed. 2020) (compiling essays reimagining national security by exploring how national security practices that have undermined democratic institutions and the rule of law have impacted democratic liberalism, among other topics); *see also* Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417, 1419 (2012) (arguing that efforts to reform national security law have largely focused on strengthening legal and institutional constraints on executive power).

[5] *See generally, e.g.,* Lisa A. Rich, *Introduction to the Symposium Edition - New Technology and Old Law: Rethinking National Security*, 2 TEX. A&M L. REV. 581 (2015) (compiling essays examining how existing legal frameworks should adapt and, in some cases, expand to address new national security challenges). While there may be other trends in the literature on reimagining and rethinking national security, reform and expansionism represent the two most prevalent and enduring approaches, in my view. See *infra* Part II for a further discussion of these approaches.

[6] *Reimagine*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/reimagine#:~:text=reimagined%3B%20reimagining%3B%20reimagines,new%20conception%20of%20%3A%20re%2Dcreate [https://perma.cc/2AU8-5XYC].

evidently necessary to such a "re-creation."[7] By contrast, failing to address the central premises of U.S. national security means that any "new conception" or "re-creation" of the field will be "new" in name only.

As I argue in this Article, to fundamentally and radically reimagine national security we must look past the law to explore the norms and assumptions that undergird how the United States government approaches national security, as well as the interests and objects this understanding of national security is designed to protect and serve. In particular, we must do what is rare for many within national security legal academia and practice: question the structural power dynamics and political economy of the national security state.[8]

This effort to radically reimagine national security[9] should explore several central presumptions and trends embedded within the field:

A. The political, social, and economic factors that have generally shaped national security practices throughout U.S. history, including deeply ingrained colonialist, imperialist, capitalist, and racist forces;

B. The political, social, and economic factors influencing how specific national security threats are identified and framed, including the pervasive role of fear and tendency for the U.S. national security establishment to create enemies;

C. The private persons participating in and enforcing U.S. national security and the implications of that participation;

D. The rule of law's limits in protecting against corrosive forms of U.S. national security power;

E. The U.S. national security state's extensive regulatory reach into the daily lives of persons both abroad and at home;

F. The ways in which the relationship between the U.S. government and national security academia restricts the horizon for rethinking national security; and

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[7] I use the word "radical" throughout this Article to describe the kind of transformation supported by the agenda presented in Part III.

[8] The phrase "national security state" was coined in the 1960s by former U.S. government official and public intellectual Marcus Raskin. *See* MARCUS RASKIN & ROBERT SPERO, THE FOUR FREEDOMS UNDER SIEGE: THE CLEAR AND PRESENT DANGER OF OUR NATIONAL SECURITY STATE xx–xxi (2008) ("The National Security State by its nature is expansionist for it deals with the continuous creation of activities in all aspects of public life and has become the single most important function of millions of federal workers, unions, police agencies, defense corporations, universities, and scientists.").

[9] Many works of national security legal scholarship begin by defining what "national security" is. This Article does not, since its aim is to dissect and critique the presumptions upon which most definitions of national security are implicitly based.

G. The critical role of social movements in radically reimagin-
ing how U.S. national security is conceived of and practiced.

The seven issues explored in this Article draw inspiration from and
rely on several scholarly approaches. First, they are rooted in the in-
sights of various schools of critical legal thought, including critical legal
theory, critical race theory, Third World Approaches to International
Law ("TWAIL"), and law and political economy. Though their emphases
and focuses differ, these approaches to legal scholarship collectively ex-
amine and interrogate the social, economic, and political factors that
shape law, and that are, in turn, shaped by law.[10] In surfacing law's
relationship to these extra-legal forces, these critical frameworks make
clear that any effort to recreate or forge a new conception of law must
challenge the political, economic, and social forces at the heart of the
legal system—[11]a belief that is a central motivation behind this agenda,
as well.

Second, in analyzing the seven cross-cutting issues laid out above,
this Article adopts an inter-disciplinary approach—relying on scholar-
ship from history, international relations, anthropology, and media
studies, among other disciplines. Third and finally, the trends identified
in this agenda are inspired by and draw from the work of a small group
of critical national security scholars[12]—as well as legal scholars whose
writings intersect with national security—who have addressed some,
though not all, of the issues discussed in this Article.[13] In putting pen

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[10] For example, critical legal studies views law as deeply political. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1517 (1991). For critical race theorists, law "shapes and is shaped by 'race relations' across the social plane." Kimberlé Crenshaw et al., *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xxv (eds. 1995). For its part, TWAIL disentangles and problematizes international law's historic and on-going role in furthering the interests of Western imperialism and colonialism. James Thuo Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE LAW & DEV. 26, 30–31 (2011). Finally, the emerging field of law and political economy em-phasizes the importance of exploring how "*law creates, reproduces, and protects political-economic power*, for whom, and with what results." Jedediah Britton-Purdy et al., *Building a Law-and-Po-litical Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1820.

[11] The approach to national security reflected in this Article also shares commonalities with a branch of security studies, known as the Copenhagen School of Security Studies. This school of thought "emphasizes the fundamental and irreducibly political character of claims to know some-thing about security." J. Benton Heath, *Making Sense of Security*, 116 AM. J. INT'L L. 289, 321 (2022). At the same time, this Article goes beyond the Copenhagen School of Security Studies' political analysis of security, which mainly revolves around the consequences of securitizing an issue. *Id.* Instead, the agenda presented in this Article examines a broader set of issues, including the history of national security, the reach of national security, and the actors involved in U.S. national security, among other topics.

[12] This group of critical national security scholars includes Sahar Aziz, Ash Bâli, Nina Farnia, Aziz Rana, Shirin Sinnar, and Wadie Said, among others.

[13] *See, e.g.*, Nina Farnia, *Imperialism in the Making of U.S. Law*, 96 ST. JOHN'S L. REV. 131,137–39 (2022) (arguing that we must "foreground an analysis of imperialism in the making of U.S. law," including U.S. national security law); Rana, *Who Decides on Security?*, *supra* note 4, at

to paper, my hope is to draw together and add to this wealth of knowledge.

This Article also has four important limitations. First and foremost, this intervention is primarily intended to inform progressive, left-visions of national security.[14] This is due both to the national security status quo's alignment with conservative politics[15] and to my own leftist commitments.[16] Second, this Article does not present a comprehensive plan for radically reimagining national security through legal scholarship. Nor does it propose a particular substantive vision for reimagining national security from a left perspective. Instead, this Article presents an agenda that *ought* to inform radical left efforts to transform how national security is approached through legal scholarship with the understanding that this agenda likely has blind spots of its own,[17] which others can and, I hope, will address.[18]

Third, the agenda presented in this Article operates at the macro-level, focusing on foundational trends that broadly exist across U.S.

1422 (noting that, in order to bring meaningful change to the practice of national security, the "broader ideological context that shapes how the balance between liberty and security is struck" must be engaged).

[14] While defining what "progressive, left" politics means is beyond the scope of this Article and also far from settled, my own understanding of it includes a principled commitment to opposing political, economic, and social systems that breed oppression and subordination of marginalized groups and communities, including imperialism, capitalism, and militarization. At the same time, I do not believe one must have a particular politics in order to find this agenda helpful. Indeed, I hope it will inform efforts to reimagine national security, regardless of partisan viewpoint. Nevertheless, I do believe this agenda will be most useful and helpful to those who want to create a progressive, left-vision of national security since, as discussed below, national security's current orientation is largely politically conservative. *See infra* note 15 and accompanying text. For past and present visions of radical leftist foreign policy, which have inspired this Article's agenda, *see* WILLIAM APPLEMAN WILLIAMS, THE TRAGEDY OF AMERICAN DIPLOMACY 308–10 (2009); Aziz Rana, *The Left's Missing Foreign Policy*, N+1 (Mar. 28, 2018), https://www.nplusonemag.com/online-only/online-only/the-lefts-missing-foreign-policy/ [https://perma.cc/33CT-69FX].

[15] *See* PETER ROADY, THE CONTEST OVER NATIONAL SECURITY: FDR, CONSERVATIVES, AND THE STRUGGLE TO CLAIM THE MOST POWERFUL PHRASE IN AMERICAN POLITICS 5–6 (2024) (arguing that after World War II conservative visions of U.S. national security triumphed over liberal visions).

[16] The seven issues discussed in Part III of this Article are informed, in part, by a left orientation, which is also shared with the schools of critical legal thought that have contributed to this agenda. See *supra* note 10 and accompanying text.

[17] One topic this agenda touches on in some places but generally omits is the range of consequences that arise from securitizing an issue, which include military-focused responses and legally exceptionalist treatments that often erode civil rights protections. Maryam Jamshidi, *Climate Change Is a Human Security, Not a National Security, Issue*, 93 S. CALIF. L. REV. POSTSCRIPT 36, 39–40 (2019). As mentioned earlier, the Copenhagen School of Security Studies focuses substantially on the consequences of securitization. *See supra* note 11 and accompanying text. This issue is also implicitly addressed by some reformist approaches to national security, which are examined in Part II. Though the topic cannot be discussed in detail here, any radical reimaging of national security must grapple with the consequences of securitization, as well.

[18] In line with these limitations, the issues discussed in this agenda are not intended to limit what it means to take a "left" perspective on national security, though my hope is that this agenda can spur more conversations within the legal academy about what a "leftist" approach to national security through legal scholarship should entail.

national security. Particular national security issues—for example, the use of autonomous weapons systems or artificial intelligence (AI) in warfare—may raise more specific political economy concerns that are not explicitly reflected in this agenda.[19] Addressing the political economy of discrete national security practices will necessarily require grappling with the particular political, social, and economic issues they implicate. This agenda is intended to encourage and support that sort of scholarly engagement, even if it cannot adequately address those types of concerns.

Finally, this Article is not pitched to those who see no need to shift from the current U.S. national security status quo or to confront and assess its central assumptions, whatever their political orientation. Indeed, many in the legal academy and beyond who work on national security may be skeptical of or resistant to this project. This may reflect a demonstrated tendency among national security academics and practitioners to embrace the field's basic premises.[20] It may also reflect the fact that debates on U.S. national security have long been "settled" in ways that assume the system's basic legitimacy and exclude revolutionary alternatives.[21] Against this backdrop, the prospects are slim at best for convincing the already resistant to embrace a radical reimagining of national security through legal scholarship.

What this agenda does try to do is provide a framework and language for those who already believe, are inclined to believe, or are open to believing that the foundations of U.S. national security should be critically examined and reassessed through legal scholarship. Indeed, part of the motivation for creating this agenda is to contribute to emergent conversations—amongst legal academics, advocates, and activists—about the need to radically reconceptualize national security as practiced in the United States.[22]

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[19] For example, the use of AI in war potentially encourages the dehumanization of those targeted and/or incidentally killed by those weapons systems. Elke Schwartz, *The Ethical Implications of AI in Warfare*, QUEEN MARY UNIVERSITY LONDON, https://www.qmul.ac.uk/research/featured-research/the-ethical-implications-of-ai-in-warfare/ [https://perma.cc/X25D-EGF5]. While this concern is arguably part and parcel of national security's tendency to create "enemies"—a topic discussed later in this Article—this agenda does not address this particular aspect of enemy creation.

[20] This commitment is particularly endemic to the national security bureaucracy, whose members are incentivized to maintain the policies on which their careers depend. Michael Glennon, *National Security and Double Government*, 5 HARV. NAT'L. SEC. J. 1, 34–38 (2014).

[21] Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 CALIF. L. REV. 335, 381–82 (2015).

[22] There are several notable examples of these burgeoning debates. For instance, a recent edited volume—composed primarily of legal scholarship—contains various perspectives on national security that challenge mainstream assumptions about the field. RACE AND NATIONAL SECURITY (Matiangai Sirleaf ed. 2023). Some legal advocacy organizations have also issued policy proposals underscoring the need for a radical overhaul of the U.S. national security apparatus. Center for Constitutional Rights, *A Rights-Based Vision for the First 100 Days* (2020),

Radically reimagining national security through legal scholar-ship—and beyond—is particularly urgent at this moment. Since Octo-ber 7, 2023, the language and tools of national security have been used by U.S. university administrators, public figures, and politicians to smear and attack students, faculty, and staff peacefully protesting Is-rael's on-going violent incursion into the occupied Gaza Strip, which the International Court of Justice has determined raises a plausible risk of genocide.[23] Over the last several months, politicians, public figures, and university officials have variously called for protesting students to be investigated for "supporting a foreign terrorist organization;"[24] accused student activists of being proxies of the Iranian government;[25] promoted efforts to include pro-Palestine students and faculty on the notorious 'No Fly List;'[26] created mass surveillance programs to track pro-Palestine statements and actions on campuses;[27] and unleashed militarized

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https://docs.google.com/document/d/1i5VCQfZoE80eTPWu5i4D-KMAk97Ll56TzRcOAlOkLQ0/ [https://perma.cc/9QBX-BVT4]. Finally, Part III.G of this paper discusses efforts by some social movements to radically reimagine national security.

[23] See, e.g., Maryam Jamshidi, *Genocide and Resistance in Palestine under Law's Shadow*, J. GENOCIDE STUD., May 2024, at 20–28.

[24] *ADL and Brandeis Center Letter to Presidents of Colleges and Universities* (Oct. 26, 2023), https://www.adl.org/resources/letter/adl-and-brandeis-center-letter-presidents-colleges-and-uni-versities [https://perma.cc/2NPC-EYL8]; Press Release, *Rubio, Colleagues Urge Removal of Hamas and Terrorist Supporters* (Oct. 20, 2023), https://www.rubio.senate.gov/rubio-colleagues-urge-re-moval-of-hamas-and-terrorist-supporters/ [https://perma.cc/5W6V-KZGJ].

[25] Justin Baragona, *CAIR Calls on MSNBC to Ban ADL Boss Over 'Iranian Proxies' Remark*, DAILY BEAST (Apr. 25, 2024), https://www.thedailybeast.com/cair-calls-on-msnbc-to-ban-adl-boss-over-iranian-proxies-remark [https://perma.cc/JJ4C-T3YC].

[26] No Flights for Terrorists Act, S. 4274, 118th Cong. (2023). For more on the 'No Fly List' see *DHS Traveler Redress Inquiry Program*, U.S. DEP'T OF HOMELAND SEC., https://www.tsa.gov/travel/security-screening/travel-redress-program [perma.cc/B5UZ-GVJK].

[27] The campus-specific surveillance tools are typically framed as addressing antisemitism, which is a long-standing strategy for quashing pro-Palestine speech. *See* Austin Jefferson, *Hochul Announces Attempt to Address Hate Online Amid Rise in Antisemitism and Islamophobia*, CITY & STATE N.Y (Nov. 21, 2023), https://www.cityandstateny.com/politics/2023/11/hochul-announces-at-tempt-address-hate-online-amid-rise-antisemitism-and-islamophobia/392207/ [perma.cc/FYQ6-2SBU]; Monica Alba & Peter Alexander, *Biden Administration Unveils New Actions to Combat Antisemitism on College Campuses*, NBC NEWS (Oct. 30, 2023), https://www.nbcnews.com/poli-tics/white-house/biden-administration-actions-combat-antisemitism-college-campuses-rcna122712 [https://perma.cc/7AA5-TB7J]; *see also Presumptively Antisemitic: Islamophobic Tropes in the Palestine-Israel Discourse*, RUTGERS UNIV. L. SCH. CTR. FOR SEC., RACE & RTS. (Nov. 2023), https://csrr.rutgers.edu/wp-content/uploads/2023/11/csrr-presumptively-antisemitic-re-port.pdf [https://perma.cc/XTX4-LZPQ] (describing how accusations of antisemitism are used to quash pro-Palestine speech and activism). In addition to campus specific surveillance measures, in April 2024, a notorious federal mass surveillance law, Section 702, was reauthorized and ex-panded by Congress over outcry from many civil liberties experts and advocates. *See* Luke Gold-stein, *Pro-Israel Groups Pushed for Warrantless Spying on Protestors*, AMERICAN PROSPECT (Apr. 26, 2024), https://prospect.org/blogs-and-newsletters/tap/2024-04-26-pro-israel-groups-warrant-less-spying-protesters/ [perma.cc/4E45-RMPS]. The final push to reauthorize the law received sup-port from pro-Israel groups that highlighted Section 702's importance to addressing events occur-ring in the wake of October 7—raising concerns the law would or could be used against students and others protesting Israel's actions in Gaza. *Id.*

police against demonstrators at universities across the country.[28] While many have been understandably appalled by these responses,[29] these measures cannot be properly understood and critiqued without engaging with the political, social, and economic factors that lie at their heart.[30] In particular, if we want to effectively ameliorate and avoid these responses in the future, then the national security presumptions they are based on need to be challenged and upended. U.S. national security must, in other words, be radically transformed.

Part II of this Article provides a general overview of past efforts to reimagine national security within legal scholarship—with a focus on the post-9/11 period[31]—and broadly highlights their main shortcomings. Part III lays out the framework for a transformational national security agenda that radically breaks with the status quo, focusing on the seven foundational assumptions and trends described above. This Article ends with a short conclusion.

II.   REIMAGINING NATIONAL SECURITY SINCE 9/11 – STATE OF THE FIELD

The post-9/11 period has generated substantial legal scholarship[32] about national security, some of which has explicitly or implicitly focused on reimagining or rethinking the field. Much of *that* effort has primarily reflected two orientations: reforming national security law and practice and/or expanding national security's scope to respond to new challenges and threats.

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[28] Jake Offenhartz, Joseph B. Frederick, & Stefanie Dazio, *Police Clear Pro-Palestinian Protesters from Columbia University's Hamilton Hall*, AP (Apr. 30, 2024), https://apnews.com/article/israel-palestinian-campus-student-protests-war-8b0d3a0cedb17f5e892c6ca43bbdf628 [perma.cc/T3RC-3GMM]; *Police Make Arrests at Columbia Amid Wave of University Protests*, THE WASH. POST (Apr. 30, 2024), https://www.washingtonpost.com/education/2024/04/30/columbia-university-protests-palestine-news/ [perma.cc/QEN5-788L].

[29] Natasha Lennard, *I've Covered Violent Crackdowns on Protests for 15 Years. This Police Overreaction Was Unhinged*, INTERCEPT, May 1, 2024, https://theintercept.com/2024/05/01/nyc-gaza-college-protests-police-outside-agitators/ [perma.cc/QB5L-YM6V]; Baragona, *supra* note 25.

[30] Without understanding the political economy of national security one might think, for example, that national security-inflected reactions to student-led, pro-Palestine protests are distortions of U.S. national security when, instead, they are aligned with its foundational premises. While it is beyond the scope of this Article to unpack this in detail, at minimum, these responses are in accord with the capitalist, imperialist, and racist forces that have long shaped U.S. national security, discussed in Part III.A; the ginning up of fear and the racially-framed construction of "enemies," discussed in Part III.B; and the pervasive reach of national security into domestic civilian life, discussed in Part III.D. I explore some of these issues in a current work-in-progress examining the securitization of U.S. universities.

[31] While efforts to reimagine or rethink national security certainly are not limited to the post-9/11 period, Part II focuses only on this recent period in national security legal scholarship.

[32] Since national security legal scholarship is produced both by practitioners and academics and appears in a variety of venues—from law reviews to blogs—the sources cited in this section reflect that reality.

Starting with reform-minded scholarship—the first of these two strands of imaginative knowledge production[33]—this work has, among other things, railed against the so-called "exceptional" nature of national security and the government's willingness to eschew the rule of law.[34] It has criticized the rise of an unaccountable national security bureaucracy,[35] and otherwise underscored the erosion of separation of powers and resulting accumulation of expansive and unchecked Executive Branch authority.[36] It has raised alarm bells about the weakness or absence of civil liberties protections for those targeted by national security laws and programs,[37] as reflected in criminal laws that prohibit the material support of terrorism,[38] government mass surveillance programs,[39] and the designation of individuals and groups as terrorist threats,[40] among other U.S. national security policies. This literature has also decried the systematic racial and religious discrimination reflected in the government's national security work—discrimination that has largely been shouldered by black and brown communities.[41]

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[33] This Article uses the labels "reformist" and "expansionist" to describe certain kinds of national security scholarship. Those terms are not mean to define or categorize the scholars and practitioners presenting those views. Nor do those terms suggest anything about the quality of the scholarship or its normative worth. Indeed, many of the pieces canvassed in this section have made important contributions to the field.

[34] *E.g.*, Thomas Anthony Durkin, *The Zealotry of Terrorism*, in REIMAGINING THE NATIONAL SECURITY STATE: LIBERALISM ON THE BRINK 104 (Karen Greenberg ed. 2020); Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2, 11 (2021); Sudha Setty, *Obama's National Security Exceptionalism*, 19 CHI.-KENT L. REV. 91, 92–93 (2015); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2355 (2006).

[35] *E.g.*, Michael Glennon, *Who's Checking Whom*, in REIMAGINING THE NATIONAL SECURITY STATE: LIBERALISM ON THE BRINK 4–5 (Karen Greenberg ed. 2020).

[36] *E.g.*, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 181–88 (2010); FREDERICK SCHWARZ & AZIZ HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 1–3 (2008); Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319–22 (2006).

[37] *E.g.*, SUSAN HERMAN, TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY 15 (2011); DAVID COLE & JAMES DEMPSEY, TERRORISM AND THE CONSTITUTION 240 (2006); Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 WASHBURN L.J. 1, 2 (2005).

[38] *E.g.*, WADIE SAID, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS 72 (2015); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R-C.L. L. REV. 1, 8–11 (2003).

[39] *E.g.*, JENNIFER STISA GRANICK, AMERICAN SPIES: MODERN SURVEILLANCE, WHY YOU SHOULD CARE, AND WHAT TO DO ABOUT IT 217 (2017); LAURA DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE 159 (2016).

[40] *E.g.*, Laura Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 661 (2008); Sahar Aziz, Note, *The Law on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?*, 9 TEX. J. ON C.L. & C.R. 45, 60–61, 78–79 (2003).

[41] *E.g.*, DAVID COLE, ENEMY ALIEN: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 5 (2005); Sahar F. Aziz, *Reflections on Security, Race, and Rights Twenty-Years After 9/11*, 12 J. NAT'L SEC. L. & POL'Y 135, 136 (2021); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576–80 (2002).

The second major trend in scholarly efforts to rethink or reimagine national security—expansionist scholarship—focuses on the increasingly broad scope of national security. While some of these efforts have questioned whether certain issues should be considered national security concerns,[42] much of this literature has advocated for additional matters to be treated as national security issues. Occasionally, these proposals have implicitly addressed reformist critiques of the field. For example, one expansionist proposal urged the government to create a new federal domestic crime of terrorism for use against white nationalist organizations in the United States—a suggestion that aimed, in part, to bring equity to federal terrorism laws that disproportionately impact Arabs, Muslims, and Middle Easterners.[43]

Other expansionist efforts have highlighted new national security threats created by technological developments, like the risks to cybersecurity resulting from Big Data.[44] Others have called for particular corporate actors or transactions to be treated in national security terms.[45] Still others have focused on humanitarian issues. For example, some legal and closely-related policy scholarship has advocated for expanding U.S. national security or adopting certain national security approaches to more effectively address climate change and public health issues[46] like COVID-19.[47]

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[42] *See generally, e.g.,* Joshua L. Dratel, *Reimagining the National Security State: Illusions and Constraints, in* REIMAGINING THE NATIONAL SECURITY STATE: LIBERALISM ON THE BRINK (Karen Greenberg ed. 2020) (arguing that while climate change, income inequality, racism, and other matters should be treated as U.S. national security issues since they pose an existential threat to the United States, terrorism poses no such threat).

[43] *E.g.,* Mary B. McCord, *Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism,* LAWFARE (Aug. 21, 2017), https://www.lawfaremedia.org/article/criminal-law-should-treat-domestic-terrorism-moral-equivalent-international-terrorism [perma.cc/5NQE-S3TK].

[44] *E.g.,* McKay Smith & Garrett Mulrain, *Equi-Failure: The National Security Implications of the Equifax Hack and a Critical Proposal for Reform,* 9 J. NAT'L SEC. L. & POL'Y 549, 572–77 (2018); Abraham R. Wagner & Paul Finkelman, *Security, Privacy, and Technology Development: The Impact on National Security,* 2 TEX. A&M L. REV. 597, 611, 628–33 (2015).

[45] *See, e.g.,* Steven Joseph Arango, *Data Brokers: A Benefit or Peril to U.S. National Security,* 20 OHIO ST. TECH. L.J. 107, 133–35 (2023) (arguing that data brokers threaten national security by selling the personal data of Americans to foreign adversaries and should be subject to congressional regulation); Tom Lin, *Business Warfare,* 63 B.C. L. REV. 1, 4 (2022) (highlighting "the contemporary war on business, its growing importance to corporate and national affairs, and the pressing need for better, pragmatic approaches to understanding and addressing these rising threats to our economic stability, national security, and social welfare").

[46] *E.g.,* Bryan Frederick & Caitlin McCulloch, *Under the Weather – The National Security Risks from Climate Change Could Go Well Beyond What the U.S. Government Thinks,* JUST SEC. (Mar. 7, 2024), https://www.justsecurity.org/93111/under-the-weather-the-national-security-risks-from-climate-change-could-go-well-beyond-what-the-u-s-government-thinks/ [perma.cc/XQ7B-KDCW]; Jacob Hacker & Oona Hathaway, *Universal Health Care Is a National Security Issue,* JUST SEC. (Mar. 12, 2020), https://www.justsecurity.org/69130/universal-health-care-is-a-national-security-issue/ [perma.cc/GRG2-P6LD].

[47] *E.g.,* Oona Hathaway, *COVID-19 Shows How the U.S. Got National Security Wrong,* JUST

While it is hard to measure the success of individual scholarly proposals, reformist and expansionist arguments have borne some fruit and altered certain government practices, whether directly or indirectly. For example, reformist efforts oriented around bolstering civil rights have been vindicated by rights-based restrictions—albeit limited ones—that have subsequently been placed on some national security policies.[48] Expansionist arguments have arguably achieved even more success—perhaps because they generally align with the government's own priorities and tendencies toward national security expansionism. In recent years, for instance, the government has expanded national security to reach various economic and technological matters,[49] such as semiconductors,[50] private investment in certain technology startups,[51]

SEC. (Apr. 7, 2020), https://www.justsecurity.org/69563/covid-19-shows-how-the-u-s-got-national-security-wrong/ [perma.cc/XQ66-CYR8]. The U.S. government already broadly considers infectious disease and climate change to be national security problems, as discussed below. WHITE HOUSE, NATIONAL SECURITY STRATEGY 27–29 (2022) [hereinafter Biden National Security Strategy]; *see infra* note 141 and accompanying text. Some expansionist proposals have, nevertheless, suggested specific national security strategies to deal with those issues. *See, e.g.*, Mark Nevitt, *Is Climate Change a National Emergency?*, 55 U.C. DAVIS L. REV. 591, 593–95 (2021) (arguing that climate change should be declared a "national emergency" under the National Emergencies Act in order to address the climate crisis); Alan Rozenshtein, *Digital Disease Surveillance*, 70 AM. U. L. REV. 1511, 1517 (2021) (arguing that "there is a strong prima facie case for" government-mandated disease surveillance for pandemics like COVID-19).

   [48] *See, e.g.*, Maryam Jamshidi, *The Discriminatory Executive and the Rule of Law*, 92 U. COLO. L. REV. 77, 156–67 (2021) (describing various changes made to federal mass surveillance laws in response to civil liberties concerns); Jenny Martinez, *Process and Substance in the War on Terror*, 108 COLUM. L. REV. 1013, 1028–29 (2008) (describing various post-9/11 Supreme Court decisions which recognized that War on Terror detainees at Guantanamo Bay enjoy certain procedural rights, despite the U.S. government's views and practices to the contrary). The Obama administration's approach to the national security sector underscores the limited inroads civil liberties reforms have made in the field. Despite its avowed commitment to incorporating rights protections into U.S. national security practices, the Obama administration often fell very short of the mark and, instead, reproduced and even exacerbated the previous administration's civil liberties failures. *E.g.*, HERMAN, *supra* note 37, at 6–9; Setty, *supra* note 34, at 95–108.

   [49] *See, e.g.*, Kristen Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549, 551 (2023) (noting that the U.S. government has recently expanded its "national security-related review and regulation of cross-border investments to allow government intervention in more transactions than ever before"). In some sense, this is not an expansion of national security. As noted below, U.S. national security has been substantially guided by economic interests from the very beginning of the U.S. republic. *See, infra*, Part III.A. That being said, U.S. national security policies are increasingly targeting discrete economic and technological areas that were not previously subject to national security treatment and are, as such, in spiritual accord with expansionist proposals.

   [50] *See* Dep't of Commerce, *Biden-Harris Administration Announces Final National Security Guardrails for CHIPS for America Incentives Program* (Sept. 12, 2023), https://www.commerce.gov/news/press-releases/2023/09/biden-harris-administration-announces-final-national-security [perma.cc/77QT-DKQC] (classifying certain semiconductors as critical to U.S. national security).

   [51] Through a new office in the U.S. Department of Defense, known as the Office of Strategic Capital, the government is reportedly developing strategies to attract private investment to so-called critical national security technologies. *Office of Strategic Capital*, DEP'T DEFENSE, https://www.cto.mil/osc/ [perma.cc/E22Z-J2X8]; Ken Klippenstein & Daniel Boguslaw, *Pentagon Tries to Cast Bank Run as National Security Threat*, INTERCEPT (Apr. 3, 2023),

and the sale of bulk sensitive personal data,[52] which may gratify schol-
ars who have been pushing for greater national security attention to
some of these areas.

Notwithstanding these successes, reformist and expansionist legal
scholarship has largely left the foundational myths and premises of
U.S. national security undisturbed. While both agendas start from a
particular baseline—namely, the state of national security as it cur-
rently exists—they seldom question the fundamental assumptions or
orientation of U.S. national security or explore the broader historical,
political, social, and economic trends embedded within the field.[53]

Certainly, reformist and expansionist proposals are under no obli-
gation to explore these issues. In failing to do so, however, their sugges-
tions, prescriptions, and diagnoses for reimagining or rethinking na-
tional security risk being limited in scope and effect. Without
addressing the political economy of national security, those who seek to
"reform" or "fix" perceived problems with U.S. national security—in-
cluding, for example, by ameliorating unchecked Executive power in the
field[54]—may simply legitimize and reify the very practices they seek to
alter.[55] For their part, expansionist efforts may inadvertently under-
mine their own goals—for example, to meaningfully and effectively ad-
dress climate change—by failing to appreciate the political, economic,

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https://theintercept.com/2023/04/03/silicon-valley-bank-bailout-pentagon/#:~:text=So%
20when%20Silicon%20Valley%20Bank,reporting%20by%20Defense%20One%20revealed
[perma.cc/7UBL-AU82].

[52] Recently, the Biden administration issued an executive order that seeks to create a regula-
tory framework that would restrict or otherwise prohibit U.S. persons from selling bulk sensitive
personal data to "countries of concern," among other things. White House, *Executive Order on Pre-
venting Access to Americans' Bulk Sensitive Personal Data and United States-Government Data by
Countries of Concern* (Feb. 28, 2024), https://www.whitehouse.gov/briefing-room/presidential-ac-
tions/2024/02/28/executive-order-on-preventing-access-to-americans-bulk-sensitive-personal-
data-and-united-states-government-related-data-by-countries-of-concern/ [perma.cc/LYZ9-F78K].

[53] This is not to say that reformist and expansionist approaches always focus on the law ex-
clusively and do not ever consider the non-legal factors informing U.S. national security. Indeed,
some of these approaches critique and question the field's basic orientation in ways that raise
political economy considerations. *See, e.g.*, Dratel, *supra* note 42, at 113–14 (arguing that U.S.
national security prioritizes the wrong threats, like terrorism, partly because of the influence of
private government contractors). That being said, these arguments often focus on very discrete
slices of national security—typically, terrorism and war—and do not explore the national security
state's broader political economy.

[54] *See supra* note 36 and accompanying text for a brief discussion of the issue of unchecked
and expansive Executive authority in U.S. national security.

[55] *See* Rana, *Who Decides on Security?, supra* note 4, at 1421 (arguing that, despite the efforts
of national security reformists, "presidential and military prerogatives continue to expand even
when the courts or Congress intervene" and that "the ultimate result [of these reformist ef-
forts] . . . has been to entrench further the system of discretion and centralization"). *See also* Aziz
Rana, *National Security Law and the Originalist Myth, in* RACE AND NATIONAL SECURITY 57
(Matiangai Sirleaf ed. 2023) (noting that reformist efforts that fail to grapple with the racial and
imperialist origins of national security "offer a limited account of the reforms necessary for genuine
anti-imperial change in the present").

and social forces that national security may bring to bear on those objectives.[56]

In addition to informing reformist and expansionist reimaginings of national security, engagement with the political economy of national security is both necessary and vital to radically transforming the field. These radical efforts stand on their own merits. While reformist and expansionist approaches have dominated legal scholarship reimagining national security, radical approaches challenging the political, economic, and social forces shaping U.S. national security are just as important to rethinking legal scholarship on the field as they have been to reimagining other areas of law.[57] The next section examines some of the foundational aspects of national security's political economy and demonstrates how engagement with those issues can contribute to a radical reimagining of the discipline through legal scholarship.

III. A TRANSFORMATIONAL NATIONAL SECURITY AGENDA

This section explores seven presumptions and trends at the heart of the U.S. national security state that ought to inform radical (left) efforts to transform the field through legal scholarship: (1) the political, social, and economic factors that have shaped U.S. national security practices throughout history, including deeply ingrained colonialist, imperialist, capitalist, and racist forces; (2) the political, social, and economic factors influencing how specific national security threats are identified and framed, including the pervasive role of fear and tendency to create enemies within U.S. national security practice; (3) the private persons participating in and enforcing U.S. national security and the implications of that participation; (4) the rule of law's limits in protecting against corrosive forms of national security power; (5) the U.S. national security state's extensive regulatory reach into the daily lives of persons both abroad and at home; (6) the ways in which the relationship between the U.S. government and national security academia restricts the horizon for rethinking national security; and (7) the critical role of social movements in radically reimagining national security as a field.

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[56] *See* Jamshidi, *Climate Change Is a Human Security, Not a National Security, Issue, supra* note 17, at 36–37 (arguing that treating climate change as a national security issue may privilege military-oriented responses that fail to tackle the underlying causes of climate change).

[57] For example, engaging with the political economy of police violence has mid-wived transformative and radial approaches to legal scholarship on policing, including abolitionist scholarship. *See, e.g.,* Amna Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020) (focusing on structuralist accounts of police violence—as being "routine . . . legal, tak[ing] many shapes . . . target[ing] people based on their race and class . . . [and] reflect[ing] and reproduc[ing] our political, economic, and social order"—in order to develop an abolitionist approach to legal scholarship on policing). There is no legitimate or sensible reason why national security should be inoculated from similar approaches.

In exploring these issues, this section takes a broad approach that does not fully capture all the nuances involved in the various issues it addresses. Indeed, many of the topics discussed here have been examined in book-length form by multiple scholars. This agenda cannot provide the same level of treatment, which is impossible to do in the space of one short, word-limited article. Nevertheless, the goal of this section is to outline the general arguments and core ideas behind each of the seven presumptions and trends it identifies, and to highlight how engaging with these issues can contribute to radically reimagining national security through legal scholarship.

A. The Political, Social, and Economic Factors Shaping U.S. National Security, Including Colonialist, Imperialist, Capitalist, and Racist Forces.

The interests driving national security are central not only to its content but also to its credibility. It is no surprise, then, that establishment discourses regarding the nature of and motives behind U.S. national security are fundamentally aimed at shoring up that legitimacy.[58] These prevailing understandings of U.S. national security implicitly depict the field as reasonable, practical, and even morally upright. According to these narratives, while the United States is certainly a global hegemon competing with other states, it has accidentally or unwillingly found itself in the role of preeminent world power.[59] Though mostly taking a defensive or preventative posture towards continuous and never-ending threats,[60] the U.S. national security apparatus works preemptively where necessary to uphold core American interests and promote the public good—whether that means ensuring the safety of the United States and its citizens, spreading American democracy and economic freedom, or punishing evildoers.[61] On this view,

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[58] ANDREW BACEVICH, AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. DIPLOMACY 9 (2002).

[59] *See id.* at 8 (noting that "in practice, the myth of the 'reluctant superpower'—Americans asserting themselves only under duress and then always for the noblest purposes—reigns today as the master narrative explaining (and justifying) the nation's exercise of global power").

[60] *Id.* at 7–8. The notion of reacting to or defending against continuous, never-ending threats is at the heart of prevailing conceptions of U.S. national security, as reflected in numerous presidential national security statements. *E.g.*, Biden National Security Strategy, *supra* note 47; White House, Trump Administration, *U.S. National Security Strategy* (2017), https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf [perma.cc/QQY2-LN8N]; White House, Obama Administration, *U.S. National Security Strategy* (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf [perma.cc/NC5V-F77N].

[61] *See, e.g.*, STEPHEN WALT, THE HELL OF GOOD INTENTIONS: AMERICA'S FOREIGN POLICY ELITE AND THE DECLINE OF U.S. PRIMACY 14 (2018) (describing and critiquing the tendency of most post-Cold War, U.S. presidential administrations to use America's global power to "defend and spread the traditional liberal principles of individual freedom, democratic governance, and a

without a robust and active U.S. national security policy, the world would be worse off.[62] While establishment views on U.S. national security can be self-critical, as they have been in the past,[63] they remain steeped in "American exceptionalism"—the belief that the United States stands apart from and above the rest of the world because of its purported dedication to liberty, equality, and freedom for all.[64]

There is an alternative understanding of U.S. national security that challenges these mainstream narratives and undermines their legitimating effects on the field. While the traditional view largely rejects any role for imperialist imperatives,[65] this alternative history describes U.S. national security as guided primarily by aggressive imperialist ambitions, driven by capitalist economic interests, and heavily tinged with racism.[66] On this view, U.S. national security has been intentionally shaped, at least in part, by imperialist, expansionist, capitalist, and racist objectives since the beginning of the American republic.[67]

As this alternative history demonstrates, territorial conquest was an important part of the U.S. imperial project until the western frontier closed in the 1890s.[68] Since then, U.S. imperial expansionism has

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market-based economy"); White House, *U.S. National Security Strategy* (2002), https://georgew-bush-whitehouse.archives.gov/nsc/nssall.html [perma.cc/Q2P5-SXS7] [hereinafter "Bush 2002 National Security Strategy"] ("We will defend the peace by fighting terrorists and tyrants. We will preserve the peace by building good relations among the great powers. We will extend the peace by encouraging free and open societies on every continent.").

[62] *E.g.*, Samuel Huntington, *Why International Primacy Matters*, 17 INT'L SEC. 68, 83 (1993); John M. Owen, IV, *Transnational Liberalism and U.S. Primacy*, 26 INT'L SEC. 117, 150 (2001–2002).

[63] Aziz Rana, *Left Internationalism in the Heart of Empire*, DISSENT (May 23, 2022), https://www.dissentmagazine.org/online_articles/left-internationalism-in-the-heart-of-empire/ [https://perma.cc/32UA-2368]; Rana, *The Left's Missing Foreign Policy*, *supra* note 14.

[64] WALT, *supra* note 61, at 14; WILLIAMS, *supra* note 14 at 20. *See generally* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2010) (describing three hundred years of U.S. foreign policy as guided by a belief in America's unique ability to bring freedom and democracy to the world). As historian William Appleman Williams argued, this notion of U.S. exceptionalism is deeply rooted in an American-version of liberalism that emerged in the nineteenth century, but took on greater force in the early twentieth century, and that understood U.S. expansion as good not only for the United States but also for the entire world. WILLIAMS, *supra* note 14, at 92–94.

[65] WILLIAMS, *supra* note 14, at 20. *See* Owen, *Transnational Liberalism and U.S. Primacy*, *supra* note 62, at 151 (arguing that the United States uses its global power "not to subjugate" but rather "to establish and uphold order via institutions that yield increasing benefits over time" and that, "[i]f the United States is an imperial power, the world may never have known such a benevolent empire").

[66] These imperialist ambitions have been justified, in part, by the same ideology of American exceptionalism found in establishment discourses around U.S. national security and foreign policy. WILLIAMS, *supra* note 14, at 60–61.

[67] *See, e.g.*, BACEVICH, *supra* note 58, at 30 (observing that the American empire was not an unintended accident but rather "emerged out of particular worldview and reflected a coherent strategy . . . "). While the term "national security" emerged in the mid-twentieth century, U.S. domestic and foreign policies have long been guided by notions of security. Laura Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1577–79 (2011).

[68] BACEVICH, *supra* note 58, at 25; WILLIAMS, *supra* note 14, at 21–23.

continued largely through the political and economic domination of weaker states and peoples.[69] Over the last century or so, U.S. imperialist objectives have extended the country's national security interests into almost every corner of the globe, with the effect—if not the goal—of subjugating racialized peoples and nations. As Aziz Rana, a legal scholar and prominent contemporary proponent of this view, puts it, "American political identity [has long been] intricately tied to assumptions about imperial power and the need for external control over indigenous and dependent communities."[70]

Whether implemented in territorial or non-territorial ways, the United States has pursued its imperial, expansionist aims, in part, to address various domestic political, economic, and social issues. In the early days of the republic, expansionism was a way of securing economic independence and self-rule for Anglo-European Protestant settlers[71] while also reducing factionalism[72] and undercutting democratic organizing.[73] More recently, it has served as a way of avoiding a "true reckoning with [America's] social problems, such as economic inequality, racism, crime and punishment, and violence."[74]

Admittedly, this alternative history does not explain every aspect of U.S. national security nor account for all the factors that have shaped its evolution and trajectory. The United States has, for example, arguably been the innocent or passive victim of internal and external threats at certain historical moments,[75] and even "anti-imperialist in some

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[69] *See* ELLEN MEIKSINS WOOD, EMPIRE OF CAPITAL 129–30 (2005) (arguing that since World War II the United States has administered an economic empire "sustained by political and military hegemony" over other states); WILLIAMS, *supra* note 14, at 55–59 (describing U.S. foreign policy at the turn of the twentieth century as aimed at creating an "informal empire," which uses U.S. economic and political power to dominate weaker countries, and arguing that this brand of empire became the "central feature of American foreign policy in the twentieth century"). While the United States has also engaged in territorial conquest since the closing of the U.S. continental frontier—as described below—this territorial imperialism has been the exception rather than the norm, partly because of racist fears about incorporating large non-white populations into the United States. *See infra* notes 94, 102, and accompanying text.

[70] RANA, *supra* note 64, at 13–14; *see also* NIKIL PAL SINGH, RACE AND AMERICA'S LONG WAR xii (2017) ("The frontier wars, the wars of the early U.S. empire, and the twentieth century's world wars all illuminated affinities between war making and race making. . ."); Matiangai Sirleaf, *Confronting the Color Line in National Security*, *in* RACE AND NATIONAL SECURITY 9 (Matiangai Sirleaf ed. 2023) ("[O]ne of the persistent ways that race manifests in national security law is in the determination of who or what counts as a 'threat.'").

[71] Rana, *National Security Law and the Originalist Myth*, *supra* note 55, at 60–61.

[72] GREG GRANDIN, THE END OF THE MYTH: FROM THE FRONTIER TO THE BORDER WALL IN THE MIND OF AMERICA 45 (2019).

[73] *Id.* at 29.

[74] *Id.* at 4–5.

[75] For some, World War II is probably one of the clearest examples of this. BACEVICH, *supra* note 58, at 87. Others, however, disagree and describe U.S. entry into that war as primarily driven by the perennial American interest in imperial expansionism. WILLIAMS, *supra* note 14, at 185–200.

respects at certain times."[76] Nevertheless, what this history *does* demonstrate is that war, imperial expansion, and subjugation of "outsiders" has remained a constant and important thread in U.S. national security from the founding of the country through to the contemporary period.[77]

Grappling with this alternative history—which few legal scholars have done[78]—necessarily destabilizes core tenets of U.S. national security in ways that can radically transform how scholars understand the discipline's essential meaning and goals, as well as legal scholarship's relationship and responsibilities to the field. For instance, this alternative history contradicts one of the most enduring mainstream narratives on U.S. national security and foreign policy—namely, that the United States is *not* and *has never been* a country that has aggressively pursued imperial power.[79] In what ways should legal scholarship on national security grapple with the United States' enduring imperial ambitions? Alternatively, what are the consequences for the discipline if U.S. national security's tendency toward imperialist expansionism and subjugation of racialized "outsiders" remains outside the purview of legal scholarship? What should legal scholarship that *does* systematically engage with these issues demand and propose as "solutions" to these tendencies? These are just some of the ways in which this alternative history might prompt a radical reimagining of national security through legal scholarship.

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[76] WILLIAMS, *supra* note 14, at 21. While beyond the scope of this Article, there are other contradictions and tensions in how the United States has pursued its foreign and national security policies. These include a so-called "humanitarian" impulse that has "prompted [the United States] to improve the lot of less fortunate peoples." *Id.* at 88. The United States has often pursued that goal by trying to "mak[e] . . . [those people] more like Americans" and has ultimately undermined their well-being by privileging the "expansion . . . of markets for American exports, and control of raw materials for American industry" over their self-determination. *Id.*

[77] *See, e.g.*, BACEVICH, *supra* note 58, at 88 (noting that "no single factor can account for every detail of U.S. policy abroad . . . [b]ut in the long view, and to a greater extent than any other factor, the pursuit of [economic] openness [and imperial expansionism] defines the essential azimuth of U.S. policy, a course set more than a century ago and followed ever since").

[78] *See, e.g.*, James Thuo Gathii, *Beyond Color-Blind National Security Law*, *in* RACE AND NATIONAL SECURITY 29 (Matiangai Sirleaf ed. 2023) ("There are very few examples of policy-related work or scholarship in the national security area that are explicitly grounded in exploring its colonial underpinnings.").

[79] Mary Ann Heiss, *Bernath Lecture: The Evolution of the Imperial Idea and U.S. National Identity*, 26 DIPLOMATIC HIST. 511, 511–12 (2002). This is not to say that government insiders have not viewed the United States as an imperial power. After the end of the Cold War, scholarly experts with significant government cache, like Arthur Schlesinger, Jr., began to describe the United States as an empire, a view that became more prevalent after 9/11. BACEVICH, *supra* note 58, at 30; Niall Ferguson, *'We're an Empire Now': The United States Between Imperial Denial and Premature Decolonization*, 16 MACALESTER INT'L 3 (2005). These views have, however, been met with much resistance and remain excluded from official government policy and discourse. BACEVICH, *supra* note 58, at 30; GREG GRANDIN, EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE MAKING OF AN IMPERIAL REPUBLIC 4–5 (2021); Ferguson, *supra* note 79, at 4.

The rest of this sub-section situates this alternative history of U.S. national security within four historical periods,[80] beginning with the founding of the U.S. republic and continuing through to the contemporary moment.[81]

1. The first period of U.S. national security

The first period of U.S. national security, which ran from 1776 to 1898, focused on protecting and shoring up the union of states that constituted the American republic.[82] These efforts involved fortifying the United States' status as a sovereign nation and fueling domestic economic growth—all of which required enlarging U.S. territory.[83] This expansionist project was also viewed as central to realizing American notions of democratic freedom, which were intimately connected with private property ownership and individual economic prosperity.[84]

Through treaties with other imperial powers and native tribes, as well as military aggression, the U.S. government took title to millions of acres of indigenous land within the North American continent during this period.[85] This colonial trans-continental agenda was justified, in part, by the chauvinistic and racist view that Americans had a responsibility to civilize the "semi-barbarous people"[86] in their midst.[87] Those people who were subjugated in the name of national security included "native, slaves and Catholics" who were seen by Protestant colonists as "united to destroy their freedom."[88]

During this first period of national security, the government made some attempts to extend its expansionist interests beyond the North

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[80] As one historian has observed, translating broad swathes of history into shorter periods is valuable since it allows for patterns and trends to be identified across time, even if it also risks oversimplifications and omissions. Heiss, *supra* note 79, at 514.

[81] The historical periodization of national security described here is based on Laura Donohue's work in *The Limits of National Security*, *supra* note 67. This presentation deviates from hers, however, in emphasizing the enduring role war, imperialist expansion, and subjugation of outsiders have played throughout all four periods of national security. In particular, my retelling of national security's historical evolution incorporates crucial insights from scholarly work steeped in the long arc of U.S. imperialism, including Aziz Rana's TWO FACES OF AMERICAN FREEDOM, *supra* note 64, Greg Grandin's THE END OF THE MYTH, *supra* note 72, William Appleman Williams' THE TRAGEDY OF AMERICAN DIPLOMACY, *supra* note 14, and Ellen Meiksins Wood's EMPIRE OF CAPITAL, *supra* note 69.

[82] Donohue, *The Limits of National Security*, *supra* note 67, at 1587–88.

[83] *Id.*

[84] GRANDIN, THE END OF THE MYTH, *supra* note 72, at 40–41; RANA, *supra* note 64, at 12; WILLIAMS, *supra* note 14, at 22–23.

[85] Donohue, *The Limits of National Security*, *supra* note 67, at 1595–96.

[86] WILLIAMS, *supra* note 14, at 60.

[87] DEEPA KUMAR, ISLAMOPHOBIA AND THE POLITICS OF EMPIRE: 20 YEARS AFTER 9/11 48 (2020).

[88] RANA, *supra* note 64, at 96.

American continent, as famously articulated in the Monroe Doctrine. Established by President James Monroe in 1823, the eponymous government policy was a warning to Europe that the United States would consider its involvement in the Western hemisphere as a direct threat to U.S. interests.[89] As historian Greg Grandin has argued, the United States would ultimately use the Monroe Doctrine to "justif[y], in the name of antinterventionism, one intervention after another [in Latin America and the Caribbean]."[90]

2. The second period of U.S. national security

The second period of U.S. national security began in 1898, with the Spanish American War, and continued until 1930, with the start of the Great Depression.[91] While some have described this period as an isolationist one for U.S. foreign and national security policy, the U.S. government in fact pursued an agenda of "formative international engagement" during this time, in which it actively sought to shape the international arena.[92]

This global engagement included seizing foreign territory. Building on ambitions originating in the first period,[93] the United States began to assert itself as a military power capable and interested in controlling lands outside the North American continent. The Spanish American War was the decisive turning point in this regard. During this armed conflict—which had been preemptively and proactively encouraged by certain members of the U.S. government and public—the United States fought and overcame Spain to seize and occupy various Spanish colonial outposts, including Puerto Rico, Cuba, and the Philippines.[94]

Ultimately, America's experiment with holding substantial territory outside the North American continent proved too complicated to pursue long-term.[95] Rather than abandoning imperialism, however, the

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[89]   Donohue, *The Limits of National Security*, *supra* note 67, at 1600.

[90]   GRANDIN, EMPIRE'S WORKSHOP, *supra* note 79, at 4. In line with the Monroe Doctrine, U.S. war-making outside the continental United States was aimed primarily at Latin America and the Caribbean during the first period of national security. *Id.* at 2–3.

[91]   Donohue, *The Limits of National Security*, *supra* note 67, at 1630.

[92]   *Id.* at 1648–49. *See* WILLIAMS, *supra* note 14, at 110–12 (rejecting the view that the interwar period, between World Wars I and II, was dominated by isolationist U.S. policies and describing it, instead, as involving continued U.S. overseas political and economic expansionism).

[93]   Donohue, *The Limits of National Security*, *supra* note 67, at 1618–19.

[94]   DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 61–72 (2019).

[95]   The decision not to continue accumulating foreign territorial holdings had to do, at least partly, with fears regarding how that territorial expansion would impact the United States' racial makeup. RANA, *supra* note 64, at 281–84; *see infra* note 102 and accompanying text. That being said, the United States ultimately held onto many of the extra-continental holdings it accumulated in the nineteenth and early twentieth centuries, incorporating a few of those territories—

U.S. government replaced one technology of imperial expansion with another, turning to its substantial military and economic might to dominate other countries.[96] As part of this non-territorial imperialism—which continues through to the contemporary period—U.S. national security policy focused on opening foreign markets to American capital and goods, something which the United States had started doing during the first period.[97] In addition to its global capitalist ambitions, the United States took steps to become an internationally dominant political power during the second period. Indeed, when the U.S. government finally decided to enter World War I in 1917, it did so primarily to ensure that it would have a central role in shaping the post-war global order.[98]

As with the first period, America's expansionist ambitions were aimed, in part, at protecting American democracy and economic welfare, particularly from the threat of domestic economic depression.[99] Expansionism was also an important strategy for both maintaining and deflecting American racism and racial subjugation, serving as a kind of safety valve for diffusing these domestic tensions.[100]

U.S. national security's focus on racial "outsiders" continued during the second period of national security. Immigrants drew particular attention in this regard. While rooted in trends that started in the first period (like so many other practices from this period), immigrants—particularly those from Asia—were systematically cast as economic and racialized national security threats with greater frequency during the second period.[101] In deciding not to extend statehood to foreign colonial

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specifically Hawaii and Alaska—as states, while maintaining others as non-incorporated territories. IMMERWAHR *supra* note 94, at 11.

[96] RANA, *supra* note 64, at 283–84; *see* Leo Panitch & Sam Gindin, *Global Capitalism and American Empire*, SOCIALIST REG. 11–12 (2004) (describing policies of informal non-territorial empire pursued by the U.S. government in the late nineteenth and early twentieth centuries).

[97] RANA, *supra* note 64, at 218; WILLIAMS, *supra* note 14, 27–57. As part of these efforts, the United States sought to "cast the economy and politics of the poorer, weaker, underdeveloped countries in a pro-American mold." *Id.*

[98] Donohue, *The Limits of National Security*, *supra* note 67, at 1643–44.

[99] WILLIAMS, *supra note* 14, at 38, 86–87, 121.

[100] *See* GRANDIN, THE END OF THE MYTH, *supra* note 72, at 138–47 (describing how America's expansionist wars during the second period of national security turned U.S. racism onto the foreign peoples conquered by the American military, facilitated the resurgence of the KKK, and provided Black Americans with a means for social mobilization as long as they were "willing to fight for the nation").

[101] *See* RANA, *supra* note 64, at 189–91 (describing popular and government backlash during the first period of national security—in the mid- to late-nineteenth century—against Asian, and especially Chinese, immigrants, who were depicted as threats to white economic power and incapable of assimilating into white American identity). The Supreme Court's decision in the *Chinese Exclusion Case* (130 U.S. 581 (1889))—which also came towards the end of the first period of national security and upheld a federal law excluding certain Chinese nationals from the United States on racial and economic grounds—was the first judicial decision to ground federal authority to regulate immigration in national security, where it has remained since. Matthew Lindsay,

holdings won from the Spanish during this period, the U.S. government adopted another kind of security logic towards racialized "outsiders." U.S. officials and others refused to formally incorporate these new colonial territories as states, fearing that their substantially non-white populations would threaten the United States' demographic status as a white nation.[102]

The second period of U.S. national security is particularly noteworthy for marking the beginning of U.S. efforts to frame internal national security threats in ways that go beyond the United States' long-standing fixation with racialized "outsiders." This new orientation was particularly directed at those who threatened the prevailing capitalist economic order, like labor organizers,[103] anti-war activists, communists, and socialists.[104] U.S. national security would continue to concentrate on these and other kinds of ideological hazards to U.S. national security interests, whether originating domestically or abroad, going-forward.

3.   The third period of U.S. national security

The third period of national security began in 1930 and ended in 1989 with the termination of the Cold War.[105] During this period, national security became the overriding concern of the U.S. government.[106] World War II and the Great Depression were central to triggering this re-orientation.[107] Both events gave those who had long wanted the United States to prioritize national security the opportunity to institutionalize their goals.[108] The modern U.S. national security state, which emerged shortly after the war's end,[109] was the realization of this vision of a federal government primarily oriented around national security concerns.[110]

Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power, 45 HARV. C.R.-C.L. L. REV. 1, 40–43, 46–47 (2010). During the late nineteenth century and much of the twentieth century, federal immigration laws, which were authorized by a now pervasive national security rationale, continuously and explicitly discriminated against non-Anglo, especially Asian, immigrants for economic and racial reasons. Rana, *National Security Law and the Originalist Myth*, *supra* note 55, at 237–39; Kevin R. Johnson, *Systemic Racism in U.S. Immigration Law*, 97 IND. L.J. 1455, 1460–62, 1471 (2022).

[102]   IMMERWAHR *supra* note 94, at 77–87.

[103]   RANA, *supra* note 64, at 220–26; *see* Donohue, *The Limits of National Security*, *supra* note 67, at 1650 (noting that during the second period of national security the U.S. government responded to labor resistance by calling on the U.S. military to respond to strikes).

[104]   GRANDIN, THE END OF THE MYTH, *supra* note 72, at 129–30; Donohue, *The Limits of National Security*, *supra* note 67, at 1656–57.

[105]   Donohue, *The Limits of National Security*, *supra* note 67, at 1657.

[106]   *Id.*

[107]   *Id.* at 1650–55, 1658–60, 1666–69.

[108]   *Id.* at 1666–67.

[109]   David Jablonsky, *The State of the National Security State*, 32 PARAMETERS 4 (2002).

[110]   Rana, *Who Decides on Security?*, *supra* note 4, at 1458, 1468.

With Europe in tatters and Germany and Japan roundly defeated, the United States assumed an unparalleled position as a global superpower after World War II, counterbalanced only by the Soviet Union. Building on the second period, the United States used its new position to decisively cement its ambitions abroad in ways that continued to rely on political, military, and economic forms of imperialism rather than the acquisition of territory.[111] While containing the Soviet Union and communism was a significant part of its agenda during this period, the U.S. national security state was just as, if not more, concerned with "open[ing] up the world, politically, culturally, and, *above all*, economically. . ." in ways conducive to U.S. interests.[112] Again, domestic factors and concerns propelled this expansionism, including a desire to secure foreign markets for investment by U.S. persons[113] as well as for the export of U.S.-made goods,[114] to ensure steady access to global resources,[115] and to keep domestic racial and class conflicts in check.[116]

To achieve these goals, the U.S. national security state formally adopted the size and complexity that it is currently known for. In particular, the Executive Branch took on an enormous set of national security authorities, responsibilities, and prerogatives—institutionalized through new or reorganized national security institutions and other congressional delegations of power.[117] Armed with these new capabilities, the United States "substantial[ly] increase[d] . . . [its] military expenditures . . . increase[d] . . . [its] economic assistance for other countries, intensif[ied] . . . political and psychological warfare . . . and expan[ded] . . . [its] intelligence activities."[118] It also became the security purveyor for many of its allies.[119] In assuming this particular

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[111] WOOD, *supra* note 69, at 128–30.

[112] BACEVICH, *supra* note 58, at 4 (emphasis added).

[113] GRANDIN, THE END OF THE MYTH, *supra* note 72, at 187.

[114] *Id.* at 195–96.

[115] *Id.* at 196.

[116] *Id.* at 209, 228–29. The U.S. government attempted to suppress racial and class conflicts primarily through war and the expansion of the U.S. military, which came "to serve as the country's most effective venue for class and race mobility and distributor of social services, such as education and welfare." *Id.* As historian Greg Grandin argues, the military's ability to keep these domestic tensions in check was substantially eroded by the Vietnam War, though the U.S. government continued to use war—albeit largely unsuccessfully—as a safety valve for enduring racial and ideological conflicts inside the United States even after Vietnam. *Id.* at 211–12, 228–29.

[117] Donohue, *The Limits of National Security*, *supra* note 67, at 1672–80, 1703.

[118] *Id.* at 1687.

[119] Benjamin Schwarz, *The Arcana of Empire and Dilemma of American National Security*, 101 SALMAGUNDI 182, 190 (1994). As noted by political scientist Leo Panitch and economist Sam Gindin, after World War II, the United States created an integrated political and economic system with other capitalist powers that it primarily controlled and directed. Panitch & Gindin, *supra* note 96, at 13. This was achieved, in part, through military alliances, like NATO, as well as through the creation of multilateral financial institutions, like the International Monetary Fund and World Trade Organization, all of which were dominated by the United States. *Id.* at 15, 22.

responsibility, the United States reserved to itself the exclusive right to unilaterally intervene in other countries, whether directly or through proxies.[120] It exercised this power with particular vigor in the Global South—consisting largely of African, Asian, and Latin American states—in ways that often reinforced global inequalities.[121]

While projecting power abroad, the United States simultaneously institutionalized and routinized its domestic security architecture, with race and ideology continuing to play an important threat-identifying role. During World War II, the U.S. government used its domestic national security powers not only to root out saboteurs and spies,[122] but also to detain over a hundred thousand persons of Japanese origin based on their race—a majority of whom were U.S. citizens[123]—and to target individuals and groups with "disparate political views."[124] Following the war, the U.S. government's substantially expanded domestic security architecture was directed against ideological and racial "enemies" to an even greater degree—ranging from communists[125] to opponents of the Vietnam War to Black civil rights and nationalist leaders, among others.[126]

4. The fourth period of U.S. national security

The fourth epoch of U.S. national security began in 1989 and continues through to the current period. As Aziz Rana argues, the moment we are now in is one in which there is "an entrenched commitment to expanding American global authority . . ." and where "[t]he extension of American power and the increased economic and political hierarchies of domestic practices have emerged in tandem . . ."[127]

As during earlier periods, America's security has been closely connected to economic expansionism abroad, which remains focused on ensuring that the international arena, including the global community of states, is aligned with American norms, values, and interests.[128] In

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[120] *See* MAHMOOD MAMDANI, GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR 179 (2003) (noting that, since the Vietnam War, the U.S. government has increasingly relied on proxies to wage its wars).

[121] Panitch & Gindin, *supra* note 96, at 16–17.

[122] Donohue, *The Limits of National Security, supra* note 67, at 1660.

[123] Huong Vo, Note, *Us Against Them: The Path to National Security Is Paved by Racism*, 50 DRAKE L. REV. 661, 665, 672–73 (2002).

[124] Donohue, *The Limits of National Security, supra* note 67, 1664. These "disparate political views" included ideologies like communism. *Id.*

[125] *Id.* at 1689–91.

[126] *E.g.*, Deepa Kumar, *Terrorcraft: Empire and the Making of the Racialised Terrorist Threat*, 62 RACE & CLASS 34, 39–40, 44 (2020); Donohue, *The Limits of National Security, supra* note 67, at 1691.

[127] RANA, *supra* note 64, at 326–27.

[128] BACEVICH, *supra* note 58, at 77, 87; Panitch & Gindin, *supra* note 96, at 23–25.

particular, the United States has continued to use imperial expansionism to address domestic issues, including adjusting to declining economic growth in the country by changing the rules of the global economic game in ways that promote greater financial speculation abroad.[129] This process has involved opening up foreign economies to international capital while protecting the U.S. economy from the very same policies.[130]

Military power has remained central to the U.S. imperialist economic project during the fourth period. Historian Ellen Meiksins Wood described this contemporary relationship as the "boundless domination of a global economy" that "requires [U.S.] military action without end, in purpose or time."[131] As Wood explained, "[i]t is this endless *possibility* of war that imperial capital needs to sustain its hegemony over the global system of multiple states."[132] In maintaining this "endless" possibility of war, the United States has continued to draw from the same military strategies it adopted after World War II. In particular, it has remained *the* "global pacifier," providing security to virtually all other important global powers in order to bolster the hegemonic authority that is vital to sustaining U.S. economic interests and thwarting the emergence of powerful rivals.[133]

As reflected in Part III.E., the internal facing character of national security has become particularly pronounced during the current period, blurring the line between the state's war powers and police powers.[134] The subjugation of racialized groups has continued, with immigrants and persons of color—especially Arabs, Muslims, and Middle Easterners or those perceived as such—disparately impacted and targeted by numerous U.S. national security policies and activities.[135] Groups that challenge the ideological foundations of U.S. capitalist and imperialist interests—including the racial logics at their core—have also been singled out by the national security state, including Black Lives Matter

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[129] WOOD, *supra* note 69, at 133. This strategy—of connecting U.S. global economic expansion with coercively-induced economic and political reforms in other countries—is not new and has been pursued by the United States since, at least, the second period of national security. WILLIAMS, *supra* note 14, at 62–66.

[130] WOOD, *supra* note 69, at 134–37.

[131] *Id.* at 144.

[132] *Id.* at 165.

[133] *Id.* at 159, 161; Schwarz, *supra* note 119, at 193. U.S. military supremacy during the fourth period of national security has also bolstered the "military-industrial-complex"—a conglomerate of government bureaucrats and private defense companies that promotes militarism within U.S. policymaking and that has been central to the strength of the U.S. economy during both the third and fourth periods. WOOD, *supra* note 69, at 166; Richard J. Barnet, *The Ideology of the National Security State*, 26 THE MASSACHUSETTS REV. 483, 487 (1985); Robert Knowles, *Delegating National Security*, 98 WASH U. L. REV. 1117, 1123 (2021).

[134] *See infra* notes 271–274 and accompanying text.

[135] KUMAR, *supra* note 87, at 148–77.

activists,[136] environmental and animal rights activists,[137] indigenous activists,[138] and, most recently, university students protesting Israel's genocide in Gaza.[139]

Despite the many enduring similarities between current and past periods of national security, the fourth period has one relatively new and notable aspect. In contrast to earlier periods, the U.S. government's formal definition of national security has become quite expansive. While this expansion remains at least partially guided by the same capitalist-imperialist interests that have always been central to U.S. national security,[140] the current scope of national security is arguably unprecedented. For example, during the contemporary period, various U.S. administrations have defined national security to embrace matters as diverse as terrorism, nuclear proliferation, drug-related and other organized crime, chemical and biological weapons, pandemics, climate change, and other environmental issues.[141]

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[136] Michael German, *The FBI Targets a New Generation of Black Activists*, BRENNAN CTR. (June 26, 2020), https://www.brennancenter.org/our-work/analysis-opinion/fbi-targets-new-generation-black-activists [perma.cc/B4FU-EHD8]. As part of its work, the Black Lives Matter movement has dedicated itself to challenging "U.S. imperialism, capitalism and white supremacy." Arun Kundnani, *As College Campuses Erupt in Protest, Some See a Political Transformation*, NEW LINES MAG. (May 1, 2024), https://newlinesmag.com/argument/as-college-campuses-erupt-in-protest-some-see-a-political-transformation/ [https://perma.cc/3FS6-LB9H].

[137] *Animal Rights Extremism and Ecoterrorism: Hearing Before the S. Jud'y Comm.*, 108th Cong. (May 18, 2004) (statement of John E. Lewis, FBI Deputy Assistant Director) https://archives.fbi.gov/archives/news/testimony/animal-rights-extremism-and-ecoterrorism [https://perma.cc/WML6-SMF7]. *See, e.g.*, Natasha Lennard, *How the Prosecution of Animal Rights Activists as Terrorists Foretold Today's Criminalization of Dissent*, INTERCEPT (Dec. 12, 2019), https://theintercept.com/2019/12/12/animal-people-documentary-shac-protest-terrorism/ [https://perma.cc/WA2L-UUFM] (drawing links between terrorism prosecutions against animal rights activists and their threats to corporate, anti-capitalist interests protected by the U.S. government); Alleen Brown, *The Green Scare: How a Movement that Never Killed Anyone Became the FBI's No. 1 Domestic Terrorism Threat*, INTERCEPT (Mar. 23, 2019), https://theintercept.com/2019/03/23/ecoterrorism-fbi-animal-rights/ [https://perma.cc/2WHE-TP6N] (connecting the government's decision to label some eco-activists as terrorists to their challenges to U.S. corporate, capitalist interests).

[138] Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists*, GUARDIAN (Feb. 10, 2017), https://www.theguardian.com/us-news/2017/feb/10/standing-rock-fbi-investigation-dakota-access [perma.cc/H8WW-EC9J]. *See* NICK ESTES, OUR HISTORY IS THE FUTURE: STANDING ROCK V. THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE 14–15, 20–21 (2016) (situating the Standing Rock protest movement within a long history of indigenous resistance against U.S. capitalism and settler-colonialism).

[139] *See supra* notes 24–28 and accompanying text; *see also* Columbia Law Students for Palestine et al., *From the Encampments: Student Reflections on Protests for Palestine*, LPE PROJ. (May 2, 2024), https://lpeproject.org/blog/from-the-encampments-student-reflections-on-protests-for-palestine/ [https://perma.cc/LY7A-6U8R] (describing the challenges pro-Palestine student protestors have made to U.S. imperialism and financial capitalism).

[140] *See supra* note 97 and accompanying text.

[141] Donohue, *The Limits of National Security, supra* note 67, at 1718–23. Many of these areas had also received national security-like treatment during the third period of national security, but were not formally included in the national security architecture until the fourth period. *Id.* at 1738.

The expansion of national security has resulted in an even more swollen national security state, as new areas of concern have given rise to novel government initiatives and agencies.[142] The widening of national security threats has simultaneously expanded the U.S. military's mission and demand for resources,[143] as greater securitization has brought with it a predictable emphasis on military-based solutions.[144]

B.   Defining Threats, Generating Fear, Identifying "Enemies"

While some legal scholarship reimagining national security—specifically, reformist scholarship—focuses on the *consequences* of treating something as a national security threat,[145] less attention has been paid to the political, economic, and social factors that inform how threats are identified and framed in the first place.[146] This sub-section focuses on some of the factors informing the identification and framing of threats. These include (1) U.S. economic interests; (2) the ginning up of fear; and (3) the construction of enemies. Rather than being separate and distinct bases for identifying and framing threats, these factors can and do overlap.[147]

Because threat identification and framing is central to contemporary national security practice,[148] unpacking this issue is critical to understanding the field's foundational presumptions. It is also vital to meaningfully reimaging the discipline through legal scholarship. If the forces informing threat identification and framing are transformed, the objects and targets of U.S. national security will necessarily change with consequences for various aspects of the national security state. If,

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[142]   *Id.* at 1723.

[143]   *Id.* at 1723, 1736.

[144]   *E.g., id.* at 1723–25, 1736, 1741–43. *See* Jamshidi, *Climate Change Is a Human Security, Not a National Security, Issue, supra* note 17, at 17 ("Most solutions to national security problems prominently feature a militarized or military-focused approach.").

[145]   *See supra* note 15.

[146]   National security legal scholarship has discussed some of the issues addressed in this subsection. *See, e.g.,* Lisa Grow Sun & RonNell Andersen Jones, *Disaggregating Disasters,* 60 UCLA L. REV. 884, 924 (2013) (examining the central role played by "enemies" in U.S. national security discourse); Donohue, *The Limits of National Security, supra* note 67, at 1701–02 (describing how the U.S. government has manipulated public fear to justify the size and primacy of the U.S. national security state). In particular, legal scholarship—especially in the reformist vein—has paid much attention to the role of race in identifying threats. *E.g.,* Volpp, *supra* note 41, at 1592–94. This Article adds to that literature by presenting a more comprehensive picture of the political, social, and economic factors that inform threat identification and connecting those factors to a larger narrative about the foundational premises of national security.

[147]   For example, as suggested by the discussion below, U.S. economic interests, fear, as well as a tendency to construct enemies can all help explain why certain states are identified as threats to U.S. national security, while others are not.

[148]   *See* Donohue, *The Limits of National Security, supra* note 67, at 1752 ("[T]he most important question now driving U.S. national security is *what potential threats does the United States face?*") (emphasis in original).

for instance, economic interests stopped influencing or played a lesser role in the identification of threats, then a host of current national security concerns might be eliminated or tackled differently. Alternatively, if fear did not drive threat identification and framing, U.S. national security would depend less on overblown or manufactured crises—which, could, in turn, impact the size and scale of the national security state. Perhaps most importantly, if the creation of "enemies" was not a defining feature of national security threat identification and framing, then the U.S. national security state might be less racially discriminatory. While these and other issues related to the social, political, and economic forces shaping threat identification and framing have received relatively little attention in legal scholarship, attending to these dynamics could prompt greater legal knowledge production that explicitly challenges or rejects—rather than accepts or at most seeks to reform—the legal architectures created to address certain kinds of national security concerns.

1.   U.S. economic interests

To understand the role that U.S. economic interests play in national security threat identification, it is important to understand some of the most prominent theories, which have been developed by international relations scholars, about how states perceive and identify threats. According to one dominant view—embraced by the realist school of international relations—states are guided by a will to survive and are primarily threatened by other states.[149] For realists, a state's security interests are defined in terms of the "protection and preservation" of the state itself.[150] In particular, the anarchical nature of the international system and the danger of war with other states represent the greatest risks to a nation's survival.[151] According to the liberal school of international relations, another major international relations school, states that are liberal in their domestic orientation—with "liberal" defined as a commitment to individual autonomy, as well as to norms and institutions that further that objective[152]—are inclined to view other liberal states as allies and illiberal states as potentially threatening.[153] In the view of liberal international relations theorists, inter-state war can be averted and peace sustained as long as states

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[149]   James Wood Forsyth, Jr., *The Past as Prologue: Realist Thought and the Future of American Security Policy*, 5 STRATEGIC STUD. Q. 102, 103–05 (2011).

[150]   *Id.* at 103.

[151]   *Id.* at 108–09.

[152]   Owen, *Transnational Liberalism and U.S. Primacy*, *supra* note 62, at 120.

[153]   John M. Owen, IV, *Liberalism and Security*, INT'L STUD., Nov. 2017, at 5.

adopt democratic norms and become inter-linked through relationships of trade and finance.[154]

Realist and liberal theories of international relations certainly help explain some contemporary U.S. approaches to identifying national security threats.[155] They do not, however, fully or adequately elucidate all of the U.S. government's threat identification practices. Why, for example are some relatively weak, non-liberal, and non-democratic states—like Venezuela, Cuba, and Syria—treated as threatening to U.S. national security while other more powerful, non-liberal, and non-democratic states—like Saudi Arabia and various Gulf monarchies—are not? And what about non-state actors, like terrorists? Why are they seen as threats to U.S. national security given their comparative weakness? Why are actor-less phenomena that *do* pose an existential threat to the United States—like climate change[156]—treated as national security concerns but given haphazard and less-than-adequate policy treatment?

An explanation for these threat identification conundrums, which also aligns with the alternative history presented in Part III.A., can be found in the Marxist theory of international relations. According to the Marxist view, each state's international relations is primarily determined by the capitalist classes—meaning, a state's foreign and national security policies, as well as threats to it, are shaped by the capitalist interests controlling and influencing the state.[157] For Marxists, imperialism and hegemony are important parts of a capitalist-driven national security. According to Marxist theory, imperialism represents the system of capitalist relations between states at the international level.[158] This imperialism consists of an "imperialist chain" made up of blocs of states aligned under the direction of a "hegemon" that leads and dominates these states through superior economic, military, and political power, as well as through its pursuit of "plausible strategies for the collective capital interests of the whole imperialist chain."[159] The hegemon's mission is to "safeguard[] capitalist relations of production and exchange within the whole world," which includes promoting

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[154] Jack Snyder, *One World, Rival Theories*, FOREIGN POL'Y (Oct. 26, 2009), https://foreignpolicy.com/2009/10/26/one-world-rival-theories/ [perma.cc/5PPU-U54X].

[155] *Id.*

[156] *See generally* Christian Huggel et. al, *The Existential Risk Space of Climate Change*, 174 CLIMATIC CHANGE 8 (2022) (proposing a framework for understanding the existential threats posed by climate change from a scientific perspective).

[157] Spyros Sakellaropoulos & Panagiotis Sotiris, *American Foreign Policy as Modern Imperialism: From Armed Humanitarianism to Preemptive War*, 72 SCI. & SOC'Y 208, 210 (2008).

[158] *Id.* at 211.

[159] *Id.* at 211–12.

"property rights, political stability and market friendly policies" glob-ally.[160] Challenges to these interests, or to the hegemon's position at the head of the imperialist chain,[161] represent threats that must be ad-dressed. According to Marxist international relations theorists, the United States has served as *the* hegemon at the head of a global impe-rialist chain, since at least the end of the Cold War.[162]

This theory of international relations helps makes sense of the threat identification conundrums laid out above. Together with the al-ternative history presented in Part III.A, the Marxist theory suggests that U.S. national security depends upon U.S. hegemony over an "im-perialist chain" of states willing and able to maintain the stability and policies necessary for global capital to flourish.[163] Where the chain is threatened by those in charge of these or other states—because they do not enforce order, fail to abide by the prevailing rules, or challenge the United States' position as the global hegemon—then those states are viewed as threats to U.S. national security.[164] Countries like Syria, Cuba, and Venezuela—who, amongst other things, generally eschew U.S. authority—threaten U.S. national security at least partly for these reasons, while countries like Saudi Arabia and the Gulf states—which are generally committed to the prevailing U.S. global capitalist order—do not.[165]

"[A]lternative forms of coercive power, which operate outside legal and political structures"[166] also represent threats to the imperialist chain. As a result, terrorism and certain forms of international orga-nized crime are defined as threats to U.S. national security, as a general matter.[167] These terrorists and international criminal syndicates create

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[160]   *Id.* at 219–20.

[161]   *Id.* at 215.

[162]   *Id.* at 213.

[163]   WOOD, *supra* note 69, at 154.

[164]   *Id.* at 155-6; KUMAR, *supra* note 87, at 109; WILLIAMS, *supra* note 14, at 173.

[165]   To clarify, the point here is that the Marxist theory explains why some non-liberal, non-democratic states are treated as friends while other non-liberal, non-democratic states are treated as enemies. Those states treated as enemies—i.e., Cuba, Venezuela, and Syria—would arguably also be defined as such by other international relations theories, like the liberal theory. By con-trast, those non-liberal, non-democratic states—like Saudi Arabia and the Gulf States—would not be treated as friends under that theory, but would be treated as friends under the realist theory of international relations. *E.g.*, Bradley Bowman, *Realism and Idealism: US Policy toward Saudi Arabia, from the Cold War to Today*, 35 PARAMETERS 91, 93–94 (2005). Neither theory, however, meaningfully explains *both* why the first group of states is treated as an enemy *and* why the second group is treated as a friend. The Marxist theory does that explanatory work.

[166]   Donohue, *The Limits of National Security*, *supra* note 67, at 1748.

[167]   It is important to note that the U.S. government defines terrorism as a categorical national security threat. In other words, it is not just terrorism on U.S. soil or terrorism backed by other states that threatens U.S. national security but rather terrorism by any state or non-state actor more broadly. *E.g.*, Biden National Security Strategy, *supra* note 47, at 30. While certain individ-ual acts of terrorism—for example, terrorist violence against the United States backed by other

insecurity and unpredictability that can disrupt the flow of capital and investment upon which U.S. hegemony both depends on and exists to serve. They can even take control of important economic assets.

Under the Marxist account of international relations, other U.S. national security threats can be understood as *opportunities* to protect and bolster U.S. hegemony over the imperialist chain, while at the same time being shaped and limited by the interests of the capitalist classes. The influence of these interests extends to the policy responses these national security threats receive. For example, climate change is expected to have a substantial impact on the global economy,[168] making it a key concern for the international capitalist system upon which U.S. hegemony is based, as well as for the capitalist classes invested in the global economy's smooth operation.[169] Classifying an area of concern, like climate change, as a national security issue also typically drives substantial government spending to that area.[170] Those resources are often directed to private corporate contractors that are central to the operation of the U.S. national security state[171] and that strengthen U.S. economic power,[172] power that is crucial to maintaining U.S. authority over the imperialist chain.

At the same time, the interests of the capitalist classes, like the U.S. fossil fuel industry, impact how far the United States can go in addressing climate change as a national security threat[173]—for

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states—might be better explained by other theories of international relations, the classification of terrorism as a national security threat, writ large, is, I believe, best explained by the Marxist theory of international relations.

[168] Daniel Heffron, *What Do Realists Think About Climate Change?*, CTR. FOR GEOPOLITICS & REALISM STUD., Nov. 13, 2015, at 10.

[169] When it comes to existential actor-less threats, realism potentially provides another explanation for identifying those phenomena as national security concerns. One can argue, for example, that climate change may lead to wars and other armed conflicts between states; poses the kind of existential threat to states that invasion or military attack by other states presents; and/or that climate change-related threats undermine a state's position and strength in relation to other states. On any of these views, and notwithstanding realism's traditional focus on threats from other states, climate change should arguably be treated as a national security concern under the realist paradigm. *E.g.*, Heffron, *What Do Realists Think About Climate Change?*, *supra* note 168. At the same time, the realist theory of international relations has a harder time explaining why climate change is treated as a national security issue but addressed in inadequate ways. *See infra* note 176 and accompanying text.

[170] Donohue, *The Limits of National Security*, *supra* note 67, at 1752–53.

[171] *See, e.g.*, Watson Institute Costs of War Project, *Corporate Power, Profiteering, and the "Camo Economy,"* BROWN UNIV., https://watson.brown.edu/costsofwar/costs/social/corporate [https://perma.cc/SE8C-U24T] ("Large defense contractors have played a central role in fighting the post-9/11 wars.").

[172] *See supra* note 116.

[173] This is not to say that the United States is simply the "military arm" of the capitalist classes, but rather that, in upholding the objectives of U.S. capital, the United States takes into consideration the "collective interests" of those classes. Sakellaropoulos & Sotiris, *supra* note 157, at 227.

example, by limiting the government's ability to enter binding international treaties, like the 1997 Kyoto Protocol, or to pass congressional laws that meaningfully reduce the greenhouse gas emissions causing climate change.[174] While the nature of the climate change threat arguably also helps explain why the U.S. response has been inadequate and haphazard,[175] the interests of the capitalist classes exacerbates those conditions and hamstring meaningful legal and policy responses, particularly at the national level.[176]

2.   Generating fear

The second crucial aspect of U.S. threat identification, which is also an important framing device, has to do with fear. Despite the United States' relative safety and security, fear pervades U.S. national security culture.[177] That fear—expressed by both politicians and military officials alike—depicts the world as full of dangers and threats, many of which are complex, unknowable, and unpredictable.[178] This is not to say fear cannot or should not be part and parcel of the identification and framing of threats–fear can be an understandable and even inherent result of facing certain kinds of dangers. Nevertheless, fear appears to play an outsized role in the U.S. national security apparatus,

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[174] Jeffrey Pierre & Scott Neuman, *How Decades of Disinformation About Fossil Fuel Halted U.S. Climate Policy*, NPR (Oct. 27, 2021), https://www.npr.org/2021/10/27/1047583610/once-again-the-u-s-has-failed-to-take-sweeping-climate-action-heres-why [https://perma.cc/R2KE-EFSC].

[175] For example, climate change affects different communities even within the same country or region differently. Huggel et al., *supra* note 156, at 13. It can also be challenging to predict when and how a climate change risk will produce catastrophic effects that necessitate "transformative change." *Id.* at 14; *see also* Pedro Mariani, *Climate Change and International Cooperation*, HARV. ADVANCED LEADERSHIP, SOC. IMPACT REV. (Feb. 2, 2024), https://www.sir.advancedleadership.harvard.edu/articles/climate-change-and-international-cooperation [https://perma.cc/8JKN-PBEX] (observing that the existential threat from climate change "although certain, is not as immediate, condensed or recognizable as threats that have historically aligned nations behind a common purpose"). These circumstances may lead politicians and government policymakers to address climate change will less urgency.

[176] Certain off-shoots of realist thought underscore other explanations for why states might not take steps to address climate change—suggesting, for example, that in order to gain advantages over other countries states will want to consume more fossil fuel not less. Heffron, *What Do Realists Think About Climate Change?*, *supra* note 168, at 13. Yet another realist school of thought, which takes the internal structure of states into account, posits that democratic states will necessarily do less to mitigate climate change. *Id.* at 16. These realist theories have a harder time, however, explaining why a state might classify climate change as a national security threat in the first place. After all, if a state sees climate change as an opportunity to gain advantages over other states, it is unlikely to view climate change as a threat. By contrast, the Marxist theory can more coherently explain why climate change is both considered a national security threat *and* addressed in inadequate ways.

[177] RASKIN & SPERO, *supra* note 8, at 229; Christopher J. Fettweis, *Nothing to Fear but Fear Itself: The National Security Policy of the United States* 98–99, 108 *in* THE PALGRAVE HANDBOOK OF NATIONAL SECURITY (Michael Clarke et al. eds. 2022); Barnet, *supra* note 133, at 490.

[178] Fettweis, *supra* note 177, at 98–99, 106–07.

particularly in light of the strong and virtually unparalleled security the United States enjoys compared to other countries.[179]

Ironically, as some have argued, the prevalence of fear within the U.S. national security sector is partly a result of the America's exceptional strength.[180] As a country becomes more powerful, it is more likely to identify and experience threats to its authority.[181] Indeed, more powerful states are predisposed to be active in both regional and global politics and to define their interests in broad terms.[182] As a result, stronger states are particularly likely to see threats to the status quo as threats to their preeminent position within the international system.[183] Perhaps most surprisingly, more powerful states are pre-disposed to view less powerful countries and other actors in negative, threatening terms.[184] In short, as a major global power, the United States is inclined to see and fear many threats coming from many different directions.

An emphasis on fear also has various practical benefits for the U.S. national security state. Since at least the third period of national security, the U.S. government has been invested in promoting a sense of threat and crisis within U.S. society.[185] Whether that sense of crisis is entirely manufactured, simply exaggerated, or perfectly justified, the emphasis on fear is one part of a multi-pronged government strategy to "engineer[] [public] consent" to the size and stature of the national security state and the massive spending it draws.[186] Promoting a sense of fear within society has the additional practical benefit of justifying broad-based violations of domestic civil liberties that the U.S. public might otherwise resist.[187] Finally, as some have argued, fear has been

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[179] *Id.* at 96. While a sense of crisis and fear may be genuinely held by some members of the U.S. government, others—including high-ranking members of the U.S. military—have strongly suggested that the government also systematically stokes fear in order to manipulate the American public. WILLIAMS, *supra* note 14, at 273 (quoting U.S. General Douglas MacArthur—one of the most prominent American military figures of the 20th century—as observing that "[o]ur government has kept us in a perpetual state of fear—kept us in a continuous stampede of patriotic fervor—with the cry of a grave national emergency. . . . Yet, in retrospect, these disasters seem never to have happened, seem never to have been quite real").

[180] *See generally* Fettweis, *supra* note 177.

[181] *Id.* at 108.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 109–10.

[185] Donohue, *The Limits of National Security*, *supra* note 67, at 1701; *see also* Barnet, *supra* note 133, at 489 ("The national security state structures [after World War II] could not accomplish their task unless the American people were socialized to accept the idea that the only peace possible is a form of permanent war.").

[186] Barnet, *supra* note 133, at 495.

[187] *See generally* Erik Luna, *The Bin Laden Exception*, 106 NW. U. L. REV. 1489 (2012) (arguing that false claims the United States is existentially threatened by terrorism, which have been made by government actors and others, have helped legitimize and justify violations of the Fourth Amendment by the Transportation Security Administration's search-and-seizure regime at U.S.

particularly useful in masking the capitalist interests guiding U.S. national security practices. According to this view, anxiety and uncertainty about the prospects of war and/or external violence are used to legitimize policies that are, in fact, primarily aimed at creating an environment conducive to U.S. economic and business interests.[188]

3.   Constructing enemies

The third element of national security threat identification and framing revolves around the "friend" vs. "enemy" binary. As one commentator describes it, "[t]he heavy economic sacrifice and the inevitable infringement on traditional liberties demanded by the national security state are legitimized by the enemy."[189] Generally, whether one is a friend or an enemy is determined, in part, by "in group" status.[190] Members of the "in-group" subscribe to a set of "values, beliefs, attitudes, [and] norms . . . "[191] that are shared by relevant power brokers. As such, those who are part of the "in-group" are likely to be viewed as friends by the powers that be. By contrast, those who question, challenge, or threaten the "rules of the game" cannot be part of the "in group" and are likely to be viewed as enemies.[192] In the language of the alternative history of U.S. national security described in Part III.A, those who accept and accede to the interests of U.S. capitalist imperialism are "friends" and those who do not are "enemies"[193] of the national security state.[194]

Race plays an important role in the friend vs. enemy binary, as also reflected in the alternative history of U.S. national security presented

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airports).

[188] *See, e.g.,* MARK NEOCLEOUS, WAR POWER, POLICE POWER 192–93, 198, 209–10 (2014) (arguing that fear and anxiety are used by states, including the United States, to justify a permanent war footing in the service of capitalist accumulation); WILLIAMS, *supra* note 14, at 239–40 (arguing that after 1945 "a good many men" within the U.S. political leadership thought it was "necessary to 'scare the hell out of the American people' in order to win their active approval and support for the kind of vigorous anti-Soviet policy . . . [they] wanted," a policy which focused on the expansion of U.S. economic and political influence around the globe); Schwarz, *supra* note 119, at 191 (arguing that, during the Cold War, the United States used the image of the Soviet Union to frighten Americans into accepting expansionist economic policies on the international plane).

[189] Barnet, *supra* note 133, at 491.

[190] DAVID ROUSSEAU, IDENTIFYING THREATS AND THREATENING IDENTITIES: THE SOCIAL CONSTRUCTION OF REALISM AND LIBERALISM 4 (2006).

[191] *Id.* at 12.

[192] Ayse Zarakol, *What Makes Terrorism Modern? Terrorism, Legitimacy, and the International System*, 31 REV. INT'L STUD. 2311, 2314 (2011).

[193] KUMAR, *supra* note 87, at 100; WILLIAMS, *supra* note 14, at 173.

[194] According to William Appleman Williams, the United States is particularly prone to defining its enemies as "unnatural men . . . beyond the pale and almost, if not wholly, beyond redemption." WILLIAMS, *supra* note 14, at 94. As Williams explained it, this tendency is rooted in the exceptionalist view of the United States as a moral force that improves and makes the entire world better. *Id.* at 93–94.

in this agenda. The image of perpetual instability fomented by racialized others in the Global South has been used, for example, to justify the use of U.S. force both at home and abroad.[195] That the targets of this force are racialized enemies taps into long standing ethno-nationalist and racist tendencies within U.S. society that make violence against those persons broadly acceptable to a mainstream audience[196] and that justify a seemingly endless flow of resources to the national security sector.[197]

U.S. capitalist interests are particularly well-served by threats framed in terms of racialized enemies. Focusing on anti-Muslim racism in the post 9/11 era, Arun Kundnani provides a succinct description of how racism is used to code the "enemy" in ways that serve the interests of U.S. capitalist empire. As he writes:

> [T]he racist and imperialist violence upon which US-led [sic] capitalism depends cannot be acknowledged in liberal society so it is transferred onto the personality of the Muslim and seen as emanating from 'outside' the social order. Imperial violence is then only ever a proportionate *response* to the inherently aggressive and threatening nature of the fanatical Muslim enemy. In these ways, a Western self-image of innocence and beneficence can be maintained by screening out resistance to the US-led system of global capitalism.[198]

C. The Private Persons Participating in and Enforcing U.S. National Security Policies

While national security is generally understood as a quintessential public function, it relies, in no small part, on private participation. That private participation primarily occurs in the form of paid government contractors and private volunteers.[199] This sub-section focuses on these

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[195] Rana, *National Security Law and the Originalist Myth*, *supra* note 55, at 68.

[196] *See* SINGH, *supra* note 70, at 31 ("American war craft remains perennially bound to American racecraft as the politics of fear and lineaments of enemies without and within morph together . . .").

[197] *See* Kumar, *Terrorcraft: Empire and the Making of the Racialised Terrorist Threat, supra* note 126, at 163–64 (noting that the FBI engages in entrapment policies primarily targeting Muslim and other marginalized communities and that it uses this work of "creating terrorists as a way to justify the billions of dollars spent on counterterrorism activity").

[198] Arun Kundnani, *Islamophobia: Lay Ideology of US-Led Empire*, https://www.kundnani.org/wp-content/uploads/Kundnani-Islamophobia-as-lay-ideology-of-US-empire.pdf [https://perma.cc/Z3RK-SPM6].

[199] Though beyond the scope of this Article, private parties participate in national security in other ways as well. For example, certain national security programs *obligate* private persons to participate in national security work, without pay and potentially against their will. *See, e.g.*, Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 782 (2008) ("Private enforcement [of immigration laws] occurs when private parties, acting under a requirement

two forms of private participation in national security, as well as the implications of this participation. While legal scholarship has been attentive to the role of private contractors in national security,[200] the work done by private volunteers has been comparatively underexamined and undertheorized and, as a result, is a particular focus of this sub-section.[201]

Grappling with the role of private parties is central to radically transforming national security through legal scholarship, since these entities are indispensable to the functioning of the national security state. It is because of the involvement of the private sector that the U.S. government has amassed a vast trove of intelligence since 9/11, to mention just one example.[202] Legal scholarship that does not attend to the systematic involvement of private parties—whether as private contractors or volunteers—will, as such, leave a large swath of the national security state undisturbed. By contrast, attending to the role of private parties can help radically reimagine the discipline by prompting legal research that explores, questions, and challenges the reasons why these actors are involved in the production of U.S. national security, as a general matter. Addressing the role of private actors is particularly important for radical, left reimaginings of national security since private party involvement can threaten democratic values and reinforce inequality and subordination, as discussed below.

1.   Private contractors

While hardly limited to the post 9/11 landscape,[203] private national security contractors—consisting of private companies and individuals paid to undertake government work—have become particularly prevalent since those attacks.[204] This profusion of private contractors has coincided with the massive institutional expansion of the national

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of law, check for legal immigration status before granting applicants access to a restricted benefit."). In other cases, private companies sell access to information or other technologies to the government, which is vital to its national security work. Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 917–19 (2008).

[200] *E.g.*, LAURA DICKINSON, OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS (2011); *infra* notes 205–211 and accompanying text.

[201] As reflected in the sources cited in this sub-section, my own work has largely focused on examining the role of private volunteers in U.S. national security.

[202] *See, e.g.*, Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, *supra* note 199, at 910–18 (listing examples of various public-private partnerships that have been critical to the U.S. government's intelligence gathering since 9/11).

[203] *E.g.*, JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 114 (2017).

[204] Jody Freeman & Martha Minow, *Reframing the Outsourcing Debate, in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1, 2 (Jody Freeman & Martha Minow eds., 2009).

security state since 9/11, as reflected in the creation of the Department of Homeland Security,[205] as well as other national security entities.[206] Over the course of nearly two and a half decades, private national security contractors have been deployed across a variety of areas, most notably to support U.S. military efforts,[207] conduct government surveillance, and aid in intelligence gathering.[208] The boom in private national security contractors post-9/11 has been so significant that the national security sector is considered to be one of the most privatized parts of government.[209]

There are upsides and downsides to this arrangement. The upsides primarily flow to the private contractors and the federal government. While private contractors receive monetary remuneration for their services, the government is able to expand the scale and scope of its national security work. As for the downsides of this relationship, those flow to U.S. society at large. In particular, private contractors threaten core governance norms, including undermining democratic and legal accountability for the government's national security activities while also exacerbating woefully low levels of transparency in the sector.[210]

2.   Private volunteers

Private volunteers—consisting of individuals and organizations that are not paid for their work—shape and enforce the government's national security policies and goals. The U.S. government has expressly cultivated voluntary private participation in at least some areas of national security[211] and implicitly acknowledged the overall importance of private volunteers to the sector.[212] For example, the government has encouraged private persons to voluntarily surveil members of the

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[205]   Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

[206]   For example, the Intelligence Reform and Terrorism Prevention Act of 2004 created a new Director of National Intelligence to coordinate the government's various intelligence agencies, as well as the National Counterterrorism Center, which is responsible for national and international counterterrorism efforts, among other things. Pub. L. 108-458, 118 Stat. 3638 (Dec. 17, 2004).

[207]   MICHAELS, CONSTITUTIONAL COUP, *supra* note 203, at 114.

[208]   *See* Dana Priest & William Arkin, *National Security Inc.*, WASH. POST (July 20, 2010), https://www.washingtonpost.com/investigations/top-secret-america/2010/07/20/national-security-inc/ [https://perma.cc/H92U-UANM] (describing the U.S. government's use of private contractors for intelligence, counterterrorism, and military-related activities).

[209]   MICHAELS, CONSTITUTIONAL COUP, *supra* note 203, at 124.

[210]   PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 2 (2007); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 994–96, 999–1000 (2005).

[211]   Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1441 (2010).

[212]   Maryam Jamshidi, *The Private Enforcement of National Security*, 108 CORNELL L. REV. 739, 788–89 (2023).

public, including their own communities, and report any "suspicious" behaviors to government authorities.[213] It has convinced private companies to willingly turn over the data of private citizens to government agencies and actors.[214] It has also incentivized persons to voluntarily enforce U.S. sanctions and counter-terrorism policies, in part, through federal statutes that allow private civil suits for terrorism-related injuries.[215] In these and other ways, private volunteers serve as "force multipliers," benefiting the U.S. government by extending U.S. national security goals into places where the government (as well as its contractors) may not have the resources, inclination, or legal basis to venture.[216]

While private volunteers benefit from these arrangements, their participation in national security, as well as the benefits they accrue, potentially create various societal harms, both locally and globally. First, private parties can use their participation in and enforcement of U.S. national security to further their parochial monetary interests[217]— in some cases, attaching and liquidating private and public assets, like foreign government-owned properties, that are subject to U.S. sanctions and otherwise unavailable to private litigants.[218] In taking control of these assets, private parties can and have depleted the wealth of already poor states that are subject to crippling U.S. sanctions regimes.[219] Second, through their role as national security enforcers, private parties have the opportunity to embed their personal interests and values within U.S. national security, giving them influence over one of the most important areas of government activity in ways that can negatively impact other communities and countries.[220] Finally, private volunteers have the opportunity to further corrosive forms of state power

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[213] *See generally* Michaels, *Deputizing Homeland Security, supra* note 211 (describing various government programs that broadly encourage private parties to voluntarily engage in surveillance and intelligence gathering on the U.S. government's behalf); Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834 (2015) (discussing efforts to recruit Muslims in the United States to surveil and report on "radicalized" members of their communities).

[214] Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror, supra* note 199, at 910–18.

[215] *See generally* Jamshidi, *The Private Enforcement of National Security, supra* note 212 (discussing how private parties use federal civil terrorism statutes to voluntarily enforce some of the government's terrorism and sanctions-related national security policies); *see also* Maryam Jamshidi, *How Private Actors Are Impacting U.S. Economic Sanctions*, 15 HARV. NAT'L SEC. J. 119 (exploring the different ways private parties shape, influence, and enforce U.S. economic sanctions).

[216] Jamshidi, *The Private Enforcement of National Security, supra* note 212, at 792; Michaels, *Deputizing Homeland Security, supra* note 211, at 1438.

[217] Jamshidi, *The Private Enforcement of National Security, supra* note 212, at 801.

[218] Jamshidi, *How Private Actors Are Impacting U.S. Economic Sanctions, supra* note 215, at 136–40.

[219] *Id.* at 192–96.

[220] *E.g., id.* at 154–79.

by enforcing national security practices that target the rights of marginalized and disempowered communities.[221] For those private parties that wish to reinforce subordination, national security's private enforcement provides them with an effective tool.[222]

Alongside these problematic effects, private volunteering in national security has an exclusionary aspect. Only those who are "friends" of the United States—which, as discussed in Part III.B, requires supporting rather than challenging the interests embedded within U.S. national security—can participate.[223] To the extent that presumptive "enemies"—often from black and brown communities—are allowed to enforce U.S. national security, they too must be willing to accept those interests,[224] which in some cases may require they police or otherwise repress their own communities.[225]

D. The Rule of Law's Shortcomings in Protecting Against Corrosive National Security Activities

While this agenda primarily focuses on the political, social, and economic aspects of national security, any effort to radically reimagine the field through legal scholarship must also grapple with the role of law and the rule of law. As discussed in Part II, reformist scholarship places special emphasis on law's relationship to U.S. national security practice and policy. In particular, some of this literature insists that national security's primary problem is its rule of law deficits.[226] As demonstrated

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[221] Jamshidi, *The Private Enforcement of National Security, supra* note 212, at 742–43. Private contractors, which directly assume the government's role in enforcing national security policies and practices that target marginalized communities, self-evidently further corrosive forms of state power.

[222] *See* Maryam Jamshidi, *Instruments of Dehumanization*, BOS. REV. (Dec. 9, 2023), https://www.bostonreview.net/articles/instruments-of-dehumanization/ [https://perma.cc/GS42-K3V2] (describing how federal civil terrorism statutes—which are part of national security's private enforcement—have been consciously and intentionally used by private litigants to subordinate Palestinians); Darryl Li, *Terrorism Torts and the Right to Colonize*, LPE PROJ. (Mar. 13, 2023), https://lpeproject.org/blog/terrorism-torts-and-the-right-to-colonize/ [https://perma.cc/9SFM-B3V8] (same).

[223] *See supra* notes 190–192 and accompanying text. Working for the government as a private national security contractor also usually necessitates that the contractor be a "friend" to the United States. Indeed, most of those positions require obtaining and maintaining a federal security clearance that is aimed, in part, at determining whether the person is "reliable, trustworthy, of good conduct and character, and loyal to the U.S." Maj. Andrew Woodbury, *Continuous Evaluation and Credit Reports: Ensuring Fairness in Current Security Clearance*, 82 A.F. L. REV. 224, 227, 229 (2022).

[224] *See, e.g.,* Akbar, *National Security's Broken Windows, supra* note 213, at 883–85 (noting that American Muslims who participate in the U.S. government's efforts to identify "radical" Muslims in their communities must effectively acquiesce and be loyal to U.S. interests). *See also* MAMDANI, *supra* note 120, at 15 (coining the phrase "good muslim, bad muslim" to denote those Muslims who are considered friends of U.S. empire and those who are considered enemies).

[225] Akbar, *National Security's Broken Windows, supra* note 213, at 885, 890, 895–96.

[226] *See, e.g., supra* note 19 and accompanying text.

in this sub-section however, others disagree. They argue that U.S. national security is both aligned with law *and* that this alignment has not meaningfully rectified the corrosive nature of many national security practices. For legal scholars seeking to radically reimagine national security, understanding this reality can both temper and enhance the rule of law's utility. In particular, while the rule of law cannot transform national security on its own, the law can serve as a tool to radically reimagine the discipline, if accompanied by a political vision that breaks with the status quo, as demonstrated below.

As legal scholars like Bernard Harcourt have argued, national security is law-full.[227] Even though the U.S. government has, at times, suspended certain legal rules and created zones of lawlessness, these efforts represent exceptions to law's overall centrality to U.S. national security.[228] Indeed, many of the most concerning national security programs—like mass surveillance, torture, and drone strikes—have been "rendered fully legalized and regulated practices—firmly embedded in a web of legal memos, preauthorized formalities, and judicial or quasi-judicial oversight."[229]

While the argument is not iron clad,[230] the view that U.S. national security largely aligns with law makes conceptual sense. The U.S. government benefits from embedding its national security programs within law since legality gives broad based legitimacy to its policies[231]—including to acts of state-sanctioned violence.[232] The rule of law is also malleable enough to further and has, in fact, furthered a range of problematic U.S. national security priorities, including policies that bolster executive power, undermine civil rights, and disproportionately target marginalized communities.[233]

This malleability derives from the rule of law's largely formalist orientation,[234] which requires that law adhere to a particular form without requiring any specific substantive content.[235] While the formalist rule of law demands that states abide by and enforce the law, it does not require that law constrain states in a particular way—law can "give the government substantial discretion, create meaningful civil liberty

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[227] BERNARD HARCOURT, THE COUNTERREVOLUTION: HOW OUR GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS 213 (2018).

[228] *Id.* at 214–15.

[229] *Id.* at 222.

[230] *See infra* note 239.

[231] HARCOURT, *supra* note 227, at 227.

[232] NEOCLEOUS, *supra* note 188, at 46.

[233] Jamshidi, *The Discriminatory Executive and the Rule of Law, supra* note 48, at 79–84.

[234] David Dyzenhaus, *Hobbes and the Legitimacy of Law*, 20 LAW & PHIL. 461, 461–62 (2001).

[235] Jamshidi, *The Discriminatory Executive and the Rule of Law, supra* note 48, at 92–95.

restraints, or strike a middle ground."[236] Nor does the formalist rule of
law demand that law further justice, avoid invidious discrimination, or
apply equally and fairly to all groups.[237] To the contrary, so long as they
adhere to formalist requirements, [238] states are generally free to create
legal regimes that further a broad and arguably limitless range of po-
litical, economic, and social interests.

While law is a tool of politics and power that can further corrode
forms of state authority, it can also be used to dismantle that power. In
order to realize that goal, the rule of law must be paired with the ap-
propriate political, social, and/or economic project. As legal scholar
Noura Erakat has argued, "[t]he language of law should not displace,
direct, or supplant politics because it does [not] possess a determinate
meaning nor guarantee a particular outcome. Politics aimed at shifting
the structure of an oppressive status quo should provide a strategic
compass."[239] Developing a political vision for a radically transformed
national security sector—a vision that, for example, breaks with na-
tional security's long history of capitalist imperialism and racism—
must, as such, accompany any effort to leverage the law in the service
of reimagining the field through legal scholarship.[240]

E.   U.S. National Security's Extensive Regulatory Reach Into the
     Daily Lives of Persons Both Abroad and at Home

To radically reimagine national security through legal scholarship,
it is necessary to understand where and how national security operates:
is it at play at home, abroad, in both places?; does it operate exclusively
as a tool of foreign or military affairs or does it have a broader regula-
tory role over individual persons, as well?[241] Without knowing the an-
swers to these questions, any effort to transform or rethink national
security will fail to appreciate the increasingly intertwined relationship
between the domestic and foreign and the centrality of that relationship
to establishment approaches to U.S. foreign and national security

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[236] *Id.* at 94.

[237] *Id.* at 94–95.

[238] *See id.* at 92–93 (describing the requirements of the formalist rule of law). One might argue
that the secrecy surrounding many national security projects—including secret laws—violates
some of these formalist requirements. While this Article cannot consider this issue in any depth,
it is worth noting that secrecy, in and of itself, does not necessarily violate formalist conceptions
of law. *Id.* at 164 n. 510.

[239] NOURA ERAKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE 19 (2019).

[240] This is another reason why legal scholars who wish to radically reimagine the field of na-
tional security should develop relationships and work with the social movements focused on devel-
oping these kinds of political visions. *See infra* Part III.G.

[241] As used here, "regulation" is defined as "government intervention in the private domain."
Robert Knowles, *Warfare as Regulation*, 74 WASH. & LEE L. REV. 1953, 1963 (2017).

policy.[242] It will also miss the substantial regulatory role that national security plays at home and abroad. This sub-section provides a broad and selective overview of the national security laws and policies interfering with, ordering, and controlling the lives of countless persons, inside and outside this country in the post-9/11 period. As it demonstrates, U.S. national security reaches into the daily lives of persons across the globe in extensive and invasive ways.

While some legal scholarship has drawn connections between counterterrorism practices abroad and certain policies and laws at home,[243] this sub-section peels back a layer of the national security status quo that has received little attention from most scholars. It provides a more expansive understanding of how the U.S. government uses national security to broadly police and securitize daily life—presenting a snapshot of an enormous regulatory apparatus. In particular, it underscores the blurred line between wartime and peacetime[244] and demonstrates how regulating or "policing"[245] the domestic population is intertwined with conducting war "abroad."[246]

Understanding these facets of U.S. national security is important to radically reimagining the field through legal scholarship since it draws attention to the ways certain domestic national security regulations are connected to U.S. military objectives abroad; the general regulatory nature of U.S. warfare;[247] and the social, economic, and political implications of the "blurred line" between domestic national security regulations and war-making—critical engagement with any of which would substantially disturb U.S. national security's status quo arrangement.[248]

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[242] *Id.* at 1982–83; COUNCIL ON FOREIGN RELS., *What Is the Relationship Between Domestic and Foreign Policy?* (June 29, 2023), https://education.cfr.org/learn/reading/what-relationship-between-domestic-and-foreign-policy [https://perma.cc/3T6J-PXU3].

[243] *E.g.*, Aslı Bâli, *Extending the Logic of Defund to America's Endless Wars, in* RACE AND NATIONAL SECURITY 145–69 (Matiangai Sirleaf ed. 2023); Wadie Said, *Law Enforcement in the American Security State*, 2019 WIS. L. REV. 819, 823–24 (2019).

[244] *See generally* MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES (2012) (challenging assumptions about the temporariness of wartime and demonstrating that wartime is an enduring condition in the United States).

[245] The term "police" is not used here to mean *the* police, but instead references the state's general powers to regulate and control actors and activities inside its borders.

[246] This connection between domestic policing and war also comports with the history described in Part III.A., in particular, with the tendency for U.S. national security and foreign policy to be driven by domestic problems and concerns.

[247] Some legal scholars have started to explore the regulatory aspects of U.S. warfare—that is, warfare as something that not only needs to be regulated, but also as a *form* of regulation. *E.g.*, Knowles, *Warfare as Regulation, supra* note 242.

[248] *Cf.*, Rana, *Left Internationalism in the Heart of Empire, supra* note 63 (insisting that U.S. foreign policies and U.S. domestic policies, including economic and social policies, are deeply connected and that reimagining U.S. foreign policy, from a left perspective, requires making that linkage).

Starting at the international level, the U.S. government has exercised regulatory control over the daily life of persons abroad through military occupations that have exposed individuals to arbitrary arrest, detention, and/or death in places like Iraq[249] and Afghanistan.[250] The U.S. national security apparatus has also regulated and ordered people's daily lives in other countries through military technologies, like drones, that constantly monitor and surveil their subjects, terrorizing them with the near-constant prospect of death.[251] The U.S. government has further exerted its national security regulatory power abroad through non-kinetic strategies, like economic sanctions that cut persons off from the global economic system and deprive them of basic necessities.[252]

On the domestic front, the U.S. government has invoked national security at the federal level[253] to control, regulate, and police the lives of countless persons. National security concerns have, for example, led

[249] *See, e.g.*, CHRIS HEDGES & LAILA AL-ARIAN, COLLATERAL DAMAGE: AMERICA'S WAR AGAINST IRAQI CIVILIANS (2009) (detailing the control U.S. troops exercised, through security checkpoints and other mechanisms, over the daily lives of Iraqi civilians). Most disturbingly, this control included the ability to kill Iraqi civilians at will. Emma Slater, *Hundreds of Civilians Gunned Down at Checkpoints*, BUREAU OF INVESTIGATIVE JOURNALISM (May 23, 2011), https://www.thebureauinvestigates.com/stories/2011-05-23/hundreds-of-civilians-gunned-down-at-check-points/#:~:text=The%20US%20war%20logs%20show,than%20not%2C%20that%20got%20killed. [https://perma.cc/V369-WZP7].

[250] *See, e.g.*, Margaret Hu, *Militarized Biometric Data Colonialism*, in RACE AND NATIONAL SECURITY 140–43 (Matiangai Sirleaf ed. 2023) (discussing U.S. government practices of biometric surveillance on "almost the entire Afghan population" during the U.S. occupation of Afghanistan); *Enduring Freedom: Abuses by U.S. Forces in Afghanistan*, HUM. RTS. WATCH (Mar. 8, 2004), https://www.hrw.org/report/2004/03/08/enduring-freedom/abuses-us-forces-afghanistan [https://perma.cc/U3EZ-2K43] (detailing the U.S. military's system of arrest and detention—used against both combatants and civilians—as part of its occupation of Afghanistan); Lynzy Billing, *The Night Raids*, PROPUBLICA (Dec. 15, 2022), https://www.propublica.org/article/afghanistan-night-raids-zero-units-lynzy-billing [https://perma.cc/L2G9-ACRC] (detailing CIA-backed night raids in Afghanistan during the U.S. occupation that resulted in the killing of hundreds of Afghan civilians).

[251] *See* Patrick Keenan, *Drones and Civilians: Emerging Evidence of the Terrorizing Effects of the U.S. Drone Programs*, 20 SANTA CLARA J. INT'L L. 1, 3–7 (2021) (arguing that U.S. drone programs terrorize civilians because of their persistent monitoring and surveillance, as well as the fear they generate among the surveilled that "their innocent movements . . . will lead to them being targeted by a missile").

[252] *See* Jamshidi, *How Private Actors Are Impacting U.S. Economic Sanctions*, *supra* note 215, at 123–24, 192–94 (demonstrating how economic sanctions regulate and control the ability of persons to engage in commercial and financial transactions and otherwise deprive people in sanctioned countries of basic resources and employment opportunities). For more on the regulatory function of U.S. national security practices like administrative detention, drone strikes, and economic sanctions see Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063 (2020).

[253] While this section mostly focuses on federal domestic national security activities, states have also increasingly invoked national security to regulate activities within their borders. *E.g.*, Annie Erling Gofus, *Florida's New Real Estate Laws: Restrictions on Property Ownership by Foreign Nationals*, WERC (Oct. 31, 2023), https://web.archive.org/web/20240302073747/https://www.worldwideerc.org/news/public-policy/florida-s-new-real-estate-laws-restrictions-on-property-ownership-by-foreign-nationals [https://perma.cc/8ZNM-8WAS].

to distinct approaches to evidence gathering and domestic criminal tri-
als in national security cases.[254] They have prompted the creation of
criminal laws of expansive reach—most notoriously reflected in a range
of federal criminal material support laws.[255] National security has also
impacted the U.S. criminal justice system in even more pervasive and
insidious ways, "affecting our underlying assumptions about the nature
of culpability and the goals of law enforcement, the way in which we
draft and interpret penal code sections or criminal statutes, our ap-
proach to affirmative defenses, and the strategies or techniques most
favored by enforcement officers and prosecutors."[256]

While long considered a national security issue,[257] the U.S. immi-
gration system has become even more subsumed by specific national
security priorities since 9/11[258] that have substantially shaped immi-
gration laws and regulations targeting persons present within the
United States and at the U.S. border.[259] National security concerns
have also affected U.S. privacy laws and norms that have demonstrat-
able impacts on persons, including through warrantless mass surveil-
lance programs,[260] policies regarding airport security searches,[261] and
national security exceptions to the federal law on medical privacy.[262]

National security concerns have even shaped economic and finan-
cial transactions engaged in by or involving U.S. persons or occurring
within the United States, through economic sanctions regulations[263] as
well as national security-focused investment, banking, and trade
laws.[264] Lastly, national security has affected federal emergency and

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[254] SAID, *Crimes of Terror, supra* note 38, at 73–105.

[255] Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SEC. L. & POL'Y 5, 5–7 (2005).

[256] Dru Stevenson, *Effect of the National Security Paradigm on Criminal Law*, 22 STAN. L. & POL'Y REV. 129, 131 (2011).

[257] *See supra* note 101 and accompanying text.

[258] Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslims Bans*, 75 WASH. & LEE L. REV. 1475, 1478–82 (2018).

[259] *See generally* Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669 (2017) (examining how U.S. national security concerns shaped immigration poli-
cies during the 2010s).

[260] GRANICK, *supra* note 39, at 192–216.

[261] *See* Luna, *supra* note 187 (demonstrating how counter-terrorism priorities have impacted U.S. airport security).

[262] Under the Health Insurance Portability and Privacy Act of 1996 (HIPAA)—which creates a national standard to protect people's sensitive medical information—a "covered entity may disclose protected health information to authorized federal officials for the conduct of lawful intelligence, counter-intelligence, and other national security activities" under the National Security Act and implementing authority. 45 C.F.R. § 164.512(k)(2).

[263] Arthur Culvahouse, Jr., *A Practical Guide to International Sanctions Law and Lore: Ma-
mas, Don't Let Your Children Grow Up to Be Sanctions Lawyers*, 32 HOUS. J. INT'L L. 587, 592–93 (2010).

[264] *See* Eichensehr & Hwang, *supra* note 49, at 560–82 (describing the U.S. government's

disaster management,[265] and influenced domestic responses to climate change[266] and public health pandemics,[267] to name but a few more areas of national security regulatory creep.

National security's pervasive reach at home and abroad supports the view put forth by some scholars that the "distinction between war and peace" is questionable, at best.[268] Even more importantly, it demonstrates a strong link between the U.S. government's war powers, including its regulatory aspects, and the government's domestic regulatory activities.[269] This, of course, raises questions as to why these two authorities have become intertwined. One answer, suggested by critical theorist Mark Neocleous, is that the state's domestic regulatory powers and war powers are linked because they both primarily focus on one objective: targeting the "enemies" of capitalist order. According to this view, the regulation of conduct at home and the operation of war abroad are tied together by the shared aim of disciplining subjects to ensure a social order that is conducive to the interests of capitalism; in this way, the "domestic order and [the] global order rely on one another."[270] Applying this theory to the War on Terror, Neocleous argues that it

> has little to do with defeating 'terror' whatever that might mean, and rather a lot to do with shaping civil society and the social order: with making and remaking citizens and/as subjects, with re-forming populations into new modes of security and

practice of conducting national security reviews of certain inbound investments into the United States by foreign individuals and entities and outbound investments by U.S. persons abroad); Kevin Tang, *The Patriot Act and Foreign Banking: Section III's Role in Foreign Policy*, 39 REV. BANKING & FIN. L. 135, 136–38 (2021) (describing how concerns about terrorism financing after 9/11 led to new federal laws requiring U.S. financial institutions to take certain measures with respect to any foreign jurisdiction, financial institution, or international transaction designated by the U.S. Treasury Secretary as a "primary money laundering concern"); Vilas Ramachandran, *A Regulatory Back Door: General Prohibition Ten and America's National Security*, 20 SANTA CLARA J. INT'L L. 31, 36–46 (2022) (providing an overview of U.S. export control laws and noting that "[w]hen Congress deliberated the United States' export control regime, its main goal was to secure America's national security and further the nation's interests around the world").

[265] *See* Saptarishi Bandopadhyay & Joshua Coene, *Disaster Risk in the Carceral State*, 42 STAN. ENVT'L L.J. 171, 208–10 (2023) (describing the Federal Emergency Management Agency, which is responsible for federal disaster management, as assuming a national security footing from its inception); Grow Sun & Andersen Jones, *supra* note 146, at 910–21 (describing various state and federal actions, rhetoric, and policies applying a war-framing to non-war natural disasters in the United States).

[266] *See* Mark Nevitt, *Climate Security Insights from the COVID-19 Response*, 98 IND. L.J. 815, 819 (2023) ("[T]here is a growing understanding that the military will be called upon to respond to . . . climate-exacerbated natural disasters.").

[267] *See id.* at 819–20, 836–38 (describing various national security-based authorities used by the government to respond to COVID-19 and noting that the U.S. military played an "outsized role" in leading the government's response).

[268] NEOCLEOUS, *supra* note 188, at 5.

[269] *Id.* at 13.

[270] *Id.* at 31–32, 175.

technologies of governing and, more than anything, with estab-
lishing new grounds of accumulation . . . [it] is the contemporary
instantiation of the combination of war power and police
power.[271]

F.   How the Relationship Between Government and National Secu-
     rity Academia Restricts the Horizon for Rethinking National
     Security

There is a revolving door between national security academia, the
U.S. government, and the think tanks shaping U.S. national security
policy. While this reality is not one every national security scholar ex-
periences or strives for,[272] it is an established fact within the field. As
this sub-section demonstrates, this reality limits the academy's recep-
tivity to radical, transformative approaches to national security that
break with the status quo—an issue with obvious implications for such
efforts within legal scholarship.
     Many of this country's leading national security scholars have
worked in the U.S. government, whether prior to entering academia or
during their academic careers, and/or have been affiliated with think
tanks closely tied to the national security establishment.[273] As historian
Andrew Bacevich notes, those aspiring to the inner-circle of U.S. na-
tional security "signal[] their trustworthiness and reliability" by adher-
ing to dominant narratives about American power.[274] National security
scholars that cycle in and out of the government and think tank world—
or desire to do so—are, as such, particularly incentivized to frame na-
tional security in terms amenable to U.S. interests and less likely to
challenge (or support those who challenge) the basic foundations of the
national security state.
     This is not to suggest that these national security academics are
unique in their tendency to serve state power. To the contrary, intellec-
tuals and scholars have long bolstered the interests of empire. For cen-
turies, scholars were central to European colonialism and imperial-
ism—both legitimizing that imperialism through their scholarship[275]

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[271]   *Id.* at 14.

[272]   Of course, there are also individual national security scholars who are outliers and/or are
actively challenging the national security status quo in radical ways.

[273]   *See* Kumar, *Terrorcraft: Empire and the Making of the Racialised Terrorist Threat, supra*
note 126, at 65 (noting the important contributions think tanks make to U.S. national security
policy).

[274]   BACEVICH, *supra* note 58, at 8.

[275]   *See* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL
LAW 28–31 (2007) (discussing the work of a seminal Western scholar of international law and the
ways it legitimized Spain's conquest of the Americas); KUMAR, *supra* note 87, at 35–36 (2020) (de-
scribing how scholarly production was used to further the interests of European colonialism in the

and actively participating in the day-to-day administration of colonial empires.[276] Since at least the third period of national security (which started with the Great Depression and ended with the Cold War), U.S. universities—especially the most elite institutions—have played a particularly important role in maintaining and supporting the national security establishment and its imperial ambitions.[277] For example, after World War II, the U.S. government, together with private foundations, funded the creation of various academic departments to develop expertise on particular regions—specifically Africa, Asia, Latin America, and the Middle East—in order to "consolidate U.S. hegemony around the globe."[278]

However usual it might be, this imbrication between government and national security academia suggests that any effort to radically transform the fundamentals of U.S. national security will be hamstrung if based exclusively or even primarily within the scholarly community. Legal scholars who seek to radically reimagine national security should, as such, be mindful of the reception their work is likely to receive from other national security scholars; determine how to respond to and engage with that reception; and consider connecting with other actors outside legal academia, the government, and the government-aligned think-tank world who may be more amenable to radically re-conceptualizing and theorizing what national security means and how it operates.

G.   The Critical Role of Social Movements in Radically Reimagining U.S. National Security

This brings us to the final issue in this transformative agenda for national security. While academics and other national security "experts" [279] may be unlikely to pursue or support radical approaches to reimagining national security, left social movements show much more promise. As legal scholars Sameer Ashar, Amna Akbar, and Jocelyn Simonson argue, left social movements are a vital and powerful force for transforming both law and politics, creating "some of the most profound changes in how we relate to one another and what we can expect of the

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nineteenth century).

[276]   KUMAR, *supra* note 87, at 34.

[277]   Barnet, *supra* note 133, at 497.

[278]   KUMAR, *supra* note 87, at 61 (quoting international relations scholar Inderjeet Parmar).

[279]   Within the U.S. national security sector, the default assumption is that experts within the Executive Branch—often with specialized military or security-related skills—are the ones best positioned to define U.S. national security and decide what constitutes a national security threat. Rana, *Who Decides on Security?*, *supra* note 4, at 1423–24. Much like many of the members of national security academia, however, these national security experts are substantially invested in maintaining the status quo. Glennon, *National Security and Double Government*, *supra* note 20.

state."[280] Across areas as diverse as criminal justice, environmental justice, racial justice, and labor, left social movements have emerged, at scale, to challenge and contest state and corporate power and upend the status quo, after decades of relative quiescence.[281]

The national security space is no exception. In the last few years, left social movements radically challenging the foundations of national security and presenting alternative political visions for the field have emerged. These movements are largely led by members of those communities most targeted and disadvantaged by U.S. national security policies—namely Middle Easterners, South Asians, Africans, and Muslims. In 2021, some of these movement groups published a policy agenda, *Abolishing the War on Terror & Building Communities of Care: A Grassroots Policy Agenda for the Biden-Harris Administration and 117th Congress* ("Abolishing the War on Terror"), that fundamentally questions and rejects many of the premises of U.S. national security and presents new conceptions of security in its place.[282]

Drawing inspiration from abolitionist approaches to U.S. criminal justice and immigration practices,[283] *Abolishing the War on Terror* calls for dismantling the national security state and the War on Terror that it birthed.[284] Explicitly rejecting reformist solutions,[285] the agenda exposes and challenges the presumptions of the War on Terror, arguing that it "is built upon and sustained through structural Islamophobia and the dehumanization of Muslim communities and anyone perceived or racialized as Muslim," and also depends "upon . . . broader structures of anti-Black racism, white supremacy, settler-colonialism, and imperialism."[286] To undo these structures, the agenda calls for eliminating various national security laws, programs, and departments, including repealing the 2001 and 2002 Authorization for the Use of Military Force, repealing the criminal material support laws, ending the U.S. government's drone program, abolishing the Department of Homeland

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[280] Amna Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 824, 827 (2021).

[281] *Id.* at 824–25.

[282] *Abolishing the War on Terror & Building Communities of Care: A Grassroots Policy Agenda for the Biden-Harris Administration and 117th Congress* (2021) [hereinafter *Abolishing the War on Terror*]. I discuss the agenda at length in *Whose Security Matters?*, 116 AJIL UNBOUND 236 (2022).

[283] *See, e.g.* Akbar, *An Abolitionist Horizon for (Police) Reform*, *supra* note 57, for a description of abolitionist approaches to policing.

[284] The authors of *Abolishing the War on Terror* include the following organizations: Justice for Muslims Collective (since renamed Muslims for Just Futures), HEART Women & Girls, Vigilante Love, the Partnership to End Gendered Islamophobia, Project South, the Partnership for the Advancement of New Americans, and the U.S. Campaign for Palestinian Rights. *Abolishing the War on Terror*, *supra* note 282, at 1.

[285] *Id.*

[286] *Id.* at 2.

Security, defunding the Pentagon, and repealing the PATRIOT ACT and the 1996 Antiterrorism and Effective Death Penalty Act, among other proposals.[287]

The *Abolishing the War on Terror* agenda is not just about ending problematic state structures; it is also dedicated to redefining and building new forms of collective security.[288] In particular, the agenda calls for redistributing resources away from the government's national security apparatus and towards communities impacted by state abuse.[289] As the agenda puts it, funds saved from abolishing national security structures should be invested in Black, brown, and indigenous communities to address issues like "COVID19 recovery, investing in free and affordable housing, universal health care, employment that guarantees a living wage and a just work-week, [and] free education."[290]

Whatever one thinks of these proposals, there is little doubt that they constitute a *radical* reimagining of the U.S. national security apparatus. Together with the groups that have developed them, they provide a political vision and potentially receptive community for those exploring similar radical approaches through legal scholarship.[291]

IV. CONCLUSION

What it means to reimagine national security is limited only by our willingness to question so-called truths and think in unconventional ways. This agenda has attempted to model such openness. It has certainly failed to address every assumption and presumption of U.S. national security and has been cursory in places where more exposition and argument would have been desirable. With any luck, though, it has provided readers with a set of topics that can help them reflect on what it means to radically rethink national security through legal scholarship and the impetus to disrupt a field in desperate need of a true reimagining.

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[287] *Id.* at 10, 11, 15.

[288] Jamshidi, *Whose Security Matters?*, *supra* note 282, at 240.

[289] *Abolishing the War on Terror*, *supra* note 282, at 33–50.

[290] *Id.* at 15.

[291] Some legal scholars have also started embracing abolitionist approaches to U.S. national security. *See, e.g.*, Bâli, *supra* note 243 (calling for the defunding of the "military-industrial-policing complex" that sustains the U.S. national security state); Matiangai Sirleaf, *Reforming, Transforming, and Radically Imagining National Security*, in RACE AND NATIONAL SECURITY 251–63 (Matiangai Sirleaf ed. 2023) (advocating an abolitionist vision of national security). I am among these scholars. Maryam Jamshidi, *Bringing Abolition to National Security*, JUST SEC. (Aug. 27, 2020), https://www.justsecurity.org/72160/bringing-abolition-to-national-security/ [https://perma.cc/43XC-X625].