

# The Great Replacement: White Supremacy as Terrorism?

*Khaled A. Beydoun<sup>1</sup> and Nura A. Sedique<sup>2</sup>*

## ABSTRACT

*The events of January 6th 2021, and the era of emboldened armed white supremacist violence that surrounded the United States Capitol attack spurred state commitment to counter “white supremacist terrorism.” This unprecedented shift on the part of the federal executive branch, spearheaded by the Biden Administration, redirected War on Terror tools previously fixated on Muslim populations toward new subjects: white supremacist terrorists.*

*The Biden Administration marshaled counter-radicalization policing—the preventative informant-driven surveillance program—as the centerpiece of its white supremacist counterterrorism strategy. Counter-radicalization theory, specifically devised with Muslim subjects in mind, seeks to prevent the process whereby a subject becomes “radicalized,” or ideologically motivated to commit a violent act. This Article begins by analyzing the War on Terror roots of counter-radicalization policing, and the state and societal white supremacy that drove it. Interrogating the entrenched nature of white supremacy within different government institutions highlights the structural realities that impede its enforcement and the harms of extending the powers of the national security apparatus.*

*In addition to examining the enforcement perils tied to white supremacist counterterrorism, this Article introduces the concept of “surveillance relapse.” Surveillance relapse is the probability that counterterror enforcement will revert to principal and historic subjects of surveillance—Muslim and Black communities—because of the deeply racialized understanding of terrorism rooted in the federal and local law enforcement agencies tasked with carrying forward surveillance. This Article examines the critiques of a white supremacist counterterrorism regime through the prism of three surveillance relapse types: state-oriented relapse, circumstantial relapse, and structural relapse.*

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<sup>1</sup> Harvard University, Scholar-in-Residence, Berkman Klein Center for Internet & Society, Initiative for a Representative First Amendment (IRFA). Associate Professor of Law, Wayne State Univ. School of Law; Co-Director, Damon J. Keith Center for Civil Rights.

<sup>2</sup> Princeton University, Postdoctoral Fellow, School of Public & International Affairs; Michigan State University, Assistant Professor of Political Science and Public Policy.

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#### INTRODUCTION

*“You will not replace us!”*

– Renaud Camus<sup>3</sup>

*“Terrorism from white supremacy is the most lethal threat to the homeland today.”*

– President Joe Biden<sup>4</sup>

The Tops Friendly Market Store transformed a community. Opening its doors to the predominantly Black community located on the eastside of Buffalo, New York in July of 2003, Tops brought a full-line grocery store to a food desert.<sup>5</sup> More than a grocery store, the Tops location instantly emerged into a “village watering hole,”<sup>6</sup> where indigent and working class Black

<sup>3</sup> See generally RENAUD CAMUS, *YOU WILL NOT REPLACE US!* (2018), the title of the manifesto adopted as the slogan of disparate white supremacist groups, in the United States and globally, who believe that the “white race” is being endangered by the rise of communities of color.

<sup>4</sup> Maanvi Singh & Joan E. Greve, *Biden Declares White Supremacists ‘Most Lethal Threat’ to US as He Marks Tulsa Race Massacre - as it Happened*, THE GUARDIAN (Jun. 1, 2021), <https://www.theguardian.com/us-news/live/2021/jun/01/joe-biden-tulsa-oklahoma-race-massacre-us-politics-live> [https://perma.cc/R4F6-JPLE].

<sup>5</sup> Jaelyn Diaz, *The Tops in Buffalo’s East Side Was a Lifeline. Should it Reopen?* NPR (May 21, 2022), <https://www.npr.org/2022/05/21/1099826247/tops-market-history-buffalo-shooting> [https://perma.cc/G5RG-7GDL].

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

Buffalonians deepened personal relationships and forged new ones. Seemingly overnight, Tops became an epicenter of community, and a standing symbol of Black Buffalo.

The Blackness of Tops—and the neighborhood that it wrapped its arms around—is precisely why it was targeted on May 14, 2022. Payton S. Gendron, an eighteen-year-old white supremacist and ethno-nationalist, parked his car outside of Tops on Buffalo’s eastside, home to a population that is approximately 73% Black.<sup>7</sup> Clad with what seems to be the customary uniform of his ideological ilk—a military grade helmet mounted with a camera, body armor, and a modified Bushmaster XM-15 rifle with slurs written across it and “white lives matter” emblazoned on the car—Gendron swung open its doors and marched into Tops at 2:30 pm to carry out what he came to do.<sup>8</sup>

It was finally time, that spring afternoon, to convert the musings of dark imagination into twisted reality. Gendron plodded methodically through the common areas and aisles of Tops. Then, he opened fire on anybody and everybody Black. The majority of Tops shoppers, like the Kingsley neighborhood that surrounds it, were Black. In the midst of his murder spree, Gendron apologized to a white victim he shot in the leg, sparing his life in the process of killing more Black people.<sup>9</sup>

But the anti-Black massacre would not be confined to Tops’s walls. Gendron’s ideological motive fueled a grander, more gruesome aim: satiating the mounting white supremacist elements that shared his worldview. He recorded the massacre and livestreamed it on his Twitch account, where his followers watched Black body after Black body shot and killed in real time.<sup>10</sup> After the final round of fire, ten people laid dead. Every single one of them was Black, bringing the white supremacist’s morbid designs into a stark and stunning reality.

In just six minutes, Tops was transformed from a site of Black possibility into the latest landmark of anti-Black murder. Gendron gunned down nearly two decades of old, entrenched relationships and new ones forged inside the walls of the institution.

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<sup>7</sup> Open Data Buffalo, *City of Buffalo Neighborhoods*, (last viewed on July 5, 2022), <https://data.buffalony.gov/stories/s/Neighborhood-Population-Profile/cry5-9ict/> [https://perma.cc/835Z-TWCD].

<sup>8</sup> Cameron McWhirter and Sadie Gurman, *Accused Buffalo Gunman Described Why He Chose his Firearms, Body Armor*, WALL STREET JOURNAL (May 15, 2022), <https://www.wsj.com/livecoverage/buffalo-ny-supermarket-shooting-latest-news/card/accused-buffalo-gunman-described-why-he-chose-his-firearms-body-armor-7vfPgmLKvLEV6oE13Cg-7vfPgmLKvLEV6oE13Cg> [https://perma.cc/9CY6-QDL5].

<sup>9</sup> Bill Chappell, *DOJ Charges Buffalo Gunman with Hate Crimes, and Says He Apologized to a White Victim*, NPR (Jun. 15, 2022), <https://www.npr.org/2022/06/15/1105226662/buffalo-payton-gendron-federal-hate-crime> [https://perma.cc/5QKK-J4RM].

<sup>10</sup> Taylor Hatmaker, *Buffalo Shooter Invited Others to His Private Discord “Diary” 30 Minutes Before Attack*, TECHCRUNCH, (May 18, 2022), <https://techcrunch.com/2022/05/18/buffalo-shooter-journal-discord-google-docs/> [https://perma.cc/2B2D-2BJ4].

The Tops Market of yesterday was no more. Its doors shuttered and the memories that were buried deep on the eastside of this Buffalo community, ravaged by poverty, had to rally closer together to strengthen the roots of its community. Those same roots summoned the vile imagination of a gunman who exacted the aims of a mounting white anxiety, and its accompanying terror, towards Black people on account of their Blackness.<sup>11</sup>

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Although Gendron walked into Tops alone on May 14th, he followed the marching orders of a movement that adapted the very white supremacy that, centuries earlier, created this nation. The “Great Replacement” theory fueled his massacre, with its conclusions of a “white genocide” unfolding with the influx of immigrants and rising influence of Black culture as root causes.<sup>12</sup> The white anxiety and rage that swelled across the United States were fueled by the fear of racial “replacement”. According to Renaud Camus, Black and Brown, Muslim and immigrant people represent the war on whites.

Following the dictates of Camus, who brought cogence in the early 2010s to a preexisting ideology with the publication of *The Great Replacement*, Gendron did his part in reversing the distorted narrative of white genocide.<sup>13</sup> Camus wrote, within the context of western Europe, that, “[whites] are being reverse colonized by Black and Brown immigrants, who are flooding the Continent in what amounts to an extinction-level event.”<sup>14</sup> Gendron, like Dylan Roof, Brenton Tarrant, and a motley crew of white supremacist gunmen before him, converted vile words into violent action, adapting Camus’s conclusions to the American context. Although distinct—Tarrant massacred Muslims in New Zealand on their holy day while Roof and Gendron gunned down Black churchgoers and shoppers<sup>15</sup>—they nonetheless targeted Muslim and Black people as well as Jewish and Latinx people. These are groups of people who are racially and religiously distinct but oriented as the demographic enemies of the “white race” and their mounting vigilante calls.<sup>16</sup>

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<sup>11</sup> Diaz, *supra* note 5, at 2.

<sup>12</sup> See generally RENAUD CAMUS, YOU WILL NOT REPLACE US (2018).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 21.

<sup>15</sup> See Khaled A. Beydoun, ‘In New Zealand We Will Give Him Nothing, Not Even His Name,’ CNN (Mar. 19 2019), <https://www.cnn.com/2019/03/19/opinions/ignore-terrorist-remember-new-zealand-victims-beydoun> [<https://perma.cc/XF9H-ZRL2>] (recounting the aftermath of the Christchurch massacres that claimed the lives of 50 Muslims).

<sup>16</sup> Jewish Americans, and synagogues, have also been targeted by white supremacist gunmen this is deeply rooted in this history. The starkest modern incident of anti-Semitic white supremacist mass murder took place on October 27, 2018, when a gunman killed eleven people inside the Tree of Life Synagogue in Pittsburgh, Pennsylvania. See Campbell Robertson, Christopher Mele, & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged*

Gendron's ideology drove his actions—meeting the disparate definitions of terrorism spread across the American legal code.<sup>17</sup> However, the racial form Gendron presented clashed with the racialized realpolitik that still prevails today, which conflates terrorism and the threat of it almost exclusively with Muslim identity.<sup>18</sup> The War on Terror, protracted over two decades, veritably enshrined this conflation. “Terrorism” and “Islam” were made inextricable by the shared force of law and propaganda, and as a result, were politically and popularly understood as synonyms. Shifting cultural tides, sparked by the Black Lives Matter (BLM) Movement, disrupted this conflation by branding white supremacy as terrorism.<sup>19</sup> The string of mass shootings unleashed by white men converging with the BLM Movement gave legs to this (re)framing, gradually dislodging the perceived Muslim monopoly over a form of violence that the state has strategically crafted since the 9/11 terror attacks. “White supremacist terrorism” entered the discursive and political lexicons after the January 6th “insurrection” on the Capitol in Washington, D.C., and it finally commanded the attention of the state.<sup>20</sup> At least, and initially, this happened by way of rhetoric.

The upstart Biden regime oriented “white supremacist terrorism” as a primary national security threat following the disparate movement galvanized and trumped up by the previous administration. President Biden sought to redirect the state's established counterterror resources toward combating the white supremacist terrorist threat, drawing on the very infrastructure and tools used to police and punish Muslim communities.<sup>21</sup> This was the rhetoric ringing from the White House, which was refreshing for advocates and scholars that have long lobbied for a neutral reframing of terrorism and policing strategies stripped of racist and Islamophobic enforcement. Yet, for

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*With 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> [<https://perma.cc/4QH6-LXG4>].

<sup>17</sup> See generally Keiran Hardy & George Williams, *What is “Terrorism?”: Assessing Domestic Legal Definitions*, 16 UCLA J. OF INT'L L. & FOREIGN AFFAIRS 77, 154-59 (2011).

<sup>18</sup> This ascription of terrorism to Islam, and Muslim subjects, forms the basis of Islamophobia, which Beydoun defines as the presumption of terror activity tied to expression of Muslim identity. See Khaled A. Beydoun, *Islamophobia: Toward A Legal Definition and Framework*, 116 COLUMBIA L. REV. ONLINE 108, 111-19 (2016) (Beydoun defines “private Islamophobia” as anti-Muslim animus or violence inflicted by individual bigots or actors not tied to the state; and “structural Islamophobia” as law, policy, and action taken by a state agency or actor.).

<sup>19</sup> For a popular article demonstrating how the reorientation of white supremacy as terrorism emerged during the thick of BLM's impact, see Sherrilyn Ifill, *Call White Supremacy By Its Name: Terrorism*, CNN (Mar. 26, 2017), <https://www.cnn.com/2017/03/26/opinions/white-supremacy-is-terrorism-ifill-opinion> [<https://perma.cc/4JM6-6TRF>].

<sup>20</sup> See generally Daniel L. Byman, *Assessing the Right-Wing Terror in the United States A Year After the January 6th Insurrection*, BROOKINGS (Jan. 5, 2022), <https://www.brookings.edu/blog/order-from-chaos/2022/01/05/assessing-the-right-wing-terror-threat-in-the-united-states-a-year-after-the-january-6-insurrection/> [<https://perma.cc/KQH7-QQYQ>].

<sup>21</sup> See Hannah Allam & Ellen Nakashima, *Biden's Domestic Terrorism Strategy Details Unprecedented Focus on Homegrown Threats*, WASH. POST (Jun. 15, 2021), [https://www.washingtonpost.com/national-security/biden-strategy-domestic-extremism/2021/06/14/d88250c8-cd4e-11eb-9b7e-e06f6cfdece8\\_story.html](https://www.washingtonpost.com/national-security/biden-strategy-domestic-extremism/2021/06/14/d88250c8-cd4e-11eb-9b7e-e06f6cfdece8_story.html) [<https://perma.cc/WXD5-DB4M>].

critics, plans to counter white supremacist terrorism were riddled with serious concerns, and spurred conclusions that new racial labels would serve the same old racist counterterrorism enforcement aims.

This Article analyzes another *great replacement* standing atop “The Great Replacement” ideology that drives white supremacist terror. Specifically, the Biden Administration’s renewed mandate to direct state antiterror tools, with counter-radicalization as the principal policing tool, to counter white supremacist terrorism *in replacement* of Islamic terrorism. Counter-radicalization, the “signature antiterror program” adopted federally by the Obama Administration in 2011 and later adapted by President Donald Trump when he entered the presidency six years later, focused wholly on “policing radicalization” within Muslim communities inside the United States.<sup>22</sup> It conceptualized radicalization, like its mother phenomenon of “terrorism,” almost exclusively to Muslim subjects.

The events of January 6th—and the tentacles of white supremacist violence that preceded and followed it—drummed up support for an unprecedented shift in counterterrorism philosophy and enforcement. This included reconfiguration of counter-radicalization to fixate centrally on the oldest form of American terror that took on a modern form: white supremacy. However, a myriad of critics raised practical and political concerns around a counter-radicalization regime focused on white supremacist terrorism, with others opposing the view that white supremacy should be labeled “terrorism” at all.<sup>23</sup> The majority of these critiques center on fears that white supremacist terrorism would extend, direct, or spur collateral harms on overpoliced communities of color, namely the principal targets of the War on Terror counterterrorism establishment: Muslims in the United States.

This Article identifies and interrogates these critiques, contributing a cogent analysis of the coming white supremacist counterterrorism strategy to the literature. In addition to surveying existing critiques made by law scholars, advocates, and activists, this Article also presents novel concerns with the formation of counter-radicalization policing strategies targeting white supremacists. The replaced focus on white supremacists, instead of Muslims as the primary subjects of counterterrorism, does little to change the cultures of white supremacy embedded within the policing agencies tasked with carrying it out. The institutionalization of white supremacy and Islamophobia within the federal and local law enforcement agencies tasked with enforcing counter-radicalization against white supremacist elements will likely: (1) derail the very possibility of carrying forward such a program; (2) drive under-policing of white supremacist groups; (3) enable the continuance of Muslim

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<sup>22</sup> Khaled A. Beydoun, *Stephen Paddock, A ‘Lone Wolf?’ Our Stunning Double Standard When it Comes to Race and Religion*, WASH. POST (Oct. 2, 2017), <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/10/02/lone-wolf-our-stunning-double-standard-when-it-comes-to-race-and-religion/> [<https://perma.cc/6PVA-ACZ3>].

<sup>23</sup> See *infra* Part II(A).

over-policing; and (4) entrench and expand community surveillance after a violent attack involving a Muslim culprit.

These predictable outcomes, tied to the weight of history and the deeply institutionalized concern with Muslim terrorism, drive our conclusion that replacing “counter-radicalization of Muslims” with “counter-radicalization of white supremacists” will do more harm than good for overpoliced communities of color. Framing white supremacy as a menace that exists beyond the bounds of the state, and the very agencies tasked with countering terrorism, overlooks its institutional entrenchment on the federal and local levels, and the salient role the various stratas of the state play in perpetuating it.

This Article will proceed in three parts. Part I will survey counter-radicalization policing targeted toward Muslims and the distinct iterations of it enforced by the Obama, Trump, and finally the Biden Administration, which is poised to refocus on white supremacists.

Part II will examine the scholarly and grassroots concerns with marshalling established counterterror tools against white supremacist violent actors. It leads with historical contextualization of the embedded nature of white supremacy, and then articulates the theoretical reservations of orienting white supremacist violence as terrorism. This is followed by the practical critiques of deploying counter-radicalization policing against white supremacists.

Part III engages with the critical observations in Part II and presents the likely effects of a *relapse* in white supremacist counter-radicalization regime upon Black, Brown, and Muslim communities—who were once the primary targets of the state and white supremacist violent actors. In particular, this section will discuss three potential scenarios where such a relapse could occur: a likely state-oriented relapse, if there is a shift in a presidential administration with differing political motivations; circumstantial relapse, if there is a Muslim culprit, how these policies would be used to further target Muslims; and structural relapse, taking into account the disjointed nature of local law enforcement equitably following through with federal agency orders.

## I. THE COUNTERTERROR ESTABLISHMENT

The events of January 6th, and the white supremacist storm that precipitated it, spurred declarations that the old War on Terror was no more. Others, including President Biden, declared in its wake that white supremacy was the primary terrorist threat “to the homeland.”<sup>24</sup> Despite proclamations ringing from pundits and politicians to the contrary, and the paradigm shift spurred by the pandemic,<sup>25</sup> the War on Terror architecture designed to police

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<sup>24</sup> Singh & Greve, *supra* note 4, at 4.

<sup>25</sup> See Ben Rhodes, *The 9/11 Era is Over*, THE ATLANTIC (Apr. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/its-not-september-12-anymore/609502/> [<https://perma.cc/ML6Q-LTQA>] (contending that the coronavirus pandemic marked a shift away from the War on Terror era).

Muslims remained firmly in place. In addition to the network of institutions and agencies tasked with policing Muslim communities, and the laws and programs created to counter terrorism within them, the prevailing epistemology that framed terrorism exclusively along the contours of Muslim identity remained deeply embedded. The complexion of terrorism, despite facially neutral legal definitions and rising concern about white supremacy, maintained its Brown and Muslim form in the popular imagination and state institutions.

This Part examines this racialized epistemology of Muslim terrorism, and the signature surveillance policy created to combat it. Section A surveys the racial construction of Muslim terrorism, drawing on the rich interdisciplinary literatures that followed and preceded 9/11. Section B examines the arc of counter-radicalization policing, a cornerstone surveillance program devised to prevent Islamic terrorism, which the Biden Administration seeks to repurpose to counter white supremacist terror.

### A. *The Complexion of Terrorism*

The banal claim that white supremacy is the “new terrorism” is echoed widely. People who hold this view overlook the settler colonial violence that created this nation and destroyed entire peoples in the process. Implicitly, they cling to the belief that terrorism is the original domain of Islam. The indemnification of whiteness from terrorism and the racialization of the image of Muslim identity demonstrates how the phenomenon is both politically and discursively imagined.<sup>26</sup>

“Terrorists are always Muslim but never white.”<sup>27</sup> With this plain-spoken thesis, Law Scholar Caroline Mala Corbin summarized a reciprocal racialization solidified by the War on Terror, but written well before the United States became a sovereign nation. The valorization of whiteness formed the epistemological and legal building blocks of the United States, hallmarked by legislation enacted in 1790 that made it a prerequisite for citizenship.<sup>28</sup> Converging with the enshrinement of whiteness as citizenship and the panoply of property interests that came along with it,<sup>29</sup> Islam was the

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<sup>26</sup> “Racialization” is defined as “an unstable and de-centered complex of social meanings constantly being transformed by political struggle” assigned to identifies in society. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, 55 (1994); see also ERIK LOVE, *ISLAMOPHOBIA AND RACISM IN AMERICA* (2017) (examining how race figures into the formation of Islamophobia).

<sup>27</sup> Caroline Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 *FORDHAM L. REV.* 455, 456 (2017).

<sup>28</sup> Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790) (limiting naturalization to ‘Whites,’ which restricted citizenship to immigrants who fit within the racial parameters of Muslim identity); see IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (analyzing the racially restrictive “Naturalization Era,” which lasted until 1952).

<sup>29</sup> See generally Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707, 1715–1720 (1993) (examining the process of constructing Blackness through the legal legiti-



antithesis of European civilization.<sup>30</sup> This orientation of Islamic otherness was exported into the United States, and found its imprint on the nation's nascent institutions and political narratives.

The “democratic” identity of the United States was simultaneously woven in the image of whiteness and against the specter of Islamic “tyranny,” as trenchantly documented by historian Robert Allison.<sup>31</sup> Allison wrote, “Americans of different political philosophies disagreed on the particular lessons drawn from Muslim history. But all of them, Tories and Patriots, Republicans and Federalists, agreed that Islam fostered religious and political oppression.”<sup>32</sup> Democracy was entwined with whiteness, and tyranny enmeshed with Islam as its nonwhite talisman. This brand of American Orientalism fueled the making of the nation and solidified the view—both popularly and legally—that Islam was inimical to democracy, and Muslim identity opposable to whiteness.<sup>33</sup>

In the nation's embryonic passages, the seeds of white indemnity and individuality were being sowed alongside the political construction of Islam as potently undemocratic, and pointedly un-American.<sup>34</sup> Religion, particularly Islam and its virtuous foil Protestantism, was central to the American race-making project, and both served as measuring sticks of de jure whiteness until the dissolution of the Naturalization Era in 1952. The complexion of Protestantism, which seeded the religious contours of whiteness before the racial category was formally created, was reflected by the “sacred” color of Christ and the vile tone of the “charlatan” Mohammed.<sup>35</sup> Through these early narratives, the formation of the Muslim terrorist trope gripped the American imagination (and its prevailing institutions) centuries before 9/11, while the exemption of whites from guilt of collective violence took on the righteous moniker of “Manifest Destiny.”<sup>36</sup>

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mation of slavery, and the concomitant making of whiteness as the pinnacle property possession that enabled myriad other forms of property rights, most notably, citizenship).

<sup>30</sup> See generally EDWARD SAID, *ORIENTALISM* (1979) (framing the master discourse of the same name, whereby European, then American, political, cultural, and societal gatekeepers defined western, “Occidental,” institutions and enterprises in mirror opposite terms of a flatly constructed Muslim world, which Said dubbed the “Orient.”; See also SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996), (perpetuating modern Orientalism by articulating how the “Muslim world” is at odds with the west and destined for a civilizational clash).

<sup>31</sup> See Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 *NYU ANN. SURV. OF AMER. L.* 29 (2013) (examining how Islam functioned as bar to naturalized citizenship until 1944).

<sup>32</sup> ROBERT ALLISON, *THE CRESCENT OBSCURED: THE UNITED STATES AND THE MUSLIM WORLD, 1776-1815* 35 (1995).

<sup>33</sup> See generally Beydoun, *supra* note 31.

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

<sup>35</sup> See EDWARD J. BLUM & PAUL HARVEY, *THE COLOR OF CHRIST: THE SON OF GOD AND THE SAGA OF RACE IN AMERICA* 11 (Univ. of N.C. Press 2012) (The colonists “presented their racial ideology as sacred, and therefore as above human creation and beyond human control.”).

<sup>36</sup> The grand settler colonial narrative that the expansion of the United States, by mass violence and genocide, was sanctioned by divine belief and state fiat.

9/11 and its aftermath cemented the “reciprocal racialization” of whiteness and Islamic violence.<sup>37</sup> While reactions to the event “redeployed old Orientalist tropes” readapted to construct the masculine Muslim terrorist caricature, the War on Terror modernized the imperial mandate of white violence.<sup>38</sup> But this time, it did so on a global scale. The categorical racialization of Muslims as terrorists justified illegal wars abroad and illegal dragnets on the home-front; the former campaigns plotted to expand American geopolitical interests and the former devised to deepen the reach of the security state. Much like the state-making missions of Manifest Destiny and slavery, whereby Native peoples were racialized as “barbarians” and Africans reduced to property, the War on Terror marked Muslims as terrorists in an empire expanding expediently.<sup>39</sup> Without this epistemological baseline, the creation of the Department of Homeland Security (DHS), the enactment of the US PATRIOT Act, or popular support for a “new global crusade” that divided the world into two warring civilizations would not have been possible.<sup>40</sup> “You’re either with us or against us,” President George W. Bush ordered, with Islam and 5 million adherents in the United States and 1.8 billion globally standing as the presumptive enemy.<sup>41</sup>

“Terrorism,” by law and propaganda, meant “Muslim.”<sup>42</sup> But how did this new fixation on “Islamic terror” impact the contours and complexion of whiteness?<sup>43</sup>

Islamic Law scholars have written at length about the racialization of Muslims as terrorists, but have only implicitly theorized how the War on Terror—as a multi-directional race-making project—remade the contours of whiteness.<sup>44</sup> The global and domestic campaign injected white identity with

<sup>37</sup> This phrase observes that, in part, the making of whiteness was constructed in mirror opposite terms to the misrepresentation of Islam, and Muslim identity.

<sup>38</sup> Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1586 (2002).

<sup>39</sup> See DEEPA KUMAR, ISLAMOPHOBIA AND THE POLITICS OF EMPIRE: 20 YEARS AFTER 9/11 (Verso 2nd ed. 2021), who argues this very point.

<sup>40</sup> See generally KHALED A. BEYDOUN, THE NEW CRUSADES: ISLAMOPHOBIA AND THE GLOBAL WAR ON MUSLIMS (2023), which frames the War on Terror as a “new global crusade” that enables and intensified a transnational crackdown on the dignity, rights, and lives of Muslim populations globally.

<sup>41</sup> Nine days after the 9/11 terror attacks, President George W. Bush stated in front of a joint session of Congress, “Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated . . . Either you are with us, or you are with the terrorists.” *Text: President Bush Addresses the Nation*, THE WASHINGTON POST 3-4 (Sept. 20, 2001), [https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress\\_092001.html](https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html) [perma.cc/S4UP-NLQ4].

<sup>42</sup> See Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 NW U. L. REV. 1213 (2018) (examining how War on Terror policy deeply conflated political and discursive understandings of terrorism with Muslim identity, and ascribed collective suspicion of terrorism to anybody who adhered to the faith).

<sup>43</sup> The term “Islamic terrorism,” mainstreamed by Bush Administration and the intelligentsia appointed to feed the War on Terror narrative, drilled the idea that Islam held exclusive dominion over the violent enterprise.

<sup>44</sup> See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN L. J. 1, 12 (2001), who observed in the immediate wake of the 9/11 terror attacks that, “Just as Asian Americans have been ‘raced’ as

an unhinged zeal that justified the mass killing of Muslims in Afghanistan and Iraq; the desensitized, nonstop droning of villages in Somalia, Yemen, Pakistan, and beyond; and the systems of surveillance and punishment that dissolved the civil liberties of Muslims and left them vulnerable to vigilante violence.<sup>45</sup> Whiteness was re-weaponized and armed to the teeth with the ammunition of unchecked patriotism that validated its mass violence against a people marked as terrorists—whether citizens on American soil or besieged people standing atop their own land.

The War on Terror, which often devolved into state-sponsored terror, peddled the myth that Islam “radicalized” its adherents, and it alone inspired terrorism.<sup>46</sup> After the War on Terror establishment was constructed by the neoconservative Bush Administration, countering this “radicalization” emerged as the focal counterterror strategy of the presidential regimes that followed. All of which, including President Biden’s plan to refocus counter-radicalization on white supremacists, colored terrorism in the exclusive complexion of Islam.

### B. *The Colors of Counter-Radicalization*

In *Islamophobia and the Politics of Empire*, media studies scholar Deepa Kumar argues that “surveillance is a mechanism of racialization that turns the target group into a suspicious race.”<sup>47</sup> This apt observation fixates on Muslims, standing as the subject of surveillance and reconstructed during the War on Terror in the image of the modern terrorist.<sup>48</sup> However, the enter-

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foreign, and from there as presumptively disloyal . . . Muslims have been ‘raced’ as ‘terrorists,’ foreign, disloyal, and imminently threatening.” See also Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002), who observed, “September 11 facilitated the consolidation of a new identity category that groups together persons who appear ‘Middle Eastern, Arab, or Muslim.’ This consolidation reflects a racialization wherein members of this group are identified as terrorists, and disidentified as citizens.”; SAHAR AZIZ, *THE RACIAL MUSLIM* (Univ. of Cal. Press 2022), for a recent treatise examining how the converging racial construction and religious demonization of Muslims in the United States, since the formative stages of American sovereignty, drives contemporary political and legal understanding of the faith group.

<sup>45</sup> See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 327-55 (2001) for an examination of the domestic counterterror and immigration policies enacted in the immediate wake of the 9/11 terror attacks. See also Muneer I. Ahmed, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1261, 1265 (2004) (Ahmed classifies public crimes of passion as those targeting populations within the U.S. that are perceived as Muslim on account of phenotype; a form of vigilante violence abetted by state law and propaganda).

<sup>46</sup> Radicalization is the process by which an individual adopts an extremist ideology that is linked to terrorist activity. Although not explicitly associated with Islam, the term has been discursively and politically linked to Muslims. See Amna Akbar, *Policing “Radicalization”*, 3 U.C. IRVINE. L. REV. 809, 811 (2013). See generally Samuel J. Rascoff, *The Law of Homegrown (Counter) Terrorism*, 88 TEX. L. REV. 1715 (2010) (examining the origins of U.S. law and policy addressing homegrown radicalization).

<sup>47</sup> KUMAR, *supra* note 39, at 23.

<sup>48</sup> Volpp, *supra* note 44, at 1575.

prise of state surveillance requires a surveillant, and the group standing behind the lens can be remade through the regulatory process. This is particularly true with the making of a new “total surveillance state,” ushered in by the War on Terror and its vast tentacles of state monitoring, control, and punishment.<sup>49</sup>

Surveillance functioned as the lifeline of state-sponsored Islamophobia, and counter-radicalization policing emerged as the most nefarious form through the Obama, Trump, and Biden Administrations. This Section surveys the establishment and arc of counter-radicalization policing, outlining its reformulation and enforcement by the Obama, Trump, and Biden Administrations.

### 1. *Countering Violent Extremism (CVE)*

The Obama Administration inherited a War on Terror that it mutated in presentation but was keen on maintaining. The bellicosity of the Bush approach could not be reconciled with the progressive cloak and neoliberal aims of the new order, which mandated a War on Terror makeover as soon as President Obama stepped into power.

The undressing of the “civilizational standoff” that characterized the posture of the Bush Administration began in a center of Islamic life: Al Azhar University in Cairo.<sup>50</sup> Taking stage in Egypt, before luminaries in attendance and billions watching the upstart American president virtually, Obama delivered a powerful address promising to mend eight years of War on Terror wounds with “A New Beginning.”<sup>51</sup> He declared,

I’ve come here to Cairo to seek a new beginning between the United States and Muslims around the world, one based on mutual interest and mutual respect, and one based upon the truth that America and Islam are not exclusive and need not be in competition. Instead, they overlap, and share common principles — principles of justice and progress; tolerance and the dignity of all human beings.<sup>52</sup>

The audience hung on to each sentence. An orator of the first order, Obama even quoted the Quran and wove together words that, one by one, con-

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<sup>49</sup> See generally DAVID LYON, SURVEILLANCE AFTER SEPTEMBER 11 (SAGE Publ’n 2003) [hereinafter SURVEILLANCE AFTER 9/11], for a leading treatise examining how the 9/11 terror attacks spawned wholesale formulation and enforcement of surveillance on a global scale. This Article adopts David Lyon’s definition of surveillance, which he frames as “the focused, systematic and routine attention to personal details for purposes of influence, management, protection or direction.” DAVID LYON, SURVEILLANCE STUDIES 14 (2007).

<sup>50</sup> Remarks By President at Cairo University on A New Beginning, THE WHITE HOUSE (June 4, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-cairo-university-6-04-09>. [perma.cc/HW3U-8UQU].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

structed the new surveillance order to come. An order that weaponized words, and the carrot of coexistence and collaboration, to deepen “the gaze” of the state in mosques, households, civic institutions, and Muslim communities at large.<sup>53</sup>

The false allure of coexistence flouted by Obama lured Muslims to be co-surveillants in their own unmaking. The promise of inclusion, seeded in Cairo and continued during Obama’s first term, functioned as the foundation of the new surveillance regime to come. The symbiosis of inclusivity as a rhetoric and community surveillance as a renewed strategy formed the crux of Obama’s “signature counterterror program:” counter-radicalization. This deftly enlisted Muslims as the eyes and ears of the state in spaces that the state had difficulty reaching or could not reach.<sup>54</sup>

The Obama Administration titled the new community surveillance program “Countering Violent Extremism (CVE).” Modeled after the British PREVENT Program and the New York Police Department (NYPD) “Spying on Muslims Program,” the federal surveillance program harmonized the resources of the federal surveillance agencies with the on-the-ground presence of local law enforcement departments.<sup>55</sup> CVE, like its foreign and local predecessors, focused on “preventing . . . radicalization,” adopting a flawed theory of radicalization designed in the image of Muslims and Islam.<sup>56</sup> Community informants, enlisted from Muslim communities, feed data to local law enforcement, who then share with federal counterterrorism agencies within DHS. In turn, this forms a data gathering pipeline where the most intimate Muslim geographies serve as the fountainhead of information that is fed to city police offices and even up to Washington, D.C.

While facially neutral, and only mentioning “Muslim” once throughout the document introducing it, CVE was virtually wholly enforced against Muslim communities.<sup>57</sup> In *Policing “Radicalization,”* law scholar Amna Akbar explicates the theory of Muslim radicalization adopted by DHS under

<sup>53</sup> Here, I use “the gaze” in direct reference to Michel Foucault’s foundational theorizing on state surveillance as a system of discipline and control. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT: THE BIRTH OF A PRISON* 205 (Alan Sheridan trans., Pantheon Books 1975).

<sup>54</sup> Rascoff, *supra* note 46, at 1735.

<sup>55</sup> See generally Fahid Qurashi, *The Prevent Strategy and the UK “War on Terror:” Embedding Structures of Surveillance Within Muslim Communities*, 4 PALGRAVE COMM. (2018), for an examination of Prevent’s surveillance architecture driven by its philosophy of “preventing” the process of Islamic “radicalisation” within concentrated Muslim communities and enclaves throughout the United Kingdom. See also *Mapping Muslims: NYPD Spying and its Impact on American Muslims*, CLEAR PROJECT, <https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/clear/Mapping-Muslims.pdf> [<https://perma.cc/Q87D-WMK4>] (last visited July 13, 2022), critically examining the NYPD strategy of monitoring Muslim life in the tri-state area through deployment of informants in heavily populated Muslim spaces and geographies.

<sup>56</sup> EXEC. OFFICE OF THE PRESIDENT, DEP’T OF HOMELAND SECURITY, *STRATEGIC IMPLEMENTATION PLAN FOR LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES* 20 (2011), <https://obamawhitehouse.archives.gov/sites/default/files/sip-final.pdf> [<https://perma.cc/7VPL-AESV>] [hereinafter CVE 2011].

<sup>57</sup> *Id.* at 8.

the Obama Administration: “Radicalization suggests that the path from Muslim to terrorist is a predictable one produced by or correlated with religious and political cultures of Muslim communities. Government radicalization discourses and programs are almost entirely fixated on Islam and Muslims.”<sup>58</sup> Like its proxy, terrorism, “radicalization” was politically conflated with Islam under the Obama regime, despite overtures that his administration would mend the wounds of Bush’s “War on Terror.”<sup>59</sup> Rather, he adapted it and moved it forward.

In short, and in line with Obama’s rhetorical pitch, CVE touted inclusivity with Muslims as a strategy to lure informants from the community, and simultaneously, disarm its posture of being antagonist toward the state. The “institutional focus on winning Muslim ‘hearts and minds’” drove the CVE mission,<sup>60</sup> flanked by the enforcement strategy of fixating entirely on Muslim terrain.<sup>61</sup> The enlisting of native informants from within the community evoked the analysis of postcolonial thinker Frantz Fanon, who observed how colonial powers situationally elevated individuals among the colonized as instruments to perpetuate the masses undoing.<sup>62</sup> Select Muslims were elevated to carry forward the newly minted CVE Program; individuals were appointed to positions with DHS and DOJ; civic and community organizations were awarded grants to function as interlocutors and legitimators of Muslim-surveillance; and masses were enlisted as informants to monitor mosques, Muslim Student Associations (MSA’s), and specific subjects of interest.<sup>63</sup> CVE further eroded and chilled the free exercise of religious liberties of Muslims, in addition to the panoply of First Amendment activity that coincided with religious exercise.<sup>64</sup> This was particularly the case for indigent and immigrant Muslim communities, where CVE scrutiny and impact was oftentimes more intense.<sup>65</sup>

In February 2015, the DHS-steered CVE Program formally launched partnership with local law enforcement departments. This expansion of CVE started with Boston, Los Angeles, and Minneapolis as pilot programs, where “[f]ederal departments and agencies have begun expanding support to local stakeholders and practitioners who are on the ground serving their communi-

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<sup>58</sup> Akbar, *supra* note 46, at 811.

<sup>59</sup> See *A New Beginning*, *supra* note 50.

<sup>60</sup> Rascoff, *supra* note 46, at 135.

<sup>61</sup> Akbar, *supra* note 46, at 855-59.

<sup>62</sup> See FRANZ FANON, *WRETCHED OF THE EARTH* (1961), for a formative analysis of the psychological impact of colonization on peoples dispossessed of their lands and disconnected from their independence.

<sup>63</sup> See KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR* 125-151 (2018).

<sup>64</sup> As Akbar notes, “Places for religious and political discussion and gathering, and potential organizing, became important targets for intelligence gathering.” Akbar, *supra* note 46, at 855.

<sup>65</sup> See generally Khaled A. Beydoun, *Between Indigence, Islamophobia and Erasure*, 104 CAL. L. REV. 1463 (2016) (examining how counter-radicalization surveillance is disproportionately enforced against poor, Black and Brown Muslim populations in the U.S.).

ties.”<sup>66</sup> These cities, selected for their large and concentrated Muslim communities, would form the foundation for a readapted War on Terror strategy that exploited Muslim individuals and organizations as the “eyes and ears” of the state.<sup>67</sup> “Building relationships” with Muslim communities was a seductive guise, which opened the doors for an intimate form of surveillance that divided communities and perpetuated the myth that terrorism and its precedent step—“radicalization”—was uniquely Muslim.<sup>68</sup>

## 2. *Countering Islamic Extremism*

“Islam hates us.”<sup>69</sup> These three words, and the presidential campaign surrounding them, eschewed the strategic inclusivity that drove the Obama surveillance state.<sup>70</sup> In fact, Donald Trump disavowed the very notion that reconciliation with the Muslim world was at all possible, and ushered in an order whereby the explicit rhetoric from the White House matched the bona fide aims of the War on Terror project.<sup>71</sup> He intensified the neoconservative vocabulary of “militant Islam,”<sup>72</sup> but coupled it with the looming notion that the United States is a white, Christian nation fending itself against demographic doom.<sup>73</sup>

<sup>66</sup> *FACT SHEET: The White House Summit on Countering Violent Extremism*, THE WHITE HOUSE (Feb. 18, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/18/fact-sheet-white-house-summit-countering-violent-extremism> [https://perma.cc/93GJ-FXJC].

<sup>67</sup> These were the exact words of democratic presidential hopeful Hillary Clinton, who said: “We need American Muslims to be part of our eyes and ears on our front lines” during the 2016 presidential debates. See Ismat Sarah Mangla, *Hillary Clinton Has an Unfortunate Way of Talking About Muslims*, YAHOO! FINANCE (Oct. 20, 2016), [https://finance.yahoo.com/news/hillary-clinton-unfortunate-way-talking-050353453.html?guce\\_referrer=AHR0cHM6Ly93d3cuZ29vZ2xllmNvbS8&guce\\_referrer\\_sig=AQAAAK540IGLK-1qmKuRbXjh0gbiFNxDxL6UHeI2tJsNEqqgicGrjB7ZfqIpICbABRPfM1zZG\\_WtuB3dvwSjSSA2FLdzZNZ3LcMYZiBwFUny7s7ueGZ1gtMSfFNoVrLZvK5oyU1raW3NFSat\\_aeVVqMbgPwgBNU88b6uiGyxyjI5xLs&guccounter=1](https://finance.yahoo.com/news/hillary-clinton-unfortunate-way-talking-050353453.html?guce_referrer=AHR0cHM6Ly93d3cuZ29vZ2xllmNvbS8&guce_referrer_sig=AQAAAK540IGLK-1qmKuRbXjh0gbiFNxDxL6UHeI2tJsNEqqgicGrjB7ZfqIpICbABRPfM1zZG_WtuB3dvwSjSSA2FLdzZNZ3LcMYZiBwFUny7s7ueGZ1gtMSfFNoVrLZvK5oyU1raW3NFSat_aeVVqMbgPwgBNU88b6uiGyxyjI5xLs&guccounter=1) [https://perma.cc/KEH8-NXMU].

<sup>68</sup> Amna Akbar, *National Security’s Broken Windows*, 62 UCLA L. REV. 834, 890 (2015).

<sup>69</sup> Jose A. DelReal, *Trump: ‘I Think Islam Hates Us,’* WASH. POST (Mar. 9, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/03/09/trump-i-think-islam-hates-us/> [https://perma.cc/HT8U-NTQ5].

<sup>70</sup> See Khaled A. Beydoun, “*Muslim Bans*” and the (Re)Making of Political Islamophobia, 2017 U. ILL. L. REV. 1237 (2017) [hereinafter *Remaking of Political Islamophobia*] (analyzing how Islamophobia was crafted and deployed by a number of presidential candidates, most notably Trump, as full-fledged campaign strategy).

<sup>71</sup> Jenna Johnson and Abigail Hauslohner, *‘I think Islam hates us’: A timeline of Trump’s comments about Islam and Muslims*, WASH. POST (May 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/> [https://perma.cc/5R3J-MKZU].

<sup>72</sup> See HAMID DABASHI, *BROWN SKIN, WHITE MASKS* 12 (2011), who wrote about the indelible imprint the likes of Francis Fukuyama, Samuel Huntington, and other scholar-advocates of the War on Terror had on Washington, D.C.

<sup>73</sup> Ironically, Trump restored the “Clash of Civilizations” worldview curated by Samuel P. Huntington, but also referred heavily to another of his texts, *WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY* 37-80 (2004), that affirmed that “American identity” is fundamentally characterized by its White Anglo Saxon Protestant “Creed.”

After seven years, CVE was no more. Trump's furious Islamophobia, symbolized most starkly by his order to "ban Muslims," unplugged its very lifeline.<sup>74</sup> The Muslim interlocutors needed to make CVE function were cast out by the new Executive—and those that would have *still* chosen to collaborate with a Trump surveillance order would have been marked pariahs by the community.

CVE was replaced by a renewed antagonism that superseded the neo-conservatism of the War on Terror's architects. While the Bush Administration drew binaries severing "good" from "bad" Muslims, and Obama strung smokescreens of peaceful "coexistence" to carry forward community surveillance, Trump tore down the formative myths and neoliberal mirages erected before him.<sup>75</sup> "Islam" hates "us," he proclaimed, orienting the former as a people divorced from the proverbial *us*, or U.S., which he viewed through the narrow prism of whiteness.<sup>76</sup>

Counter-radicalization did not yield, however, under Trump. Instead of confining its War on Terror strategy on a single, signature program, the Trump Administration expanded the state's anti-Muslim ire on a network of policies he enacted or was poised to see through. After signing the Muslim Ban executive order, President Trump discussed restructuring CVE and renaming it "Countering Radical Islamic Extremism," undressing the Obama program of its neutral façade and fixating it on its bona fide aim.<sup>77</sup> Many Muslim recipients of CVE grants rejected funds and work from the Trump Administration, while DHS rescinded funding of others.<sup>78</sup> However, plans to reform CVE were muted by the turbulence that marked Trump's presidential term and the anti-Muslim hysteria that spilled from the state in the form of vigilante violence, hate crimes, and unreported hate incidents.<sup>79</sup>

<sup>74</sup> A week after his inauguration, President Trump signed Executive Order 13769 into law. In the hours after, airports across the United States were instantly transformed into holding cells. Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017), revoked by Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13,209 (Mar. 6, 2017). The Executive Order, widely called the "Muslim Ban," was upheld by the Supreme Court. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (holding that "[t]he President lawfully exercised that discretion based on his finding . . . that entry of the covered aliens would be detrimental to the national interest").

<sup>75</sup> See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 68-70 (2004). Principal among "good Muslim" expressions are not supporting American War on Terror policy, dressing in a western style, and placing an American flag on one's home. See also MAHMOOD MAMDANI, *GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR* 15 (2004) (examining the genesis of the good-bad Muslim binary and its global application).

<sup>76</sup> See DelReal, *supra* note 69.

<sup>77</sup> Eric Rosand and Steven Weine, *On CVE, The Trump Administration Could Have Been Worst. But It's Still Not Good Enough*, BROOKINGS (Apr. 7, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/04/07/on-cve-the-trump-administration-could-have-been-worse/> [<https://perma.cc/FH52-BF3F>].

<sup>78</sup> *Id.* at 1.

<sup>79</sup> Reuters Staff, *U.S. anti-Muslim hate crimes rose 15 percent in 2017: advocacy group*, REUTERS (Apr. 23, 2018), <https://www.reuters.com/article/us-usa-islam-hatecrime/us-anti->



Despite the stalled restructuring of CVE, it continued under the Trump Administration with diminished funding and minimal Muslim community support. It was not officially renamed, but informally recharacterized by anti-Muslim rhetoric that emanated from the White House and key Trump officials. Community surveillance converged with the atmosphere of anxiety and paranoia sowed by the Muslim Ban, particularly in Muslim communities populated by nationals from barred states, whereby informants were developed under the pressure of threatened removal or third party (family) suspicion.<sup>80</sup> Following the footsteps of the Obama Administration, community surveillance under Trump fixated almost wholly on Muslims. But unlike the previous administration, this administration utilized an unabashed vocabulary that paired terrorism with Islam, to supplement its enforcement strategy. However, it continued the CVE philosophy of “preventing” radicalization through its enforcement mechanisms, shifted from a local law enforcement/informant model to an immigration/surveillance model with plans to formally restructure CVE during a second presidential term that would not come.<sup>81</sup>

Trump’s surveillance philosophy was expressly punitive and expanded its ire on Black activists in addition to Muslims. In 2017, an FBI report targeting “Black Identity Extremists (BIE)” was leaked.<sup>82</sup> The report outlined a program to surveil activists sympathetic to the movement to combat anti-Black racism, and namely, police brutality against Black people.<sup>83</sup> It focused most intensely on activists tied to the BLM Movement and Black elements sympathetic to it. Writing for *The New York Times*, law scholars Khaled A. Beydoun and Justin Hansford observed,

[T]he fabrication of a “B.I.E.” movement that could justify the F.B.I.’s marshaling of its counterterrorism capabilities against anyone who it decides fits the vague, baseless designation potentially threatens the civil liberties of all Americans. The COINTELPRO program began with an effort to prevent the rise of a “black messiah who could unify and electrify the militant black nationalist movement” and evolved to target the American Indian Movement, the Brown Berets and those who protested against the Vietnam War. Similarly, the F.B.I.’s broadening of the “War on Terror” to include Black Identity Extremists in addition to the primary targets

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muslim-hate-crimes-rose-15-percent-in-2017-advocacy-group-idUSKBN1HU240 [https://perma.cc/ZMY4-Z8X2].

<sup>80</sup> See Khaled A. Beydoun, *The Ban and the Borderlands Within: The Travel Ban as a Domestic War on Terror Tool*, 71 STANFORD LAW REVIEW ONLINE 251 (2019).

<sup>81</sup> Rosand and Weine, *supra* note 77, at 3.

<sup>82</sup> The BIE designation is outlined in the FBI report, leaked shortly after its publication. COUNTERTERRORISM DIV., FBI, BLACK IDENTITY EXTREMISTS LIKELY MOTIVATED TO TARGET LAW ENFORCEMENT OFFICERS (Aug. 3, 2017), <https://privacysos.org/wp-content/uploads/2017/10/FBI-BlackIdentityExtremists.pdf> [https://perma.cc/Y9AF-RPN2] [hereinafter BIE REPORT].

<sup>83</sup> *Id.*

of that campaign — Muslims — could be just the beginning. It’s not hard to imagine that those who advocate for women’s rights, immigrant rights and other groups could be the subject of a fantasy “movement” in a future F.B.I. report.<sup>84</sup>

By focusing on Black and Muslim communities, victims of mounting anti-Black racism and a protracted War on Terror, the Trump Administration expanded the bounds of the surveillance state in line with its populist perspective.<sup>85</sup> The expansion of “surveillance capitalism,”<sup>86</sup> and organizing efforts shifting traditional public forms to virtual platforms, also moved the gaze of the state from on-the-ground to online sites.<sup>87</sup> Nonwhite targets, on and off-line, were disparately vulnerable to the conjoined fury of state surveillance and white supremacist hate. The other side of “Make America Great Again” was punishing nonwhite populations and placating the white supremacist elements that formed the base of the Trump Movement.<sup>88</sup>

CVE was in a standstill. But four years of Trump witnessed the furious entrée of state and societal regulatory programs that marked Muslim immigrants, Black communities, and intersecting communities as more than just presumptive “radicals” or “terrorists,” but racial and religious outliers threatening the white identity of the nation.

### 3. *Countering White Supremacist Terrorism*

The Trump regime ended with a white supremacist bang. The legions of desperate white supremacists he mobilized, through conspiracies he proffered, drove the mass violence that unfolded on January 6th in Washington, D.C.<sup>89</sup>

Everybody, most notably the security state, saw it coming. However, the FBI, the DOJ, and local law enforcement—the very agencies that diligently policed Muslim communities and punished Black activists—did nothing. Instead, they stood idly by despite the ample intelligence that foretold

<sup>84</sup> Khaled A. Beydoun and Justin Hansford, *The F.B.I.’s Dangerous Crackdown on “Black Identity Extremists,”* N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/opinion/black-identity-extremism-fbi-trump.html> [<https://perma.cc/2SJZ-V7H9>].

<sup>85</sup> Black and Muslim communities are hardly independent, but often intersect. In fact, the largest demographic of Muslim Americans is Black. *Id.* at 3.

<sup>86</sup> See generally SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019).

<sup>87</sup> See Sahar Aziz and Khaled A. Beydoun, *Fear of a Black and Brown Internet: Policing Online Activism*, 100 BOSTON UNIV. L. REV. 1153, 1179-1184 (2020).

<sup>88</sup> See Amanda Graham, Francis T. Cullen, Leah C. Butler, Alexander L. Burton, and Velmer S. Burton, Jr., *Who Wears the MAGA Hat? Racial Beliefs and Faith in Trump*, 7 SOCIOUS 16 (2021), for a sociological analysis of how racism, and white supremacists’ elements, figure into the pro-Trump political camp.

<sup>89</sup> Tom Dreisbach, *How Trump’s ‘will be wild!’ tweet drew rioters to the Capitol on Jan. 6*, NPR (Jul. 13, 2022), <https://www.npr.org/2022/07/13/1111341161/how-trumps-will-be-wild-tweet-drew-rioters-to-the-capitol-on-jan-6> [<https://perma.cc/SVA6-4AFQ>].

the terror to come.<sup>90</sup> These agencies, and the entire surveillance state itself, were disarmed by the whiteness of the motley crews that surrounded the Capitol, who then stormed it minutes before 1pm.<sup>91</sup>

Upon taking office in late January, one of the Biden Administration's first charges was reorienting counterterrorism efforts against white supremacist movements.<sup>92</sup> In line with the events of January 6th, and the culture that precipitated it, Biden "directed his national security team to lead a 100-day comprehensive review of U.S. Government efforts to address domestic terrorism."<sup>93</sup> The political definition, and more importantly, the religious and racial scope of "domestic terrorism" would be far more capacious under Biden, and unprecedented in ranking white supremacist "terrorists" as primary national security threats.<sup>94</sup> Biden's national security commission found that the "two most lethal elements of today's domestic terrorism threat are (1) racially or ethnically motivated violent extremists who advocate for the superiority of the white race and (2) anti-government or anti-authority violent extremists, such as militia violent extremists."<sup>95</sup>

The voids were as striking as the additions. "Islamic terrorism" and "Muslims" were wholly absent from the findings, supplanted by "white race" supremacists and "anti-government" actors, the latter of which fixated on the January 6th insurrectionists, who are largely white and male.<sup>96</sup>

However, beyond the description of the terror subject priorities and the familiar voids in the letter of the coming "white supremacist surveillance program," the structural imprint of CVE—the program then Vice President Biden presided over during the Obama Administration—was considerable. Biden outlined his revitalization of CVE into four pillars. The "First Pillar," focused on "domestic terrorism analysis and improve information sharing throughout law enforcement," restoring CVE's facilitation of federal and local law enforcement cooperation.<sup>97</sup> This pillar also focused on the international connections to homegrown terrorism, "assess[ing] whether additional foreign entities linked to domestic terrorism can be designated as Foreign Terrorist Organizations or Specially Designated Global Terrorists."<sup>98</sup> This

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<sup>90</sup> Carol D. Leonnig and Jacqueline Alemany, *New evidence to show Trump was warned of violence on Jan. 6*, THE WASHINGTON POST (Oct. 12, 2022), <https://www.washingtonpost.com/nation/2022/10/12/new-evidence-show-trump-was-warned-violence-jan-6/> [https://perma.cc/ZR5T-VBJ7].

<sup>91</sup> Kat Lonsdorf et al., *A timeline of how the Jan. 6 attack unfolded — including who said what and when*, NPR (Jun. 9, 2022), <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when> [https://perma.cc/2PCC-DDT3].

<sup>92</sup> *National Strategy for Countering Domestic Terrorism*, THE WHITE HOUSE (Jun. 15, 2021) at 5, [hereinafter *National Countering Domestic Terrorism Strategy*].

<sup>93</sup> *Id.* at 1.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 2.

<sup>98</sup> *Id.* at 2.

prong of the First Pillar probed whether domestic terror subjects were inspired, or “radicalized,” by a foreign or transnational network of some kind, replicating CVE’s model of tying Muslim suspects to the Islamic State of Iraq and Syria (ISIS) or Al Qaeda.<sup>99</sup>

The “Second Pillar” wholly adopted CVE’s preventative mandate and belief that surveillance could thwart the activation of terrorists and preempt violence. In addition to absorbing this philosophy and adapting radicalization theory to white supremacist and anti-government actors, Biden’s surveillance program also rebuilt the structure of working with community actors to facilitate enforcement: “The U.S. Government has revamped support to community partners who can help to prevent individuals from ever reaching the point of committing terrorist violence.”<sup>100</sup> In turn, DHS and DOJ have slowly returned to extending grants to civic, political, and other community institutions to work collaboratively with federal and local law enforcement to curtail terrorism.

Next, the “Third Pillar” of Biden’s white supremacist surveillance regime plans on earmarking considerable financial resources to expand and deepen it. This included over \$100 million in additional funds to the DOJ, FBI, and DHS, which included additional funds to be given to local law enforcement agencies.<sup>101</sup> These funds, tied to Pillar Two, included the creation of a new “Center for Prevention Programs,” which “[would] help build local prevention frameworks to provide communities with the tools they need to combat terrorism and targeted violence.”<sup>102</sup> While the Trump Administration muted additional funding to CVE, Biden has heavily reinvested in federal police presence and local law enforcement attention to white supremacist and anti-government terrorism. Biden again revitalized the CVE mandate of enhanced surveillance and policing in communities of interest.

Finally, “Pillar Four” highlights that “every component of the government has a role to play in rooting out racism and bigotry.”<sup>103</sup> This directive, while encouraging facially, fails to look inward. Instead of characterizing racism and white supremacy as cultures that also exist *within the state*, Pillar Four positions the government (broadly stated) as a benign actor tasked with combating a “racial, ethnic, and religious hatred” that only exists beyond it.<sup>104</sup> Pillar Four perhaps functions as an admission that raises concern for the enforcement of surveillance moving forward, which can easily be redirected on traditional communities of concern—Muslims and Black Americans—if

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<sup>99</sup> CVE 2011, *supra* note 56, at 3.

<sup>100</sup> National Countering Domestic Terrorism Strategy, *supra* note 92, at 2.

<sup>101</sup> *Id.* at 3.

<sup>102</sup> *DHS Creates New Center for Prevention Programs and Partnerships and Additional Efforts to Comprehensively Combat Domestic Violent Extremism*, U.S. DEP’T OF HOMELAND SECURITY (May 11, 2021), <https://www.dhs.gov/news/2021/05/11/dhs-creates-new-center-prevention-programs-and-partnerships-and-additional-efforts> [https://perma.cc/P2T2-P76V].

<sup>103</sup> National Countering Domestic Terrorism Strategy, *supra* note 92, at 4.

<sup>104</sup> *Id.*

the internal culture of Islamophobia, anti-Black suspicion, racism, and white supremacy are not entrenched within the state.<sup>105</sup>

The structure and philosophy of CVE is written all over Biden's reconfiguration of white supremacist surveillance, or whatever title it will eventually take on. This is more concerning, particularly for Muslim communities, even if its focus is on white supremacy and its "strategy is grounded in good intentions."<sup>106</sup> With white supremacy firmly entrenched within government institutions, particularly those agencies and institutions tasked with enforcing counterterrorism, Biden's white supremacist counterterrorism regime has to navigate the "trust deficit" that exists within Muslim, Black, and historically targeted communities.<sup>107</sup> But more importantly, Biden's white supremacist counterterrorism regime must fight the roots of white supremacy within the state to effectively counter it beyond.

## II. WHITE SUPREMACY, COUNTERTERRORISM, AND THE CRITIQUES BETWEEN

"Today that 37-year-old white man  
with 13 years of police forcing  
was set free  
by eleven white men who said they were satisfied  
justice had been done  
and one Black Woman who said  
'They convinced me' meaning  
they had dragged her 4' 10" black Woman's frame  
over the hot coals  
of four centuries of white male approval  
until she let go  
the first real power she ever had  
and lined her own womb with cement  
to make a graveyard for our children."

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<sup>105</sup> "The new program is supposed to work with the Homeland Security Office of Civil Rights and Liberties to ensure rights are protected, but it has not specified any concrete safeguards," which opens the door to continued threats against the civil liberties of Muslim, Blacks, and other historically targeted groups. Harsha Panduranga, *Why Biden's Strategy for Preventing Domestic Terrorism Could Do More Harm Than Good*, THE BRENNAN CENTER FOR JUSTICE (Jun. 23, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/why-bidens-strategy-preventing-domestic-terrorism-could-do-more-harm-good> [<https://perma.cc/7QRC-7MLG>].

<sup>106</sup> Hina Shamsi and Hugh Handeyside, *Biden's Domestic Terrorism Strategy Entrenches Bias and Harmful Law Enforcement Power*, ACLU (Jul. 9, 2021), <https://www.aclu.org/news/national-security/bidens-domestic-terrorism-strategy-entrenches-bias-and-harmful-law-enforcement-power> [<https://perma.cc/SCS3-6J38>].

<sup>107</sup> Odette Yousef, *Biden Team Promises New Approach to Extremism, But Critics See Old Patterns*, NPR 3 (Jan. 27, 2022), <https://www.npr.org/2022/01/27/1075790314/biden-team-promises-new-approach-to-extremism-but-critics-see-old-patterns> [<https://perma.cc/7R7P-EMKJ>].

—Audre Lorde, 1978<sup>108</sup>

Audre Lorde's poignant words reference her reactions to the death of ten-year old Clifford Glover in Queens, New York—a racially targeted death at the hands of a police officer.<sup>109</sup> It highlights the historic lineage of violence by white supremacists that are either directly or indirectly endorsed by the state and state institutions. Lorde's writings not only reference state sanctioned violence, but also the absence of accountability and shortcomings of providing protection from white supremacist violence. Racial justice remains an elusive, unattainable goal with the current approach to curbing white supremacist violence.

This section examines white supremacy more closely, exploring the arc between the historic role of supremacist organizations to its current manifestation. In particular, this interrogation reveals how entrenched white supremacy has been to the fabric of socio-political life, its power in maintaining social control over minority communities, and how white supremacist violence has permeated local and federal law enforcement since the country's early inception. This understanding contextualizes the shortcomings and risks of reframing white supremacist violent actors as simply domestic terrorism, and why the current strategy falls short of achieving racial justice.

There are both theoretical and practical concerns for why Biden's framework to address white supremacist violence may be inaccurate and have deleterious consequences for historically surveilled communities. Section 2b will follow discussing this in further detail. Not only is this definition limited in considering the scope of the entrenchment of supremacist terrorism, but the proposed solution may increase harm for communities of color and leave the problem to escalate.

White supremacy broadly refers to the idea that this type of domination is part of a political system. Notable political philosopher Charles Mills refers to white supremacy as a “particular mode of domination, with its special norms for allocating benefits and burdens, rights and duties, its own ideology, and an internal logic at least semi-autonomous, influencing law, culture, and consciousness . . . encompassing de facto as well as de jure white privilege, that would refer more broadly to the European domination of the planet for the past several hundred years that has left us with the racialized distributions of economic, political and cultural power that we have today.”<sup>110</sup>

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<sup>108</sup> AUDRE LORDE, *THE COLLECTED POEMS OF AUDRE LORDE* 33 (1997).

<sup>109</sup> Jim Dwyer, *A Police Shot to a Boy's Back in Queens, Echoing Since 1973*, *THE NEW YORK TIMES* (Apr. 16, 2015) <https://www.nytimes.com/2015/04/17/nyregion/fired-at-queens-boy-fatal-1973-police-shot-still-reverberates.html> [<https://perma.cc/YN32-5EJ6>].

<sup>110</sup> Charles W. Mills, *Revisionist Ontologies: Theorizing White Supremacy*, *SOC. & ECON. STUD.*, Sept. 1994, at 105, 108.

The entrenchment of white supremacy within informal social norms, law, and daily actions is important to keep in consideration when determining what strategies may help curb the violence that comes with white supremacy. Such entrenchment also explains the ease with which a relapse can occur, which part three will further articulate. While white supremacist violence also includes individual actions, the large-scale impact of these actions is connected to varying organizations. Understanding the historical manifestations of white supremacist violence helps situate the prevalence of its modern manifestation and illuminate why Biden's strategy falls short of rooting out the problem.

### A. *White Supremacist Organizations*

White supremacy is not something positioned outside of the state but rather is intrinsic to American nation-building efforts and the state's attempt to socially control populations. These attempts include the social control of indigent groups and the mass casualties targeting their displacement from their original lands (e.g., Trail of Tears), and the brutal slave patrol system that slave masters implemented.<sup>111</sup> The unwritten norms of white supremacy have held immense power. The time period after the U.S. Civil War and the Reconstruction of the South is the most pronounced in establishing the institutionalized reign of white supremacy within the socio-political fabric of the United States.

#### 1. *Formative Manifestations of White Supremacy*

White dominance is a permeable feature of American life utilized in conceptualizing the various non-white groups that comprise the American fabric. Author L. Frank Baum's opinions on the Sioux Nation reflect this idea; he notes, "[t]he Whites, by law of conquest, by justice of civilization, are masters of the American continent, and the best safety of the frontier settlements will be secured by the total annihilation of the few remaining Indians."<sup>112</sup> The very candid conversations on decimating the populations of indigenous communities with violence as a rational route highlight how entrenched this notion was in the nation's earliest era. The "best safety of the frontier settlements" becomes one main feature of the rationale used to justify their violent strategies.<sup>113</sup> This logic is what permeates the national security framework justifying the extra-judicial processes that target non-white suspects accused of violating the safety of the American public.

Moreover, examining one of the most well-known arcs of white supremacy—targeting Black American bodies—the origin of its violence

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<sup>111</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW* (2011).

<sup>112</sup> L. Frank Baum, *L. Frank Baum's Editorials on the Sioux Nation, The Sitting Bull Editorial*, SATURDAY PIONEER, Dec. 20, 1890, Retrieved December 9, 2007.

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

traces to the first arrivals of Black Americans in 1619.<sup>114</sup> The arrival of the first slave ship to the U.S. in Point Comfort, Virginia highlights the origins of this kind of violence. Slave Codes were established by the British to justify slavery and define the type of violence permitted to control individuals.<sup>115</sup> Slave patrols, or ‘paddy rollers,’ existed in every slave-holding state and utilized violence to ensure enslaved Africans were caught if they fled. This entire system was disrupted by the U.S. Civil War and the Emancipation Proclamation, which installed constitutional amendments that bestowed new rights to enslaved Americans.

## 2. *KKK and the unwritten laws of the South*

In response to this change, came the organizational origins of the most well-known white supremacist organization, the Ku Klux Klan (“KKK”). The KKK was conceived in 1865 after the U.S. Civil War and in response to Reconstruction policies that aimed to provide equitable pathways to recently freed slaves.<sup>116</sup> Its early members included Confederate War veterans, and the first organizational leader, the grand wizard, was Confederate General Nathan Bedford Forest, highlighting the early interconnections of military institutions with the KKK.<sup>117</sup> By 1870, there was a KKK presence in every southern state.

Lynchings offer a stark example of the consequences of KKK presence and their forms of social control in the South. Lynching, known as the “unwritten law” of white supremacy, is a signature example of white supremacist violence.<sup>118</sup> Well-known anti-lynching activist Ida B. Wells articulated that, “[t]he lynching mania . . . manifested itself through what was known as the Ku Klux Klan, armed bodies of masked men, who during the period between 1865 and 1875, killed Negroes who tried to exercise the political rights conferred on them by the United States until by such terrorism the South regained political control.”<sup>119</sup>

Between 1877 to 1950, the Equal Justice Initiative reports that over 3,959 Black women, men, and children were victims of lynchings at the hands of white supremacist violence.<sup>120</sup> Lynchings were strategic and organized violence, reified to keep social order in absence of legal systems. As Wells noted, it was the “cool, calculating deliberation of intelligent people

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<sup>114</sup> M.A. Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint from January 1, 2015, through December 31, 2015*, J. OF BLACK STUD., 2017, at 552.

<sup>115</sup> *Id.* at 552-53.

<sup>116</sup> KATHLEEN BELEW, *BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA* (2018).

<sup>117</sup> *Id.* at 96.

<sup>118</sup> Verena Erlenbusch-Anderson, *Historicizing White Supremacist Terrorism with Ida B. Wells*, POL. THEORY, 2022, at 287.

<sup>119</sup> IDA B. WELLS, *ON LYNCHINGS* (2014).

<sup>120</sup> EQUAL JUST. INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 40 (3d ed. 2017).



who openly avow that there is an ‘unwritten law’ that justifies them in putting human beings to death” without respect for the legal process.<sup>121</sup>

The ‘unwritten law’ of the South, during Reconstruction, was the reign of white supremacy as arbiters of social control. These mechanisms ostensibly reversed the advancements that Reconstruction sought to bring. Lynching functioned as a key enforcement of the unwritten law enforced by white supremacist organizations. As Ida B. Wells notes, these unwritten norms and laws, upheld by organizations like the KKK functioned as “unwritten laws which kept the {B]lack man down.”<sup>122</sup> Social control, implemented by the dominant group, positions white supremacy as part of the power-making apparatus. Historian Katherine Belew notes that, “[b]ecause white supremacy undergirded state power throughout U.S. history, vigilantes most often served the white power structure.”<sup>123</sup>

While not officially part of state institutions, the prevalence and entrenched support for white supremacist ideology permitted its reign of terror to harm Black communities across the country. It is one of the most violent elements of the reign of Jim Crow. Although the subjugation of Black communities utilized legal elements, the informal tools—such as lynching—that permitted the reign of white supremacist violence not only complemented but served as the bedrock of white control and the legitimacy of Jim Crow law within the American South. This becomes important to keep in consideration when thinking through the theoretical limitations of Biden’s domestic terrorism frame. The regional entrenchment of the KKK within the Southern fabric in the post-Civil War period has impacts to this day. Its dismantling may provide obstacles for present-day law enforcement, where local agencies continue to have such influences seep into their agencies.

### 3. *Institutional Entrenchment of White Supremacy*

The KKK’s tentacles moved beyond reinforcing a subjugated social order in the South. In the West, historian Kevin Waite documents the violence that the KKK inflicted upon Asian Americans.<sup>124</sup> The largest mass lynching occurred toward Chinese immigrants in Los Angeles.<sup>125</sup> On October 24, 1871, nineteen Chinese immigrants were tortured and subsequently hung while white L.A. residents watched and cheered.<sup>126</sup> Stories of church-burn-

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<sup>121</sup> Ida B. Wells, *Lynch Law in America* (Jan. 1900), in *THE LIGHT OF TRUTH: WRITINGS OF AN ANTI-LYNCHING CRUSADER*.

<sup>122</sup> WELLS, *supra* note 119, at 214.

<sup>123</sup> BELEW, *supra* note 116, at 106.

<sup>124</sup> KEVIN WAITE, *WEST OF SLAVERY: THE SOUTHERN DREAM OF A TRANSCONTINENTAL EMPIRE* (2021).

<sup>125</sup> SCOTT ZESCH, *THE CHINATOWN WAR: CHINESE LOS ANGELES AND THE MASSACRE OF 1871* (2012).

<sup>126</sup> Kevin Waite, *The Bloody History of Anti-Asian Violence in the West*, *NAT’L GEOGRAPHIC* (May 10, 2021), <https://www.nationalgeographic.com/history/article/the-bloody-history-of-anti-asian-violence-in-the-west> [<https://perma.cc/VB4S-8GNF>].

ings for schools designed for Chinese children and workers are documented in Sacramento's *Daily Union* and other local papers. As Waite notes, "[a] newly opened school for Chinese children in Nevada City, California, was scheduled to operate strictly in the daytime and on Sundays, 'to avoid the Ku Klux Klan, who are burning churches, and will next attempt to destroy all schoolbooks,' according to a local newspaper."<sup>127</sup>

California was distinct in that there existed greater political freedom to have unabashed white supremacists in political control. California Governor Henry Haight in his inaugural address on December 5, 1867, discussed how "[t]he aid of Africans and Asiatics would be an evil, and not a benefit."<sup>128</sup> Buttressed by state support, the reign of the KKK on the West Coast brought violence, death, and terror to the lives of Chinese immigrants and their families; controlling the way they could move around within local California towns and reifying state support for white supremacist violence.

On the east coast, the KKK had a resurgence in the 1920s opposing the arrival of Catholic and Jewish immigrants. The KKK's presence within local communities surged with their promise to remove bootleggers and moonshiners.<sup>129</sup> They raided homes, burned down businesses, and planted evidence within Catholic immigrants' places to hold against them. The KKK grew subsidiaries, including KKK Youth groups and the Women of the Ku Klux Klan. They were not relegated to the shadows but instead were part of public American life. For example, in the fall of 1923, Youngstown, Ohio elected an outspoken KKK member to be their mayor, with "an overwhelming majority" over five opponents.<sup>130</sup> By 1925, the Southern Poverty Law Center notes that the KKK had over 4 million members and "considerable political power" in certain localities.<sup>131</sup>

In the 1960s, their efforts remained strong in opposing the Civil Rights Movement and the dismantling of segregation. The various permutations of the KKK targeting Black Americans, immigrants, Catholics, and Jewish Americans highlight the large scope of targets.<sup>132</sup>

The military's connection with white supremacist violence is also historically prevalent and became evident in this process. Members of the

<sup>127</sup> Kevin Waite, *The Forgotten History of the Western Klan*, THE ATLANTIC (Apr. 6, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/california-klans-anti-asian-crusade/618513/> [<https://perma.cc/4KD9-V254>].

<sup>128</sup> Henry Haight, CALIFORNIA LIBRARY ARCHIVES, Dec. 5, 1867.

<sup>129</sup> T.R. PEGRAM, ONE HUNDRED PERCENT AMERICAN: THE REBIRTH AND DECLINE OF THE KU KLUX KLAN IN THE 1920S (2011).

<sup>130</sup> Linton Weeks, *When the KKK was Mainstream*, NPR (Mar. 19, 2015), <https://www.npr.org/sections/npr-history-dept/2015/03/19/390711598/when-the-ku-klux-klan-was-mainstream> [<https://perma.cc/ETM4-J3LX>].

<sup>131</sup> *Ku Klux Klan*, S. POVERTY L. CENTER (2022), <https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan> [<https://perma.cc/TRR9-TBSE>].

<sup>132</sup> *Id.*

armed forces were documented to have offered combat-trained personnel and caches of weapons.<sup>133</sup> According to historian Katherine Belew,

After the Civil War, the Confederate veterans who formed the first Klan terrorized both black communities and the Reconstruction-era state. World War I veterans led second-era Klan efforts to violently ensure “all-American” racial, religious, and nationalist power. Third-era Klansmen who had served in World War II and Korea played key roles in the violent opposition to civil rights, including providing explosives expertise and other skills they had learned in the military. After each war, veterans not only joined the Klan but also played instrumental roles in leadership, providing military training to other Klansmen, and carrying out acts of violence.<sup>134</sup>

The expertise and culture that they brought with them as veterans from paramilitary groups influenced the culture of the KKK and the types of tactical violence and cache of arms the KKK had access to. It also highlighted how entrenched white supremacy was within different military institutions.

#### 4. *Resurgence and Mainstreaming of White Supremacy*

The KKK’s position as an embedded part of communities—social institutions with state and military support—provides a different context to the desire to recognize them as a terrorist organization situated outside of state power and control. The reality is more complex.

On one hand, white supremacist organizations went from directly diverging from state powers to directly antagonizing them in the 1980s. The gathering of the Aryan Nations World Congress in 1983 was the most explicit example, where there was a direct articulation for a “white homeland” and a declaration of war on the American state.<sup>135</sup> Since then, organized white supremacy included individuals antagonistic towards the state, in addition to those in partnership with members of mainstream political parties and organizations.

The number of white supremacist organizations surged after Barack Obama was elected the first Black President of the United States.<sup>136</sup> This brought a “whitelash,” and Obama’s ascendancy into the highest political office in the country became a recruiting talking point used to persuade new

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<sup>133</sup> BELEW, *supra* note 116.

<sup>134</sup> *Id.* at 20.

<sup>135</sup> *Id.* at 104.

<sup>136</sup> Vera Bergengruen & W.J. Hennigan, ‘We Are Being Eaten from Within.’ *Why America Is Losing the Battle Against White Nationalist Terrorism*, TIME (Aug. 8, 2019, 6:02 AM), <https://time.com/5647304/white-nationalist-terrorism-united-states/> [https://perma.cc/BZJ3-43Q3].

members to join.<sup>137</sup> But the white supremacist intonations targeting Obama were also emboldened by members of political parties and mainstream media channels. Supremacist theories like the questioning of Obama's birthright citizenship were advocated by then-businessman Donald J. Trump and gained major media attention on Fox News.

In 2018, the fifty deaths from terror attacks in the United States were all linked to right-wing organizations.<sup>138</sup> According to the Southern Poverty Law Center, the number of white nationalist groups peaked in 2019 at 155 groups total.<sup>139</sup> However, the number has since declined.<sup>140</sup> At face value, that would be optimistic news. However, the decline in number is associated with supremacist organizations becoming mainstreamed during the Trump Administration's presidential term. The embedded nature of white supremacists to political parties, campaigns, and public life is reminiscent of the revival of the KKK in the 1920s and their active engagement in public life.<sup>141</sup>

The concern increases on how law enforcement agencies can target and hold organizations accountable that are now part of the mainstream. Can the tools utilized to socially control non-white communities be used to manage the dominant groups, ones who are fostered with support by law enforcement? There should be deep skepticism to this approach given the entrenchment and the lenient policies afforded white perpetrators of violence. The terrorist designation is highly contingent on the political terrain. As noted earlier, white supremacy violence is part of a political system. This not only includes political parties but also members of local and federal law enforcement.

A report from the FBI in 2006 highlights concern and caution about the infiltration of law enforcement agencies with White Supremacists, noting "white supremacist infiltration of law enforcement can result in other abuses of authority and passive tolerance of racism within communities served."<sup>142</sup> Frank Meeink, a former neo-Nazi, testified before Congress in 2020, noting:

In 1991, I attended a meeting run by the White Student Union at Temple University. This was a monthly meeting of about 15-20 members. They were college guys, so they were career minded.

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<sup>137</sup> *Id.*

<sup>138</sup> Masood Farivar, *In 2018, At Least 50 US Deaths From Surging Right-Wing Extremist Attacks*, VOICE OF AMERICA (Mar. 25, 2019, 7:13 AM), <https://www.voanews.com/a/in-2018-at-least-50-us-deaths-from-surging-right-wing-extremist-attacks/4846707.html> [https://perma.cc/K38E-JTM5].

<sup>139</sup> *White Nationalist*, S. POVERTY L. CENTER (2022), <https://www.splcenter.org/fighting-hate/extremist-files/ideology/white-nationalist> [https://perma.cc/J893-HFX2].

<sup>140</sup> *Id.*

<sup>141</sup> Weeks, *supra* note 130.

<sup>142</sup> Alice Sperti, *Unredacted FBI Document Sheds New Light on White Supremacist Infiltration of Law Enforcement*, THE INTERCEPT (Sept. 20, 2020), <https://theintercept.com/2020/09/29/police-white-supremacist-infiltration-fbi/> [https://perma.cc/HZH4-YPWQ].

They would say to us that we need to grow out our hair, stop getting tattoos, and get ready to go into the military or police. Two people who attended that meeting became cops. That same year, I attended a small meeting in Baltimore, run by the National Socialist Movement and a group called SS Action. I heard the same rhetoric there. They told us to join law enforcement, so that we can give Blacks felonies. So that they wouldn't be able to legally arm themselves. So that they wouldn't be able to vote.<sup>143</sup>

Frank Meeink's testimony brings to life the very intentional strategies supremacist organizations have put into place to infiltrate and influence law enforcement agencies. A 2020 report by the Brennan Center for Justice provides detailed documentation of the participation of law enforcement agents and police officers in supremacist and far-right groups, in addition to public documentation of racist remarks in social media platforms.<sup>144</sup>

The FBI has also struggled with racial diversity. Seventy-four percent of FBI employees are white, and only 4.7% of the roughly 13,500 special agents are Black or African American.<sup>145</sup> Evidence from political scientists suggests that having a more diverse police force means there are less punitive and more nuanced decisions made when targeting communities of color, which can diminish the level of bias that permeates the targeting of marginalized communities.<sup>146</sup> However, the inability to build a diverse employee force leaves room for supremacists to grow while marginalized communities remain on the sidelines of direct influence within federal law enforcement.

Understanding the depth of white supremacy within the very fabric of American political institutions, from para-military support to state supported violence, situates the forthcoming concerns in Parts B and C of this Section. This analysis suggests that this lens is not only narrow, but that the tools the Biden administration has brought about will be difficult to apply to the groups because of social and political constraints. Instead, these new tools may then just be used to target the typical racialized subjects that counterterrorism policy has traditionally focused upon.

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<sup>143</sup> *Hate Crimes and the Rise of White Nationalism: Hearing Before the H. Oversight and Reform Subcommittee on Civil Rights and Civil Liberties*, 116th Cong. 11 (2020) (statement of Frank Meeink).

<sup>144</sup> Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CENTER (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [https://perma.cc/D7RF-QA2V].

<sup>145</sup> Jessica Schneider, *FBI Faces Its Own Racial Reckoning While Leading Probes into Police Shooting Deaths*, CNN (June 10, 2021, 3:55 AM), <https://www.cnn.com/2021/06/09/politics/fbi-race-diversity-officer> [https://perma.cc/RF3P-NYHU].

<sup>146</sup> Bocar A. Ba, Dean Knox, Jonathan Mummolo, & Roman Rivera, *The Role of Officer Race and Gender in Police-Civilian Interactions in Chicago*, SCIENCE, Feb. 12, 2021, at 700-01.

*B. Theoretical Concerns of White Supremacy*

Examining history and the present-day entrenchment of white supremacy contextualizes the theoretical concerns for labeling white supremacy within a myopic lens as domestic terrorism.<sup>147</sup> White supremacy is far more expansive and embedded within state institutions than Biden's policy initiative has acknowledged.

Theoretically, some critics are concerned that this narrow framing misrepresents the problem of white supremacy in a manner that makes it difficult to tackle on a practical level. Moreover, increasing the power of the national security apparatus begs a larger question of whether this approach really attains racial justice.

Traditionally, white supremacist violence was treated within the legal lens as a hate crime. This lens pushed violence labeled as hate crimes within the dimensions of civil and criminal law, which are perceived as less serious than charges of terrorism. The hate crimes framework meant less harsh sentences and that the perpetrator is perceived as having the potential to be rehabilitated back into society, whereas terror suspects are perceived as "enemy combatants" with less likelihood to be rehabilitated.<sup>148</sup> Hate crimes are typically treated after the fact.<sup>149</sup> There are limited preventative measures or policies associated with them, and action toward the perpetrator is typically taken after the crime is committed. Terrorism, on the other hand, is treated with a preventative strategy, with extensive funding and profiling tactics to pre-emptively target and identify potential perpetrators of a terrorist attack.<sup>150</sup>

Shifting from a hate crime legal framework to domestic terrorism, brings more consequence to how white supremacist violence is perceived within the law, and the type of accountability and punishment perpetrators receive. However, the shift in defining white supremacist violence as terrorism has engendered concerns about whether extending the scope has deleterious consequences. In order to understand these concerns, it is important to note that the roots of terrorism as a term emerge within a national security context.

Terrorism emerged as a key legal interest in the early 1970s, primarily in response to an awareness of an emergence of political violence. Individuals are perceived to be enemy combatants working against the interests of the American state. This definition suggests a foreign policy dimension to terrorism and reifies Part One's overview of how synonymous terrorism became with the perception of Muslims.

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<sup>147</sup> GERMAN, *supra* note 144.

<sup>148</sup> See Shirin Sinnar, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*, 110 CAL. L. REV. 489, 504–37 (2022).

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

<sup>150</sup> See Sahar Aziz & Khaled A. Beydoun, *Fear of a Black and Brown Internet: Policing Online Activism*, 100 BOSTON UNIV. L. REV. 1153, 1179–1184 (2020).

### 1. *Domestic Terrorism's Global Reach*

Shifting the approach to addressing white supremacist violence to a terrorism framework has two key shortcomings. First, it creates a boundary between ‘terrorism’ and ‘domestic terrorism.’ This distinction is problematic because it claims that white supremacist violence is a U.S.-based problem. As legal scholar Darin E.W. Johnson notes, “[w]hite supremacist terrorism is a rising threat that has been overlooked by national security authorities as a global threat, even though white supremacist terrorism now surpasses Al Qaeda- and ISIS-associated terrorism in the scope and impact of its destructiveness in the United States. White supremacist terrorism has been viewed exclusively as isolated homegrown domestic terror and has not been understood as part of a global terror movement.”<sup>151</sup>

Johnson points to three primary reasons there has been a limited definition of white supremacy as understood purely within a domestic politics frame. He notes,

The failure of the general public and national security institutions to conceptualize white extremism as a global terror threat has occurred for an array of reasons, including the early twenty-first century global focus on responding to the catastrophic September 11, 2001 (9/11) attacks and the ability of white supremacists to build a global terror network on digital platforms under the public radar. This terror threat has been overlooked because the global nature, shared ideology, and digital cohesion of this movement have not been widely understood.<sup>152</sup>

Johnson’s analysis reiterates Part One’s discussion of the fixation of terrorism as a ‘Muslim problem’ and the narrowly subscribed tunnel-vision utilized to focus nearly exclusively on Muslim and Muslim-adjacent communities.<sup>153</sup> The national security apparatus had a nearly singular focus which diverted its attention from the growing movement of white supremacist organizations who were not only antagonistic to the state but also building international connections.

Limited attention to the rising problem became a larger issue as digital platforms catapulted the resurgence and popularity of supremacist ideologies online and helped spread ideas transnationally. Active efforts have been made by white supremacist leaders like David Duke and the Aryan Nation to move their worldview to a global audience.<sup>154</sup> Extensions of this recruiting

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<sup>151</sup> See Darin E.W. Johnson, *Homegrown and Global: The Rising Terror Movement*, 58 HOUS. L. REV. 1059, 1059 (2021).

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

<sup>153</sup> See Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes and Double Standards*, 112 NW. L. REV. 1213, 1213 (2018).

<sup>154</sup> JESSIE DANIELS, *CYBER RACISM: WHITE SUPREMACY ONLINE AND THE NEW ATTACK ON CIVIL RIGHTS*, 39–56 (2009).

are seen by individuals like Andrew Anglin, editor of the Neo-Nazi Daily Stormer.<sup>155</sup> Digital media has served as an effective platform for the swift spread of their ideologies and the strengthening of a transnational community committed to ideas of targeting hate towards Jewish people, immigrants, Black Americans, and other minorities.

According to a 2016 study about Twitter, American white-nationalist movements had a 600% increase in followers since 2012, outperforming other far-right groups like ISIS.<sup>156</sup> Researcher J.M. Berger found that, “The increase was driven in part by organized social media activism, organic growth in the adoption of social media by people interested in white nationalism, and, to some extent, the rise of organized trolling communities seeking to flood social media platforms with negative content, regardless of participants’ actual beliefs.”<sup>157</sup>

Twitter became a concern after the 2019 massacre of Muslims in Christchurch, New Zealand. The shooter, Brenton Tarrant, was inspired by supremacist ideology that he found online, particularly around conspiracy theories like the Great Replacement. Tarrant specifically aimed at harming Muslims and brutally killed 51 people at two mosques that he targeted. Evidence of the influence of this ideology on his actions became clear in hindsight examining his twitter page.<sup>158</sup> Tarrant posted white supremacist propaganda articles and a link to the 74-page manifesto he wrote prior to implementing his deadly shootings.<sup>159</sup> The day of his violent attack, he live-streamed the actions via Facebook, escalating the role of social media as a part of white supremacist violence. In response to these killings, New Zealand’s Prime Minister, Jacinda Ardern, advocated that the world needs to “take a united front on what is a global issue.”<sup>160</sup> Ardern became among the first to take note of the global interlinkages of the supremacist movement and advocated for their surveillance and nation-states to collaborate to prevent the further spread of these ideologies.

With emerging crackdowns on mainstream platforms, users have turned to additional arenas, like 4chan and 8chan to convene and disperse supremacist ideas. For example, German terror group Atomwaffen is one example of a terror group formed through an online forum that is now eighty-members strong. They have been linked to several murders within the U.S. and have

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<sup>155</sup> James E. Hawdon, *The Internet Has Become the Most Fertile Landscape for All Types of Extremism*, BUS. INSIDER (Aug. 21, 2017), <https://www.insider.com/the-internet-has-become-a-fertile-landscape-for-extremism-2017-8> [<https://perma.cc/S44Q-B79T>].

<sup>156</sup> J.M. BERGER, GEO. WASH. UNIV. PROGRAM ON EXTREMISM, NAZIS VS. ISIS ON TWITTER: A COMPARATIVE STUDY OF WHITE NATIONALIST AND ISIS ONLINE SOCIAL MEDIA NETWORKS, 3, (2016), <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/downloads/Nazis%20v.%20ISIS.pdf> [<https://perma.cc/4FBE-F2VJ>].

<sup>157</sup> *Id.*

<sup>158</sup> Charlie Campbell, *The New Zealand Attacks Show How White Supremacy Went From a Homegrown Issue to a Global Threat*, TIME, March 21, 2019, <https://time.com/5555738/new-zealand-shooting-white-supremacy/> [<https://perma.cc/RF57-7KB5>].

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

<sup>160</sup> *Id.*



encouraged a race war.<sup>161</sup> Johnson contends, “[d]espite the fact that global white supremacist terror attacks have caused more deaths than Al Qaeda and ISIS-associated terror attacks, the United States and the global community have not collectively organized to address white supremacist terrorism as a global movement. In fact, some Western state leaders do not view white supremacist terror attacks as part of a global terror movement, and instead view them as isolated attacks.”<sup>162</sup> If the terrorist frame is the prescription Biden seeks to move forward with, a more comprehensive frame of their attempts as a transnational and globally embedded phenomenon is required.

Moreover, domestic terrorism claims face less accountability and punitive judgement than transnational terrorism. Domestic terrorism is a distinction not necessarily afforded to other U.S. citizens, such as Arab and Muslim terror suspects that are U.S. citizens but were treated like international enemy combatants. This signaling suggests that while white supremacist violence has further accountability with this new policy prescription, it will be treated with less punitive judgement than its non-white counterparts.<sup>163</sup>

## 2. *The Limits to Attaining Racial Justice*

Domestic terrorism claims face less accountability and punitive judgement than transnational terrorism. Moreover, those laws already on the books are not enforced properly against white supremacists in the U.S. domestic terrorism context. This is a distinction not necessarily afforded to other U.S. citizens, such as Arab and Muslim terror suspects who are U.S. citizens but whose treatment was as an international enemy combatant. This signaling suggests that while white supremacist violence has further accountability with this new policy prescription, it will be treated with less punitive judgement than their non-white counterparts.<sup>164</sup>

Biden’s policy to situate white supremacy as a form of domestic terrorism, instead of categorizing it as a global terrorism network, still protects white supremacists from the full scope of terrorism laws. This type of protection is consistent with existing statutes that target domestic terrorism. Civil rights advocates and experts contend that there already exists a body of statutes that can be used to prosecute supremacist violence, but the problem is that they have not been used to hold people fully accountable.

The DOJ and FBI have over 50 terrorism-related statutes already at their disposal that they could use to investigate and prosecute the criminal conduct of white supremacist violence. This couples with dozens of addi-

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<sup>161</sup> Farivar, *supra* note 138.

<sup>162</sup> Johnson, *supra* note 151, at 1090.

<sup>163</sup> Beydoun, *supra* note 153.

<sup>164</sup> J.M. BERGER, VOX-POL NETWORK OF EXCELLENCE, THE ALT-RIGHT TWITTER CENSUS, 55, (2018), [https://www.voxpol.eu/download/vox-pol\\_publication/AltRightTwitterCensus.pdf](https://www.voxpol.eu/download/vox-pol_publication/AltRightTwitterCensus.pdf) [<https://perma.cc/2297-FDFS>].

tional federal statutes that could be used to target white supremacist violence, including organized crime, violent crime and hate crime statutes.<sup>165</sup>

According to the Leadership Conference of Civil and Human Rights (LCCR), a civil-rights coalition of 156 groups, “[t]he failure to confront and hold accountable white nationalist violence is not a question of not having appropriate tools to employ, but a failure to use those on hand. To date, the DOJ has simply decided as a matter of policy and practice not to prioritize white nationalist crimes.”<sup>166</sup>

The policies in place already would be strong enough to use if implemented. However, key cases in recent memory suggest that the FBI may fall short of labeling violence as politically motivated. For example, Dylann Roof, the known killer who murdered nine Black parishioners at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina was a known white supremacist. However, FBI Director James B. Comey did not initially label Roof as a terrorist. As such, his prosecution did not include any terrorism charges. However, evidence did emerge that Roof’s radicalization was influenced by the transnational terror network, yet there was not clear public acknowledgement by authorities of this fact.<sup>167</sup> The dismissal of Roof’s actions as a form of terrorism highlights how much the subjective opinion of authorities influences how a crime is defined. Extensive terrorism statutes existed that could have been used in Roof’s prosecution, but they were ignored. As such, civil rights experts remain deeply skeptical that a new wave of policies implemented by Biden would have any impact on countering white supremacist violence, given the history of ignoring it with prior acts of violence.

### 3. *Deleterious Impact on Communities of Color*

The extension of Biden’s policy engenders a larger shortcoming—the deleterious impact that these new policies can have on communities traditionally subject to anti-terrorism policy. Civil rights advocates have expressed great concern about the extension of government institutional powers, particularly within the realm of the national security field. As part one details, U.S. counterterrorism has focused on non-white communities in pernicious ways.

First, Biden’s strategy replicates the Trump administration’s method of guiding agencies to investigate a broader category of extremism that is “racially motivated extremism.” Categorizing it as “racially motivated extrem-

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<sup>165</sup> Bergengruen & Hennigan, *supra* note 136.

<sup>166</sup> LEADERSHIP CONFERENCE ON CIVIL RIGHTS, LETTER TO MEMBERS OF CONGRESS (Jan. 19, 2021), 1, <https://civilrights.org/2021/01/19/leading-civil-rights-organizations-oppose-creation-of-new-domestic-terrorism-legislation/> [<https://perma.cc/SZK4-BRGT>].

<sup>167</sup> Janet Reitman, *US Law Enforcement Failed to See the Threat of White Nationalism. Now They Don't Know How to Stop It*. N.Y. TIMES MAG. (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html> [<https://perma.cc/T3CW-3WW6>].

ism” opens the category to include actions that are not necessarily linked with political violence, which brings greater subjectivity permitting its application to other groups beyond white supremacists. As section three further articulates, this means if specific contexts emerge, these same laws will be used to target marginalized communities.

The ACLU contends that “[a] new law that criminalizes the malleable, fraught, and politicized concept of terrorism would only expand authorities that target Black and Brown communities and people engaged in dissent for unjustified surveillance, investigation, and prosecution. A new, catchall crime of domestic terrorism should be off the table.”<sup>168</sup> While Biden’s policy advocates for no bias, part one’s deeper analysis on strategies like CVE implemented by the Department of Homeland Security and the Department of Justice’s subjective oversight permit racial and religious bias within their strategies. Historically, this has meant that the focus of these types of policies increases surveillance towards Muslim and Black communities.

The expansion of government powers, even when motivated by white supremacist violence, has been used to target communities of color. One stark example is the Antiterrorism and Effective Death Penalty Act (AEDPA), which was signed into law in 1996 in the wake of the anniversary of the Oklahoma City bombings. The OKC bombings killed 168 people and the terrorist plot, put forward by white supremacist Timothy McVeigh. As one of the most fatal terrorist plots executed, the public reeled from the event and Congress sought to work swiftly to prevent further events from occurring.

AEDPA’s passage was also advocated by President Bill Clinton to serve as a deterrent for future terrorist plots. However, the objectives of the policy were missed, and the policy did not impact or deter white supremacists, but rather had a disparately harmful impact on marginalized communities. AEDPA not only reduced defendants’ access to courts but drastically diminished the federal writ of habeas corpus, which was used by federal courts as a means to release wrongly imprisoned individuals. Given the extensive history of people of color being wrongfully convicted, AEDPA had particularly harmful effects.<sup>169</sup> For example, a 2017 report from the University of Michigan highlighted that while Black Americans account for 13% of the population, “[t]hey constitute 47% of the 1,900 exonerations listed in the National Registry of Exonerations (as of October 2016), and the great majority of more than 1,800 additional innocent defendants who were framed and con-

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<sup>168</sup> Hina Shamsi & Hugh Handeyside, *Biden’s Domestic Terrorism Strategy Entrenches Bias and Harmful Law Enforcement Power*, THE AM. CIV. LIBERTIES UNION (July 9, 2021), <https://www.aclu.org/news/national-security/bidens-domestic-terrorism-strategy-entrenches-bias-and-harmful-law-enforcement-power> [<https://perma.cc/6PAV-X89N>].

<sup>169</sup> See SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, NAT’L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES, ii, (2017), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1121&context=Other> [<https://perma.cc/N99T-73JD>].

victed of crimes in 15 large-scale police scandals and later cleared in ‘group exonerations.’”<sup>170</sup>

Moreover, AEDPA made it possible to subject noncitizens for automatic deportation for minor offenses.<sup>171</sup> Finally, the policy also included a ban on “material support” for foreign terrorist organizations. The implications upon this for Muslims were telling, as it permitted the criminalization of Muslims based upon articulated religious views, their ideologies, and potential connections to Muslim community groups. Rather than focusing on transnational white supremacist linkages, AEDPA became a tool to further target and racialize Muslim subjects.

AEDPA was coined by the *New Yorker* as, “one of the worst statutes ever passed by Congress and signed into law by a President.”<sup>172</sup> AEDPA’s passage was inspired by one of the deadliest acts of white supremacist violence, but its target did not impact white supremacist groups, but rather marginalized communities, like Black prisoners and noncitizens with minor offenses. This is one of the policy examples that has made civil rights professors and advocates concerned about the extension of Biden’s policy. While framed as neutral categories, the implementation of these policies continues to target the historically marginalized and prosecuted communities, while permitting white supremacist ideology to grow and fester.

As civil rights attorney Diala Shamas notes, “[u]ndergirding calls to label the Capitol mob ‘terrorism’ is the misguided assumption that simply meeting the legal definition of terrorism — or simply winning the argument that White violence is also terrorism — will necessarily lead to consequences. . . . Using the right words doesn’t flip some magical switch that forces agencies to go after those plotting harm. Instead, the decision to do so or not is an active, ongoing choice, one that is largely determined by a combination of ideology and power.” As AEDPA’s passage highlights, this extension of terrorism will not be focused just on white supremacist violence, but rather will be used as a way to target a broad spectrum of political movements, which likely increase focus on historically targeted communities.

#### 4. *Expansion of Government Powers*

Intrinsic in this concern of further harm to communities of color is the expansion of powers to the national security apparatus. A *Washington Post* investigation found that,

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<sup>170</sup> *Id.*

<sup>171</sup> Diala Shamas & Tarek Z. Ismail, *Calling the Capitol Riot ‘Terrorism’ Will Only Hurt Communities of Color*, WASH. POST (January 10, 2021), <https://www.washingtonpost.com/outlook/2021/01/10/capitol-invasion-terrorism-enforcement/> [<https://perma.cc/62YT-F8K7>].

<sup>172</sup> Lincoln Caplan, *The Destruction of Defendants’ Rights*, NEW YORKER (June 21, 2015), <https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights> [<https://perma.cc/PLV5-5G3Z>].

The top-secret world the government created in response to the terrorist attacks of September 11, 2001, has become so large, so unwieldy and so secretive that no one knows how much money it costs, how many people it employs, how many programs exist within it or exactly how many agencies do the same work.<sup>173</sup>

From the passage of AEDPA, to the 1994 Crime Bill, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, and the 2001 USA PATRIOT Act, the powers of the government have grown exponentially and strengthened the national security apparatus. It also lends further financial support and power to the cottage industry of “terrorism experts” that have become an appendage of the national security state. According to Shirin Sinnar, “[t]his group’s dependency on government patronage and the field’s limited gatekeeping, however, make their claims to expertise and independent analysis questionable.”<sup>174</sup> This means that consultants within this industry have financial incentives to meet the needs of security agencies. This gives agencies like DHS additional power to designate specific groups, such as think tanks, and consulting firms as designated experts. The cottage industry has had a harmful impact already. In a study of the cottage industry of terrorism suspects focused on Muslims, the Center for American Progress “reveals not a vast right-wing conspiracy behind the rise of Islamophobia in our nation but rather a small, tightly networked group of misinformation experts guiding an effort that reaches millions of Americans through effective advocates, media partners, and grassroots organizing. This spreading of hate and misinformation primarily starts with five key people and their organizations, which are sustained by funding from a clutch of key foundations.”<sup>175</sup> These individuals have testified before state legislatures and claimed that many mosques harbor terrorists or sympathizers of terrorism. The stronghold of a small group of “experts” to disseminate information on terrorism with deeply Islamophobic roots shows the dangers of giving further oversight to agencies that have a history of collaborating with these groups: strengthening agencies’ power to dictate the political agenda of national security issues.

Biden’s approach to curbing white supremacy by extending federal oversight stands in stark contrast to how hate crime laws were created, wherein civil rights advocates and community-based organizers weighed in through congressional testimony to help determine elements of the hate crime framework. In this instance, the broader institution and its attached institutions are not connected to the community, and there is a minimal feed-

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<sup>173</sup> Dana Priest & William M. Arkin, *A Hidden World Growing Beyond Control*, WASH. POST (July 19, 2010), <https://www.washingtonpost.com/investigations/top-secret-america/2010/07/19/hidden-world-growing-beyond-control-2/> [https://perma.cc/MBX5-9LU2].

<sup>174</sup> Sinnar, *supra* note 148 at 546.

<sup>175</sup> WAJAHAT ALI, ELI CLIFTON, MATTHEW DUSS, LEE FANG, SCOTT KEYES, & FAIZ SHAKIR, *THE ROOTS OF THE ISLAMOPHOBIA NETWORK IN AMERICA* (2011), <https://www.americanprogress.org/article/fear-inc/> [https://perma.cc/D8V4-EE8X].

back loop in relation, which reifies their power and diminishes their accountability to not mismanage their power and use it to target racialized subjects.<sup>176</sup> The very institutions that white supremacist organizations have permeated are being commissioned to serve as the primary institutions to hold white supremacy accountable.

### C. *Practical Concerns of Defining White Supremacy*

There are also practical implications and constraints to Biden's policy that ought to be considered. Not only does the extension engender new concerns by civil rights advocates who are concerned with how these policies might be abused after the Biden administration, but it also offers social and political constraints. Kimberlé Crenshaw argues that "a society once expressly organized around white supremacist principles does not cease to be a white supremacist society simply by formally rejecting those principles. The society remains white supremacist in its maintenance of the actual distribution of goods and resources, status, and prestige."<sup>177</sup> In many ways, Crenshaw's words highlight how the goods and resources, the practical elements, maintain supremacist structures. The role of the public provides practical and political constraints in limiting Biden's public objective of holding white supremacists accountable.

Laws, formal and informal (like lynching), receive potency from the role of public opinion and support. While Biden may push for white supremacist violence to be prosecuted within a terrorism frame, he will have less support for that from the public, in relation to prosecuting someone non-white. As our 2021 public opinion survey of Americans nationwide indicated, the public is more likely to associate terrorism with Muslims and Black Americans than whites.<sup>178</sup> The general public's opinion and skepticism of communities of color further entrenches the reality that it is more politically feasible to respond severely to security threats from marginalized communities, who have the stereotypical trope of dangerous and violence associated with them.

As high-profile cases of recent years highlight, public pressure and attention may influence processes. One of the most compelling constraints is the mainstreaming of white supremacist ideology with the rise of Donald J. Trump as the 45th President of the United States. Regarding the ascendancy of Trump as president, Ta-Nehisi Coates writes, "his ideology is white

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<sup>176</sup> Arun Kundnani & Jeanne Theoharris, *Don't Expand the War on Terror in the Name of Antiracism*, JACOBIN (November 1, 2019), <https://jacobin.com/2019/11/war-on-terror-domestic-terrorism-act-racism-muslims> [<https://perma.cc/5B9J-4Y33>].

<sup>177</sup> Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 7, 1336 n.20 (1988).

<sup>178</sup> See Khaled A. Beydoun and Nura Sediqa, *The Law of Gendered Islamophobia*, 111 CAL. L. REV. (forthcoming 2023).

supremacy, in all its truculent and sanctimonious power. . . To Trump, whiteness is neither notional nor symbolic but is the very core of his power.”<sup>179</sup>

Having a sitting U.S. president whose close advisors have known affiliations with far right and white supremacist organizations has made the categorization of white supremacy difficult.<sup>180</sup> Stephen Miller, Trump’s senior policy advisor, is one notable example. The Southern Poverty Law Center shared leaked emails aggregated by Hatewatch. They note, “[i]n the run-up to the 2016 election, White House senior policy adviser Stephen Miller promoted white nationalist literature, pushed racist immigration stories and obsessed over the loss of Confederate symbols after Dylann Roof’s murderous rampage.”<sup>181</sup>

As a result, it may become difficult to label specific events as acts of white supremacy with the full support of the public. The opinions of the public are buttressed by the role of the media and their involvement as well. News coverage of attacks based on the background of the perpetrator also varies. As Shanto Iyengar’s classic analysis of news and criminality reveals, when the perpetrator is a minority, their racial background is connected explicitly with the crime with limited conversation on their background or context.<sup>182</sup> Conversely, when the perpetrator is from the dominant group, they are more likely to receive a more comprehensive reporting of the factors that influenced their actions. Moreover, a UNESCO report reveals that while perpetrators that are Muslims are responsible for 5 to 12.4% percent of attacks, 32% of terror-related news coverage focuses on it, amplifying it three times more than other groups.<sup>183</sup> This reifies the notion that, to the public, certain communities are more culpable for committing specific types of crimes than others. The normativity around terrorism, according to the media, is that the perpetrator is Muslim or non-white. This is exemplified with cases like Dylann Roof, where his actions were initially framed as politically motivated instead of framed as an act of terror.

An additional political constraint is the reality that politicians with motivations to utilize marginalized communities as scapegoats for building public support have heavy media support to platform their opinions. For example, Fox News prime-time host Tucker Carlson provides some of the most explicit support for white supremacist ideologies, where he has referred to

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<sup>179</sup> Ta-Nehisi Coates, *The First White President*, THE ATL. (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/> [<https://perma.cc/R57P-2N3S>].

<sup>180</sup> Michael Edison Hayden, *Stephen Miller’s Affinity for White Nationalism Revealed in Leaked Emails*, S. POVERTY L. CTR. (November 12, 2019), <https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails> [<https://perma.cc/AH88-G9P6>].

<sup>181</sup> *Id.*

<sup>182</sup> SHANTO IYENGAR, *Is Anyone Responsible? How Television Frames Political Issues* 43 (1991).

<sup>183</sup> UNESCO, *TERRORISM AND THE MEDIA: A HANDBOOK FOR JOURNALISTS*, 22, (2017), <https://unesdoc.unesco.org/ark:/48223/pf0000247074> [<https://perma.cc/V552-BACT>] [hereinafter UNESCO Report].

replacement theory saying that the presence of new Americans diminishes his power, painting immigration as a zero-sum game that threatens the state of the dominant group in America.<sup>184</sup> The identity of white supremacists, given their proximity to dominant public opinion and the mainstreaming of supremacist discourse in recent years affords them the benefit of the doubt and a level of protection nonwhites do not receive.

For example, cases brought to jury trial have faced difficulty, with juries giving perpetrators the full benefit of the doubt. There have been high-profile acquittals, such as the 1988 Fort Smith trial. This case involved 14 alleged supremacists.<sup>185</sup> The FBI brought forward 113 witnesses and sought to demonstrate that they had robbed banks of \$4.1 million as part of a goal to build a white Aryan nation within the country. After a few days of deliberation, the jury motioned in favor of the supremacists. One juror anonymously told reporters, “[w]e just didn’t believe the government’s witnesses.”<sup>186</sup> This acquittal is consistent with other high-profile cases, such as the acquittal of neo-Nazis and KKK members in a 1979 case in Greensboro, North Carolina, where members were acquitted despite considerable evidence put forward.<sup>187</sup> Both prosecutors and FBI agents are acutely aware of the willingness of juries to question terror-related convictions of supremacists. The ‘benefit of the doubt’ is far more likely to be given to white perpetrators than others. The leniency towards white defendants highlights the constraints of the court of public opinion falling out of favor with the government’s perception of white supremacists.

In many ways, the role of the court of public opinion, and the expansion of federal powers, highlights the dangers of Biden’s policy. The following section articulates three specific scenarios that show the great likelihood that Biden’s policies will inevitably end up harming communities of color and missing their targeted goal of mitigating the harm of white supremacist violence.

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<sup>184</sup> Jonathan Chait, *Tucker Carlson Endorses White Supremacist Theory by Name*, NEW YORK MAGAZINE (Apr. 9, 2021), <https://nymag.com/intelligencer/2021/04/tucker-carlson-great-replacement-white-supremacist-immigration-fox-news-racism.html> [https://perma.cc/R23J-TTS9]

<sup>185</sup> The defendants included Richard G. Butler, the one-time leader of the Aryan Nations in Idaho; Robert E. Miles, former grand dragon of the Michigan Ku Klux Klan; Louis Ray Beam of Houston, former grand dragon of the Texas Klan; Richard Scutari of New York; Bruce Carroll Pierce of Washington State; Andrew Virgil Barnhill of Florida; Ardie McBrearty of Arkansas; David Eden Lane of Denver, Colorado; Lambert Miller of Missouri; David Michael McGuire of Illinois; Robert Smalley of Fort Smith; Richard Wayne Snell of Oklahoma; William Wade, Ivan Ray Wade of Smithville, Arkansas.

<sup>186</sup> Bill Simmons, *Defendants All Acquitted in Sedition Trial*, ASSOCIATED PRESS (Apr. 8, 1988), <https://apnews.com/article/604c50e36bd020ac70be35445b12d059> [https://perma.cc/W9Q2-UCUKJM2EH-V79S].

<sup>187</sup> Belew, *supra* note 116 at 67–74, 170–83, 199–208.



### III. SURVEILLANCE RELAPSE

Biden's policies, at face value, have good intentions if utilized as he has articulated. The 'terrorist' designation, however, is highly contingent on the political context. This Section articulates potential shortcomings by identifying three "surveillance relapses" surrounding the socio-political context that can lead robust returns to fixating on Muslim populations as the primary culprits of terrorism. We define surveillance relapse as an institutionalized reversion toward policing Muslim communities as the focal subjects of terrorism on account of deeply entrenched stereotypes within federal and local policing agencies.

Furthermore, *relapse* reifies the ways that Biden's policies can be misapplied for different outcomes than its original intention. One, a state-oriented relapse identifies the reality that the framing around terrorism is highly contingent on the presidential administration in office and can be abused if a future administration enters with anti-Muslim or anti-Black views, as was the case with the Trump administration. Second, circumstantial relapse reminds us of what happens when a culprit is Muslim and explores the hypothetical scenario of a Muslim culprit emerging, and how the policy would be applied if there is a Muslim-terror suspect in the future. Finally, structural relapse builds on part two's detailed description of embedded white supremacy and highlights how local law enforcement's extensive involvement with the national security state has limited oversight and accountability, which can easily lead to local abuses of the extended powers Biden has put into place.

#### A. State-Oriented Relapse

One of the most compelling concerns is that extending the powers of the national security apparatus, and its appendages, leaves extended the powers in place that can be manipulated in ways that are hard to hold accountable. While the Biden administration may be more measured in trying to use these extended powers to focus on white supremacist terrorism, this goal may shift with the next presidential administration. As Part I of this article delineates, surveillance regimes are not static. Rather, they are fluid, in line with the aims of presidential administrations. Therefore, if a Republican candidate wins the 2024 presidential election, it is highly likely that a white supremacist counter-radicalization regime will be dissolved, or materially reformed.

Biden's policy is predicated on the assumption that presidential administrations that come after him will utilize these expanded powers responsibly and that there is a level of neutrality that these laws would be evenly applied to all suspects, despite their racial or ethnic background. Even before Biden's policy introduction, there were extensive laws in place that could be used to target white supremacists and other perpetrators. Examining the use of

facially neutral policies during the Trump administration highlights the potential danger of a shift in presidential administrations in the future. It also highlights how presidential administrations, like Trump's, can utilize existing structures to put forward their own political agendas.

This was demonstrated in the dangerous display of Trump's stances on immigration and the leverage he afforded his senior policy advisor Stephen Miller to implement his hardline anti-immigration stances using existing policies. Miller is known for being the "adviser with total authority over a single issue that has come to define an entire Administration."<sup>188</sup> In particular, Miller's misuse of power within the Department of Homeland Security foreshadows the potential misuse that could occur with the extension of the policies that Biden has implemented. According to reports from former officials, the drastic changes Miller implemented required that DHS policymaking processes were sidelined.<sup>189</sup> According to a *New Yorker* expose, "Miller has cultivated lower-level officials in the department who answer directly to him, providing information, policy updates, and data, often behind the backs of their bosses."<sup>190</sup> This misuse of DHS employees becomes even more harmful if we consider the extended powers that are given to the national security apparatus under Biden's policy.

Trump's visceral anti-immigration stances became a defining element of his administration and highlight the ways he used his political motivation to unfairly target specific communities. One of the key policies his administration canceled was the Deferred Action for Childhood Arrivals (DACA). According to the *New Yorker*, Miller wrote an email to a Breitbart editor in response to DACA stating, "that expanding the 'foreign-born share' of the U.S. workforce was an instance of 'immigration' being used 'to replace existing demographics.'"<sup>191</sup> It reiterates the replacement theory ideology and that central figures in the Trump administration not only subscribed to this belief but also the reality that, on an issue they had a hardline stance upon, they were able to manipulate existing policies to achieve their target.

This is particularly consequential in relation to terrorism because immigration authorities are closely interlinked with the national security apparatus, particularly the Department of Homeland Security. In the case of Miller's brutish path forward, Miller intentionally targeted lower-level DHS officials to strong-arm in order to achieve his anti-immigrant policy objectives.<sup>192</sup> With the extended discretionary powers provided to agencies through Biden's new policy, we can only wonder how much more power

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<sup>188</sup> Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, THE NEW YORKER (March 2, 2020), <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession> [https://perma.cc/V4PL-9F9K].

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

Miller would have to control DHS employees if someone like him were to enter the next presidential administration in a position of power.

With respect to CVE specifically, as articulated in Part One, the policies in place for grants made it possible for Trump to manipulate it. During Trump's reign, at least 85% of CVE grants included explicit language that they are targeting minority groups, including Muslims, individuals interested in Islam, Black Lives Matter Activists, immigrants, refugees, and LGBTQ Americans.<sup>193</sup> Funding also tripled for law enforcement from \$764,000 to \$2,340,000.<sup>194</sup> Trump's ability to harness his power to manipulate federal agencies and policies to implement his goals highlights the dangers of a structural relapse, and signals how the very nature of American democracy—and electoral politics—makes it part of the surveillance beast.

### B. *Circumstantial Relapse*

*What if a Muslim is the culprit?* This fear looms heavy in the minds of Muslims after every incident of mass violence, and colors the presumptions of police agencies before an actual culprit is identified.<sup>195</sup> While the formal focus of surveillance may change, racialized understandings of “terrorism” are deeply entrenched. Particularly with federal, and even more so local, law enforcement agencies.

The limits of the current conceptualization of Biden's white supremacy law will be severely tested if there is one suspect who emerges as a perpetrator that is affiliated with the Muslim community. With the rise in white supremacist violence, while Biden's focus has been on this specific population, the cottage industry of Islamophobes who have profited from the surveilling of Muslims is established and ready if there is a future attack by a Muslim. Reviewing one of the most recent terror plots put forward by Muslim perpetrators highlights the ease with which Biden's policy can be used to target non-white individuals and Muslims specifically.

Phone calls began incessantly from the early hours for the Islamic Society of Boston Cultural Center.<sup>196</sup> There had been a targeted terrorist attack at the Boston Marathon, killing three and injuring seventeen others who lost limbs in the process.<sup>197</sup> Questions emerged about whether the mosque leader-

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<sup>193</sup> Faiza Patel, *Countering Violent Extremism in the Trump Era*, BRENNAN CENTER FOR JUSTICE (June 15, 2018), <https://www.brennancenter.org/our-work/research-reports/countering-violent-extremism-trump-era> [https://perma.cc/K3RR-WY4Z].

<sup>194</sup> *Id.*

<sup>195</sup> See KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR* 8 (2018).

<sup>196</sup> FAIQA MAHMOOD ET AL., “HOW A MOSQUE MANAGED A CRISIS : THE ISBCC RESPONSE TO THE BOSTON MARATHON BOMBING” 6 (2017), <https://www.ispu.org/wp-content/uploads/2017/07/RMS-ISBCC-Crisis-Management.pdf> [https://perma.cc/A8RW-4VR3].

<sup>197</sup> JONATHAN D. GATES ET AL., *The Initial Response to the Boston Marathon Bombing*, 260(6) *Annals of Surgery* 960, 960 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5531449/> [https://perma.cc/ER73-URG5].

ship were aware of any suspects. In the midst of trying to find the Tsarnaev brothers, there were many individuals racially profiled as the perpetrator, such as a Saudi student who was injured while participating in the marathon. The student, an innocent victim of the attack, was tackled by another bystander and reported as a suspect by the *New York Post*.<sup>198</sup> Moreover, Twitter was a vital part of the search and one of the main hashtags trending after the event was #Muslim.<sup>199</sup>

News emerged that the attackers were two brothers: Dzhokhar Tsarnaev and Tamerlan Tsarnaev. It was immediately revealed that they were Chechen and Muslim, and thus, white. However, as social commentator Sarah Kendzior noted in a compelling piece published in the wake of the attacks, the Brothers Tsarnaev were “The wrong kind of Caucasian” because of their Muslim identity and Chechen origins.<sup>200</sup> A manhunt captured the brothers, which meant immediate attention to the mosques and Muslim institutions in the greater Boston area. The two were eventually found, with Tamerlan killed during the standoff and Dzhokhar apprehended shortly after. The younger Tsarnaev brother was later tried in federal court, and sentence to the death penalty.<sup>201</sup>

In the aftermath of these tragic events, the climate surrounding Muslims in Boston was heightened and palpably more nervous. One week after the bombings, former U.S. Congressman Joe Walsh (Republican-Illinois) appeared on MSNBC and expressed his feelings on Muslims, stating, “we’re at war, and this country got a stark reminder last week again that we’re at war. Not only should we take a pause when it comes to our immigration, we need to begin profiling who our enemy is in this war: young Muslim men.”<sup>202</sup> The discourse around Muslims, Islam, and religiously motivated violence entered public discourse once again.

Not surprisingly, the Obama Administration named Boston one of the three pilot cities for the federal CVE Program.<sup>203</sup> The decision to prioritize Boston, in addition to Los Angeles and Minneapolis, was fueled potently by the terror attacks committed by the Tsarnaev Brothers, and the ensuing cul-

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<sup>198</sup> Lacey Gray, *Muslim Bashing in the Wake of Boston Bombing*, NATIONAL GEOGRAPHIC, (Apr. 26, 2013), [https://perma.cc/B3WV-LWT3].

<sup>199</sup> *Id.*

<sup>200</sup> Sarah Kendzior, *The Wrong Kind of Caucasian*, AL JAZEERA ENGLISH (Apr. 21, 2013), https://www.aljazeera.com/opinions/2013/4/21/the-wrong-kind-of-caucasian [https://perma.cc/S6DK-53JL].

<sup>201</sup> Ariane de Vogue, *Supreme Court upholds death sentence of Boston Marathon bomber Dzhokhar Tsarnaev*, CNN (Mar 4, 2022), https://www.cnn.com/2022/03/04/politics/tsarnaev-supreme-court/index.html [https://perma.cc/N6T7-SYLT].

<sup>202</sup> Richard Solash, *Following Boston Attacks, Uptick in Islamophobia, Gestures of Tolerance*, RADIO FREE LIBERTY EUROPE, (Apr. 27, 2013), https://www.rferl.org/a/boston-attacks-islamophobia-tolerance/24970144.html [https://perma.cc/C6AL-XJCQ].

<sup>203</sup> *Fact Sheet: The White House Summit on Countering Violent Extremism*, OBAMA WHITE HOUSE (Feb. 18, 2018), https://obamawhitehouse.archives.gov/the-press-office/2015/02/18/fact-sheet-white-house-summit-countering-violent-extremism [https://perma.cc/G8RK-HLRE].

ture of suspicion toward the Boston Muslim population within federal counterterrorism agencies. This highlights the pliability of circumstantial relapse, particularly in relation to Muslim culprits of terror and mass violence, which can—and historically has—spurred marked state surveillance reform and policing response.

The reality is that the full political might of the national security state can be deployed easily to target Muslims. If an attack as egregious as the events of January 6th were to occur with Muslims as the perpetrators, it begs the question of how different the response would have been. Given the way that the national security state was intentionally redesigned post 9/11 with Muslims as forefront suspects, Biden's policy faces a relapse and shift in goals, similar to the AEDPA, if there is a future occurrence with a Muslim involved. A Muslim culprit will be swiftly designated a terrorist, not only by federal law enforcement, but by the court of public opinion and the media. Given the public's likelihood to be more suspicious of Muslim suspects, the national security apparatus has more freedom to move forward to hold the individual, and any of their alleged associates, accountable. While there is more of a delay and limitation to holding white supremacists accountable, we would anticipate seeing the full powers of the state at hand if this scenario were to come to fruition.

### C. *Structural Relapse*

Finally, the relapse that can occur within the law enforcement structure is quite probable given the current state of local and federal law enforcement relationships. We dub this “structural relapse.” Since 9/11, state and local law enforcement agencies have transitioned into a new role, serving on the front lines of the domestic battle against terrorism. They have essentially taken the role of the foot soldiers for CVE programming. The federal government saw the participation of local and state agencies with roughly 800,000 officers nationwide as a force multiplier in battling terrorism.<sup>204</sup> This shift in further empowering local agencies is an arena ripe for structural relapse, expanding profiling and surveillance of a myriad of people with limited accountability for abusive local agency actions.

American counterterror policing is federally led but functionally decentralized, which means that this initiative has created a patchwork of rules and guidelines on how police departments gather and maintain information on suspects. Regional rule variation and minimal oversight and accountability remain the primary problems with implementation. This decentralized and highly entrenched system leaves the system vulnerable to infringement on the civil rights and civil liberties of marginalized communities. It not only

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<sup>204</sup> Michael Price, *National Security and Local Police*, BRENNAN CENTER FOR JUSTICE, (Dec. 10, 2013), <https://www.brennancenter.org/our-work/research-reports/national-security-and-local-police> [<https://perma.cc/AAH5-FHMA>].

leads to disjointed application of Biden's new policy rollout, but misapplications of policies to further target Black and Muslim suspects, as some local appendages are accustomed to doing.

The extensive entrenchment of this system post 9/11 reifies this point. The national security apparatus has curated two main initiatives, the Joint Terrorism Task Forces (JTTFs), which are led by the FBI, and "fusion centers", which are funded by both the DOJ and DHS. As a result, there are approximately, 14,600 sub-federal law enforcement agencies, 78 fusion centers that are run both regionally and at the state level, and 103 JTTF's.<sup>205</sup> The breadth of these local-federal partnerships is important to emphasize because it shows the wide-scale entrenchment of the national security apparatus in everyday local and state level law enforcement. Of great concern is the exponential level of vulnerability this leaves communities of color at because of the variation of rules and guidelines that emerge from this mixture of federal and local level engagement.

Before 9/11, police departments had stronger limits and were unable to gather information on innocent communities without reasonable suspicion. They were only able to investigate First Amendment-protected events if a direct link was found to a suspected crime. Post 9/11 federal policies prompted local police departments to change rules. The Chicago PD and NYPD, for example, eased restrictions to permit their police officers to spy on religious or political organizations.

In addition, local law enforcement has varied forms and scopes of training that influence their level of experience and ability to engage in federal law enforcement. Becoming a police officer, on average, requires 652 hours of academy training.<sup>206</sup> Many states have considerably lower requirements. Georgia for example, requires 408 hours of academy training to become a police officer.<sup>207</sup> By comparison, Georgia requires 3,000 hours of training to become a licensed barber.<sup>208</sup> The additional factor of concern is that at least 37 states allow police to begin work without training, with states like Nebraska allowing officers to go 12 months into work as a police officer without training.<sup>209</sup> Limited local law enforcement training introduces great points of vulnerability, raising questions about whether these officers are equipped to conduct federal law enforcement because federal officers undergo more extensive training for tracking suspects and information related to terror-cases across sub-groups of individuals.

There are also inconsistent rules and procedures in place between the different enforcement agencies, which limits the quality control possibilities

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<sup>205</sup> *Id.*

<sup>206</sup> *State Law Enforcement Training Requirements*, The Institute For Criminal Justice Training Reform, <https://www.trainingreform.org/state-police-training-requirements> [<https://perma.cc/JB7K-XAW5>] (last visited Dec. 30, 2022).

<sup>207</sup> *Id.*

<sup>208</sup> Ga. Comp. R. & Regs. r. 70-2-.07.

<sup>209</sup> *State Law Enforcement Training Requirements*, *supra* note 206.

and oversight. For example, for local police departments, the general oversight model can include the following: “(1) the review and appellate model; (2) the investigative and quality assurance model; and (3) the evaluative and performance-based model.”<sup>210</sup> Miami-Dade County has no oversight measurements, for example. The NYPD and Dearborn, Michigan Police Department only includes an investigative and quality assurance model but omits the other two characteristics. This is particularly troubling given that Dearborn, Michigan has one of the largest concentrations of Muslim Americans in the country, and NYC and Miami-Dade County have sizeable Black and immigrant communities, in addition to large Muslim communities. Their limited oversight leaves individuals in those cities more vulnerable as a result.

Beyond local police departments, the Brennan Center for Justice found that, “Independent oversight of fusion centers is virtually non-existent and compounds the risks of the decentralized form that information sharing has taken.”<sup>211</sup> Moreover, they reiterate that existing oversight mechanisms for the police are not effectively equipped to monitor intelligence activities or accurately estimate the impact of these programs on the civil liberties of their residents.

Of greatest concern are JTTF’s, as there is no mechanism in place to ensure that compliance is ensured for local and state laws. The DOJ Inspector General found that the FBI did not have signed memoranda of understanding (MOU) with many agencies involved with the JTTF.<sup>212</sup> Further investigation has found that even when an MOU exists, the language is vague, leaving much discretion to the officer in the JTTF and great room for variance. This further entrenches that the national security apparatus is hard to control when it has become so large and varied with federal agencies interacting with decentralized rules, regulations, and policies.

With greater power granted to the extensive array of local and state agencies working with the federal government, it is hard to monitor and hold people accountable. This is also coupled with the reality that part two reiterated, that local law enforcement agencies are particularly vulnerable to being permeated with white supremacist members and being embedded with white nationalist notions. With the post 9/11 apparatus intentionally designed to information share on sub-groups of Americans, Biden’s policy will not alter that, but may further entrench these systems to focus on marginalized communities. This makes it foreseeable that structural relapses can occur, from the way fusion centers respond to how local law enforcement engages with implementing these policies.

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<sup>210</sup> Price, *supra* note 204, at 29.

<sup>211</sup> *Id.*, at 5.

<sup>212</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE DEPARTMENT OF JUSTICE’S TERRORISM TASK FORCES IV (Jun. 2005), <https://oig.justice.gov/reports/plus/e0507/final.pdf> [<https://perma.cc/G345-GGZZ>].

## CONCLUSION

*“There is no flag large enough to cover the shame of  
killing innocent people.”*

—Howard Zinn, *Terrorism Over Tripoli*<sup>213</sup>

For more than two decades, the American War on Terror oriented Muslims as the embodiment of terrorism. This racialization, rooted in longstanding misrepresentations of Islam and valorization of whiteness, planted the false flag that Islam was the enemy and that national security mandated foreign wars and domestic crusades against Muslims. War on Terror fixation on “Islamic terrorism” enabled white supremacist organizations and networks to organize in the shadows before the Trump Administration galvanized them toward horrific and bloody action, as scores of incidents in the past several years have illustrated, including the events in Buffalo, New York.

The Tops Friendly Market Store had served as a community space for Black possibility. The transformation of the community site from a place of interconnections to a site mired with memories of white supremacist violence will continue to haunt the community. Civil rights advocates have advocated for a future where the possibility of equity and justice is available for all communities. Yet, the embedded nature of white supremacy harms this potential. Our analysis highlights the ways that the tentacles of white supremacy remain and may increase their hold because of the way that President Biden’s designation of white supremacy as domestic terrorism currently stands: a designation that limits the definition of terrorism and also increases the powers of the national security apparatus.

The institutionalization of white supremacy within the very federal and local law enforcement agencies tasked with enforcing counter-radicalization against white supremacy (1) derails the possibility of carrying forward such a program; (2) will drive under-policing of such groups; (3) enables the continuance of Muslim over-policing; and (4) after a violent attack involving a Muslim culprit, would entrench and expand Muslim community surveillance.

Biden’s policy, while important in trying to hold white supremacist violence accountable, falls short of achieving its mission. More urgently, it places the lives of marginalized communities at stake by increasing the power of the national security apparatus—the very institution that has turned a blind eye to using enforcement mechanisms equitably and has utilized these tactics to further target communities of color. Moving forward, the future of this policy remains questionable and requires more interrogation to empirically assess how local partnerships with federal agencies will act with these shifts and evaluating the repercussions of this policy on marginalized communities.

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<sup>213</sup> Howard Zinn, *THE ZINN READER* 362 (1993).