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SORRY, THAT'S CLASSIFIED: POST-9/11 SURVEILLANCE POWERS, THE SIXTH AMENDMENT, AND NIEBUHRIAN ETHICS

SEJAL H. PATEL*

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I. INTRODUCTION

On December 20, 2011, Tarek Mehanna, a well-educated Muslim man, was convicted of seven counts of terrorism-related crimes in Boston federal court.[1] I, along with three colleagues, represented Mehanna at trial. As we emphasized throughout the trial, Mehanna had made no attempt to procure weapons or plan an attack. However, based on a trip to Yemen, engagement with Islamic youth, and anti-American rhetoric, the government successfully argued that Mehanna conspired to provide material support to terrorists and to a foreign terrorist organization, to kill, murder, or maim on foreign territory, and to make false statements to the FBI about the location of a suspected terrorist. The govern-

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[1] *See* Milton Valencia, *Tarek Mehanna guilty of terror charges*, BOSTON GLOBE (Dec. 20, 2011), http://www.bostonglobe.com/metro/2011/12/20/tarek-mehanna-found-guilty-all-terror-charges/chpbwimRMbvdNMOladJ08J/story.html; Boston Globe, *Tarek Mehanna found guilty on all terror charges*, YOUTUBE (Dec. 20, 2011), http://www.youtube.com/watch?v=ipjs4F65WE8 [hereinafter "Tarek Mehanna found guilty"].

ment's evidence derived from largely electronic materials that law enforcement secretly extracted from his home and from the homes of people he corresponded with online.

Drawing on my experiences in Mehanna's case, this article explores how law enforcement's post-9/11 surveillance powers impact a criminal defendants' constitutional right to effective assistance of counsel. The Foreign Intelligence Security Act ("FISA"), amended under the USA Patriot Act six weeks after 9/11, authorized law enforcement to secretly enter Mehanna's family home, mirror all of his computers,[2] photograph every item in the house, tap his phones, and then leave the house apparently undisturbed.[3] Because this case involved matters of national security, we as Mehanna's defense attorneys were not allowed to view the warrant that authorized these colloquially dubbed "sneak and peek" searches, nor were we allowed to inquire what evidence the government gathered during these searches. Prosecutors are not required to disclose FISA warrants to defense lawyers.[4] The prosecutors furnished us discovery only as they deemed it relevant. At trial, the government was further permitted to introduce electronic evidence from convicted terrorists in the United Kingdom, and presented testimony from three witnesses from Scotland Yard.[5] The government's theory was that because Mehanna had been on the same web forum as

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[2] A mirror image, also called a "disk image" or a "forensic image," is the creation of an exact duplicate of a hard drive. This process requires expert computer forensic protocol because the duplication must maintain the integrity of the original information, relay hash information about the data, and follow proper chain of custody requirements. "A forensic image . . . is an exact duplicate of the entire hard drive, and includes all the scattered clusters of the active and deleted files and the slack and free space." Franz J. Vancura, Note, *Using Computer Forensics to Enhance the Discovery of Electronically Stored Information*, 7 UNIV. ST. THOMAS L. J., 727, 728 (2010) (*citing* United States v. Triumph Capital Grp., Inc., 211 F.R.D. 31, 48 (D. Conn. 2002)).

[3] Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 (2000); *see* Milton Valencia and Martin Finucane, *Investigators conducted secret search of Mehanna's home in Sudbury in 2006*, BOSTON GLOBE (Oct. 28, 2011), http://www.boston.com/2011/10/28/mehanna/eBN9wFeas425OXmq6I0hpL/story.html.

[4] "Never in the 36-year history of the Foreign Intelligence Surveillance Act (FISA) has anyone but the government and a judge seen the basis for a FISA application or material derived from one." Spencer Akerman and Tom McCarthy, *Defence lawyers granted access to FISA surveillance documents in terror case*, GUARDIAN (Jan. 29, 2014), http://www.theguardian.com/law/2014/jan/29/defence-terrorism-case-fisa-documents-surveillance. The only time a court has ever allowed a defense attorney to view a FISA warrant to date was in the recent case of *United States v. Adel Daoud* in the U.S. District Court in Chicago. Daoud's attorney called the allowance "historic." *See* Jason Meisner, *Defense in Loop bomb plot case to get secret terror court filings*, CHICAGO TRIBUNE (Jan. 29, 2014), http://articles.chicagotribune.com/2014-01-29/news/chi-adel-daoud-fisa-court-ruling-20140129_1_adel-daoud-terrorism-prosecutions-thomas-anthony-durkin.

[5] *See* Milton Valencia, *British investigator tells court of contacts with terrorists: Still no evidence presented to show Mehanna acted*, BOSTON GLOBE (Nov. 11, 2011), http://www.

certain individuals, they were all co-conspirators in a broad international terrorism scheme.[6] The government deposited the UK evidence at our doorstep weeks before trial with little description of why this evidence was gathered. They offered us no catalogue of other evidence they possessed and declined to disclose. We filed motion after motion contesting what we viewed as gross discovery abuse.[7] The trial judge denied the discovery motions, and the First Circuit affirmed the appealed rulings.[8]

The Mehanna case raises a host of crucial questions about the impact of the government's post-9/11 surveillance power on a defendant's right to effective assistance of counsel. How can counsel effectively prepare for trial without knowing what evidence against the defendant the government possesses? What options do prosecutors have when facing the impossible dilemma of deciding how much to produce in their desire to balance fairness and efficiency in the name of national security? The analysis here seeks answers to these questions through ethnography, legal analysis, and intellectual history.

In particular, this article draws upon the works of American theologian Reinhold Niebuhr to explore how this conception of government's surveillance powers reshapes American democracy. Niebuhr, President Barack Obama's favorite philosopher, was a prolific author of books, articles, sermons, and letters about Christian ethics, politics, and American democracy during the middle decades of the twentieth century.[9] Today, policymakers and religious leaders across the ideological spectrum cite Niebuhr to support their visions of how America should respond to the 9/11 terrorist attack and the threat of a rising "militant Islam."[10] Public intellectual Cornel West calls Niebuhr's voice prophetic.[11] In this article, I resist the urge to play into the "What Would Niebuhr Do" dialogue. Harvard historian K. Healan Gaston has pointed out that "[a]lthough Niebuhr's way of thinking remains intensely relevant to the challenges we face, there are a wide range of discernably Niebuhrian positions one

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boston.com/news/local/massachusetts/articles/2011/11/11/mehanna_had_contact_with_terror_ring_in_london_british_investigator_says/.

[6] The court used this "steno pool" concept throughout the trial. *See* Trial Transcript at 11-12, 74, 48–50, United States v. Mehanna, No. 09-10017-GAO, (D. Mass. 2011).

[7] We filed, for example, a motion for a Bill of Particulars, a motion to organize evidence, FISA motions, and a motion to suppress hard drives.

[8] Appellate counsel argued, among many other issues, that the prejudice and spillover of inadmissible evidence required reversal and remand on all counts. *See* Brief of Defendant Tarek Mehanna at 68–70, United States v. Mehanna, No. 12-1461 (1st Cir. Dec. 17, 2012). The First Circuit rejected the argument and affirmed the counts.

[9] *See* David Brooks, *Obama, Gospel, and Verse*, N.Y. TIMES, Apr. 26, 2007, at A25.

[10] Justine Isola, *Everybody Loves Reinhold*, ATLANTIC MONTHLY (Oct. 7, 2007), http://www.theatlantic.com/magazine/archive/2007/11/everybody-loves-reinhold/306367/.

[11] Cornel West, *Foreword* to REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS (2013) [hereinafter *Foreword*].

might take on almost any contemporary issue."[12] This article employs Niebuhrian philosophy not to predict his views on the Patriot Act but to extract analytical tools and tropes of Niebuhrian thought to guide our thinking about post-9/11 law enforcement and evidence gathering. The primary aim of this article is to unearth questions about enemies, coercion, and patriotism that Niebuhr's thought requires us to consider, questions we have neglected since 9/11. In the post-9/11 era, have we too often sacrificed American freedom in the name of protecting it?

II. The Prosecution of Tarek Mehanna and Post-9/11 Surveillance

I undertake this work with an ethnographic approach, as my inquiries are guided by my direct experiences in the post-9/11, technologized, surveillance culture. The evidence in Tarek Mehanna's trial derived from the government's authority under FISA to secretly acquire information. The government obtained most of the over one thousand trial exhibits during a 2006 search of the Mehanna family home. That summer the Mehannas had traveled to Egypt.[13] During this time the FBI watched Tarek Mehanna and his family and knew that the family would be away. In August 2006, a team of agents broke into the Mehanna's residence in Sudbury, Massachusetts late at night. The agents disabled the home alarm system. They crept in wearing dark clothing and carrying cameras, phone taps, and computer forensic mirroring devices. While the city of Sudbury slept, these agents worked room by room, photographing every bookcase, closet, and individual pages of books and notepads. Computer forensics agents duplicated every computer in the house, producing an active replica of all computer data for themselves. Other agents installed pen and trap trace devices to listen on all calls and to trace all telephone numbers. Then, the agents left everything in the home exactly the way they found it so that no one would know they had been there.[14] It was evidence from this search, especially the computer imaging, that the prosecutors used against Mehanna at trial.

As defense counsel, we observed the standard practice of challenging the search warrant. In non-terrorism cases, defense lawyers receive the warrant and accompanying paperwork from law enforcement and challenge the basis for the search. The Fourth Amendment protects against "unlawful search and seizure," so defense attorneys must ensure that the basis for an invasion of privacy was lawful.[15] For example, in a hypothetical drug case, defense attorneys may argue that there was insufficient probable cause justifying the issuance of a warrant, even though law enforcement may ultimately find contraband in their search. If

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[12] Chris Herlinger, *WWND: What Would Niebuhr Do?*, Huffington Post (Mar. 3, 2011), http://www.huffingtonpost.com/2011/03/03/wwnd-what-would-niebuhr-d_n_830523.html.

[13] *See* Trial Transcript, United States v. Mehanna, No. 09-10017-GAO (D. Mass. 2011).

[14] *See* Valencia, *supra* note 1.

[15] U.S. Const. amend. IV.

a search is determined to have been unlawful, all evidence gathered during that search will be suppressed under the "fruit of the poisonous tree" doctrine.[16]

In terrorism cases, however, defense attorneys are denied the right to see the warrant or ascertain any information about why their client was the subject of a secret search.[17] It is important to note that this exception exists exclusively in terrorism cases. In the Mehanna case, we filed motions challenging the FISA warrant without knowing why the warrant was issued. No defense attorney has successfully challenged a FISA warrant in any terrorism case prosecuted in the United States.[18] Given that defense lawyers have to guess why their client was searched, it is not surprising that judges remain unmoved by the lack of specificity in suppression motions.[19] Defense attorneys insist that the secret tribunals presiding over these warrants approve them with little more than a rubber-stamp, an assertion that the government contests.[20] The decision over who may

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[16] The "fruit of the poisonous tree" doctrine is a rule that prohibits admission of evidence derived from unlawful means in a criminal prosecution. The U.S. Supreme Court in *Weeks v. United States*, 232 U.S. 383 (1914) first enunciated the rule. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court held that the exclusionary rule was also applicable to the states. The Court adopted the phrase "fruit of the poisonous tree" in *Nardone v. United States*, 308 U.S. 338 (1939). The standard for determining whether evidence is fruit of the poisonous tree is set forth in *Wong Sun v. United States*, 371 U.S. 471 (1963).

[17] *See supra* note 4.

[18] No court has found FISA, pre- or post-9/11, an unconstitutional infringement of civil liberties. *See generally* C. WILLIAM MICHAELS, NO GREATER THREAT: AMERICA AFTER SEPTEMBER 11 AND THE RISE OF A NATIONAL SECURITY STATE (2002) (cataloguing how pre-2001 challenges to FISA in federal district and circuit courts survived constitutional scrutiny); Note, *The Foreign Intelligence Surveillance Act: Legislating a Judicial Role in National Security Surveillance,* 78 MICH. L. REV. 1116 (1980) (setting forth an excellent discussion of FISA and its background). Post-9/11, defense attorneys file motions challenging FISA, but no defendant has succeeded in a district or circuit court finding the FISA provisions unconstitutional. *See, e.g.*, United States v. Mubayyid, 521 F. Supp. 2d 125, 136 (D. Mass. 2007) (holding that disclosure of classified information to defense counsel was unnecessary, that the government complied with FISA requirements, and that FISA itself was constitutionally sound).

[19] *See generally* Groh v. Ramirez, 540 U.S. 551 (2004) (affirming that a warrant must describe with particularity the person or things to be seized).

[20] "At a conference sponsored by the National Association of Criminal Defense Lawyers on May 3, 2008 . . . Judge James Carr, then a member of the FISA Court, stated that as of that date, approximately 15-20% of FISA applications provoke questions from a judge, which may lead to informal withdrawal of the application . . . ." David Kris and Douglas Wilson, *The Foreign Intelligence Surveillance Court—The FISC's review of applications*, NAT'L SECURITY INVESTIGATIONS AND PROSECUTIONS § 5:4 (2012) (setting forth the validity, construction and application of FISA and asserting that the judicial oversight process is not a "rubber stamp"). Statistics show that between 2002 and 2012, the average number of applications filed was 1807 per year. Of those, the average number denied by FISA judges in whole or in part was an average of 1.6. *Id. See also Mubayyid*, 521 F. Supp. 2d at 136; David

be searched lies with a handful of individual FBI agents and federal prosecutors.

Apart from the debate over whether such power is checked, the evidence itself is problematic because of its overwhelming volume.[21] There are two pockets of evidence in this case—Mehanna's computer and the computers of his alleged co-conspirators—that have the capacity to generate deep wellsprings of potentially admissible evidence. A mirrored hard drive, for example, can hold vast amounts of evidence. The hard drive contains typical files, like music and video files, internet history, and word processing or spreadsheet documents. But an endless collection of disorganized electronic debris accumulates in hard drives as well. That debris can consist of fragments of deleted files residually saved to hard drives, deteriorated internet history or cached data, or images automatically downloaded from internet sites, unintentionally by the user but deliberately by the computer.[22] For this reason, experts examining this electronic evidence are called "forensic specialists," much like specialists who examine corpses in murder cases. "Forensic" means applying scientific methods or techniques to the examination of a crime.[23] One would think that this boring litany of additional evidence does not matter to anyone, least of all to a judge or a jury. But it does matter—immensely—and in surprising ways.

The government believed it fulfilled its discovery obligations to the defense team by delivering stacks of hard drives to our office. Not so long ago, a printed box of evidence contained a first and last page. The cardboard walls of Banker's boxes contained evidence in finite, quantifiable amounts. The advent of computer forensic evidence, however, has presented unseen problems with evidence review and trial preparation for attorneys on both sides of the table.[24] In the Mehanna case, the sheer volume of digital word processing and photo files, for example, was staggering, though it was at least relatively straightforward. The problem lay in the debris space on the hard drive. For example, the government told the court that Mehanna saved a photo of Nicholas Berg on his computer, the journalist who was beheaded by *Al Qaeda*. The prosecutors argued that Mehanna possessing that photo proved his criminal intent to provide

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Kravets, *Surveillance Court's Opinion Must Remain Secret, Feds Say,* WIRED (Apr. 3, 2013), http://www.wired.com/threatlevel/2013/04/secret-surveillance-court/.

[21] Computer hard drives contain far more information than just documents, photographs, and saved files that we associate with hard drive space. Deleted documents, metadata describing documents, and cache spaces contain huge volumes of information as well, so large in their scope that reviewing all of this in its entirety is impossible and cost prohibitive even if it were possible. *See supra* note 2. *See also* Testimony and Affidavit of Mark Spencer, Trial Transcript, United States v. Mehanna, No. 09-10017-GAO (D. Mass. 2011).

[22] *See* Trial Transcript, United States v. Mehanna, No. 09-10017-GAO (D. Mass. 2011).

[23] *Forensic Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/forensic (last visited Feb. 9, 2014).

[24] *See infra* note 67.

material support to terrorists.[25] Any defense lawyer would need to know the source of this photo. Was it a photo that Mehanna himself took in celebration of this horrible act? Was it a photo that someone sent to him along with malicious words in support of the act? Or was the photo from somewhere else?

We asked the prosecutors to identify the origins of the photo, but they were unable to tell us. We retained a computer forensics expert and asked him to locate the photo in the computer. After dozens of hours of billable time and thousands of taxpayer dollars, the expert discovered that the photo was a CNN.com thumbnail picture accompanying an article that Mehanna and thousands of other readers must have inadvertently stored on their computers. We asked the judge to consider how this could possibly evince criminal intent. If it did, we argued, then every other CNN reader risked having criminal intent by reading the news. The judge nevertheless allowed this photo, and many others like it, into evidence. This example illustrates why the debris space affects trial preparedness. The origins of electronic evidence are difficult and costly to ascertain, and there were many pieces of evidence like this one that we could not locate on the computer at all. Counsel cannot challenge the claim that such evidence speaks to criminal intent without knowing the source of the evidence.

A second giant evidence pool is the electronic evidence not only of the target, but also of every alleged co-conspirator. Again, I draw a contrast here between non-terrorism and terrorism cases. In a hypothetical bank robbery, the conspirators are the three men who planned the robbery, drove the car, and robbed the bank. In a terrorism case, however, conspirators' involvement can amount to being on a web forum or exchanging emails with a target. For example, Osama Bin Ladin was cited as a conspirator with Tarek Mehanna.[26] Mehanna never met Bin Ladin nor contacted him or anyone who worked with him. The government argued that Bin Ladin's violently anti-American positions inspired Mehanna, and that the two men were thereby co-conspirators. There were also conspirators with whom Mehanna may have exchanged messages over a web forum or email once or twice.

This poses the practical problem for defense counsel that every statement or admission by a co-conspirator may come into evidence against a defendant as an exception to the hearsay rule.[27] The fact that Osama Bin Ladin said that he hated America should be inadmissible as hearsay and irrelevant. However, because Bin Ladin was a co-conspirator, the judge allowed the evidence. Most of this evidence was not verbal but electronic. A defense lawyer must therefore

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[25] Government's Proffer and Memorandum in Support of Detention at 28, United States v. Mehanna, No. 09-CR-10017-GAO (D. Mass. 2009).

[26] Second Superseding Indictment at 3, United States v. Mehanna, No. 09-CR-10017-GAO (D. Mass. 2010).

[27] FED. R. EVID. 801(d)(2)(E) (statements that are not hearsay are those "made by the party's coconspirator during and in furtherance of the conspiracy").

request in discovery co-conspirator hard drives to add context to the conversations that may come into evidence. This would mean that the government would need to produce hundreds of hard drives. The defense lawyer needs the evidence but also cannot search the hard drives in any practicable way without expending thousands of hours and dollars to find a single conversation or photo that the government has selected to use at trial. If a single hard drive contains an unsearchable volume of evidence, no defense lawyer can search through hundreds of hard drives, identify where evidence came from, and determine who put it there.

The government faces a conundrum of its own in that all terrorism-related evidence is "classified," which means that prosecutors must declassify it in order to produce that evidence to defense counsel.[28] Prosecutors, FBI agents, and their superiors contend that information on those hard drives could compromise cooperator agreements or national security agendas in ways that do not bear on a particular defendant's case.

This process creates an impasse wherein neither the prosecutor nor the defense attorney can thoroughly perform his or her professional duties. The critical difference here is that the government has a self-conceptualized duty to society, while the defense attorney has a constitutionally mandated duty to the client.[29] This article thereby focuses here on how the policies set forth in these surveillance laws play out in our courtrooms through the attorneys. The analysis here relies on certain assumptions. Assume that defense attorneys represent both a single defendant as well as individual liberties at large.[30] Society's advo-

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[28] The classification wall in terrorism cases has created a firestorm of dissent from the defense bar. In Guantanamo cases, for example, defense lawyers argued, "Defense lawyers aren't told what evidence is classified, need the prosecution's approval to call witnesses, and have to defend their clients in a commission that may have been unlawfully influenced by senior U.S. officials hungry for a conviction." Daphne Eviater, *Questions of Legitimacy Hang Heavy over 9/11 Trial*, HUFFINGTON POST (Oct. 19, 2012), *available at* http://www.huffingtonpost.com/daphne-eviatar/september-11th-trial_b_1989787.html. This frustration manifests itself in civilian cases as well as in military tribunals. The Classified Information Procedures Act ("CIPA") governs discovery of classified information in terrorism investigations. For a wonderful exposition of how the classification and de-classification procedures work in national security cases, *see* Stephen J. Schulhofer, *Prosecuting Suspected Terrorists: The Role of the Civilian Courts*, 2 ADVANCE: J. ACS ISSUE GRPS. 63 (2004), *available at* https://www.acslaw.org/files/Prosecuting-Suspected-Terrorists.pdf. "Discovery, rather than trial, is where most classified information problems arise in terrorism prosecution. CIPA requires the judge to make difficult determinations about precisely what information should be disclosed to the defense and what information should be withheld. Deciding what information is 'helpful' or 'essential' to the defense may be impossible without standing in defense counsel's shoes." *Id.* Defense attorneys are allowed certain permission to view documents under protective orders, but the decision of which documents counsel can view still lies with the judge and the prosecutors. *Id.*

[29] U.S. CONST. amend. VI.

[30] "[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed

cate, the government, withholds evidence in terrorism cases from the individual's advocate, the defense attorney. However, the government is comprised of individual decision-makers who wield tremendous power. This article presses whether it might be time to rethink allowing the government to exclusively control these investigations with no checking of that authority by defense counsel.

Acknowledging that Americans are nervous about potential terrorists, the public must consider whether it trusts government to make reasonable use of its surveillance power with no oversight from the guardian of individual rights. The post-9/11 scales have tipped in favor of government authority over individual rights, and as America trends towards bigger government, citizens' micro-level choices threaten to undermine our democracy.[31] This article looks to Reinhold Niebuhr's thought for help in identifying these crucial points of inquiry.

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necessary to insure fundamental human rights of life and liberty . . . . The Sixth Amendment stands as a constant admonition that, if the constitutional safeguards it provides be lost, justice will not 'still be done.'" Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)). The *Gideon* court went on to say, "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some counties, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Id.* at 344.

[31] "Since 9/11, Americans generally have valued protection from terrorism over civil liberties, yet they have also expressed concerns over government overreach and intrusions on their personal privacy." Carroll Doherty, *Balancing Act: National Security and Civil Liberties in Post-9/11 Era*, PEW RESEARCH CTR. (June 7, 2013), *available at* http://www.pewresearch.org/fact-tank/2013/06/07/balancing-act-national-security-and-civil-liberties-in-post-911-era/. The study cites to a poll about whether sampled Americans found it necessary to give up civil rights to curb terrorism. In 2001, fifty-five percent of those polled answered that it was necessary to sacrifice civil rights, and thirty-five percent of those polled responded that it was not necessary to cede individual rights. Ten years later in 2011, the trend reversed, with fifty-four percent indicating that it was not necessary to sacrifice civil rights and forty percent saying it was still necessary. *Id.* In 2011, Adam Liptak called the Patriot Act "Orwellian" and wrote that "it quickly became a sort of shorthand for government abuse and overreaching." Adam Liptak, *Civil Liberties Today: Criminal law changed surprisingly little after the attacks. How law was enforced is another matter*, N.Y. TIMES (Sept. 7, 2011), *available at* http://www.nytimes.com/2011/09/07/us/sept-11-reckoning/civil.html?pagewanted=all. David D. Cole, a law professor at Georgetown, added: "Since 9/11, the criminal law has expanded, ensnaring as 'terrorists' people who have done no more than provide humanitarian aid to needy families, while privacy and political freedoms have contracted, especially for those in Muslim communities . . . . One the one hand, the past 10 years have shown that criminal law can be used effectively to fight terrorism; on the other, it has also demonstrated that the demand for prevention can all too quickly lead to the abuse of innocents." *Id.*

III. WHY REINHOLD?

The writings of the theologian Reinhold Niebuhr have resurfaced in politics in recent years because President Barack Obama and former Secretary of State Hillary Clinton both cited him as among their favorite philosophers.[32] Why does a Christian ethicist whose writings spanned the middle decades of the twentieth century, from the Great Depression through the Vietnam War, matter to us today?[33] Calling Niebuhr prophetic, Cornel West and Arthur Schlesinger, Jr. lauded his ability to relate social ethics to politics with timeless clarity.[34] Niebuhrian meditations on human nature, limited government, and the tension inherent in democracy are critical resources in considering how we can preserve democracy in the face of an emerging security state.[35]

This epigram hearkens us to Niebuhr's work: "Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary."[36] Writers have appropriated Niebuhrian views on democracy both to justify and to denounce America's post-9/11 invasion of Iraq.[37] I apply Niebuhrian thoughts to analyze the ideological civil war raging within our borders post-9/11. Were Reinhold Niebuhr alive today, he would pose questions about the arsenal of investigatory techniques the United States Congress en-

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[32] *See* David Brooks, *Obama, Gospel, and Verse*, N.Y. TIMES, Apr. 26, 2007, at A25; Paul Allen, *The Obama Niebuhr Connection*, TORONTO STAR (June 14, 2008), *available at* http://www.thestar.com/news/world/2008/06/14/the_obama_niebuhr_connection.html; Fred Kaplan, *Obama's War and Peace*, SLATE (Dec. 10, 2009), *available at* http://www.slate.com/articles/news_and_politics/war_stories/2009/12/obamas_war_and_peace.html. HILLARY CLINTON, LIVING HISTORY 22 (2003).

[33] Karl Paul Reinhold Niebuhr was born on June 21, 1892 and died on June 1, 1971. He was an American theologian and political commentator who was a professor at Union Theological Seminary for over 30 years. Two biographies on Niebuhr that provide detail about his personal and professional life as well as his theological and political views as represented in his many books are RICHARD FOX, REINHOLD NIEBUHR: A BIOGRAPHY (1985) and DANIEL F. RICE, REINHOLD NIEBUHR REVISITED: ENGAGEMENTS WITH AN AMERICAN ORIGINAL (2009).

[34] West, *Foreword*, *supra* note 11; Arthur Schlesinger, Jr., *Reinhold Niebuhr's Long Shadow*, N.Y. TIMES (June 22, 1992), *available at* http://www.nytimes.com/1992/06/22/opinion/reinhold-niebuhr-s-long-shadow.html; Arthur Schlesinger, Jr., *Forgetting Reinhold Niebuhr*, N.Y. TIMES (Sept. 18, 2005), *available at* http://www.nytimes.com/2005/09/18/books/review/18schlesinger.html?pagewanted=all&_r=0.

[35] *See* West, *Foreword*, *supra* note 11; Gary Dorrien, *Introduction to* REINHOLD NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENSE (2011). It is no wonder that politicians across the ideological spectrum look to Niebuhr for how to relate policy to ethics. *See supra* notes 33, 35.

[36] REINHOLD NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENSE xxxii (2011) [hereinafter "CHILDREN OF LIGHT"].

[37] Herlinger, *supra* note 12.

acted six weeks after September 11th.[38] As we enter an era where our enemies no longer exclusively lurk on distant shores, but instead may be our neighbors, we can benefit from the steely clarity and wisdom of Niebuhr's critiques in considering whether the sort of democracy we have fashioned for ourselves serves justice.[39] Drawing on three of Niebuhr's seminal works—*Moral Man and Immoral Society* (1932), *The Children of Light and the Children of Darkness* (1944), and *The Irony of American History* (1952), I explore how a Niebuhrian view of democratic ethics can help us grapple with the post-9/11 surveillance regime. My aim in doing so is not to speculate about what he would *say* but to suggest what questions Niebuhr would *ask* so that we can consider that for the national security apparatus we live with today.

IV. What Would Niebuhr Ask?

Niebuhr's seminal works grapple with the ravages of the Great Depression, international wars, nuclear armament, and an increasing divide between the rich and poor in America. Then and now, individuals and governments erode liberty in order to save it.[40] "Yet there is beauty in our tragedy," Niebuhr writes. "We are, at least, rid of some of our illusions."[41]

Three Niebuhrian themes permeate through the post-9/11 surveillance culture: (1) Enemies, (2) Coercion, and (3) Patriotism. The central question is not whether the surveillance techniques we use today are good or evil, necessary or excessive. Like Niebuhr, who eschewed polarizing views of public policy, any policy decision, especially one involving national security, bears shades of both good and evil.[42] This article explores whether the policies and practices we have implemented are robust or whether they have become rote exercises in the name of democracy. Niebuhrian ethics underscore this dynamic conception of what safety and democracy means.[43]

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[38] "In think tanks, on op-ed pages, and on divinity school quadrangles, Niebuhr's ideas are more prominent at any time since his death, in 1971." Jordan Michael Smith, *The Philosopher of the Post-9/11 Era*, SLATE BOOK REV. (Oct. 17, 2011), *available at* http://www.slate.com/articles/arts/books/2011/10/john_diggins_why_niebuhr_now_reviewed_how_did_he_become_the_phil.html (quoting Paul Elie, *A Man for All Reasons*, ATLANTIC (Nov. 1, 2007), *available at* http://www.theatlantic.com/magazine/archive/2007/11/a-man-for-all-reasons/306337/).

[39] *See supra* notes 33, 35, 36.

[40] *See generally* REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS 33 (2013) [hereinafter "MORAL MAN "] (indicating that "[w]hen [the state] wants to make use of the police power . . . to subdue rebellions and discontent in the ranks of its helots, it justifies the use of political coercion and the resulting suppression of liberties by insisting that peace is more precious than freedom and that its only desire is social peace.").

[41] *Id.* at 276.

[42] *Id.* at 6, 21.

[43] *Id.* It is critical to note here that Niebuhrian ethics cannot be divorced from their Chris-

A. *Enemies*

The shock of 9/11 propelled America into a search for explanation.[44] Almost immediately after the attack, Americans focused national grief and anger towards Osama Bin Ladin and *Al Qaeda*.[45] Terrified of how it ever came into being, many Americans feel guilty about being part of the soil that let it grow.[46] In Osama Bin Ladin, as in Adolf Hitler decades ago, we had an epic enemy, the loathing of whom defined post-9/11 patriotism.

In his 1944 book *Children of Light, Children of Darkness,* Niebuhr addresses the role that an enemy plays in society: "arriving at communal self-consciousness through encounter with an enemy is a . . . significant symbol of the role which particularity plays in establishing national communities."[47] Here, Niebuhr references the 1581 Dutch emancipation from Spain.[48] Dutch provinces wanted to practice Protestantism, which was forbidden under Spanish rule.[49] Niebuhr describes the prestige of the succeeding Dutch House of Orange to the "source of unity in a national community, the root of its collective self-consciousness . . . provided by the experience of facing a common foe." Common foes, Niebuhr observes, make for cohesive communities.[50]

For Americans, Osama Bin Ladin and *Al Qaeda* were such foes. Nationwide

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tian roots. Any exercise in Niebuhr's democratic critique and dialogue presupposes that actors behave in the interest of Christian brotherhood and love. I appropriate Niebuhr's Christian worldview in a pluralistic context because I believe that the virtues and moral code he advocates are not limited to a Christian worldview. He may have disagreed with this interpretation of his writings, but I believe that Reinhold Niebuhr himself trended towards a pluralistic dialogue in his later writings as he saw American society morph into a more diverse, less Christian stronghold. Insofar as peacefulness between neighbors now involves non-Christian neighbors, I think the application of his principles in this manner is consistent with Reinhold Niebuhr's views on the progress and self-destruction of American society.

[44] *See generally* MICHAEL JACKSON, MINIMA ETHNOGRAPHICA: INTERSUBJECTIVITY AND THE ANTHROPOLOGICAL PROJECT 108 (1998) ("To cope with such an existential crisis, human beings characteristically seek to restore themselves some provisional certainty, some sense of being in control.").

[45] *See* Mark Thompson, *Inside the Osama bin Ladin Strike: How America Got Its Man*, TIME (May 3, 2011), *available at* http://content.time.com/time/nation/article/0,8599,2069249,00.html; HANS JUERGEN WIRTH, 9/11 AS COLLECTIVE TRAUMA: AND OTHER ESSAYS ON PSYCHOANALYSIS AND SOCIETY (2013); Kate Yanina DeConinck, *Has "Justice Been Done"?: Various American Responses to the Death of Osama Bin Laden*, 7 CULT/URE: GRAD. J. HARV. DIVINITY SCH. (2012), *available at* http://cultandculture.org/culture/index.php/issues/23-culture-2012-spring-issue/66-has-justice-been-done.html.

[46] *See generally* W.G. SEBALD, ON THE NATURAL HISTORY OF HUMAN DESTRUCTION 9-10 (2003).

[47] NIEBUHR, CHILDREN OF LIGHT, *supra* note 36, at 166.

[48] *Id.* at 165.

[49] *Id.*

[50] *Id.* at 166.

hatred served both as a coping mechanism and call to action.[51] These reactions took two forms: the passage of the Patriot Act six weeks after 9/11, and the invasion of Iraq a year later.[52] The latter propelled us into an international war, and the former also launched a war, though it is seldom described that way. The Patriot Act began a civil war in the wake of 9/11 because the greatest threat to our national security was within our borders. The American government reversed Lincoln's famous quote, issued in his Second Inaugural Address before he was assassinated: "with malice towards none; with charity towards all."[53] The Patriot Act called for malice towards all, and charity towards none. Law enforcement needed greater muscle to catch terrorists, and the Patriot Act armed the FBI with that authority. Conservatives and liberals parted ways on the controversial topic of how far America should cede individual rights in the name of protecting American society.[54]

In the weeks following 9/11, the government responded with swift and drastic action. Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the "USA Patriot Act") on October 26, 2001, less than six weeks after the 9/11 terrorist attacks.[55] Events such as the 1995 Oklahoma City bombing,[56] the 1993 World Trade Center truck bombing,[57] and the 1995 terrorist nerve gas attack in the Tokyo subway system[58] put the world on alert about the potential for mas-

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[51] *See* Michael T. McCarthy, *USA Patriot Act*, 39 HARV. J. ON LEGIS. 435 (2002).

[52] *Id.*

[53] Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).

[54] McCarthy, *supra* note 51; David A. Hollinger, *Amalgamation and Hypodescent: The Question of Ethnoracial Mixture in the History of the United States*, 5 AM. HIST. REV. 108 (2003).

[55] *See generally* McCarthy, *supra* note 51; ANTHONY SUMMERS & ROBBYN SWAN, THE ELEVENTH DAY: THE FULL STORY OF 9/11 (2011).

[56] On April 19, 1995, Timothy McVeigh and Terry Nichols detonated a bomb on the Alfred P. Murrah Federal Building in downtown Oklahoma City. The bombing killed 168 people and injured 680 others, and it destroyed 324 buildings in the vicinity. McVeigh was an American militia movement sympathizer who was a Gulf War veteran. McVeigh and Nichols were both convicted of terrorism crimes, and McVeigh was sentenced to the death penalty. He died on June 11, 2001. *See generally* ANDREW GUMBEL AND ROGER G. CHARLES, OKLAHOMA CITY: WHAT THE INVESTIGATION MISSED—AND WHY IT STILL MATTERS (2012).

[57] On February 26, 1993, a group of 6 men detonated a truck bomb below the North Tower of the World Trade Center in New York. They intended to knock the North Tower into the South Tower and bring both down. Though their plan failed, the bomb still killed 6 people and injured over a thousand. All six men were prosecuted and convicted of terrorism crimes in federal court. *See generally* PETER CARAM, THE 1993 WORLD TRADE CENTER BOMBING: FORESIGHT AND WARNING (2001).

[58] On March 20, 1995, members of Aum Shinrikyo carried out a sarin gas attack in the Tokyo subway, killing 13 people and injuring 50. *See generally* HARUKI MURAKAMI, UNDERGROUND: THE TOKYO GAS ATTACK AND THE JAPANESE PSYCHE (2001).

sive and random acts of violence. However, the attacks on 9/11 differed from past attacks in that the U.S. government had solid intelligence about the likelihood of a plane attack on the World Trade Center on September 11th.[59] The terrorist act succeeded because the FBI and the President deemed the intelligence unworthy of further action or counter-measure.[60] In the post-9/11 wake, the government had to reassert its ability to protect the American people, which it had undermined with the intelligence mishap. Congress pushed the Patriot Act through with a decisive margin.[61] In the meantime, civil libertarians and immigrant organizations challenged the Act as a serious threat to individual liberties.[62] Among the many powers granted under the Patriot Act, Congress authorized federal agents to collect information about suspected terrorist Internet use.[63] Congress recognized that terrorists frequently used the internet and

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[59] *See generally*, PETER L. BERGEN, THE LONGEST WAR: THE ENDURING CONFLICT BETWEEN AMERICA AND AL-QAEDA (2011); KURT EICHENWALD, 500 DAYS: SECRETS AND LIES IN THE TERROR WARS (2012); LAWRENCE WRIGHT, THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11 (2006).

[60] "Could the 9/11 attack have been stopped, had the Bush team reacted with urgency to the warnings contained in all of those daily briefs? We can't ever know. And that may be the most agonizing reality of all." Kurt Eichenwald, *The Deafness Before the Storm*, N.Y. TIMES (Sept. 10, 2012), *available at* http://www.nytimes.com/2012/09/11/opinion/the-bush-white-house-was-deaf-to-9-11-warnings.html?_r=0 (citing Eric Lichtblau and David E. Sanger, *August '01 Brief is Said to Warn of Attack Plans*, N.Y. TIMES (Apr. 10, 2004), *available at* http://www.nytimes.com/2004/04/10/us/august-01-brief-is-said-to-warn-of-attack-plans.html?pagewanted=all&src=pm).

[61] McCarthy, *supra* note 51, at 435, n. 4 (identifying that the House vote was 357 to 366 (147 CONG. REC. . . H7224 (daily ed. Oct. 24, 2001) (Roll Call No. 398)), and the Senate vote was ninety-eight to one (147 CONG. REC. S11,059 (daily ed. Oct. 25, 2001) (Roll Call No. 313))).

[62] McCarthy, *supra* note 51, at 435.

[63] For a thorough explanation of the computer and electronic provisions of the USA Patriot Act as it was passed in 2001, *see* Marcia Smith et al., *Internet and the USA Patriot Act: Potential Implications for Electronic Privacy, Security, Commerce, and Government*, CRS REPORT FOR CONGRESS RL31289 (Mar. 2, 2002), *available at* http://epic.org/privacy/terrorism/usapatriot/RL31289.pdf (identifying the following provisions of the USA Patriot Act that impact computer security: Section 105 (increasing the U.S. Secret Service's National Electronic Crime Task Force Initiative), Sections 202 and 217 (allowing law enforcement permission to intercept electronic communications of "computer trespassers" and criminalizing computer fraud and abuse in 18 U.S.C. 1030); Section 210 (expanding information that law enforcement may obtain from providers of electronic communications services); Section 211 (clarifying that in the deregulated telecommunications environment, cable providers that also provide communications services are also governed by statutes that pertain to the interception of communications, disclosure of consumer records, and application of pen registers and trap and trace devices); Section 216 (modifying authorities relating to the use of pen registers and trap and trace devices); Section 220 (allowing a single court with jurisdiction over the offense under investigation to issue a warrant allowing the search of electronic evidence anywhere in the country); Section 808 (adding computer fraud and abuse offenses

email in planning and executing their crimes.[64]

Congress fashioned FISA to address both the fractured intelligence system and the need for more information to prevent and monitor terrorist activity.[65] FISA authorized relaxed warrant requirements, expanded wiretap laws to allow for government monitoring of mobile and electronic communications, authorized the seizure of terrorist assets, and allowed for the detention and deportation of non-citizens with links to terrorist organizations.[66] Paradoxically, the greater information gathering and sharing mechanism allowed under FISA proved both strong and crippling. While FISA allowed the FBI and CIA to gather an abundance of additional evidence, that information wreaked discovery havoc when cases matured from investigations into prosecutions.[67] Defense attorneys found it impossible to access all of the information collected. In Mehanna's case, FBI agents and prosecutors had to exercise discretion, with little guidance from statutory language, court rulings, or precedent, as to how much evidence to turn over. Further complications resulted because the evidence was computer-based, often in both English and Arabic. This Congressional creation unfortunately plagued law enforcement and prosecutors with the burden of too much.

The lack of foresight in anticipating these problems can mainly be attributed to the speed of the Patriot Act's passage. Not only was Congress responding to an urgent need to protect the American people, but legislators were managing the contemporaneous anthrax hysteria on Capitol Hill. Michael T. McCarthy notes: "legislators simply lacked the time and opportunity to develop complex, nuanced definitions that would be neither over-inclusive nor under-inclusive."[68] Since such issues of national security are typically classified, there is limited

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to the list of violations that may constitute a federal crime of terrorism); Section 814 (increasing penalties for certain computer fraud and abuse offenses); Section 816 (authorizing expenditures of $50 million to develop and support regional cybersecurity forensic capabilities)).

[64] McCarthy, *supra* note 51, at 438.

[65] *Id.*

[66] *Id.* at 438–39.

[67] Defense Secretary Robert M. Gates told *The Washington Post* that "There has been so much growth since 9/11 that getting your arms around that—not just for the CIA, for the secretary of defense—is a challenge." Dana Priest & William M. Arkin, *A hidden world, growing beyond control*, WASH. POST (July 19, 2010), *available at* http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/1/. This article reveals some of the details of a two-year investigation by *The Washington Post* about "what amounts to an alternative geography of the United States, a Top Secret America hidden from public view and lacking in thorough oversight. After nine years of unprecedented spending and growth, the result is that the system put in place to keep the United States safe is so massive that its effectiveness is impossible to determine." *Id.* One "Super User," or one of a handful of senior officials with access to all of the Department of Defense's activities, says, "I'm not going to live long enough to be briefed on everything." *Id.*

[68] *Id.* at 452.

review of the Act's validity or its success in serving the best interest of law enforcement.[69]

Niebuhr addresses these hasty decisions by warning us about the myopia associated with enemy-making.[70] Niebuhr predicted, in his 1932 book *Moral Man and Immoral Society*, that large groups would find it difficult "to achieve a common mind and purpose and . . . [would] be unified by momentary impulses and immediate and unreflective purposes."[71] Adding to this polemic, in his 1952 book *The Irony of American History*, he argues that we need constant proof "that the foe is hated with sufficient vigor."[72] He published this later book during the bruised interlude between the end of World War II and the beginning of the Vietnam War. Niebuhr's analysis of the way lawmakers negotiated with the citizens they were supposed to protect offers valuable insight into our fight against terrorism today.[73] To put it simply, hatred militates against clear thought and prudent action:

> Hatred disturbs all residual serenity of spirit and vindictiveness muddies every pool of sanity. In the present situation even the sanest of our statesmen have found it convenient to conform their policies to the public temper of fear and hatred which the most vulgar of our politicians have generated or exploited.[74]

The USA Patriot Act, and FISA as a subsidiary, represented our retaliation against a national enemy. The legislation was an immediate symbolic act in response to grief, guilt, and fear.

The tools that expanded law enforcement and prosecutorial powers have germinated now for twelve years since the 9/11 attacks. At this juncture, we must ask whether this coercive power actually defeats the enemy. It is this sort of iterative reconstituting, this constant consideration of whether the law is protecting rather than harming America, which embodies the classic Niebuhrian contextual approach to ethical problems.

B. *Coercion*

In order to contain an enemy, the government must be able to coerce people.[75] The archetypal good versus evil construction of *Al Qaeda* terrorism requires that we barter American freedom in order to preserve it.[76] In *Moral Man*

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[69] *See supra* note 28.

[70] REINHOLD NIEBUHR, THE IRONY OF AMERICAN HISTORY 146 (1952).

[71] NIEBUHR, MORAL MAN, *supra* note 40, at 48.

[72] NIEBUHR, THE IRONY OF AMERICAN HISTORY, *supra* note 70, at 146.

[73] *Id.*

[74] *Id.*

[75] "All social cooperation on a larger scale than the most intimate social group requires a measure of coercion." *See* NIEBUHR, MORAL MAN, *supra* note 40, at 3.

[76] *See generally id.* at 33 (indicating that "[w]hen [the state] wants to make use of the police power . . . to subdue rebellions and discontent in the ranks of its helots, it justifies the

and Immoral Society, Niebuhr asks how we are to negotiate the coercion that inheres in any societal power.[77] Niebuhr states that force is an inevitable part of social cohesion, but "the same force which guarantees peace also makes for injustice."[78] In other words, Niebuhr recognized as early as 1932 that coercion exists in a peaceful society precisely to keep it peaceful.[79] Thus, the question is whether the coercion serves the cause of peace or whether it is overbearing and defeats its own purported objective.

To analyze coercion in our post-9/11 world, we must begin by asking who is being coerced today, more than a decade after the passage of the Patriot Act and FISA. Without opining on whether the Patriot Act is good or bad, it is clear that Muslim-Americans have been coerced, and scholars have written extensively about how Islam is often viewed as antithetical to American patriotism.[80] Anna Hartnell states that "9/11 raised the alarm of religion's dangerous encroachment into the public sphere, and branded Islam as a violently anti-Western tradition which poses a particular threat to 'American values.'"[81] Hartnell identifies the anger that citizens worldwide felt from the wound of terror, shock, and mass death.[82] A wider enemy than *Al Qaeda* arose from those feelings. As a result, our contemporary enemy has become an entire religion.

The Mehanna trial suggests that the circumference of the circle of our enemies could grow to include other religions, as the surveillance powers under FISA are not directed solely at Muslim-Americans.[83] The fence enclosing that

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use of political coercion and the resulting suppression of liberties by insisting that peace is more precious than freedom and that its only desire is social peace.").

[77] *See id.* at 85 (where Niebuhr writes: "Since both sympathy and justice depend to a large degree upon the perception of need, which makes sympathy flow, and upon the understanding of competing interests, which must be resolved, it is obvious that human communities have greater difficulty than individuals in achieving ethical relationships.").

[78] *Id.* at 6.

[79] *Id.*

[80] *See e.g.*, Anna Hartnell, *Between Exodus and Egypt: Malcolm X, Islam, and the "Natural" Religion of the Oppressed*, 27 EUROPEAN J. AM. CULTURE [E.J.A.C.] 208 (1998). *See also* Edward Curtis, *The Islamophobic History of the United States*, 40 BULLETIN FOR THE STUDY OF RELIGION 30 (2011).

[81] Hartnell, *supra* note 80.

[82] *Id.*

[83] Drafting FISA or the Patriot Act to apply to only Muslim-Americans would have been immediately challenged in the courts. The statute has to be facially neutral in its application to survive constitutional scrutiny. *See* U.S. CONST. amend. XIV. There is a raging debate across political lines as to whether the Patriot Act unfairly targets minority and immigrant communities. While the American Civil Liberties Union argues that the FBI has unfairly targeted minorities and immigrants, United States Attorneys like Charles S. Morford and Kevin V. Ryan deny allegations of targeting, citing to Section 102 of the Patriot Act, which condemns acts of violence or discrimination against Arab-Americans, Muslim Americans, and South Asians. *See Does the PATRIOT Act Unfairly Target Minority and Immigrant Communities?*, ACLU, http://aclu.procon.org/view.answers.php?questionID=000719 (last

circumference is fluid rather than fixed, and the government retains exclusive discretion as to how wide to expand the circle.[84] David Hollinger poses this critical question as it applies to historians and contemporary legal scholars. "[I]n an era of global dynamics, the challenge of drawing the 'circle of the we' is more central than ever: where to try to draw what boundaries, with whom, and around what?"[85] The loosened warrant requirements and government surveillance capabilities could intrude upon all of our lives, regardless of our religion or other identity designations.[86]

Of course, in assessing the practical impact of the Patriot Act, society is hesitant to admit that American policies could engender bigotry. Niebuhr stated clearly, "[l]et a nation be accused of hypocrisy and it shrinks back in pious horror at the charge."[87] Our confident denials of the racist or xenophobic cast of our policies exacerbate the problem both in the policy realm and in the courtroom. Pointing to this "large blindspot" in reasoning,[88] Sheri Lynn Johnson, whose work explores discrimination against blacks in death penalty cases, identifies a logic that applies to post-9/11 Muslim defendants standing trial for terrorism.[89] White jurors may maintain that they judge on a color-blind basis, but statistics prove that race and ethnicity profoundly impact guilt-determination in jury verdicts.[90] We cannot tackle the possibility of excessive coercion without first acknowledging our shortcomings and foibles in this area.

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updated June 4, 2008). Section 102 does memorialize the guarantee to these groups as to protection of their civil rights and liberties, but the guarantees in Section 102 appear to not have been fulfilled in how Muslim Americans feel about their citizenship and rights. The American Psychological Association found that Americans' acceptance of Muslims has continued to deteriorate since 9/11, and as a result Muslim Americans are resilient but also depressed and anxious. *See* Rebecca A. Clay, *Muslims in America, post 9/11*, 42 AM. PSYCHOL. ASS'N 72 (2011).

[84] Hollinger, *supra* note 54.

[85] *Id.*

[86] *Id.*

[87] NIEBUHR, MORAL MAN, *supra* note 40, at 107.

[88] Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1016–17 (1998).

[89] Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1605, 1640 (1985) (maintaining that unconscious racism can lead to discrimination in criminal cases).

[90] *See id.* The empirical evidence of bias and unconscious racism is tragic and startling. *See* Jennifer L. Eberhardt et al, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 385 (2006) (finding that "in cases involving a Black defendant and a White victim—cases in which the likelihood of the death penalty is already high—jurors are influenced not simply by the knowledge that the defendant is Black, but also by the extent to which the defendant appears stereotypically Black. In fact, for those defendants who fell in the top half as opposed to the bottom half of the stereotypicality distribution, the chance of receiving a death sentence more than doubled.").

Since 9/11, however, prosecutors, lawmakers, and politicians have defended their actions as the necessary balance between national security and civil liberties.[91] Somehow, government supporters and civil libertarians have made enemies of each other, thereby becoming embroiled in the ideological fracas the Patriot Act has ignited. For example, in the press conference immediately following Mehanna's guilty verdicts, United States Attorney Carmen Ortiz declared that "[t]he job of law enforcement agencies and prosecutors is to bring terrorists to justice. And it is vitally important that we prevent the incidents of terrorism before they happen."[92] A clear implication of her statement is that the government must prosecute not only crimes committed in the past but also possible crimes committed in the future. And we are to trust her and her office of prosecutors to make determinations as to whom among us is most likely to commit those future acts. Ortiz invokes the oft-referenced truism: "we are just doing our jobs." But Niebuhr would have asked whether guarding democracy should be a static undertaking.[93] Just as democracy changes, so too should the job and the tools that enable the job change. As a result, prosecutors like Ortiz should, but likely will not, express doubt about whether the tools fashioned to attack terrorism have eaten away at our freedom.

However, Niebuhr insists that special privileges like these make all individuals dishonest.[94] James Madison warned also that "all men having power ought to be distrusted."[95] Niebuhr consistently warned that the individual's self-interest governs all of his or her actions. "So difficult it is to avoid the Scylla of despotism and the Charybdis of anarchy," Niebuhr explains, "that it is safe to hazard the prophecy that the dream of perpetual peace and brotherhood for human society is one which will never be fully realized."[96] If we accept, as Niebuhr does, that conflict is inevitable, then we can only calibrate power with humility and self-doubt. But these "soft" qualities never appear in terrorism prosecutions because aggressiveness and self-assuredness is the name of the game. Furthermore, the defense and civil liberties bar respond in kind in their denigration of the government's role and their indictment of law enforcement motive.

Where do these overly confident assessments from both sides of the debate lead us, then? As Niebuhr points out, "[a] too confident sense of justice always leads to injustice."[97] When *The Irony of American History* was published in 1952, nuclear annihilation was the topic of gravest security concern. The tension between preserving civilization and the moral hazards attendant to that

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[91] *See supra* note 31.

[92] *Tarek Mehanna found guilty*, *supra* note 1.

[93] NIEBUHR, MORAL MAN, *supra* note 40, at 162.

[94] *Id.*

[95] *Id.* at 164 (citing James Madison, Speech in the Constitutional Convention (July 11, 1787)).

[96] NIEBUHR, MORAL MAN, *supra* note 40, at 21.

[97] *Id.* at 138.

preservation preoccupied Niebuhr and his contemporaries.[98] Niebuhr wrote in the 1960 Foreword to *Children of Light, Children of Darkness*: "[i]f we escape disaster it will only be by the slow growth of mutual trust and tissues of community over the awful chasm of the present international tension."[99] Keenly attuned to the deterioration of mutual trust, Niebuhr continually reminded his readers that perfect peace is impossible. It is not a matter of finding perfect solutions but of settling on those imperfect solutions that most nearly approximate the democratic ideal. Hubris demonstrated by both sides undercuts any meaningful effort to approximate an ideal because each party sees no fault in its own actions and no need for change. The imbalance of coercive power here undermines a meaningful dialogue about how to effect a compromise between these warring ideals.

If we accept Nièbuhr's critique of the faultiness of power-holders and the dangers of hubris, but also accept that we need coercion to preserve freedom, how do we arrive at a best, albeit imperfect solution? Niebuhrian themes under this logic could support either the government or the civil liberties view of the freedom-coercion tension. Therefore, while policymakers are not wrong to appropriate Niebuhr's logic to justify their individual positions, they fail to recognize that his inquiries are contextual and elastic. But asking questions rather than laying a stake to answers is how to best apply Niebuhr. The emphasis must lie in making decisions critically. And the epicenter of a contextual inquiry is deciding what sort of patriotism we have endorsed in this era of terror.

C. *Patriotism*

An obvious place to look to for what sort of patriotism we have adopted is in the very name of the "USA Patriot Act." Since October 26, 2001, being a patriot has been synonymous with preventing terrorism and prosecuting terrorists. The United States Congress and the sitting United States President must periodically extend FISA and other parts of the Patriot Act that expire, a mechanism that forced lawmakers to decide whether the powers were still necessary. Minutes before midnight on May 27, 2011, President Obama signed into law a four-year extension of the post-9/11 surveillance powers.[100] The Senate voted seventy-two to twenty-three for the legislation to renew, and the House vote was 250 to 153.[101] President Obama stated in support of his decision that "[i]t is an important tool for us to continue dealing with an ongoing terrorist threat."[102]

Senators Ron Wyden of Oregon and Mark Udall of Colorado, two of the

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[98] NIEBUHR, THE IRONY OF AMERICAN HISTORY, *supra* note 72, at 5.

[99] NIEBUHR, CHILDREN OF LIGHT, *supra* note 36, at xxix.

[100] Jim Abrams, *Patriot Act Extension Signed By Obama*, HUFFINGTON POST (May 27, 2011), http://www.huffingtonpost.com/2011/05/27/patriot-act-extension-signed-obama-autopen_n_867851.html.

[101] *Id.*

[102] *Id.*

many opponents of renewing these provisions, extracted a promise from Senate Intelligence Committee chairwoman Dianne Feinstein (D-Cal) that she would hold hearings with intelligence and law enforcement officials on how the law is being carried out.[103] Senator Udall identified the dangerous gap between what the public thinks the USA Patriot Act says and what the government believes it says.[104] Sen. Tom Udall of New Mexico said almost ten years after the Patriot Act's passage that "we still haven't had the debate that we need to have on this piece of legislation."[105] The provisions were signed into law notwithstanding critique from these and other members of the U.S. Congress and from outside groups like the ACLU.

The debate in the media centered on the authority of law enforcement, the threat of terrorism, and civil liberties.[106] But no one questioned how law enforcement agents, prosecutors, defense attorneys, and judges were negotiating the powers conferred by the Patriot Act in the courtroom. Suspending for a moment the question of whether we have balanced national security and civil liberties, a question to which there may never be a satisfactory answer, no one compared the practical effectiveness of the Patriot Act against the challenges it presents.

Politicians and pundits may have said the system was working until April 15, 2013, when we saw at the Boston Marathon the only successful terrorist attack on United States soil since 9/11.[107] With the intelligence that is now available in our expensive defense and intelligence industrial complex, how could the planning and execution of this attack have escaped law enforcement attention?

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[103] 157 CONG. REC. S3369-72 (daily ed. May 25, 2011).

[104] *Id.*

[105] Paul Kane & Felicia Somnez, *Patriot Act extension signed into law despite bipartisan resistance in Congress*, WASH. POST (May 27, 2011), *available at* http://web.archive.org/web/20130625062445/http://articles.washingtonpost.com/2011-05-27/politics/35263903_1_patriot-act-key-provisions-extension

[106] *Id.*

[107] *See* Amber Barno, *Reflections from the Boston Bombing: Is Our Nation Safer One Year Later?*, FORBES, (Apr. 15, 2014), *available at* http://www.forbes.com/sites/realspin/2014/04/15/reflections-from-the-boston-bombing-is-our-nation-safer-one-year-later/ ("Aside from the Fort Hood shooting on November 5, 2009—which is still deemed 'workplace violence' by the Obama administration–we had not seen a successful terrorist attack on U.S. soil since 9/11, until the Boston bombing. While the intelligence community and law enforcement should be commended for foiling numerous terrorist plots since then, information sharing and collaboration between government agencies, law enforcement, and the private sector remains intermittent with significant room for improvement."). *See also* Brian A. Jackson & David Frelinger, *Understanding Why Terrorist Operations Succeed or Fail*, RAND ix (2009), *available at* http://www.rand.org/content/dam/rand/pubs/occasional_papers/2009/RAND_OP257.pdf ("For a terrorist attack to have the greatest chance of success, there needs to be (1) a match between its capabilities and resources and the operational requirements of the attack it is seeking to carry out and (2) a mismatch of security countermeasures and intelligence/investigative efforts with both the group and its plans.").

The prosecution of Dzhokhar Tsarnaev is presently being handled by the same United States Attorney's Office that prosecuted Tarek Mehanna's case. One critical point of overlap in the two prosecutions is that the USA Patriot Act enabled government to collect massive volumes of evidence in both cases, but law enforcement did not have time to review all of it in either case. Post-9/11 and again at the Boston Marathon bombings, valuable intelligence *did* slip by law enforcement.[108] "Boston is becoming to me, a case study in system failure," said Senator Lindsey Graham of South Carolina.[109] On March 4, 2011, U.S. law enforcement received Russian internal intelligence about Tamerlan Tsanaev, the brother who died in a police shooting after he and his brother Dzhokhar were chased down hours after the bombing.[110] The intelligence alerted the FBI and the CIA about Tsarnaev's six-month trip to Russia, and the U.S. government had placed him on a watch list.[111] Security expert Marcy Wheeler writes "[t]his is the problem with over-collection of data: it adds a bunch more hay to the haystack for the time you want to start looking for a needle."[112]

Blaming law enforcement for missing this needle in an overly large haystack, as I described earlier in this article, seems an unfair critique. The volume of information that FISA and the USA Patriot Act allows law enforcement to capture is not searchable by any number of human eyes at any reasonable cost in any reasonable timeframe. Law enforcement may rebut that, despite one missed intelligence report, their tactics have prevented many other attacks. Rather than levy accusations or draw conclusions based on shrouded information, I return to Niebuhr to pose a question: is this FISA and Patriot Act culture of the "too much" preventing terrorism, or is it burdening the law enforcement apparatus with so much information that the real threats are falling through the cracks? The engagement with this issue is not in quickly answering that question but in pressing nuanced, conflicting perspectives. Whatever decisions policymakers then arrive at are at least considered and informed, rather than knee-jerk and complacent measures on critical issues of democracy and public safety.

Based on my work in trying the Mehanna case, I believe that the missing voice of the criminal defense attorney in these debates cripples the policy dialogue. Generally speaking, the landmark United States Supreme Court case *Gideon v. Wainwright* articulates why a criminal defense attorney is so essential to the administration of justice.[113] Justice Black wrote in the majority opinion that "our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before

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[108] Peter Grier, *Boston Marathon bombing: Did US really miss chance to prevent it?*, CHRISTIAN SCIENCE MONITOR (Apr. 25, 2013), http://www.csmonitor.com/USA/DC-Decoder/2013/0425/Boston-Marathon-bombing-Did-US-really-miss-chance-to-prevent-it-video.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Gideon*, 372 U.S. at 335.

impartial tribunals in which every defendant stands equal before the law."[114] Criminal defense attorneys give life to these procedural and substantive safeguards. The *Gideon* decision underscored that these mechanisms balance the scales of justice. In its wake, public defender organizations around the country began to receive more personnel, funding, and attention.

The open question *Gideon* raised was how far a defense lawyer should go in representing a client, an ambiguity left up for grabs in terrorism cases.[115] Courts have issued loose guidelines about what constitutes "effective assistance of counsel" under the Sixth Amendment.[116] Criminal defense attorneys in terrorism cases have argued that the FISA surveillance powers deny defendants a robust defense because defense counsel does not know what the government has in its possession. Given that the government must prove a defendant "guilty beyond a reasonable doubt" in a criminal trial, the question becomes how aggressively defense lawyers can work to hold the government to its burden. And the robustness of a defense comes under scrutiny for public defenders and not private attorneys because the taxpayers foot the bill for zealous public representation that, in terrorism cases, is also prohibitively expensive.

The government has amassed a great deal of evidence about terrorist suspects because of how broadly prosecutors can charge terrorism conspiracies, as discussed earlier in this paper. The defense lawyer is not allowed to know about the scope of the intelligence or contest its applicability in a trial. Thus, the trial becomes, for everyone involved, enormous in scope. Terrorism trials would be more bounded and less expensive if the government had to be more prudent about evidence collection and production. FISA, however, enables the government to cast a wide net of historically unprecedented breadth. When a case moves from the investigatory stage to the adversarial one, prosecutors typically have to whittle down the universe of evidence. But terrorism laws present so many exceptions to normal criminal practice that the cases become literally boundless.

What complicates this analysis is that the Department of Justice and FBI have shown no signs of willingness to cede this post-9/11 power. "Since those who hold special privileges in society are naturally inclined to regard their privileges as their rights and to be unmindful of the effects of inequality upon the

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[114] *Id.* at 344.

[115] Recent Supreme Court cases highlight the confusion over what the contours of "effective" means under the Sixth Amendment. *See* Lafley v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012); Padilla v. Kentucky, 559 U.S. 356 (2010). *See* Richard E. Myers II, *The Future of Effective Assistance of Counsel: Rereading* Cronic *and* Strickland *in light of* Padilla, Frye, *and* Lafler, 45 TEX. TECH L. REV. 229, 245 (2012) ("After *Padilla, Lafler,* and *Frye* . . . it is not apparent that a current majority has unhinged the right to counsel from the crucible of adversarial testing and is substituting it for an evolving court-administered standard of some kind.").

[116] The seminal case on the meaning of "effective assistance of counsel" is *Strickland v. Washington*, 466 U.S. 668 (1984).

underprivileged, they will have a natural complacence toward injustice," Niebuhr writes.[117] Whether we deem the Patriot Act and FISA "unjust" or not, we can draw important lessons from Niebuhr's reflections on the complacency of those who wield power. Moral suasion alone will achieve nothing when the power scales have been tilted so far in one direction.[118]

Niebuhr's legacy challenges us to question more rigorously the perspectives of both law enforcement and defense attorneys. As Niebuhr reminds us, "there is hidden kinship between the vices of even the most vicious and the virtues of even the most upright."[119] The barrel-chested idealism of both government supporters and civil libertarians, enabled by their reluctance to question their own views in the context of their opponents' views, is the true illness plaguing American democracy. Of this dynamic, Niebuhr assures us that, "[t]he ironic elements in American history can be overcome, in short, only if American idealism comes to terms with the limits of all human striving, the fragmentariness of all human wisdom, the precariousness of all historic configurations of power, and the mixtures of good and evil in all human virtue."[120] It is this more realistic, more humble questioning that forms the patriotic essence of Niebuhr's work. I felt in our case a strange shared sense of purpose with the government and the trial judge, notwithstanding our differing roles in the trial. As we all muddled through hard drives in a laboratory of damaged justice, I wondered how each of us could work tirelessly for a pittance and not believe in our individual missions. How could we each be sure that we were right and the other wrong?

This moral and legal confusion over good and bad is the sort of rigorous examination we should be undertaking, not in search of solutions but in search of questions. But the skewed power imbalance set forth on the heels of the worst catastrophe on American soil prevents us from arriving at a more ideal version of democracy. This article blames the antiterrorism apparatus that is leading us astray, not the individual desire to do good.

V. CONCLUSION

In Reinhold Niebuhr's political philosophy, we find valuable meditations on what it means to be a citizen in a democratic nation that is facing an enemy. The nation must exert coercive powers to protect itself, and those static powers shift to fit a dynamic world. Reading Niebuhr as a fortune-teller misses the gravitas of his work, as his own positions on isolationism, war, and civil liberties changed over time. What reading Niebuhr does encourage us to do is to view policies and laws as elastic, straining and slacking to the mores of a changing society and the vagaries of changing historical contexts. Our legal

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[117] NIEBUHR, MORAL MAN, *supra* note 40, at 129.

[118] *Id.* at 141.

[119] NIEBUHR, THE IRONY OF AMERICAN HISTORY, *supra* note 70, at 147.

[120] *Id.* at 133.

system relies on precedent as the stabilizing force of peaceful society. But precedent changes, as it must, to accommodate our society's needs. The rigidity and inflexibility of policy to societal need contravenes democracy. In *The Irony of American History*, Niebuhr wrote that if we as a nation should perish, "[t]he primary cause would be that the strength of a giant nation was directed by eyes too blind to see all the hazards of the struggle; and the blindness would be induced not by some accident of nature but by history and vainglory."[121] The laws protecting our national security require time, debate, and differences of perspective from the people who are living out the consequences of those laws. It is a system that is causing prosecutors, law enforcement, criminal defense lawyers, defendants, judges, and jurors to strain to understand what we are afraid of and what we are protecting. It is time we remove this public blindfold and ask questions about what sort of democracy we have made for ourselves in the wake of 9/11.

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[121] *Id.* at 174.