

**TEXAS
INTERNATIONAL
LAW
JOURNAL**



Volume 52

Summer 2017

Number 2

Volume 52, Issue 2

Symposium Articles

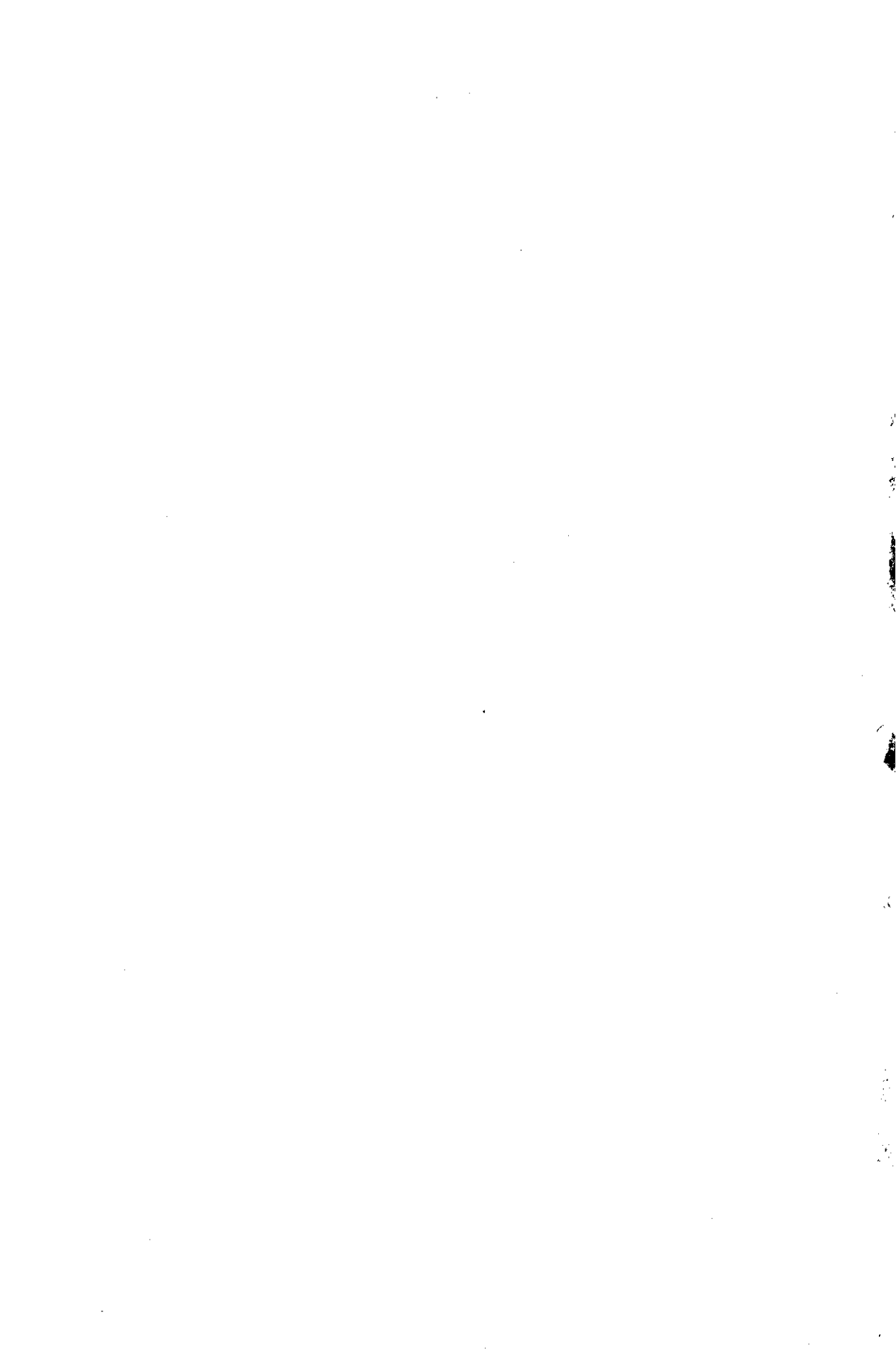
PRUDENCE IN INTERNATIONAL STRATEGY: FROM 'LAWYERLY' TO 'POST-LAWYERLY'
Jeremiah S. Pam

UNRESOLVED LEGAL QUESTIONS CONCERNING OPERATION INHERENT RESOLVE
Oren Gross

LOSING THE "WAR OF IDEAS:"
A CRITIQUE OF COUNTERING VIOLENT EXTREMISM PROGRAMS
Sahar F. Aziz

Notes

ANALYZING THE CAUSES OF STATELESSNESS IN SYRIAN REFUGEE CHILDREN
David M. Howard



CONTENTS

SYMPOSIUM ARTICLES

PRUDENCE IN INTERNATIONAL STRATEGY: FROM ‘LAWYERLY’ TO ‘POST-LAWYERLY’ 197
Jeremiah S. Pam

UNRESOLVED LEGAL QUESTIONS CONCERNING OPERATION INHERENT
RESOLVE 221
Oren Gross

LOSING THE “WAR OF IDEAS:” A CRITIQUE OF COUNTERING VIOLENT
EXTREMISM PROGRAMS 255
Sahar F. Aziz

NOTES

ANALYZING THE CAUSES OF STATELESSNESS IN SYRIAN REFUGEE
CHILDREN 281
David M. Howard

In the rapidly expanding discipline of international law, the *Texas International Law Journal* helps readers stay abreast and informed of recent developments and new scholarship by providing access to leading international legal, theoretical, and policy analysis. The *Journal* publishes academic articles, essays, and student notes in the areas of public and private international law, international legal theory, the law of international organizations, comparative and foreign law, and domestic laws with significant international implications. The editors and staff aim to fulfill these needs by concentrating on groundbreaking articles that will be useful to both practitioners and scholars. We hope you enjoy this latest issue.

The *Journal* is among the oldest and best-established student-published international law journals in the United States. In the wake of the Bay of Pigs disaster and the Cuban Missile Crisis, our publication began as an offshoot of the Texas International Law Society.¹ In January 1965, under the guidance of Professor E. Ernest Goldstein, we planted the Texas flag in the international arena with our first issue, entitled *The Journal of the University of Texas International Law Society*. Publications thereafter were biannual, taking the name *Texas International Law Forum* until summer 1971, when the *Journal* adopted its present title and began publishing three or four issues per year. Of the more than one hundred student-published international law journals across the country, only three schools have an older international heritage: Harvard, Columbia, and Virginia.

Over the years, the *Journal* staff has made the most of its established heritage. We have developed international repute by forging close ties with numerous scholars and authors worldwide. As a result, we receive over six hundred unsolicited manuscripts each year and are extremely selective in our publication choices. This position has helped us develop one of the largest student-published subscription circulations of any international law journal in the United States. The *Journal's* subscription base includes law schools, government entities, law firms, corporations, embassies, international organizations, and individuals from virtually every state in the U.S. and more than forty-five countries.

With over thirty editorial board members and more than eighty staff members made up of full-time J.D. and LL.M. students, the *Journal* maintains a refined and well-organized editing process. As economic integration accelerates and nations forge closer ties in the new millennium, we are confident the *Journal* will continue to provide a significant contribution to the burgeoning field of international law.

DISTINGUISHED AUTHORS

The *Journal* has been fortunate to publish articles from a number of eminent scholars, including:

The Honorable William O. Douglas, former Justice of the Supreme Court of the United States; **W. Page Keeton**, former dean of the University of Texas School of Law; **Thomas Buergenthal**, former president of the Inter-American Court of Human Rights; **Charles Alan Wright**, former professor at the University of Texas School of Law, co-author of the leading treatise *Federal Practice and Procedure*, and former president of the American Law Institute; **Louis Henkin**, former president of the American Society of International Law, chief reporter of the Restatement of Foreign Relations Law of the

1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the Texas International Law Journal Were Born*, 30 TEX. INT'L L.J. 223 (1995).

United States, and former editor-in-chief of the *American Journal of International Law*; **the Honorable Richard J. Goldstone**, member of the Constitutional Court of South Africa and former chief prosecutor of the United Nations International War Crimes Tribunal for the former Yugoslavia and Rwanda; and **the Honorable Dalia Dorner**, Associate Justice of the Supreme Court of Israel.

OUTSTANDING CONTRIBUTORS

Our submissions consistently reflect the highest degree of quality from outstanding professionals, including:

Robert Reich, former U.S. Secretary of Labor, former professor of government and public policy at Harvard University, and former director of public policy for the Federal Trade Commission; **Joseph Jove**, former U.S. ambassador to Mexico; **Andreas Lowenfeld**, professor at New York University School of Law and leading international law scholar; **Dean Rusk**, U.S. Secretary of State under President Johnson; **Ewell “Pat” Murphy**, former chairman of the International Law Section of the American Bar Association and respected practicing attorney in the field of international business transactions; **Walter S. Surrey**, former chairman of the National Council for U.S.-China Trade and former president of the American Society of International Law; and **W. Michael Reisman**, professor at Yale Law School and member the board of directors of the American Society of International Law.

MISSION STATEMENT

Practitioners, scholars, and courts of all levels have cited articles from the *Texas International Law Journal* as legal authority since its first issue appeared in 1965. Members of the *Journal* seek to maintain this tradition of excellence for our 44th continuous year of publishing by providing the legal community with the highest quality of secondary source material on current and relevant international legal developments.

COPYRIGHT

Copyright © 2017

The *Texas International Law Journal* (ISSN 0163-7479) is published three or four times a year by University of Texas School of Law Publications.

Cite as: TEX. INT’L L.J.

Except as otherwise expressly provided, the authors of each article have granted permission for copies of their articles to be made available for educational use in a U.S. or foreign accredited law school or nonprofit institution of higher learning, provided that (i) copies are distributed at or below cost; (ii) the author and the *Journal* are identified; (iii) proper notice of copyright is affixed to each copy; and (iv) the *Journal* is notified of use.

SUBSCRIPTIONS

Annual subscriptions to the *Journal* are available at the following rates:

- \$45.00 for domestic subscribers
- \$40.00 for *TILJ* alumni and current law students
- \$50.00 for foreign subscribers

To subscribe to the *Texas International Law Journal*, order reprints, or indicate a change of address, please visit www.tilj.org or write to:

University of Texas School of Law Publications
P.O. Box 8670
Austin, TX 78713
www.TexasLawPublications.com

Subscriptions are renewed automatically unless timely notice of termination is received. For any questions or problems concerning a subscription, please contact our Business Manager at (512) 232-1149 or Publications@law.utexas.edu.

BACK ISSUES

William S. Hein & Co., Inc. holds the back stock rights to all previous volumes of the *Texas International Law Journal*. For back issues and previous volumes of the *Journal*, please direct inquiries to:

William S. Hein & Co., Inc.
1285 Main St.
Buffalo, NY 14209
www.wshein.com

THE FORUM

The *Texas International Law Journal Forum* is the online companion to our printed volumes. The *Forum* publishes original scholarship on topics relating to recent developments in international law, as well as responses to scholarship printed in the *Texas International Law Journal*.

As with the *Journal*, all submissions are reviewed blindly throughout the year on a rolling basis. For more information regarding the *Forum*, please contact our Managing Editors at tilj@law.utexas.edu or visit www.tilj.org/forum.

ANNUAL SYMPOSIUM

The *Journal* hosts an annual symposium offering in-depth treatment of a topic of international legal concern. The purpose of these symposia is to promote the awareness of important developments in the formation of international law and to forge closer ties among scholars, practitioners, students, and members of the global legal community. We welcome your interest in these events. For more information regarding our annual symposium, please contact our Symposium Coordinator at tilj@law.utexas.edu or visit www.tilj.org/symposium.

MANUSCRIPT SUBMISSIONS AND EDITORIAL POLICIES

In conformity with the standard practice of scholarly legal publications in the United States, the *Texas International Law Journal* holds copyrights to its published works. Neither the Editorial Board nor the University of Texas are in any way responsible for the views expressed by contributors.

The *Journal* welcomes submissions from scholars, practitioners, businesspeople, government officials, and judges on topics relating to recent developments in international law. In addition to articles, the *Journal* also invites authors to submit shorter works, such as comments, book reviews, essays, notes, and bibliographies. All submissions are reviewed blindly throughout the year on a rolling basis.

We accept both hard-copy and electronic submissions. Please send article submissions, accompanied by a curriculum vitae, cover letter, and abstract, to the attention of the Submissions Editor. Manuscripts should conform with *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 18th ed. 2005) and, to the extent feasible, follow *The Chicago Manual of Style* (Univ. of Chicago Press, 15th ed. 2003). Manuscripts should be typewritten and footnoted where necessary.

All submission inquiries and requests for review should be directed to the Submissions Editor at:

Submissions Editor
Texas International Law Journal
The University of Texas School of Law
727 E. Dean Keeton St.
Austin, TX 78705

Tel: (512) 232-1277
Fax: (512) 471-4299
E-Mail: tilj@law.utexas.edu
www.tilj.org

VOLUME 52 EDITORIAL BOARD

Y. Jingjing Liang
Editor-in-Chief

Christopher Marshall
*Managing Editor—
Publication*

Jonathan Bodle
Marisa Joyce
Margaret Wittenmyer
Executive Editors

Maegan Giere
*Managing Editor—
Business*

Helen Kerwin
Submissions Editor

Anna Shepard
Student Notes Editor

Michael Darling
Director of Development

David Howard
Symposium Editor

Brendan Hammond
Research Editor

Lauren Davis
Jackie Groves

Daniella Gruwell
Emilie Heck
Erwin Reschke
Articles and Notes Editors

Rosa Sung
Celia Villarreal

Jay Westbrook
Faculty Advisor

Paul N. Goldman
Business Manager

VOLUME 52 STAFF

Iman Ali*	Sean Doyle	Leonel Mata
Caroline Barrow	Madeline Gaffney*	George Miller
Justin Campbell*	Andrew Gille*	Olivia Mora
Carolyn Campion	David Holmes	Jonathon Morace
Ana Cenaj	Irene Kau	Jackson Oliver*
Alicia Chan	Apostolos Kyprios*	Jack Polisini*
Vanessa Chorush	Taylor LeMay	Beth Rozacky
Lorenza Cigarroa*	Leslie Liberman	Judy Schweinfurth
Christiaan Cleary*	Erika López*	Tatyanna Senel
Erin Cusenbary	Julian Martinez	Vickie Wang

* Third-Year Member

+ LL.M. Member

^ Abroad/Away

EDITORIAL ADVISORY BOARD

John A. Barrett
Norton Rose Fulbright LLP (ret.).
Houston, Texas

Jadd F. Masso
Strasburger & Price, L.L.P.
Dallas, Texas

Robert M. Chesney
The University of Texas School of Law
Austin, Texas

Ewell E. Murphy, Jr.
University of Houston Law Center
Houston, Texas

Jacob Dolinger
Universidade do Estado do Rio Janeiro
Rio de Janeiro, Brazil

Jonathan Pratter
The University of Texas School of Law
Austin, Texas

Francesco Francioni
European University Institute
Fiesole, Italy

Robert Rendell
Patton Boggs, L.L.P.
Dallas, Texas

Patricia I. Hansen
The University of Texas School of Law
Austin, Texas

Jay Lawrence Westbrook
The University of Texas School of Law
Austin, Texas

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

ADMINISTRATIVE OFFICERS

WARD FARNSWORTH, B.A., J.D.; *Dean, John Jeffers Research Chair in Law.*
JOHN B. BECKWORTH, B.A., J.D.; *Associate Dean for Administration and Strategic Planning, Lecturer.*
ROBERT M. CHESNEY, B.S., J.D.; *Associate Dean for Academic Affairs, Charles I. Professor in Law.*
WILLIAM E. FORBATH, A.B., B.A., Ph.D., J.D.; *Associate Dean for Research, Lloyd M. Bentsen Chair in Law.*
EDEN E. HARRINGTON, J.D.; *Associate Dean for Experiential Education, Clinical Professor, Director of William Wayne Justice Center for Public Interest Law.*
ELIZABETH T. BANGS, A.B., J.D.; *Assistant Dean for Student Affairs.*
KIMBERLY L. BIAR, B.B.A., C.P.A.; *Assistant Dean for Financial Affairs.*
MICHAEL G. HARVEY, B.A., B.S.; *Assistant Dean for Technology.*
REBECCA MELTON, B.A., J.D.; *Assistant Dean for Alumni Relations and Development.*
MONICA K. INGRAM, B.A., J.D.; *Assistant Dean for Admissions and Financial Aid.*
DAVID A. MONTOYA, B.A., J.D.; *Assistant Dean for Career Services.*
GREGORY J. SMITH, B.A., J.D.; *Assistant Dean for Continuing Legal Education.*

FACULTY EMERITI

HANS W. BAADE, A.B., J.D., LL.B., LL.M.; *Hugh Lamar Stone Chair Emeritus in Civil Law.*
RICHARD V. BARNDT, B.S.L., LL.B.; *Professor Emeritus.*
JULIUS G. GETMAN, B.A., LL.B., LL.M.; *Earl E. Sheffield Regents Chair Emeritus.*
WILLIAM W. GIBSON, JR., B.A., LL.B.; *Sylvan Lang Professor Emeritus in Law of Trusts.*
ROBERT W. HAMILTON, A.B., J.D.; *Minerva House Drysdale Regents Chair Emeritus.*
DOUGLAS LAYCOCK, B.A., J.D.; *Alice McKean Young Regents Chair Emeritus.*
J.S. LEBOWITZ, A.B., J.D., LL.M.; *Joseph C. Hutcheson Professor Emeritus.*
BASIL S. MARKESINIS, LL.B., Ph.D., D.C.L., LL.D.; *Jamail Regents Chair Emeritus in Law.*
JOHN T. RATLIFF, JR., B.A., LL.B.; *Ben Gardner Sewell Professor Emeritus in Civil Trial Advocacy.*
JAMES M. TREECE, B.S., J.D., M.A.; *Charles I. Francis Professor Emeritus in Law.*

PROFESSORS

JEFFREY B. ABRAMSON, B.A., J.D., Ph.D.; *Professor of Government and Law.*
DAVID E. ADELMAN, B.A., Ph.D., J.D.; *Harry Reasoner Regents Chair in Law.*
DAVID A. ANDERSON, A.B., J.D.; *Fred and Emily Marshall Wulff Centennial Chair in Law.*
MARILYN ARMOUR, B.A., M.S.W., Ph.D.; *Associate Professor of Social Work.*
MARK L. ASCHER, B.A., M.A., J.D., LL.M.; *Joseph D. Jamail Centennial Chair in Law.*
RONEN AVRAHAM, M.B.A., LL.B., LL.M., S.J.D.; *Thomas Shelton Maxey Professor in Law.*
LYNN A. BAKER, B.A., B.A., J.D.; *Frederick M. Baron Chair in Law.*
BARBARA A. BINTLIFF, M.A., J.D.; *Joseph C. Hutcheson Professor in Law, Director of Tarlton Law Library and the Jamail Center Legal Research.*
LYNN E. BLAIS, A.B., J.D.; *Leroy G. Denman, Jr. Regents Professor in Real Property Law.*
ROBERT G. BONE, B.A., J.D.; *G. Rollie White Teaching Excellence Chair in Law.*
OREN BRACHA, LL.B., S.J.D.; *Howrey LLP and Arnold, White & Durkee Centennial Professor.*
DANIEL M. BRINKS, A.B., J.D., Ph.D.; *Associate Professor, Co-Director of Bernard and Audre Rapoport Center for Human Rights and Justice.*
J. BUDZISZEWSKI, B.A., M.A., Ph.D.; *Professor of Government.*
NORMA V. CANTU, B.A., J.D.; *Professor of Education and Law.*
LOFTUS C. CARSON II, B.S., M. Pub. Affs., M.B.A., J.D.; *Ronald D. Krist Professor.*
MICHAEL J. CHURGIN, A.G., J.D.; *Raybourne Thompson Centennial Professor.*
JANE M. COHEN, B.A., J.D.; *Edward Clark Centennial Professor.*
FRANK B. CROSS, B.A., J.D.; *Herbert D. Kelleher Centennial Professor of Business Law, Professor of Law.*
WILLIAM H. CUNNINGHAM, B.A., M.B.A., Ph.D.; *Professor of Marketing Administration.*
JENS C. DAMMANN, J.D., LL.M., Dr. Jur., J.S.D.; *William Stamps Farish Professor in Law.*
JOHN DEIGH, B.A., M.A., Ph.D.; *Professor of Philosophy and Law.*
MECHELE DICKERSON, B.A., J.D.; *Arthur L. Moller Chair in Bankruptcy Law and Practice.*
GEORGE E. DIX, B.A., J.D.; *George R. Killam, Jr. Chair of Criminal Law.*
JOHN S. DZIENKOWSKI, B.B.A., J.D.; *Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process.*
DAVID J. EATON, B.A., M.Sc., M.A., Ph.D.; *Professor of Public Affairs.*
ZACHARY S. ELKINS, B.A., M.A., Ph.D.; *Associate Professor of Government.*
KAREN L. ENGLE, B.A., J.D.; *Minerva House Drysdale Regents Chair in Law, Founder and Co-Director of Bernard and Audre Rapoport Center for Human Rights and Justice.*
KENNETH FLAMM, A.B., Ph.D.; *Professor of Public Affairs.*
MIRA GANOR, B.A., M.B.A., LL.B., LL.M., J.S.D.; *Professor of Law.*
CHARLES E. GHOZL, B.S., B.S., Ph.D.; *Associate Professor of Public Affairs.*
JOHN M. GOLDEN, A.B., J.D., Ph.D.; *Loomer Family Professor in Law.*
STEVEN GOODE, B.A., J.D.; *W. James Kronzer Chair in Trial and Appellate Advocacy, University Distinguished Teaching Professor.*
LINO A. GRAGLIA, B.A., LL.B.; *A. W. Walker Centennial Chair in Law.*
BENJAMIN G. GREGG, B.A., M.S., Ph.D.; *Associate Professor of Government.*
CHARLES G. GROAT, B.A., M.S., Ph.D.; *Professor of Public Affairs.*
PATRICIA I. HANSEN, A.B., M.P.A., J.D.; *J. Waddy Bullion Professor.*
HENRY T. C. HU, B.S., M.A., J.D.; *Allan Shivers Chair in the Law of Banking and Finance.*
BOBBY R. INMAN, B.A.; *Professor of Public Affairs.*
GARY J. JACOBSON, B.A., M.A., Ph.D.; *Professor of Government and Law.*
DEREK P. JINKS, B.A., M.A., J.D.; *The Marrs McLean Professor in Law.*

- LAUREN FIELDER, B.A., J.D.; *Senior Lecturer, Director of Graduate and International Programs.*
- LYNDA E. FROST, B.A., M.Ed., J.D., Ph.D.; *Clinical Associate Professor.*
- DENISE L. GILMAN, B.A., J.D.; *Clinical Professor, Co-Director of Immigration Clinic.*
- KELLY L. HARAGAN, B.A., J.D.; *Clinical Professor, Director of Environmental Law Clinic.*
- BARBARA HINES, B.A., J.D.; *Clinical Professor, Co-Director of Immigration Clinic.*
- HARRISON KELLER, B.A., M.A., Ph.D.; *Senior Lecturer, Vice Provost for Higher Education Policy [at the University of Texas at Austin].*
- ANDREW KULL, B.A., B.A., M.A., J.D.; *Senior Lecturer.*
- BRIAN R. LENDECKY, B.B.A., M.P.A.; *Senior Lecturer.*
- JEANA A. LUNGWITZ, B.A., J.D.; *Clinical Professor, Director of Domestic Violence Clinic.*
- JIM MARCUS, B.A., J.D.; *Clinical Professor.*
- FRANCES L. MARTINEZ, B.A., J.D.; *Clinical Professor.*
- TRACY W. MCCORMACK, B.A., J.D.; *Senior Lecturer, Director of Advocacy Programs.*
- F. SCOTT MCCOWN, B.S., J.D.; *Clinical Professor, Director of Children's Rights Clinic.*
- ROBIN B. MEYER, B.A., M.A., J.D.; *Lecturer.*
- RANJANA NATARAJAN, B.A., J.D.; *Clinical Professor, Director of Civil Rights Clinic.*
- RACHAEL RAWLINS, B.A., M.R.P., J.D.; *Senior Lecturer.*
- SEAN J. PETRIE, B.A., J.D.; *Lecturer.*
- ELIZA T. PLATTS-MILLS, B.A., J.D.; *Clinical Professor.*
- WAYNE SCHIESS, B.A., J.D.; *Senior Lecturer, Director of The David J. Beck Center for Legal Research, Writing and Appellate Advocacy.*
- RAOUL D. SCHONEMANN, B.A., J.D., LL.M.; *Clinical Professor.*
- PAMELA J. SIGMAN, B.A., J.D.; *Clinical Professor, Director of Juvenile Justice Clinic.*
- DAVID S. SOKOLOW, B.A., M.A., J.D., M.B.A.; *Distinguished Senior Lecturer, Director of Student Life.*
- LESLIE L. STRAUCH, B.A., J.D.; *Clinical Professor.*
- MELINDA E. TAYLOR, B.A., J.D.; *Senior Lecturer, Executive Director of Center for Global Energy, International Arbitration and Environmental Law.*
- HEATHER K. WAY, B.A., B.J., J.D.; *Clinical Professor, Director of Entrepreneurship and Community Development Clinic.*
- LUCILLE D. WOOD, B.A., J.D.; *Clinical Professor.*
- ELIZABETH M. YOUNGDALE, B.A., M.L.I.S., J.D.; *Lecturer.*

ADJUNCT PROFESSORS AND OTHER LECTURERS

- ELIZABETH AEBERSOLD, B.A., M.S.
- WILLIAM R. ALLENSWORTH, B.A., J.D.
- ANDREW W. AUSTIN, B.A., M.Phil., J.D.
- MARJORIE I. BACHMAN, B.S., J.D.
- CRAIG D. BALL, B.A., J.D.
- SHARON C. BAXTER, B.S., J.D.
- KARL O. BAYER, B.A., M.S., J.D.
- JERRY A. BELL, B.A., J.D.
- ALLISON H. BENESCH, B.A., M.S.W., J.D.
- CRAIG R. BENNETT, B.S., J.D.
- JAMES B. BENNETT, B.B.A., J.D.
- MURFF F. BLEDSOE, B.A., J.D.
- WILLIAM P. BOWERS, B.B.A., J.D., LL.M.
- STACY L. BRAININ, B.A., J.D.
- ANTHONY W. BROWN, B.A., J.D.
- JAMES E. BROWN, B.S., LL.B., J.D.
- TOMMY L. BROYLES, B.A., J.D.
- PAUL J. BURKA, B.A., LL.B.
- W. AMON BURTON, JR., B.A., M.A., LL.B.
- ERIN G. BUSBY, B.A., J.D.
- DAVID J. CAMPBELL, B.A., J.D.
- AGNES E. CASAS, B.A., J.D.
- RUBEN V. CASTANEDA, B.A., J.D.
- EDWARD A. CAVAZOS, B.A., J.D.
- LINDA BRAY CHANOW, B.A., J.D.
- JEFF CIVINS, A.B., M.S., J.D.
- ELIZABETH COHEN, B.A., M.S.W., J.D.
- KEVIN D. COLLINS, B.A., J.D.
- KASIA SOLON CRISTOBAL, B.A., M.S., J.D.
- PATRICIA J. CUMMINGS, B.A., J.D.
- KEITH B. DAVIS, B.S., J.D.
- SCOTT D. DEATHERAGE, B.A., J.D.
- DICK DEGUERIN, B.A., LL.B.
- ADAM R. DELL, B.A., J.D.
- MELONIE M. DEROSE, B.A., J.D.
- RICHARD D. DEUTSCH, B.A., B.A., J.D.
- STEVEN K. DEWOLF, B.A., J.D., LL.M.
- REBECCA H. DIFFEN, B.A., J.D.
- ANDREW S. DREIER
- CASEY D. DUNCAN, B.A., M.L.I.S., J.D.
- PHILIP DURST, B.A., M.A., J.D.
- JAY D. ELLWANGER, B.A., J.D.
- EDWARD Z. FAIR, B.A., M.S.W., J.D.
- ROSS FISCHER, B.A., J.D.
- JOHN C. FLEMING, B.A., J.D.
- KYLE K. FOX, B.A., J.D.
- DAVID C. FREDERICK, B.A., Ph.D., J.D.
- GREGORY D. FREED, B.A., J.D.
- FRED J. FUCHS, B.A., J.D.
- RYAN M. GARCIA, B.G.S., J.D.
- GRETTA G. GARDNER, B.A., J.D.
- BRYAN A. GARNER, B.A., J.D.
- MICHAEL S. GOLDBERG, B.A., J.D.
- MICHAEL J. GOLDEN, A.B., J.D.
- DAVID M. GONZALEZ, B.A., J.D.
- JOHN F. GREENMAN
- DAVID HALPERN, B.A., J.D.
- ELIZABETH HALUSKA-RAUSCH, B.A., M.A., M.S., Ph.D.
- BARBARA HANNON, B.A., M.S., J.D., Ph.D.
- CLINT A. HARBOUR, B.A., B.A., J.D., LL.M.
- ROBERT L. HARGETT, B.B.A., J.D.
- MARY L. HARRELL, B.S., J.D.
- CHRISTOPHER S. HARRISON, Ph.D., J.D.
- WILLIAM M. HART, B.A., J.D.
- JOHN R. HAYS, JR., B.A., J.D.
- SUSAN J. HIGHTOWER, B.A., M.A., J.D.
- KENNETH E. HOUP, JR., B.A., J.D.
- RANDY R. HOWRY, B.J., J.D.
- MONTY G. HUMBLE, B.A., J.D.
- JENNIFER D. JASPER, B.S., M.A., J.D.
- DIRK M. JORDAN, B.A., J.D.
- JEFFREY R. JURY, B.A., J.D.
- PATRICK O. KEEL, B.A., J.D.
- DOUGLAS L. KEENE, B.A. M.Ed., Ph.D.
- CHARI L. KELLY, B.A., J.D.
- JEAN A. KELLY, B.A., J.D.
- ROBERT N. KEPPEL, B.A., J.D.
- PAUL S. KIMBOL, B.A., J.D.
- MARK L. KINCAID, B.B.A., J.D.
- ALICE L. KING, B.A., J.D.
- MICHAEL R. KRAWZSENEK, B.S., J.D.
- AMI L. LARSON, B.A., J.D.
- LARRY LAUDAN, B.A., M.A., Ph.D.
- JODI R. LAZAR, B.A., J.D.
- KEVIN L. LEAHY, B.A., J.D.
- DAVID P. LEIN, B.A., M.P.A., J.D.
- ANDRES J. LINETZKY, B.A., LL.M.
- JAMES-LLOYD LOFTIS, B.B.A., J.D.
- MANUEL LOPEZ, A.B., J.D.
- MARIO A. LOYOLA, B.A., J.D.
- ANDREW F. MACRAE, B.J., J.D.

ANDREA M. MARSH, B.A., J.D.
 HARRY S. MARTIN, A.B., M.L.S., J.D.
 LORI R. MASON, B.A., J.D.
 PHILIP K. MAXWELL, B.A., J.D.
 PETER C. MCCABE, B.A., J.D.
 ANN M. MCGEEHAN, B.A., J.D.
 BARRY F. MCNEIL, B.A., J.D.
 MARGARET M. MENICUCCI, B.A., J.D.
 JO ANN MERICA, B.A., J.D.
 RANELLE M. MERONEY, B.A., J.D.
 ELIZABETH N. MILLER, B.A., J.D.
 JONATHAN F. MITCHELL, B.A., J.D.
 DARYL L. MOORE, B.A., M.L.A., J.D.
 EDWIN G. MORRIS, B.S., J.D.
 SARAH J. MUNSON, B.A., J.D.
 HENRY C. MYERS, B.S., J.D.
 JOHN A. NEAL, B.A., J.D.
 MANUEL H. NEWBURGER, B.A., J.D.
 HOWARD D. NIRKEN, B.A., M.P.Aff., J.D.
 CHRISTINE S. NISHIMURA, B.A., J.D.
 DAVID G. NIX, B.S.E., LL.M., J.D.
 JOSEPH W. NOEL, B.S.E., J.D., M.S.L.S.
 JANE A. O'CONNELL, B.A., M.S., J.D.
 PATRICK L. O'DANIEL, B.B.A., J.D.
 M. ARIEL PAYAN, B.A., J.D.
 MARK L. PERLMUTTER, B.S., J.D.
 JONATHAN PRATTER, B.A., M.S.L.I.S., J.D.
 VELVA L. PRICE, B.A., J.D.
 MARGARET K. REIN, B.A., J.D.
 CLARK W. RICHARDS, B.A., LL.M., J.D.
 BRIAN C. RIDER, B.A., J.D.
 ROBERT M. ROACH, JR., B.A., J.D.
 BRIAN J. ROARK, B.A., J.D.
 BETTY E. RODRIGUEZ, B.S.W., J.D.
 JAMES D. ROWE, B.A., J.D.
 MATTHEW C. RYAN, B.A., J.D.
 KAREN R. SAGE, B.A., J.D.
 MARK A. SANTOS, B.A., J.D.
 JAMES J. SCHESKE, B.A., J.D.
 MICHAEL J. SCHLESS, B.A., J.D.
 SUSAN SCHULTZ, B.S., J.D.
 AMY J. SCHUMACHER, B.A., J.D.
 SUZANNE SCHWARTZ, B.J., J.D.
 RICHARD J. SEGURA, JR., B.A., J.D.

STACEY ROGERS SHARP, B.S., J.D.
 DAVID A. SHEPPARD, B.A., J.D.
 HON. ERIC M. SHEPPERD, B.A., J.D.
 A. HAAG SHERMAN, B.B.A., J.D., C.P.A.
 RONALD J. SIEVERT, B.A., J.D.
 AMBROSIO A. SILVA, B.S., J.D.
 STUART R. SINGER, A.B., J.D.
 HON. BEA A. SMITH, B.A., M.A., J.D.
 LYDIA N. SOLIZ, B.B.A., J.D.
 STEPHEN M. SONNENBERG, A.B., M.D.
 JAMES M. SPELLINGS, JR., B.S., J.D.
 KACIE L. STARR, B.A., J.D.
 MATTHEW R. STEINKE, B.A., M.L.I.S., J.D.
 MOLLIE E. STEMPER, B.A., J.D.
 WILLIAM F. STUTTS, B.A., J.D.
 MATTHEW J. SULLIVAN, B.S., J.D.
 GRETCHEN S. SWEEN, B.A., M.A., Ph.D., J.D.
 JEREMY S. SYLESTINE, B.A., J.D.
 BRADLEY P. TEMPLE, B.A., J.D.
 SHERINE E. THOMAS, B.A., J.D.
 TERRY O. TOTTENHAM, B.S., LL.M., J.D.
 CARLOS R. TREVINO
 TRISHA TRIGILIO, B.A., J.D.
 MICHAEL S. TRUESDALE, B.A., M.A., J.D.
 TIMOTHY J. TYLER, B.A., J.D.
 SUSAN S. VANCE, B.B.A., J.D.
 LANA K. VARNEY, B.A., J.D.
 DEBORAH M. WAGNER, B.A., M.Arch., J.D.
 CHRISTOPHER M. WEIMER
 WARE V. WENDELL, A.B., J.D.
 RODERICK E. WETSEL, B.A., J.D.
 THEA WHALEN, B.A., J.D.
 DARA WHITEHEAD, B.A., M.S.
 RANDALL B. WILHITE, B.B.A., J.D.
 TIMOTHY A. WILKINS, B.A., M.P.P., J.D.
 DAVID G. WILLE, B.S.E.E., M.S.E.E., J.D.
 ANDREW M. WILLIAMS, B.A., J.D.
 CHRISTINA T. WISDOM, B.A., J.D.
 TRAVIS M. WOHLERS
 STEPHEN M. WOLFSON, B.A., M.S., J.D.
 DENNEY L. WRIGHT, B.B.A., J.D., LL.M.
 DANIEL J. YOUNG, B.A., J.D.
 EVAN A. YOUNG, A.B., B.A., J.D.
 TREVOR YOUNG, B.A., B.A., M.A., J.D., LL.M.

VISITING PROFESSORS

OWEN L. ANDERSON, B.A., J.D.
 ANTONIO H. BENJAMIN, LL.B., LL.M.
 VICTOR FERRERES, J.D., LL.M., J.S.D.

ALON KLEMENT
 GRAHAM B. STRONG, B.A., J.D., LL.M.

Prudence in International Strategy: From ‘Lawyerly’ to ‘Post-Lawyerly’

JEREMIAH S. PAM*

TABLE OF CONTENTS

INTRODUCTION	197
I. THREE PERSONAL BUT POSSIBLY ILLUSTRATIVE DATA POINTS ABOUT INTERNATIONAL STRATEGY	200
II. THE RISE OF LAWYERLY PRUDENCE IN INTERNATIONAL STRATEGY.....	202
A. <i>Henry Stimson</i>	204
B. <i>Elihu Root</i>	205
C. <i>John J. McCloy</i>	209
D. <i>An Underappreciated Key to the New York Lawyer-Statesman Tradition: Living in Uniquely “Interesting Times”</i>	212
III. THE FALL OF LAWYERLY PRUDENCE IN INTERNATIONAL STRATEGY.....	213
IV. THE FUTURE OF PRUDENCE IN INTERNATIONAL STRATEGY: FROM LAWYERLY TO POST-LAWYERLY	216
ANNEX	219

INTRODUCTION

In considering this symposium’s subject of how the international community should respond to the challenge of ISIS, I suspect we can agree that it is imperative to be informed by the recent experiences with interventions in Iraq and Afghanistan. Of

* Research Scholar, Arnold A. Saltzman Institute of War and Peace Studies, Columbia University School of International and Public Affairs. In addition to the organizers of and participants in this Symposium, I am grateful to friends and colleagues for helpful comments during discussions of related subjects over the last four years at Columbia’s Law School and Saltzman Institute, Cleary Gottlieb Steen & Hamilton in New York, and MIT’s Sloan School of Management and Security Studies Program, as well as in countless searching and fruitful exchanges with David Wolitz, Dorothy Pam and Robert Pam. All errors remain my own.

course, the difficult question is *how* those experiences should inform us. Given my own time in Iraq and Afghanistan,¹ it is perhaps not surprising that I have a few observations from those interventions that strike me as potentially relevant, to which I will turn very briefly in a moment.

But as I've already written elsewhere about some of these,² what really interests me in the context of this symposium is what might be called the meta-question of how, *in general*, we should learn from and integrate past experience in thinking about how best to respond to pressing present-day international challenges such as ISIS—and to questions of international strategy defined more broadly—while at the same time giving due consideration to the likely future consequences of such decisions.

Put simply, this is the question of prudence.³ While prudence has something of an archaic ring to it today and is not used as often as it once was—with the important but technical exception of the bank regulatory context⁴—I think its essence is both simple and of continuing relevance. My favorite depiction of what prudence entails can be seen in a wonderful 16th century painting by the Italian Renaissance master Titian, which hangs in the National Gallery in London.⁵ As described by the art historian Erwin Panofsky, the painting shows “the countenance of a middle-aged man

1. From 2006–2007, I worked for the Treasury Department at the U.S. Embassy in Baghdad as the Financial Attaché for Iraq, and from 2010–2012 I worked for the State Department at the U.S. Embassy in Kabul as the Governance Policy Chief.

2. See generally JEREMIAH S. PAM, THE TREASURY APPROACH TO STATE-BUILDING AND INSTITUTION-STRENGTHENING ASSISTANCE: EXPERIENCE IN IRAQ AND BROADER IMPLICATIONS (2008) [hereinafter THE TREASURY APPROACH]; Jeremiah S. Pam, *The Paradox of Complexity: Embracing Its Contribution to Situational Understanding, Resisting Its Temptation in Strategy and Operational Plans*, in COMPLEX OPERATIONS: NATO AT WAR AND ON THE MARGINS OF WAR 26 (Christopher M. Schnaubelt ed., 2010) [hereinafter *The Paradox of Complexity*]; Jeremiah S. Pam, *The Rise and Fall of Afghan “Subnational” Governance in General: And the Belated Recognition of the Importance of Provincial Governance and Finance in Particular* (Saltzman, Working Paper No. 25, 2015), <http://www.siwps.org/wp-content/uploads/2015/08/Working-Paper-25-Pam.pdf> [<https://perma.cc/F6MM-Y6H6>] [hereinafter *The Rise and Fall*].

3. While the celebration of prudence as an important virtue dates to classical antiquity—notably in Aristotle’s conception of *phronesis* (most commonly translated as prudence or practical wisdom) in the Nichomachean Ethics—my own interest in prudence (and its relationship to law and lawyers) was inspired more recently by Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567 (1985) [hereinafter Kronman, *Alexander Bickel’s Philosophy of Prudence*]. For Kronman’s development of related themes, see also Anthony T. Kronman, *Practical Wisdom and Professional Character*, 4 SOC. PHIL. & POL’Y 203 (1986); Anthony T. Kronman *Living in the Law*, 54 U. CHI. L. REV. 835 (1987); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

4. Traditionally, “prudential” regulation has been regulation focused on the safety and soundness of individual financial institutions. Dennis Lockhart, President & CEO, Fed. Res. Bank of Atlanta, Georgia Law Review Symposium: Thoughts on Prudential Regulation of Financial Firms (Mar. 20, 2015). More recently, and particularly since the financial crisis of 2008, financial supervisory and regulatory efforts have also been focused on protecting the financial system’s ability to deliver vital services to the general economy. *Id.* Regulation of this sort is referred to as “macroprudential” regulation. *Id.* Regulation of the older sort targeted at individual financial institutions now referred to as “microprudential.” JACEK OSIŃSKI ET AL., MACROPRUDENTIAL AND MICROPRUDENTIAL POLICIES: TOWARD COHABITATION 6 (2013).

5. Titian & Workshop, *An Allegory of Prudence* (1565), <https://www.nationalgallery.org.uk/paintings/titian-and-workshop-an-allegory-of-prudence> [<https://perma.cc/TLZ2-RL2P>]. I first encountered the painting as the cover illustration of John Dunn’s collection of essays, *Interpreting Political Responsibility*. For his discussion of prudence that was an early influence on my thinking, see generally JOHN DUNN, *Reconceiving the Content and Character of Modern Political Community*, in INTERPRETING POLITICAL RESPONSIBILITY: ESSAYS 1981–1989 193, 193 (1990).

in full face, the profile to left of an old man, and the profile to right of a youth.”⁶ Above each of the conjoined partial portraits there is a corresponding inscription in Latin, which translated reads: “[Learning] from yesterday, today acts prudently, lest by his action he spoil tomorrow.”⁷ The title of the painting is “An Allegory of Prudence.”⁸

This brief Article makes (or at least gestures toward) three points. First, although the general quality of prudence has long been loosely associated with lawyers,⁹ for a discrete period of time in American history (roughly the first two-thirds of the 20th century), one of the most distinctive contributions of a certain type of lawyer—which I will refer to in shorthand as the “New York lawyer-statesman” for historical reasons that will shortly become clear—was the application of prudence not to the practice of law as such, but to the broader domain of U.S. international strategy and policy. Accordingly, the historical part of this Article focuses not on the narrow lawyer’s question of what was understood as “lawful,” but rather on what was distinctively “lawyerly” in these lawyer-statesmen’s contributions to international strategy—what I call the quality of “lawyerly prudence.”

Second, the circumstances that shaped, allowed, and even encouraged such contributions to international strategy by these lawyers had largely run their course by the last third of the 20th century. While other types of prominent lawyers have remained important in public and private affairs—for example, the “Washington lawyer,”¹⁰ or the “lawyer’s lawyer” found in many cities¹¹—the specific phenomenon of New York lawyer-statesmen contributing their lawyerly prudence to international strategy more or less ended as a distinctive, socially-reproducing tradition during this time. However we feel about this tradition, my argument goes, that ship has sailed.

Third, international strategy nonetheless remains as much in need of prudence now as ever before¹²—arguably more so because of the absence from the scene for the last couple of generations of the lawyerly prudent type. But because New York lawyers can no longer serve as the primary exemplars of lawyerly prudence in this context, we must unpack the elements of the old lawyerly prudence and encourage their self-conscious adoption by a *broader* group of citizen-statespeople, who have accumulated the kind of direct and relevant experience with what does and does not work in international strategy that is necessary (but not sufficient) to develop and exercise prudence of the old lawyerly kind, even though many or most of such people will not be lawyers.

6. Erwin Panofsky & Fritz Saxl, *A Late Antique Religious Symbol in Works by Holbein and Titian*, 49 BURLINGTON MAG. FOR CONNOISSEURS 177, 177 (1926). See also ERWIN PANOFSKY, *Titian's Allegory of Prudence: A Postscript*, in MEANING IN THE VISUAL ARTS 146 (1955).

7. *After 3 Months and 244 Donations, Frame Appeal Hits Its Target*, NAT'L GALLERY (Feb. 2015), <https://www.nationalgallery.org.uk/about-us/press-and-media/press-releases/after-3-months-and-244-donations-frame-appeal-hits-its-target> [<https://perma.cc/D3QC-B8v6>] (alteration in original) (internal quotation marks omitted).

8. Titian & Workshop, *supra* note 5.

9. See, e.g., Kronman, *Alexander Bickel's Philosophy of Prudence*, *supra* note 3, at 1573 (“[P]rudence—‘good practical wisdom’—is and will continue to be the lawyer’s distinctive virtue . . .”).

10. Edward O. Laumann et al., *Washington Lawyers and Others: The Structure of Washington Representation*, 37 STAN. L. REV. 465, 465–66 (1985).

11. See generally WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* (1973).

12. See generally MICHAEL MANDELBAUM, *MISSION FAILURE: AMERICAN AND THE WORLD IN THE POST-COLD WAR ERA* (2016).

In short, this Article establishes the need for, and preliminarily describes, a new kind of “post-lawyerly”¹³ prudence in international strategy. Fortunately, the international events of the last 15 or so years have left us with a significant pool of people with experiences that make them potential candidates to exercise this post-lawyerly prudence.

I. THREE PERSONAL BUT POSSIBLY ILLUSTRATIVE DATA POINTS ABOUT INTERNATIONAL STRATEGY

Since one of the subjects of this symposium is the future of the West’s response to ISIS, I will begin with the briefest possible account of three observations from my own experience related to Iraq and Afghanistan. My intention here is not to shift the focus from today and ISIS to the past and other conflicts, but simply to provide illustrative examples of the kind of experience that the concept of prudence demands that we consciously integrate, along with future considerations, in deciding how to act today in response to relevant major international strategic challenges—three data points, if you will. In the interest of time, I will simply set out my three observations.

From 2004 to 2005, while a lawyer in private practice with an international firm in New York, I helped advise the government of Iraq on the restructuring of Iraq’s sovereign debt. This resulted in an international agreement to cancel 80 percent of the country’s Saddam Hussein-era debt, ultimately saving Iraq approximately \$100 billion.¹⁴ The debt restructuring was achieved, first, through international negotiations with country creditors, then through international negotiations with private creditors (and then again through more international negotiations with other country creditors). By most accounts, the debt deal was a rare success of the Iraq effort.¹⁵ However, it is important to note it was carried out largely *outside* Iraq. Apart from government decisions made in Baghdad at pivotal junctures, much of the work involved took place in locations like Paris, London, Dubai, and Amman, rather than on the ground in Iraq.¹⁶

13. Note that the term “post-lawyerly” is intended to capture the idea of the specified “lawyerly” qualities applying to a broader population, rather than any transcendence of, let alone opposition to, the qualities themselves. See *infra*, Section IV (describing the need for post-lawyerly prudence).

14. See Roula Khalaf et al., *Iraq Debt Agreement Ends Stand-off*, FIN. TIMES (Nov. 22, 2004, 2:00 AM), <http://www.ft.com/cms/s/0/a0174c38-3c2a-11d9-8b17-00000e2511c8.html> [https://perma.cc/6JG9-RH6R] (discussing the Paris Club’s decision to cancel up to 80% of Iraqi debt); Craig S. Smith, *Major Creditors in Accord to Waive 80% of Iraq Debt*, N.Y. TIMES (Nov. 22, 2004), <http://www.nytimes.com/2004/11/22/world/middleeast/major-creditors-in-accord-to-waive-80-of-iraq-debt.html> [https://perma.cc/3GD6-7QZ3] (describing the effect of the Paris Club’s decision on other nations owning Iraqi debt).

15. See Joanna Chung & Stephen Fidler, *Restructuring Under Fire: Why Iraqi Debt Is No Longer a Write-Off*, FIN. TIMES (July 17, 2006), http://www.ft.com/cms/s/0/dc70f4f0-1530-11db-b391-0000779e2340.html?ft_site=falcon&desktop=true#axzz4QlwmoKPM [https://perma.cc/D2WJ-9838] (“Even though incomplete, this effort to remove an obstacle to Iraq’s economic recovery has been one of the few successful projects undertaken in post-Saddam Iraq.”).

16. See Hadi Nicholas Deeb, *Project 688: The Restructuring of Iraq’s Saddam-Era Debt*, RESTRUCTURING NEWSLETTER (Cleary Gottlieb Steen & Hamilton, New York, N.Y.), Winter 2007, at 3, 6, <https://www.clearygottlieb.com/~media/cgsh/files/publication-pdfs/cleary-gottlieb-restructuring-newsletter-winter-2007.pdf> [https://perma.cc/n5t5-vb87] (describing the various international actors involved in the restructuring process); YVONNE WONG, SOVEREIGN FINANCE AND THE POVERTY OF NATIONS: ODDIOUS DEBT IN INTERNATIONAL LAW 54 n.50 (2012) (explaining that the Iraqi Debt Reconciliation Office was set up in Amman, Jordan).

Not long after, while working for the U.S. Treasury Department as the Financial Attaché for Iraq at the U.S. Embassy in Baghdad from 2006 to 2007, I worked with others to shift Iraqi and Coalition attention away from spending U.S. money through U.S. parallel structures and towards Iraq spending Iraq's money through Iraqi institutions and processes.¹⁷ This could only be considered a success in that it involved us walking back an approach that was clearly unsustainable in the long term.¹⁸ However, as the current situation in Iraq underscores, it did not sufficiently strengthen Iraqi governance for Iraq to fully function as an effective state.¹⁹

Third and finally, from 2010 to 2012, while working for the U.S. State Department as Embassy Kabul's Governance Policy Chief, I worked with others to shift Afghan and international governance efforts from a scattershot approach pursuing a wide variety of governance objectives at many levels of governance—from tens of thousands of villages to hundreds of districts to 34 provinces—to a more focused approach centered around strengthening the budgetary-governance interface between Afghanistan's central ministries and their provincial institutions.²⁰ Again, this could only be considered a success in that it walked back international governance objectives that could not be achieved or sustained even at the height of the surge,²¹ and certainly could not be sustained after the drawdown.²² And here too, it may have been a case of "too little, too late," as it currently appears that Afghan governance has not been sufficiently strengthened for Afghanistan to fully function as an effective state yet either.²³

With those contemporary points of reference in mind, let me now take a step back in history, to the early and mid-20th century.

17. See JAMES D. SAVAGE, *RECONSTRUCTING IRAQ'S BUDGETARY INSTITUTIONS: COALITION STATE BUILDING AFTER SADDAM 202-04* (2013); OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, *HARD LESSONS: THE IRAQ RECONSTRUCTION EXPERIENCE 267-68* (2009) [hereinafter *HARD LESSONS*] ("Improving the ability of the Iraqi government to spend its own revenue became the keystone in a new arc of capacity-development activities. It was all part of a shift in the reconstruction program to supporting Iraqi priorities with Iraqi resources."); see also *The Paradox of Complexity*, *supra* note 2, at 41 (describing the value of indirect approaches by international actors in working with local parties). See generally THE TREASURY APPROACH, *supra* note 2 (describing the need for local institution-oriented work in Iraq).

18. *HARD LESSONS*, *supra* note 17, at 298 ("The new standard, Meese explained, was 'if it can't be done by the Iraqis, we probably shouldn't do it.' 'What is better is a project that takes 60 days instead of 30 days—but is done by the Iraqi manager and is sustainable by the Iraqis [and] that their operations can support.'").

19. See, e.g., Tim Arango, *With Iraq Mired in Turmoil, Some Call for Partitioning the Country*, N.Y. TIMES (Apr. 28, 2016), <http://www.nytimes.com/2016/04/29/world/middleeast/with-iraq-mired-in-turmoil-some-call-for-partitioning-the-country.html> [<https://perma.cc/AR82-S4QS>] (describing the lack of adequate leadership in the Iraqi government).

20. See FRANCES Z. BROWN, U.S. INST. OF PEACE, *THE U.S. SURGE AND AFGHAN LOCAL GOVERNANCE: LESSONS FOR TRANSITION 316* (2012), <http://www.usip.org/sites/default/files/resources/SR316.pdf> [<https://perma.cc/9LP6-73EH>] (describing the shortcomings of the U.S. effort to transform local governance); *The Rise and Fall*, *supra* note 2 (describing the shift from a scattershot approach to a more center-province and budget-focused approach in governance).

21. *The Rise and Fall*, *supra* note 2, at 28.

22. *Id.* at 35.

23. See, e.g., Philip Reeves, *Why Afghanistan Is Once Again on the Brink*, NAT'L PUB. RADIO (May 5, 2016, 9:38 AM), <http://www.npr.org/sections/parallels/2016/05/05/475928020/why-afghanistan-is-once-again-on-the-brink> [<https://perma.cc/7KHF-YDBX>]; Mujib Mashal, *Afghanistan Is in Chaos. Is That What Hamid Karzai Wants?*, N.Y. TIMES (Aug. 5, 2016), <http://www.nytimes.com/2016/08/06/world/asia/afghanistan-hamid-karzai.html> [<https://perma.cc/y87N-2ZVP>].

II. THE RISE OF LAWYERLY PRUDENCE IN INTERNATIONAL STRATEGY

In some respects, this is a story that has been well told elsewhere, perhaps most famously in Walter Isaacson's and Evan Thomas's book *The Wise Men*.²⁴ Pictured on the cover of the book are Robert Lovett, John McCloy, Averell Harriman, Charles Bohlen, George Kennan, and Dean Acheson: Two financiers (Lovett and Harriman), two professional diplomats (Bohlen and Kennan), and two lawyers (McCloy and Acheson).²⁵ But the book's preface frames all these figures in the context of a tradition originating with McCloy and Lovett's mentor, New York lawyer Henry Stimson, and with Stimson's mentor, New York lawyer Elihu Root, Sr.²⁶ In 1899, President McKinley famously called Root to leave his practice as a very successful corporate lawyer in New York, where he specialized in matters like railroad reorganizations, in order to come down to Washington and serve as McKinley's Secretary of War following the conclusion of the Spanish-American War and America's acquisition of the territories of Puerto Rico, Cuba, and the Philippines.²⁷

But while the "wise men" story is well known,²⁸ two things about it have attracted less attention. First, why were so many lawyers playing prominent roles in what were clearly policy and strategy decisions? And second, what is the significance of all of the wise men except Acheson having been lifelong New Yorkers (when not serving in government) rather than Washington creatures?

There are some obvious historical factors that must be mentioned: Elite lawyers possessed a disproportionately large share of social and professional capital at the

24. See generally WALTER ISAACSON & EVAN THOMAS, *THE WISE MEN: SIX FRIENDS AND THE WORLD THEY MADE* (1986).

25. *Id.* at 17–25.

26. *Id.* at 28–29, 180.

27. See ELIHU ROOT, *ADDRESSES ON GOVERNMENT AND CITIZENSHIP* 503–04 (Robert Bacon & James Brown Scott eds., 1916). Root gave his own account of receiving the offer from President McKinley in an address to the New York County Lawyers' Association on March 13, 1915. *Id.* Here is the key passage:

Sixteen years ago, in the month of July [1899], . . . I was called to the telephone and told by one speaking for President McKinley, 'The President directs me to say to you that he wishes you to take the position of Secretary of War.' I answered 'Thank the President for me, but say that it is quite absurd, I know nothing about war. I know nothing about the army.' I was told to hold the wire and in a moment there came back the reply, 'President McKinley directs me to say that he is not looking for any one who knows anything about war or for any one who knows anything about the army; he has got to have a lawyer to direct the government of these Spanish islands, and you are the lawyer he wants.' Of course I had then, on the instant, to determine what kind of lawyer I wished to be, and there was but one answer to make, and so I went to perform a lawyer's duty upon the call of the greatest of all our clients, the Government of our country.

Id.

28. See, e.g., Bryce Nelson, *The Wise Men: Six Friends and the World They Made*, L.A. TIMES (Nov. 30, 1986), http://articles.latimes.com/1986-11-30/books/bk-106_1_wise-men [<https://perma.cc/L7B2-GL7Y>] (book review) (calling the book "compulsory reading for anyone wishing to understand modern American foreign policy").

time.²⁹ At the time, New York was by far the most international city in the U.S.³⁰ And Washington, D.C. was not very developed prior to the New Deal and World War II.³¹ Each of these historical factors played a role. I argue, however, that there were also at least four other important elements. I will first outline them schematically then elaborate on them by reference to three illustrative New York lawyer-statesmen.

First, sophisticated corporate lawyers had notable *experience with complexity* in the real world: Large, far-flung undertakings that involved dealing with multiple and competing agendas and interests, such as continental railroad mergers and reorganizations, an experience of significant practical relevance to America's new global role in the 20th century.

Second and relatedly, corporate lawyers had a *heightened awareness of uncertainty* inherent in undertakings with many moving parts that interact with each other and frequently produce unintended, emergent effects—perhaps the conditions of international relations *par excellence*.

Third, well-educated lawyers were better prepared than many of their contemporaries in the policy elite to have some self-conscious appreciation of at least recent history as something that necessarily influences, and constrains the forms of, political change. This is one of the fundamental lessons of common law training: Precedents always have to be considered (even when departing from them).

Fourth, the figures happened to live in an extraordinarily eventful time in which to gather lessons of experience. The demands of the period and the norms of the time conspired such that it was possible for contemporaries to develop a substantial stock of direct experience of strategically consequential events. These days, when we look

29. Using the reflexive sociology method of Pierre Bourdieu and drawing on Lauro Martinez' history of lawyers in early modern Europe, Bryant Garth and Yves Dezalay have described a transnational pattern in the 19th and 20th centuries by which various kinds of capital (including familial, economic, learned, cosmopolitan, political, and religious) combined to create national groups of elite lawyers possessing distinctive social capital recognized as valuable in intermediating between private interests and the state. YVES DEZALAY & BRYANT G. GARTH, *ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE* 22–23, 54 (2010) (providing a general description of this process); see also Yves Dezalay & Bryant G. Garth, *Law, Lawyers, and Empire*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 718, 718–57 (Michael Grossberg & Christopher Tomlin eds., 2008) (applying the analytical framework to the elite American lawyers of the 20th century U.S. foreign policy establishment).

30. See James R. Kurth, *Between Europe and America: The New York Foreign Policy Elite*, in *CAPITAL OF THE AMERICAN CENTURY: THE NATIONAL AND INTERNATIONAL INFLUENCE OF NEW YORK CITY* 71, 73 (Martin Shefter ed., 1993) (discussing how New York was thought of almost as part of Europe due to its commercial sophistication and international ties).

31. At the turn of the 20th century, criticism of Washington, D.C.'s urban and aesthetic shortcomings in 1901 prompted the U.S. Senate to appoint the Senate Park Commission, chaired by Senator James McMillan, to make recommendations on a plan for improvements. Jon A. Peterson, *The Senate Park Commission Plan for Washington, D.C.: A New Vision for the Capital and the Nation*, in *DESIGNING THE NATION'S CAPITAL: THE 1901 PLAN FOR WASHINGTON, D.C.* 1, 6–9 (Sue Kohler & Pamela Scott eds., 2006). The resulting 1902 McMillan Plan set out a comprehensive plan for the demolition of slums around the existing federal buildings, the modernization of rail facilities, the development of the Mall and the surrounding monuments and museums, and the clearance of space for future federal office buildings. *Id.* However, the plan was implemented slowly over the next three decades, with major elements not completed until the 1930s and 1940s during the recovery from the Great Depression and the advent of World War II. Timothy Davis, *Beyond the Mall: The Senate Park Commission's Plans for Washington's Park System*, in *DESIGNING THE NATION'S CAPITAL: THE 1901 PLAN FOR WASHINGTON, D.C.* 137, 163 (Sue Kohler & Pamela Scott eds., 2006).

back historically at pivotal periods of the 20th century, we often focus most on World War II, the creation of the post-war order and institutions, and the so-called “Greatest Generation” involved in these accomplishments. But the key factor that gave rise to the tradition of lawyers acquiring and exercising prudence regarding international strategy actually started earlier, and lay with the contingent historical fact that key individual figures were the right age to be active during the *two* world wars (as well as during the profound economic challenges of the interwar period).

These elements can be illustrated by just the most skeletal account of three central figures: Henry Stimson (1867–1950), Elihu Root, Jr. (1881–1967), and John J. McCloy (1895–1989).

A. *Henry Stimson*

Born in New York City, Henry Stimson was educated at Phillips Academy in Andover, Massachusetts, Yale College (class of 1888), and Harvard Law School (class of 1890).³² In 1891, he joined the prominent Wall Street legal practice of Elihu Root, Sr. and Samuel Clarke.³³ Over the course of the previous two decades, Root had earned a reputation as a brilliant and effective lawyer for some of the period’s largest corporate interests, including the Havemeyer sugar refining companies (known as the Sugar Trust) and the many railway-related matters (including mergers, acquisitions, and reorganizations) of William C. Whitney, Jay Gould, and E.H. Harriman.³⁴ The Root Clarke firm was among the elite group of New York law firms that, while still intimate by comparison to what they would become in the late 20th century, were developing the sophistication to focus on national and, increasingly, international business.³⁵ One of Root Sr.’s biographers described his defining characteristic as having “an extraordinary talent for finding workable solutions to technical and complex problems.”³⁶ And yet, when Root, Sr. accepted President McKinley’s appointment as Secretary of War in 1899, he turned over primary responsibility for this sophisticated practice on behalf of extremely sophisticated business clients to Stimson and another young lawyer who had joined the firm, Bronson Winthrop³⁷ (in 1901, the firm would become Winthrop & Stimson).³⁸ Stimson’s mastery of a legal practice requiring an understanding not only of law but of some of the largest and most complicated business arrangements of the day (some of which, like the Sugar Trust, he subsequently encountered from the opposite side of the table when enforcing antitrust laws while serving as the U.S. Attorney for the Southern District of New York from

32. See HENRY L. STIMSON & MCGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR xiii-xv (1947) (discussing Stimson’s education).

33. GODFREY HODGSON, THE COLONEL: THE LIFE AND WARS OF HENRY STIMSON 1867–1950, at 48 (1990); STIMSON & MCGEORGE, *supra* note 32, at xviii.

34. DAVID GODDARD, COLONIZING SOUTHAMPTON: THE TRANSFORMATION OF A LONG ISLAND COMMUNITY, 1870-1900 64 (2011).

35. See HODGSON, *supra* note 33, at 56 (stating that firms such as Root & Clark were turning to more international affairs).

36. RICHARD W. LEOPOLD, ELIHU ROOT AND THE CONSERVATIVE TRADITION 6 (1954).

37. HODGSON, *supra* note 33, at 57; see ELTING E. MORISON, TURMOIL AND TRADITION: A STUDY OF THE LIFE AND TIMES OF HENRY L. STIMSON 71 (1960) (stating that after the appointment of Root to Secretary of War the “steadying influence of the senior partner was withdrawn . . . the two young men . . . set out to defend the business they had inherited”).

38. HODGSON, *supra* note 33, at 57.

1906–1909)³⁹ imbued in him an appreciation of both the complexity of national- and international-scale undertakings, and the inevitability of some irreducible uncertainty as to the outcomes of such things.⁴⁰ This appreciation would serve him well in both his remaining legal career and in his subsequent public offices, which included his service as Secretary of War under President Taft from 1911–1913, as Governor-General of the Philippines under President Coolidge from 1927–1929, as Secretary of State under President Hoover from 1929–1933, and again as Secretary of War under Presidents Franklin Roosevelt and Harry Truman from 1940–1945. Merely listing these offices conveys both the depth and breadth of Stimson’s experience in international affairs.⁴¹

In April 1917, when America entered World War I, Stimson was not in public office but once again a private lawyer and citizen, aged 49.⁴² Once war was declared, however, one of his biographers recounts:

[H]e threw himself into the not-so-easy task of getting into uniform, and not just into uniform, but into active service abroad. For this purpose he pulled strings shamelessly. . . . He got his name onto the list of officers for the artillery—his chosen branch of the service—only to have it removed personally by President Wilson’s Secretary of War, Newton D. Baker [But] as Stimson left Baker’s office after a somewhat abrasive encounter, the door to the office of the chief of staff, Major General Hugh Scott, was open. . . . Through his intervention, Stimson found himself, on the verge of his fiftieth birthday, training . . . preparatory to going to France. . . . In July his battalion led the Seventy-seventh Regiment into the line with Colonel Stimson in temporary command. . . . His unit was only in the line for those three weeks, but in that time, he reckoned, “he saw enough of war and danger to be able to feel certain that he was a good soldier; this knowledge was important to him.”⁴³

In his memoir, Stimson said that of his motivations,

[T]he basic one was that, after preaching preparedness for years and war for months, he could not in conscience remain a civilian. Though in some ways it might be quixotic for a man nearly fifty to become a soldier, it was the only way in which Stimson could feel comfortable in his mind.⁴⁴

B. *Elihu Root, Jr.*

While Stimson’s mentor, Elihu Root, Sr., was too old to be involved in both wars, Root’s son, Elihu Root, Jr. (born in 1881), 15 years younger than Stimson and co-founder with Grenville Clark of his own New York law firm, Root Clark,⁴⁵ served full-

39. *Id.* at 58–70.

40. *Id.*

41. For Stimson’s second tenure as Secretary of War during WWII, see *infra* note 99 and accompanying text.

42. HODGSON, *supra* note 33, at 83–84.

43. *Id.* at 83–85.

44. *Id.* at 85.

45. See LEO GOTTLIEB, CLEARY, GOTTLIEB, STEEN & HAMILTON: THE FIRST THIRTY YEARS 47–53 (1983) (discussing the history of the Root Clark firm).

time in the WWI effort when he was already a 35-year old established lawyer,⁴⁶ and during WWII, in his 60s, played an important role advising the Army Air Force on strategy for the European offensive.⁴⁷ Two short anecdotes from Elihu Root, Jr.'s life illustrate the experiences that both gave rise to and embodied his lawyerly prudence in international strategy.

The first occurred shortly after the Cunard ocean liner RMS Lusitania was torpedoed and sunk by a German U-boat off the coast of Ireland, killing some 1,200 passengers, including 124 Americans.⁴⁸ When the news made it to New York, on Sunday, May 9, the 34 year-old Root and his partner Clark were scheduled to play golf together in Westchester, New York.⁴⁹ But rather than play golf, the two partners ended up engaged in a long and intense conversation about what the tragedy meant for the United States's future role in the war raging in Europe, which led them both to the conclusion that "inaction was intolerable."⁵⁰ With Clark taking the lead, Root and a dozen other lawyers and professional men gathered the next evening in Root Clark's downtown office to prepare a public statement.⁵¹ The following day a larger group of such prominent professional men met over lunch at the Harvard Club to form a formal committee pledging support for a more internationally engaged role for the country.⁵² Finally, following consultations with the well-known Army General Leonard Wood, the committee proposed that a military training camp for college students scheduled to take place that summer in Plattsburg, upstate New York, be adapted to train older professional men such as lawyers and bankers between the ages of 30 and 40 (the "Business Men's Camp"), to serve as the nucleus of an officer corps in the event the United States required a large-scale popular mobilization to enter World War I.⁵³ In due course, the proposal of Clark, Root, and their like-minded New York professional (and social) peers was accepted by the government, and the first training camp at Plattsburg took place from August 8 to September 6, 1915.⁵⁴ This novel citizen-soldier initiative (which was repeated in 1916) became known as the Plattsburg Movement and, following the Selective Service Act of 1917, did in fact provide many of the officers mobilized for service in Europe once the U.S. entered the war.⁵⁵ During the war, Clark worked in the office of the Adjutant General, which was responsible for mobilizing the wartime force with the rank of lieutenant colonel.⁵⁶ Root served in the Allied Expeditionary Force as a major in the 304th Infantry⁵⁷ (and with both Root and Clark taken away by the war from their still young law firm, Elihu Root, Sr., having recently completed his term as a U.S. Senator from New York in March 1915, generously

46. *Id.* at 47.

47. *Elihu Root Jr., Lawyer, Is Dead; Statesman's Son a Civic Leader: Arts Patron and Yachtsman Received Truman Medal-Leading La Guardia Backer*, N.Y. TIMES, Aug. 28, 1967, at 31 [hereinafter *Elihu Root Jr., Lawyer, Is Dead*].

48. GERALD T. DUNNE, GRENVILLE CLARK: PUBLIC CITIZEN 36-37 (1986).

49. *Id.* at 37.

50. *Id.*

51. *Id.* at 37-40.

52. *Id.* at 40.

53. *Id.* at 40-45.

54. JOHN GARRY CLIFFORD, THE CITIZEN SOLDIERS: THE PLATTSBURG TRAINING CAMP MOVEMENT, 1913-1920 54-60 (1972).

55. *Id.*

56. See DUNNE, *supra* note 48, at 46.

57. *Elihu Root Jr., Lawyer, Is Dead, supra* note 47, at 31.

volunteered to help cover the firm's business in their absence—about which Clark later said, “[t]he truth is that the Senator pretty much set us up in business. His prestige was enormous and his kindness and interest in us beyond measure.”⁵⁸

The second anecdote illustrating Elihu Root, Jr.'s lawyerly prudence in international strategy came more than 25 years later, in the midst of World War II. In late 1942, the highest levels of the U.S. civilian and military war leadership were consumed with intense debates about both the relative priority that should be assigned to the different theaters of the conflict (i.e., Europe vs. the Mediterranean vs. the Pacific) and the relative effectiveness of (and thus the resources that should be devoted to) the different arms of the military (i.e., army, air forces, navy) in prosecuting a campaign in the main theaters.⁵⁹ Perhaps the most pressing question to be resolved was the most effective way to prepare to invade and retake continental Europe. To help answer this question, the most senior leaders of the Army Air Forces (AAF) decided to convene a small, outside group to analyze how a sustained air campaign against strategic targets in western Europe might most effectively degrade the German war effort sufficient to enable a successful ground invasion.⁶⁰ Notwithstanding the existing intelligence and analytical resources already available to the AAF, the leaders were interested in getting a new perspective⁶¹ and were intrigued by the nascent idea of “operations research,” which involved careful analysis of interactions within networks.⁶² They believed both that AAF personnel lacked the background to conduct such analysis and that a certain kind of civilian might be better equipped to do so.⁶³ Specifically, the AAF sought “civilians with considerable experience in analyzing large, complex problems.”⁶⁴ Accordingly, the AAF officers charged with setting up this committee⁶⁵ ended up assembling a group including a disproportionate number of New York corporate lawyers, and the first person they turned to was none other than Elihu Root, Jr., then 62 years old.⁶⁶ Also invited to join the group, which was to become known as the Committee of Operations Analysts (COA), were: Fowler Hamilton, former Department of Justice antitrust lawyer turned “economic warfare” expert who a few years later would be among the founders of the Root Clark offshoot firm still known today as Cleary, Gottlieb, Steen & Hamilton; and Major Barton

58. GOTTLIEB, *supra* note 45, at 48.

59. See Robert C. Ehrhart et al., *Building an Air Intelligence Organization and the European Theater*, in *PIERCING THE FOG: INTELLIGENCE AND ARMY AIR FORCES OPERATIONS IN WORLD WAR II* 111, 150–52 (John F. Kreis ed., 1996) (detailing President Roosevelt's request of the AAF to garner the best way to retake Europe).

60. See *id.* at 152 (examining the date when strategic air targets would lead to the deterioration of the German war effort and thus permit a successful invasion of Western Europe).

61. See *id.* (stating that because the military had come across operations research, a new technique, General Arnold sought to explore it).

62. See *id.* (discussing the military's recent discovery of operations research).

63. See *id.* (explaining that military officers lacked the training and the time needed for economic analysis, and therefore the inclusion of civilians, especially prominent civilians, would be better).

64. RONALD SCHAFFER, *WINGS OF JUDGMENT: AMERICAN BOMBING IN WORLD WAR II* 110 (1985).

65. The principal staff officers involved were Colonel Byron Gates, Director of Management Control at AAF headquarters, and Gates' executive officer, Major Guido Perera, who had been a corporate lawyer in Boston before the war. *Id.*

66. See Ehrhart et al., *supra* note 59, at 152 (explaining that Gates and Perera reached out to Elihu Root, Jr. to ask for his participation even before receiving Arnold's official directive).

Leach, a property law expert on leave from the faculty of Harvard Law School.⁶⁷ Rounding out the civilian members of the COA were economics professor Edward Mason from Harvard, military historian Edward Mead Earle of the Institute for Advanced Study in Princeton, and the eminent New York banker Thomas Lamont (then 73), who for some 30 years had been the international face of J.P. Morgan.⁶⁸

The activities, conclusions, and impact of this Committee of Operations Analysts⁶⁹ (which, it must be noted, also included a number of non-lawyer, active duty AAF officers) are for another article.⁷⁰ But one general observation about Elihu Root, Jr.'s work on the COA is relevant to our argument. In his first-hand account of the experience, Major Perera (the Executive Officer) specifically noted Root Jr.'s awareness of the inherent limitations in analysts' ability to fully predict the result of the interactions between Allied forces' successful targeting of one part of a complex system and the Axis forces' reactions to the damage done.⁷¹

I recall [Mr. Root's] prophetic statement that it was impossible to determine in advance what man's ingenuity might accomplish when faced with desperate necessity. We could never conjure up all of the methods the enemy would devise to repair the damage inflicted on his vital targets, to substitute other products for those being produced there or even to manage to get along without such products.⁷²

67. See *id.* at 153 (explaining who joined the group); see also SCHAFFER, *supra* 64, at 196 (explaining who joined the group); *W. Barton Leach Dies; On Faculty Since 1929*, HARVARD CRIMSON (Dec. 17, 1971), <http://www.thecrimson.com/article/1971/12/17/w-barton-leach-dies-on-faculty> [<https://perma.cc/QBE9-8G7M>] (detailing Barton's teaching at Harvard Law School); Walter H. Waggoner, *Fowler Hamilton, 73, Is Dead; Directed A.I.D. for Kennedy*, N.Y. TIMES (June 9, 1984), <http://www.nytimes.com/1984/06/09/obituaries/fowler-hamilton-73-is-dead-directed-aid-for-kennedy.html> [<https://perma.cc/N4KL-DBRB>] (detailing Hamilton's career including his time at the DOJ and Cleary Gottlieb).

68. See SCHAFFER, *supra* note 64, at 110–11 (explaining who joined the group).

69. For the AAF's nearly contemporaneous official account of the two-year history of the COA (which was apparently written by Major Perera), see generally U.S. DEP'T OF THE AIRFORCE, HISTORY OF THE ORGANIZATION AND OPERATIONS OF THE COMMITTEE OF OPERATIONS ANALYSTS (1944).

70. Such an article could also describe the periodic bureaucratic tensions between (1) the COA commissioned by HQ AAF in Washington; (2) the operations analysis section already established within the staff of Eighth Air Force in England, which was led by another Root Clark lawyer, the future Supreme Court Justice John M. Harlan II, and his deputy Leslie Arps, a younger Root Clark lawyer who would in 1948 be one of the founders of the major New York law firm now known as Skadden, Arps, Slate, Meagher & Flom; and (3) the group of mostly civilian economists assembled by the Office of Strategic Services (the wartime predecessor to the Central Intelligence Agency) as the Enemy Objectives Unit in an annex of the U.S. Embassy in London, which was headed by future MIT economics professor Charles Kindleberger and included, among others, future National Security Advisor to President Lyndon Johnson Walt Rostow, future Deputy National Security Advisor to President Kennedy Carl Kaysen, and future Federal Reserve Bank of New York and U.S. Treasury senior official Robert Roosa. On John Harlan and the Eighth Air Force operations analysis section, see J. Edward Lumbard, *John Harlan: In Public Service 1925-1971*, 85 HARV. L. REV. 372, 373–74 (1971). On Leslie Arps, see Dennis Hevesi, *Leslie H. Arps Dies; A Founding Member of Major Law Firm*, N.Y. TIMES (July 16, 1987), <https://www.nytimes.com/1987/07/16/obituaries/leslie-h-arps-dies-a-founding-member-of-major-law-firm.html> [<https://perma.cc/V7AB-VNKA>]. On the Enemy Objectives Unit, see W.W. Rostow, *Waging Economic Warfare from London: The Enemy Objective Unit*, CIA: STUD. INTELLIGENCE (May 8, 2007, 9:01 AM), https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol35no4/html/v35i4a06p_0001.htm [<https://perma.cc/ZU4T-27SH>]; Interview by Richard D. McKinzie with Charles P. Kindleberger, Chief of German and Austrian Economic Affairs Division, Department of State, in Cambridge, Mass. (July 16, 1973), <https://www.trumanlibrary.org/oralhist/kindbrgr.htm> [<https://perma.cc/9RKE-NCD2>].

71. 2 GUIDO PERERA, LEAVES FROM MY BOOK OF LIFE 79 (1975).

72. *Id.*

Perera also connected this awareness of inherent uncertainty that follows from interactive complexity to Root's humility: "Elihu Root, Jr., was a very modest man but his modesty was in no sense affected; it was securely based on a thorough and penetrating intellect and a flawless character."⁷³

In 1945, Elihu Root, Jr. was awarded the highest civilian decoration, the Medal for Merit, for his work on the Committee of Operational Analysts.⁷⁴ Perera's memoir reproduces a photo of the ceremony showing Root with Fowler Hamilton, Barton Leach and himself (all lawyers), and reprints a letter from Root to him saying "there should have been four medals or none, for if four men ever worked in complete and unstratified equality you and Bart and Fowler and I did during our years on the steering committee of the COA."⁷⁵

C. John J. McCloy

John J. McCloy, the third and youngest of our exemplars of lawyerly prudence, was born in Philadelphia in 1895 to modest but proud circumstances.⁷⁶ Here also we will satisfy ourselves with two anecdotes that illustrate how he acquired and exercised lawyerly prudence in international affairs.

Entering Amherst College in 1912, McCloy completed his junior year in May 1915 and sought out the opportunity to attend the four-week military training camp for college students at Plattsburg referred to earlier.⁷⁷ After completing training, he requested to remain for the "Business Men's Camp" beginning the next week, where he was exposed to many of the elite lawyers and businessmen who had responded to Grenville Clark and Elihu Root's call.⁷⁸ After graduating from Amherst in 1916, he again attended the business men's camp at Plattsburg, where he may have met first-time attendee Henry Stimson.⁷⁹ In the fall of 1916, McCloy entered Harvard Law School, where he crossed paths with many men already on the fast track to a prominent career in law, including Dean Acheson and Leo Gottlieb, but was himself only a middling student.⁸⁰ Over the course of his first year at the law school, news of the war in Europe became increasingly grave.⁸¹ By the end of the year, McCloy had decided to attend the Plattsburg camp for the third time in the summer of 1917, with the goal of winning a regular commission as a field artillery officer by the end of the summer.⁸²

He succeeded in his goal, and was invited to serve as aide-de-camp to Brigadier General Guy Preston.⁸³ General Preston and Lieutenant McCoy shipped out for

73. *Id.*

74. *Id.* at 150.

75. *Id.* at 151; Lauris Norstad, *W. Barton Leach: In His Country's Service*, 85 HARV. L. REV. 726, 726-28 (1972).

76. KAI BIRD, *THE CHAIRMAN: JOHN J. MCCLOY & THE MAKING OF THE AMERICAN ESTABLISHMENT* 25 (1992).

77. *Id.* at 40.

78. *Id.* at 41.

79. *Id.* at 45-46.

80. *Id.* at 49.

81. *Id.* at 50.

82. BIRD, *supra* note 76, at 50.

83. *Id.* at 51.

France with the 160th Field Artillery Brigade in July 1918.⁸⁴ After seeing a little action before Armistice Day on November 11, 1918, McCloy was transferred to General Pershing's AEF headquarters at Chaumont, where he met many of the great leaders of the Army,⁸⁵ including General John J. Pershing,⁸⁶ George C. Marshall,⁸⁷ and Douglas MacArthur,⁸⁸ as well one of the greatest popular heroes of the war, William "Wild Bill" Donovan.⁸⁹ With most of the mission accomplished, McCloy was soon discharged, and he re-entered Harvard Law School in the fall of 1919 and graduated in 1921.⁹⁰ McCloy's World War I experience thus constituted a precocious first step in what would become his long career of acquiring direct experience in events of great international significance.

McCloy then pursued a career as a corporate lawyer in New York, working first for the well-regarded but somewhat sleepy firm of Cadwalader, Wickersham & Taft, and then transferring after three years to the city's most advanced law firm, the Cravath firm.⁹¹ Cravath represented the vanguard of the modern "law factory," where a small number of experienced senior lawyers each trained and put to work groups of junior associates, and transmitted the firm culture of a rigid insistence on excellence.⁹² McCloy went on to practice at Cravath for nearly 20 years, finding both intellectually rewarding legal work and the opportunity to live and travel widely abroad.⁹³ He even occasionally worked on issues with an international and public dimension, as with the extended investigation he conducted into the responsibility for a notorious 1916 explosion of a U.S. arms depot on Black Tom Island in New York Harbor.⁹⁴ In 1934,

84. *Id.* at 52.

85. *Id.*

86. Incidentally, Pershing was himself trained as a lawyer at the University of Nebraska Law School when he was assigned to the university as military instructor during the early 1890s, and at the law school formed a lifelong friendship with Charles Dawes, the prominent international banker who received the Nobel Prize in 1925 for formulating the Dawes Plan to attempt to deal with post-WWI reparations issues and went on to serve as Calvin Coolidge's Vice President. JIM LACEY, *PERSHING: A BIOGRAPHY* 19 (2008).

87. Marshall went on to serve as Chief of Staff of the Army throughout WWII, then as Secretary of State under President Truman. Forrest C. Pogue, *George Catlett Marshall*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/biography/George-C-Marshall> [<https://perma.cc/4GY7-YVJX>].

88. MacArthur served as Chief of Staff of the Army during the 1930s, commander of allied forces in the Pacific during WWII, military governor of Japan during the post-war occupation, and initial commander of UN forces during the Korean War. D. Clayton James, *Douglas MacArthur*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/biography/Douglas-MacArthur> [<https://perma.cc/S3MG-F3EP>].

89. Donovan, a Columbia Law School graduate who was a prominent lawyer in his hometown of Buffalo, NY, would go on during World War II to found the Office of Strategic Services. BIRD, *supra* note 76, at 52.

90. *Id.* at 53, 56.

91. *Id.* at 61.

92. It is interesting to note, however, that by the time McCloy joined the Cravath firm in 1921, the legendarily hard-driving and rigid founder Paul Cravath, who had served during ex-WWI as an advisor to senior U.S. and international figures and was sometimes called to operate in a quasi-diplomatic capacity, had been changed by his wartime experience. *See id.* at 63 (stating Cravath's junior partner Swaine wrote that "The Cravath who returned from World War I was a much more human person than the prewar Cravath. . . . He acquired tolerance. He learned that few men are unflinching in their judgements and he became less sure of his own and less insistent that everything be done his way"); *see also* Priscilla Roberts, *Paul D. Cravath, The First World War, and the Anglophile Internationalist Tradition*, 51 *AUSTL. J. POL. & HIST.* 194, 199 (2005) (explaining that WWI changed Cravath's view).

93. BIRD, *supra* note 76, at 61-77.

94. *See* MICHAEL S. MAYER, *PRESIDENTIAL PROFILES: THE EISENHOWER YEARS* 488 (2010) (discussing McCloy's involvement in the Black Tom Island case where his clients were awarded \$50 million

new evidence about shadowy sabotage networks during WWI allowed McCloy to successfully re-open and eventually win in 1939 an action for damages against Germany for the destruction caused by the 1916 explosion.⁹⁵ This naturally attracted much public attention in the charged early WWII environment.⁹⁶

Nonetheless, when in 1940 McCloy received a call from Henry Stimson, the recently re-appointed Secretary of War,⁹⁷ requesting that he come to Washington to assist in some War Department matters, McCloy did not hesitate to accept, and shortly thereafter he resigned from his partnership in the Cravath firm and relocated to Washington.⁹⁸

It is futile for this brief Article to try to do justice to McCloy's WWII career as a public servant or to his subsequent intermittent service in important public roles after the war. He was generally recognized as perhaps the most irreplaceable of Secretary Stimson's key advisors during WWII,⁹⁹ he served as the second president of the World Bank from 1947–1949, and he was the first civilian U.S. High Commissioner for

against saboteurs working for the German government).

95. BIRD, *supra* note 76, at 78–95.

96. *Id.* at 113 (explaining that in the autumn of 1940 “[t]he newspapers were filled with stories of mysterious munition explosions,” reminiscent of the Black Tom Island case).

97. The famous story goes that the origin of Stimson's second appointment as Secretary of War in 1940 (when he was 73) lay with a private conversation in May 1940 between then Supreme Court Justice Felix Frankfurter and his old Harvard Law School classmate and friend Grenville Clark about the need for a “wartime” Secretary of War (to replace Harry Woodring) given the tenor of the news from Europe at the time. DUNNE, *supra* note 48, at 125–27, 131–32. Clark and Frankfurter drew up separate lists of their top choices for the post, and when Stimson's name appeared on both men's lists, they agreed immediately to promote his candidacy, with Frankfurter passing on the idea to President Roosevelt and Clark laying the groundwork with Stimson. *Id.* By June 1940, Roosevelt had called Stimson to offer him the position, and Stimson accepted—with the proviso that he would be assisted in the undertaking by an immediate circle of aides including some of the sharpest younger men. *Id.* These key aides turned out to be New York lawyer and judge Robert Patterson, Boston lawyer Harvey Bundy, New York banker Robert Lovett, and New York lawyer John McCloy. *Id.*

98. See BIRD, *supra* note 76, at 121–22 (“On December 18, Stimson went to see FDR and got the president's approval to appoint both McCloy and Lovett as ‘Special Assistants to the Secretary of War’ at a salary of \$8,000 each. McCloy had formally terminated his Cravath partnership on December 7, 1940, though he viewed this break as a temporary separation, not a divorce.”).

99. In his memoir discussing this period, Stimson observed that:

So varied were [McCloy's] labors and so catholic his interests that they defy summary. For five years McCloy was the man who handled everything that no one else happened to be handling. He became Stimson's principal adviser in the battle for the Lend-Lease Act and it was his skillful preparation that cleared the way for the War Department's successful assumption of the whole military burden of lend-lease procurement. Later he was Stimson's chief adviser on matters connected with international relations and his agent in supervising the great work of military government. He was equally good in a complicated interdepartmental negotiation or in dealing with Congress. His energy was enormous, and his optimism almost unquenchable. He became so knowing in the ways of Washington that Stimson sometimes wondered whether anyone in the administration ever acted without ‘having a word with McCloy’

HENRY L. STIMSON & MCGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE & WAR 342–43 (1947). Another accomplishment worthy of note was McCloy's supervision of the construction of the new Pentagon building across the Potomac when War Department wartime needs rapidly outstripped the space available to it—an innovative project to design and build the world's most capacious office building in record time (nonetheless the project was known for a time as “McCloy's Folly”). BIRD, *supra* note 76, at 177.

Germany from 1949–1952. Exploring these topics, however, must be left to other articles or books.¹⁰⁰

But among the things that particularly marked McCloy (and Elihu Root, Jr. and Henry Stimson) as exemplary was his (and their) exceptional ability to move from the private practice of law at the highest levels in New York to the public practice of international strategy at the highest levels in Washington and throughout the world—and not just once, but during multiple periods of extraordinary strategic consequence. In other words, McCloy, Root, and Stimson did not just begin as New York lawyers and then get pulled permanently into the Washington policy orbit. Instead, after completing their public service during periods of maximum need, they returned to New York to resume exercising their lawyerly abilities in the distinctive setting of private legal practice—and all three of these figures did this at least twice (and often more than that) as the nation moved from WWI to the interwar period, and then to WWII and the postwar period. By contrast, most of their contemporaries who experienced even some of these momentous events usually left the next crisis to subsequent generations, as they often followed a pattern of either moving permanently from their original professional base to Washington after initially being called to it by a major event like a world war, or performing a finite period of public service and then returning home for good.¹⁰¹

D. An Underappreciated Key to the New York Lawyer-Statesman Tradition: Living in Uniquely “Interesting Times”¹⁰²

Notwithstanding the inherent drama of even brief accounts of these three exemplary New York lawyer-statesmen, the point most relevant to the argument of this Article is less about *what* they did than it is about *when* and *how* they did it. It is by no means a coincidence that I selected three New York lawyer-statesmen who each served in various capacities (reflecting in part their different ages during the key years) in both World War I and World War II. One of the reasons Stimson, Root, Jr., and McCloy were able to acquire the experience they did is almost shockingly straightforward: They simply were born in just the right narrow window of time—the less than 30 years between 1867 and 1895.¹⁰³ Aside from their individual qualities, this fact was necessary for them to see more, do more, and learn more through direct experience about what does and does not work in truly consequential international strategy than lawyer-statesmen before or since.

100. See generally BIRD, *supra* note 76; ALAN BRINKLEY, LIBERALISM AND ITS DISCONTENTS 164–209 (1998); THOMAS ALAN SCHWARTZ, AMERICA’S GERMANY: JOHN J. MCCLOY AND THE FEDERAL REPUBLIC OF GERMANY (1991).

101. See FREDERIC S. NATHAN, CENTURIONS IN PUBLIC SERVICE: PARTICULARLY AS PRESIDENTS, SUPREME COURT JUSTICES & CABINET MEMBERS 108–09 (2010) (describing the evolution of the pattern of young lawyers taking public service jobs and then returning to New York).

102. See Robert F. Kennedy, N.U.S.A.S. “Day of Affirmation” Speech at the University of Cape Town, South Africa (June 6, 1966), <http://www.rfksafilm.org/html/speeches/unicape.php> (quoting the Chinese curse “may he live in interesting times”).

103. It goes without saying that the three lawyers I’ve selected as examples for this Article are far from the only New York lawyers born during this window who also combined distinguished public careers spanning the two world wars with longstanding ties to New York legal practice. Among the most obvious others are John Foster Dulles (born 1888) and Allen Dulles (born 1893), who both practiced law in New York at Sullivan & Cromwell. See generally STEPHEN KINZER, THE BROTHERS: JOHN FOSTER DULLES, ALLEN DULLES, AND THEIR SECRET WORLD WAR (2013) (chronicling the lives of Dulles brothers).

III. THE FALL OF LAWYERLY PRUDENCE IN INTERNATIONAL STRATEGY

One can see some continuing, partly second-hand echoes of this rare experience in the next generation¹⁰⁴ of lawyers who learned at the feet of the “double world war” generation. Consequently, the influence continued with people born during the first decade or two of the 20th century.¹⁰⁵ But the influence of the particular type of double

104. The reality, and significance, of “generations” in any particular context is of course always a long-contested issue. A number of scholars have discussed the concept and significance of generations in the history of American foreign policy. See generally ARTHUR M. SCHLESINGER, *PATHS TO THE PRESENT* (1964); Frank L. Klingberg, *The Historical Alternation of Moods in American Foreign Policy*, 4 *WORLD POL.* 239, 239–373 (1952); Frank H. Denton & Warren Phillips, *Some Patterns in the History of Violence*, 12 *J. CONFLICT RESOL.* 182, 182–95 (1968); Samuel P. Huntington, *Paradigms of American Politics: Beyond the One, the Two, and the Many*, 89 *POL. SCI. Q.* 1, 1–26 (1974); YUEN FOONG KHONG, *ANALOGIES AT WAR: KOREA, MUNICH, DIEN BIEN PHU, AND THE VIETNAM DECISIONS OF 1965* (1992); Jack S. Levy, *Learning and Foreign Policy: Sweeping a Conceptual Minefield*, 48 *INT’L ORG.* 279 (1994). But I want to suggest that a resolution of these academic debates is unnecessary for the argument of this Article, which is not chiefly concerned with the lessons different generations (however defined) may or may not have drawn from different experiences. My focus here is instead on trying to tease out a common sensibility possessed by a select group of individuals who (1) shared a common formative professional training and practice as New York corporate lawyers during a period roughly bounded by the first four decades of the 20th century and (2) were directly involved as soldiers and officials in both of the two world wars—thus allowing them, in effect, to serve as members of something like a single, unusually extended, generation. While the juxtaposition of these two pivotal sets of experiences is my own, I am greatly indebted to the work of legal historian Robert W. Gordon for my understanding of the distinctive professional ethos of elite New York legal practice of the late 19th and early 20th centuries, including the emphasis on the ideal of the “citizen lawyer.” To take just one example from his many articles over the past three decades touching on this broad subject, in his 1988 article, Gordon describes as arguably “a true Golden Age compared to the present” the period 1900–1975—which roughly coincides with the combined period of peak professional activity of Stimson, Root, Jr. and McCloy taken together. Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U.L. REV.* 1, 60 (1988). For other relevant works by Robert W. Gordon, see generally Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870–1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51 (Gerard W. Gewalt ed., 1984); Robert Gordon, *The American Legal Profession, 1870–2000*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER* (1920–) 73 (2008); Robert W. Gordon, *The Citizen Lawyer: A Brief History of a Myth with Some Basis in Reality*, 50 *WM. & MARY L. REV.* 1169 (2009).

105. An obvious example of a group to which this applies are lawyers who might be called the “children of Root Clark”—lawyers such as Fowler Hamilton (b. 1911) and George Ball (b. 1909, another of the founding partners of the Cleary Gottlieb law firm that descended from the Root Clark firm), who either worked directly with Root, Jr. or Clark or as the close colleagues of others who had (such as the other founding partners of Cleary Gottlieb), and thus picked up through a kind of osmosis the lawyerly habits of mind not only of Root and Clark and their partners, but also of the lawyers that the Root Clark lawyers themselves looked up to such as Stimson and Elihu Root, Sr.—as well as the habit of thinking that they were quite capable of contributing valuable broader strategic insights and management capabilities to the world of U.S. international strategy. See GOTTLIB, *supra* note 45 (describing Fowler Hamilton’s association with the Root Clark firm); see also GEORGE W. BALL, *THE PAST HAS ANOTHER PATTERN: MEMOIRS* 101 (1982) (describing Ball’s decision with Fowler Hamilton and Hugh Cox in 1945 to join with the four partners leaving the Root Clark firm to form a new, conjoined firm known initially in New York as Cleary, Gottlieb, Friendly & Cox, and from 1950, as Cleary, Gottlieb, Friendly & Hamilton, and in Washington as Cleary, Gottlieb, Friendly & Ball). In an exceptional case or two this transmission mechanism might even extend to a New York lawyer born in the second decade of the 20th century, such as Cyrus Vance (b. 1917), who regarded the eminent New York lawyer John W. Davis (b. 1873) of the New York firm Davis, Polk & Wardwell as a father figure and early on worked at the New York firm of Simpson, Thacher & Bartlett. See DAVID S. MCLELLAN, *CYRUS VANCE* 1–5 (1985) (describing Vance’s close relationship with his uncle John W. Davis and summarizing his tenure at Simpson Thacher & Bartlett prior to his public service in the Defense

world war-learned and war-tested lawyerly prudence described here had significantly faded by the time we got to the generation whose direct strategic experience was oriented solely around WWII, rather than both world wars.

I want to avoid psychoanalyzing these figures, so I leave my comment on this “WWII only” generation at this: Perhaps it was possible for someone to have *one* “good” world war—one in which things seemed to go more or less the right way (eventually). But from my study of the experience of the “double world war” generation (consistent with my own lesser experience), it seems exponentially harder to have had *two* “good” world wars¹⁰⁶ (recall the sentiment attributed to Elihu Root, Jr. at the end of WWII: “[I]t was impossible to determine in advance what man’s ingenuity might accomplish when faced with desperate necessity.”¹⁰⁷). Instead, that uniquely intensive degree of experience seemed to have almost inevitably underscored the difficulty of fully predicting or controlling the consequences of large-scale international actions,¹⁰⁸ and to have underscored the power of not only intended but also unintended consequences.¹⁰⁹

In any case, by the 1960s the social factors that had supported a special role for lawyerly prudence in U.S. foreign and national security policy and international strategy had undergone some significant changes. First was the rise of new disciplinary competitors in the policy elite with their own claims to special expertise on international matters, most notably economists and political scientists.¹¹⁰ Second,

Department during the Kennedy and Johnson administrations and as Secretary of State during the Carter administration). After that, however, the transmission seems to grow unavoidably faint. While many lawyers born after WWI obviously still established impressive legal practices in a proliferating number of U.S. metropolitan centers apart from New York—including Chicago, Dallas, Los Angeles, and eventually most of the nation’s biggest cities—by the time they came to maturity there appears to have been less of an accepted pattern of back-and-forth movement to Washington. *Infra* note 119. Consequently, it became more common for ambitious lawyers either to move to Washington and not return or to simply resist the temptation of Washington in the first place.

106. Relevant to this theme generally is an observation by the theologian and nationally influential realist foreign policy commentator during the early post-WWII period Reinhold Niebuhr, who noted in a 1956 preface to a book of his originally published in 1929:

As the self-revelations of a young parson [these notes] express the then typical notions of liberal Protestantism before the whole liberal world view was challenged by world events. Of course they were written after the first world war. But that war did not essentially challenge the liberal culture of America. It required a depression and another world war to corrode an optimism in America which was lost in Europe after the first world war.

REINHOLD NIEBUHR, *LEAVES FROM THE NOTEBOOK OF A TAMED CYNIC* 8 (1956).

107. PERERA, *supra* note 71, at 79.

108. It is irresistible to quote on this proposition the unimpeachable (albeit non-lawyer) Dwight D. Eisenhower, who famously said in 1946: “I hate war as only a soldier who has lived it can, only as one who has seen its brutality, its futility, its stupidity.” Dwight D. Eisenhower, Address at the Canadian Club (Jan. 10, 1946).

109. The definitive description of the phenomenon of unintended consequences was given by Robert K. Merton. Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 894–904 (1936); see also *The Paradox of Complexity*, *supra* note 2, at 32, 33. The importance of recognizing unintended consequences of public policies remains a common theme. See, e.g., AARON WILDAVSKY, *SPEAKING TRUTH TO POWER* 47 (1987) (“[S]ociety’s capacity for measuring results has outstripped its ability to cause consequences. We know that programs have failed but we have been unable to bring about the changes in behavior that would have labeled them successful.”).

110. See generally YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002).

Washington developed as an economic and cultural ecosystem in its own right.¹¹¹ While Washington did not necessarily become less dependent on importing talented lawyers (and other professionals) from New York and other major cities, the growth of Washington's economy made it less necessary and less attractive for those imported professionals to return to where they came from after investing time and effort learning how government and Washington worked.¹¹² In short, what had been a "two-way ticket" between New York and Washington, D.C. for our exemplary New York lawyer-statesman into the 1960s now increasingly became a "one-way ticket."

Third, partly in response to the previous two changes, New York and other non-Washington lawyers tactically began to cede the territory of international policy and strategic matters to Washington, and instead increasingly focused their efforts on issues with a more obvious legal dimension.¹¹³ In their chapter *Law, Lawyers, and Empire*,¹¹⁴ Garth and Dezalay describe the process by which New York lawyers interested in international policy gradually shifted their emphasis from strategic questions to fields such as international human rights law and international commercial arbitration that could be more easily protected as the inherent preserve of lawyers and kept to a greater extent in New York.¹¹⁵ Fourth, the pace required of lawyers working for rich and demanding financial sector clients on Wall Street increased to such a degree that it required a virtually total commitment by ambitious lawyers, leaving New York lawyers working in big firms in the 1970s with little time to think about international strategy and straddle the Northeast corridor between New York and Washington, except on client business.¹¹⁶ Finally, in part to compensate for the loss of time that could be have been used for other things, the Wall Street legal sector became by the 1980s so remunerative that the idea of leaving it for a lower-paying government job (and uncertain prospects if one later wanted to return) became increasingly unpopular.¹¹⁷ The result of all this was that by the 1980s the tradition of lawyerly prudence in international strategy had largely faded away. John McCloy died in 1989.¹¹⁸

111. See generally MEG GREENFIELD, *WASHINGTON* (2001).

112. Robert G. Kaiser provides a rich history of the rise of the lobbyist sector in Washington since WWII and particularly since the 1970s. See generally ROBERT G. KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT* (2009) (explaining how so many lawyers who were more traditional lawyers in their original city and perhaps originally came to Washington in order to serve in government ended up choosing to stay in Washington and join the lucrative and growing legal/lobbying sector).

113. DEZALAY & GARTH, *Law, Lawyers and Empire*, *supra* note 29, at 740–57.

114. *Id.*

115. *Id.* at 44–51.

116. NATHAN, *supra* note 101, at 114–15.

117. Contrast this state of affairs with the older and more flexible expectations of legal employers and their bank clients described by Stimson in his 1948 autobiography. *Id.* at 119–21 (“During my various excursions into public life I always felt that I remained a lawyer with a law firm waiting as a home behind me, to which I could return on the completion of my public task. . . . This feeling gave me a confidence in the performance of my public duties which was an inestimable encouragement.”).

118. A kind of testament to McCloy and the end of the old tradition can be found in Alan Brinkley's 1983 profile of McCloy, which concluded by recounting “a story making the rounds at cocktail parties in Washington and New York about an episode in the 1980 presidential campaign.” Alan Brinkley, *Minister Without Portfolio*, *HARPER'S*, Feb. 1983, at 46. As Brinkley described it,

IV. THE FUTURE OF PRUDENCE IN INTERNATIONAL STRATEGY: FROM LAWYERLY TO POST-LAWYERLY

Let me close by returning to the specific context for the question of the contemporary utility of prudence in international strategy presented by this symposium: How we should best learn from our relevant recent experiences with interventions in Iraq, Afghanistan, and elsewhere in the region in deciding a current strategy for responding to the challenge of ISIS, while giving due consideration for the future. The first part of my argument has been an indirect one: That the most effective way for us to meet the ISIS challenge—or really any strategic-level international problem, private as well as public, and economic as well as political or military—is to identify people with the background and qualities to approach strategic challenges in a manner comparable to that which the New York lawyer-statesmen we’ve discussed might have used—namely, in a lawyerly prudent matter that, as in Titian’s painting, learns from the experience of the past, and acts prudently in the present, to avoid spoiling tomorrow.

However, the other part of my historical argument has been that for over-determined reasons, the tradition of “lawyerly prudence” in international strategy, practiced as I’ve described it here, is now, in essence, a dead letter.

Consequently, the final questions we are left with are: (1) Whether any or all of the elements of lawyerly prudence are still valuable, and (2) if so, can they exist and be cultivated in a *broader* group of citizen-statespeople who have acquired relevant, comparably intense experience?

To answer this, recall the fundamental qualities of lawyerly prudence sketched out near the beginning of this Article and illustrated through the accounts of our three New York lawyer-statesmen: (1) Experience with the complexity that follows from national and international scale activity, in matters public and private; (2) a heightened awareness of the uncertainty inherent in complex (especially international) undertakings, and from that, a humble recognition that the consequences of actions cannot always be predicted or controlled;¹¹⁹ (3) appreciation of at least recent history as something that necessarily influences, and constrains the forms of, political change;¹²⁰ and (4) a substantial store of direct experience of strategically consequential events.

John Anderson—in the heat of the primaries, when it appeared he might have a chance—called John McCloy (as political figures have been doing for forty years) and asked for some advice. He wanted the name of someone in the Stimson-Acheson-McCloy tradition, someone experienced in the corporate establishment and yet wise in international affairs, a Wall Street lawyer who might make a good secretary of state. McCloy hardly paused to think before answer: “You won’t find one. Those lawyers don’t exist anymore. They’re all too busy making money.”

Id.

119. The great international relations scholar Hans Morgenthau taught us that international relations requires no less than “cosmic humility,” because “[i]f you know that states are subject to the moral law is one thing; to pretend to know what is morally required of states in a particular situation is quite another.” Hans J. Morgenthau, *Another “Great Debate”: The National Interest of the United States*, 46 AM. POL. SCI. REV. 961, 983–84 (1952); see also David Wolitz, *Indeterminacy, Value Pluralism, and Tragic Cases*, 62 BUFF. L. REV. 529, 587 (2014) (discussing the ways uncertainty and indeterminacy leads to tragic choices where a decision maker must decide, even while knowing that he or she lacks full knowledge of the consequences of his or decision).

120. Note that a lawyerly appreciation of at least the recent past (because the past is one of the constraints

In fact, this last element was the spur to my first insight that eventually led to this Article: When it occurred to me that if direct experience of strategically consequential events is a necessary condition for prudence, a significant number of our contemporaries today have already accumulated quite a significant store of strategically significant experience since September 2001, and done so during an even more compressed period than the double war generation—15 years versus 30. To put it differently, the contingent historical fact that we were born when we were and thus ended up in a position to experience the big strategic events of the last 15 years at least gives us a shot at recreating a version of the old lawyerly prudence. While we have not had two world wars, we have had two fairly large-scale (by contemporary standards) regional interventions, as well as many smaller interventions, and a wide range of ongoing war-like activities (and this is to say nothing of the potentially even more strategically consequential international financial crises since 2008). My original question was: Can we take advantage of this opportunity? Is it possible for a critical mass of people today to also embrace the other elements of lawyerly prudence and then pull the pieces together into a coherent and self-conscious sensibility that might serve (with appropriate updates as necessary) as a kind of new (or post-) lawyerly prudence *for our time*?

So far, the record has not been particularly encouraging. As a final personal data point, eight years ago I gave a talk at New York Law School based on my experiences to that point in Iraq, on what I thought were the mistakes and lessons (on the civilian side) of the Iraq intervention.¹²¹ Nonetheless, just a couple of years later, I found myself in Afghanistan trying to undo some strategy mistakes that sometimes seemed eerily similar.¹²²

Nonetheless, I think it is possible to leave us in at least a potentially optimistic place about the future of a “post-lawyerly prudence.” While it is true that the group that exemplified these distinctive qualities in the past—namely lawyers who were products of the distinctive professional training, legal practice, and war-time experiences described here—have become, since roughly the last third or quarter of the 20th century, unable to bear the same responsibility for exemplifying the qualities that they did 100, 75, or even 50 years ago, it is also true that the challenging

on the future) is distinct from a true historian’s detailed knowledge of history for its own sake. As such, the level of knowledge of the past necessary for lawyerly prudence is a much less demanding standard than has sometimes been suggested by eminent historians. See generally ERNEST R. MAY, “LESSONS” OF THE PAST: THE USE AND MISUSE OF HISTORY IN AMERICAN FOREIGN POLICY (1973); RICHARD E. NEUSTADT & ERNEST R. MAY, THINKING IN TIME: THE USES OF HISTORY FOR DECISION MAKERS (1986). May and Neustadt offer many examples of good and bad uses of history in foreign policy and make many useful suggestions about how to avoid common pitfalls. More recently, Allison and Ferguson take up May and Neustadt’s argument for the value of “historian’s history” being part of the policymaking process and propose to operationalize it by calling for a group of actual historians to be made a part of the White House staff. Graham Allison & Niall Ferguson, *Why the U.S. President Needs a Council of Historians*, ATLANTIC (Sept. 2016), <https://www.theatlantic.com/magazine/archive/2016/09/dont-know-much-about-history/492746/> [<https://perma.cc/XYL5-9T4L>]. This is a thought-provoking idea, but I mention it only to make clear that the understanding of the past I have discussed here is quite explicitly the less-demanding level of understanding of a well-educated lawyer rather than that of a trained historian. While knowledge of the past has inherent value and almost always has some use, to be lawyerly prudent one only has to know enough about the past to have some sensitivity to the kinds of pitfalls that might jeopardizing the future.

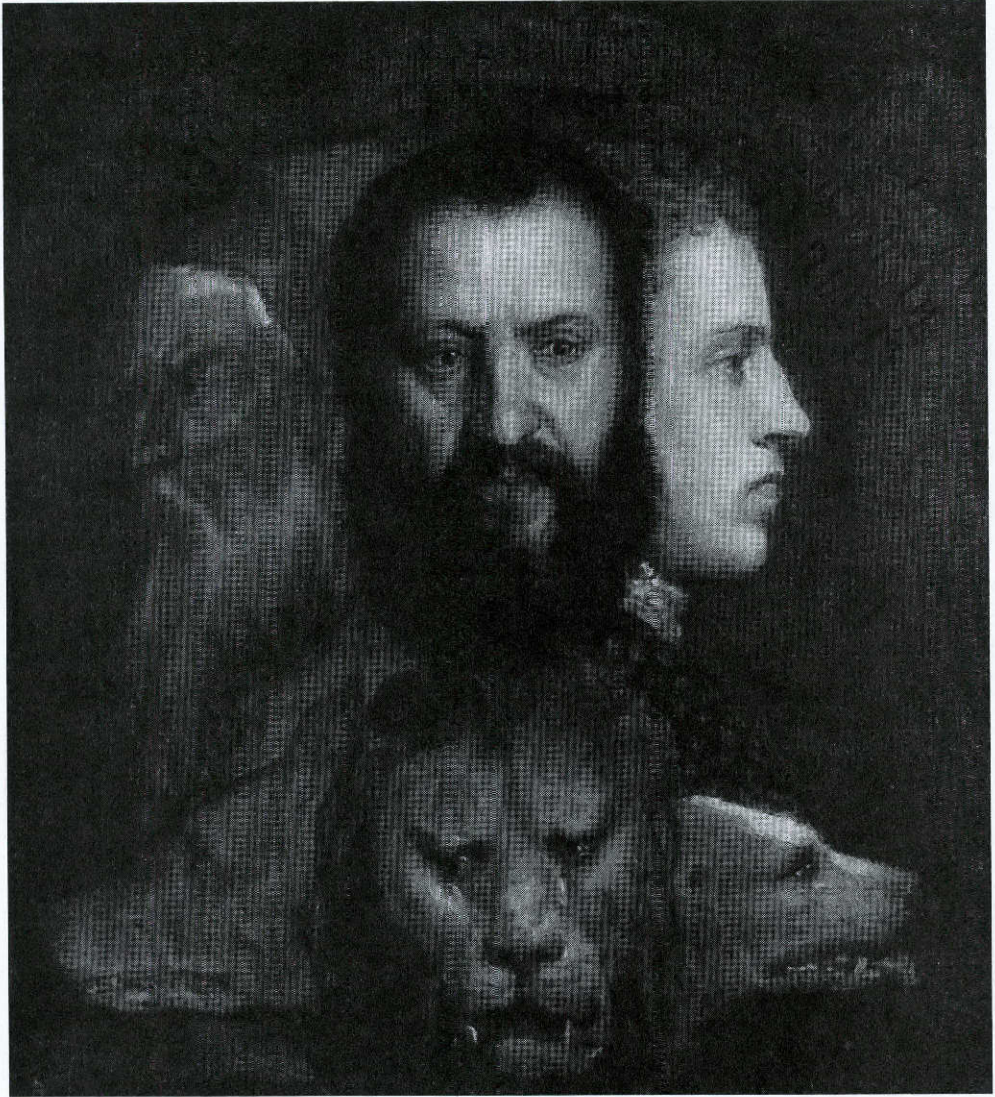
121. Jeremiah S. Pam, C.V. Starr Lecture: State-building and the Interplay Between U.S. and Local Institutions: Lessons from Iraq, Center for International Law, New York Law School (Nov. 5, 2008).

122. See generally *The Rise and Fall*, *supra* note 2.

international events of the last 15 years have provided the opportunity for the creation of new groups of citizen-statespeople whose international strategic judgment, like that of their lawyer-statesmen predecessors, has been forged in part by direct experience in multiple international strategic crises. And the direct experience of these crises has given these select citizen-statespeople the raw material with which it might yet be possible to self-consciously formulate a new sensibility of prudence: One that begins with the key components of the old lawyerly prudence—experience with complexity; awareness of inherent uncertainty and the related imperative of humility; appreciation of at least the recent past; and last but not least, a constantly-interrogated store of the hard-earned lessons of experiences over the last 15 years—and then adds to these any new components called for by the particularities of our own era. If we think what I've called lawyerly prudence was useful in the past, perhaps the least that can be said is that post-lawyerly prudence is worth a try in the present.

ANNEX

Titian and Workshop, *An Allegory of Prudence* (1565),
<http://www.nationalgallery.org.uk/paintings/titian-an-allegory-of-prudence>
[<https://perma.cc/TLZ2-RL2P>].



Unresolved Legal Questions Concerning Operation Inherent Resolve

OREN GROSS*

To start from first principles—the United States complies with the international law of armed conflict in our military campaign against ISIL, as we do in all armed conflicts. We comply with the law of armed conflict because it is the international legal obligation of the United States; because we have a proud history of standing for the rule of law; because it is essential to building and maintaining our international coalition; because it enhances rather than compromises our military effectiveness; and because it is the right thing to do.¹

TABLE OF CONTENTS

INTRODUCTION222

I. RISE OF ISIS.....222

II. OPERATION INHERENT RESOLVE.....229

III. INTERNATIONAL LAW AND OPERATION INHERENT RESOLVE.....231

A. *Security Council Authorization*.....231

B. *Invitation to Intervene*.....235

C. *Humanitarian Intervention*.....238

D. *Self-Defense*240

1. The Inherent Right of Individual or Collective Self-Defense240

2. May a State Legally Exercise Force in Self-Defense Against a Non-State Actor?.....243

3. “Unable or Unwilling”246

CONCLUSION253

* Irving Younger Professor of Law and Director, Institute for International Legal & Security Studies, University of Minnesota Law School. My thanks to Andrew Leindecker and Caroline Bressman for excellent research assistance. I am able and willing to accept full responsibility for any error contained herein.

1. Brian J. Egan, Legal Adviser, U.S. Dep’t of State, Keynote Address at the 110th Annual Meeting of the American Society of International Law (Apr. 1, 2016).

INTRODUCTION

Since August 2014, the United States and several of its allies have been embroiled in military operations against the Islamic State of Iraq and al-Sham in Iraq, Syria, and later, also in Libya. Those military engagements raise a plethora of vexing legal questions both on the domestic constitutional law plane in the United States² and on the international level. This Article seeks to explore and examine the legal justifications for the United States's military operations against ISIS under international law.

Part I sketches the rise of ISIS, and Part II briefly describes the contours of Operation Inherent Resolve, which was launched by the United States on August 8, 2014 with a series of airstrikes directed against ISIS targets in Iraq before expanding, a month later, to attacks on ISIS targets in Syria. Part III examines critically the four main legal justifications put forward in support of the United States's (and its allies') military operations against ISIS, namely acting in pursuance of Security Council authorization (in reliance on Security Council Resolution 2249 of 2014), invitation by the Iraqi government to its friends and allies to intervene militarily in order to defeat ISIS, claims of humanitarian intervention, and last but not least, arguments that in pursuing military options, the United States exercises its inherent right for individual or collective self-defense.

I. RISE OF ISIS

The origins of ISIS can be traced back to 1999 and the founding of *Jamaat al-Tawhid wa'l-Jihad* (JTWJ) by Abu Musab al-Zarqawi.³ In October 2004, after several years in which JTWJ was loosely affiliated with al-Qaeda,⁴ al-Zarqawi formally pledged allegiance to that organization and to Osama bin Laden, renaming JTWJ as al-Qaeda in the Land of Two Rivers (AQI).⁵ However, there continued to be an “ideological divide” between AQI and al-Qaeda, as “Zarqawi felt that the only way to save the *umma* (global Islamic community) from itself was through purging it, whereas bin Laden's number two, Ayman al-Zawahiri, believed that Muslims were not the problem, but that instead the ‘apostate’ institutions needed to be changed.”⁶ In 2006, al-Zarqawi established a new terrorist organization, the *Majlis Shura al-Mujahedin* (MSM), a collection of “Iraqi insurgent factions . . . with AQI at the top.”⁷ Al-

2. These questions are explored separately in Oren Gross, *Fighting ISIS Under the Constitution* (2017) (unpublished manuscript) (on file with author).

3. Aaron Y. Zelin, *The War between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement*, WASH. INST. NEAR E. POL'Y, June 2014, at 1, http://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote_20_Zelin.pdf [<https://perma.cc/M4B7-XGRF>].

4. *Id.* at 2; see also JOBY WARRICK, *BLACK FLAGS: THE RISE OF ISIS* 67–68 (2016) (detailing how al-Qaeda provided “start-up money” to al-Zarqawi, as al-Zarqawi was identified as someone al-Qaeda could use to help establish a “presence in the countries of the Levant”).

5. Zelin, *supra* note 3, at 2; see also WARRICK, *supra* note 4, at 174 (“[T]hree years after the attacks of September 11, 2001, Zarqawi offered the potential for something that Bin Laden desperately needed: a win . . . [b]y co-opting Zarqawi, al-Qaeda could share the credit for his successes and draw in new energy.”).

6. Zelin, *supra* note 3, at 3.

7. *Id.*

Zarqawi's death in June 2006 by U.S. airstrike⁸ "invalidated MSM's implied pledge to bin Lad[e]n."⁹ Within a few months, al-Zarqawi's successor, Abu Hamza al-Muhajir, shifted his loyalty to Abu Omar al-Baghdadi, the leader of the Islamic State of Iraq (ISI).¹⁰ In 2010, al-Baghdadi was killed in "an operation led by Iraqi security forces with the support of U.S. troops."¹¹ He was replaced by Abu Bakr al-Baghdadi, who, in April 2013, changed the organization's name to the Islamic State of Iraq and al-Sham (ISIS), announcing that it was extended into Syria.¹² Baghdadi went so far as to assert that al-Zarqawi was never truly loyal to Osama bin Laden and al-Qaeda and that the purported alliance was "for strategic reasons, and not out of some genuine devotion or need."¹³

For its part, al-Qaeda openly disavowed ISIS in February 2014, declaring, "ISIS is not a branch of the Qaidat al-Jihad [al-Qaeda's official name] group, we have no organizational relationship with it, and the group is not responsible for its actions."¹⁴ Part of the reason for the split is that ISIS believes that it—and not the current iteration of al-Qaeda—is the "true heir of bin Laden's al-Qaeda."¹⁵ There were also deep ideological differences between ISIS and al-Qaeda responsible for the groups' split. As an example, al-Qaeda had deep misgivings regarding the "beheadings and other shock-theater tactics" used by ISIS.¹⁶

In June 2014, ISIS declared itself a Caliphate (Islamic state),¹⁷ claiming that its own leader, al-Baghdadi, was the spiritual leader of all Islam.¹⁸ Since then ISIS and other terrorist organizations pledging allegiance to the caliphate have established provinces in Syria, Iraq, Saudi Arabia, Yemen, Afghanistan, Pakistan, Egypt, Libya, Algeria, and Nigeria.¹⁹

8. Ellen Knickmeyer & Jonathan Finer, *Insurgent Leader Al-Zarqawi Killed in Iraq*, WASH. POST (June 8, 2006, 5:57 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/08/AR200606080114.html> [https://perma.cc/RE47-M3NB].

9. Zelin, *supra* note 3, at 3.

10. *Id.*

11. Waleed Ibrahim, *Al Qaeda's Two Top Iraq Leaders Killed in Raid*, REUTERS (Apr. 19, 2010, 4:25 PM), <http://www.reuters.com/article/us-iraq-violence-alqaeda-idUSTRE63I3CL20100419> [https://perma.cc/VCQ2-RZXA].

12. Zelin, *supra* note 3, at 4.

13. WARRICK, *supra* note 4, at 283.

14. Zelin, *supra* note 3, at 5.

15. *Id.* at 5–6.

16. WARRICK, *supra* note 4, at 283–84.

17. Karen Yourish et al., *Where ISIS Has Directed and Inspired Attacks Around the World*, N.Y. TIMES (Mar. 22, 2016), <http://www.nytimes.com/interactive/2015/06/17/world/middleeast/map-isis-attacks-around-the-world.html> [https://perma.cc/575B-VFPK].

18. Adam Withnall, *Iraq Crisis: What Is a Caliphate?*, INDEPENDENT (June 30, 2014), <http://www.independent.co.uk/news/world/middle-east/iraq-crisis-what-is-a-caliphate-9572100.html> [https://perma.cc/MHG4-C3NK] (noting that the last widely recognized caliphate was the Ottoman Empire caliphate, which ended in the early 20th century).

19. See Karen Yourish et al., *How Many People Have Been Killed in ISIS Attacks Around the World*, N.Y. TIMES (July 16, 2016), <http://www.nytimes.com/interactive/2016/03/25/world/map-isis-attacks-around-the-world.html> [https://perma.cc/6FXU-HW4K] (demonstrating on a map that ISIS has declared provinces in Syria, Saudi Arabia, Afghanistan, Pakistan, Egypt, Libya, Algeria, and Nigeria and that IS conducts regular military operations in Iraq and Turkey).

Nowhere was ISIS's expansion and reach as wide as in Iraq and Syria. In June 2016, the United Nations Human Rights Council concluded that "Islamic State forces have committed genocide and other war crimes in a continuing effort to exterminate the Yazidi religious minority in Syria and Iraq."²⁰ These crimes have included "mass killings of Yazidi men and boys who refused to convert to Islam, . . . [with d]ozens of mass graves . . . uncovered in areas recaptured from [ISIS.]"²¹ ISIS has also committed brutal acts of rape and sexual slavery,²² thrown homosexuals off of buildings,²³ engaged in torture,²⁴ forced marriages,²⁵ detonated bombs in civilian centers,²⁶ and carried out attacks targeting children.²⁷

Raqqa, one of the largest cities in Syria, was taken by ISIS in January 2014 and made into the capital of the caliphate.²⁸ In Iraq, ISIS captured the city of Fallujah in the same month, with the Anbar province becoming "a battleground" that spring.²⁹ Five months later, the cities of Mosul and Tikrit were seized "in a blitz offensive."³⁰ ISIS continued to expand its reach in Iraq, "seiz[ing] the districts of Sinjar, Tel Afar and the Ninewa Plains" in August 2014.³¹

20. See Nick Cumming-Bruce, *ISIS Committed Genocide Against Yazidis in Syria and Iraq*, U.N. Panel Says, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/2016/06/17/world/middleeast/isis-genocide-yazidi-un.html> [<https://perma.cc/HBC9-2ZTT>].

21. *Id.*

22. Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html> [<https://perma.cc/T43F-P8KB>].

23. Isaac Chotiner, *The ISIS Correspondent*, SLATE (July 12, 2016, 5:45 AM), http://www.slate.com/articles/news_and_politics/interrogation/2016/07/rukmini_callimachi_the_new_york_times_isis_reporter_discusses_her_beat.html [<https://perma.cc/6DH3-Y2CN>] ("[T]he ISIS ideology is a perfect place for somebody who is homophobic. This an ideology of a group of people that are throwing homosexuals off of buildings in Iraq and Syria as punishment for what they consider to be their devious sexuality.").

24. William Booth & Aaso Ameen Shwan, *Iraqis Find Evidence of Torture by Islamic State in Mass Grave near Mosul*, WASH. POST (Nov. 8, 2016), https://www.washingtonpost.com/world/middle_east/iraqis-find-evidence-of-torture-by-islamic-state-in-mass-grave-near-mosul/2016/11/08/989c9dc4-a521-11e6-ba46-53db57f0e351_story.html?utm_term=.408968521a8b [<https://perma.cc/NB2A-N7BA>].

25. *Iraq: Sunni Women Tell of ISIS Detention, Torture*, HUM. RTS. WATCH (Feb. 20, 2017, 1:01 AM), <https://www.hrw.org/news/2017/02/20/iraq-sunni-women-tell-isis-detention-torture> [<https://perma.cc/ER7W-XBDC>] ("Fighters from the Islamic State . . . are arbitrarily detaining, ill-treating, torturing, and forcibly marrying Sunni Arab women and girls . . .").

26. See WARRICK, *supra* note 4, at 285 ("ISIS dispatched suicide bombers into sports arenas and community soccer games as well as mosques, cafés, and markets.").

27. *Id.* ("Even Iraqis inured to bloodshed expressed shock when an ISIS recruit drove an explosives-laden truck into an elementary-school playground . . . in October 2013, killing thirteen children . . .").

28. *ISIL Recaptures Raqqa from Syria's Rebels: Al-Qaeda-linked Group Take the Northern City After Fierce Fighting with a Loose Coalition of Rebel Groups*, AL JAZEERA (Jan. 14, 2014), <http://www.aljazeera.com/news/middleeast/2014/01/isis-recaptures-raqqa-from-syrias-rebels-2014114201917453586.html> [<https://perma.cc/42DB-W7HG>].

29. U.N. High Comm'r for Hum. Rts., *Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups*, para. 4, U.N. Doc. A/HRC/28/18 (Mar. 27, 2015).

30. *Id.*

31. *Id.* para. 5.

In early 2015, ISIS became a truly globalized terrorist organization. Since then, more than 1,200 people outside of Iraq and Syria have been killed in attacks coordinated or inspired by ISIS.³² These terrorist attacks have included:

- January 2015: “A series of simultaneous bombings targeting security facilities in the Sinai killed at least 26 people,” with ISIS claiming responsibility.³³
- February 2015: In Libya, ISIS claimed responsibility “for three car bombs that killed at least 38 people.”³⁴
- March 2015: A series of suicide attacks on mosques throughout Yemen took the lives of at least 130 citizens.³⁵
- April 2015: In Sinai, Egypt, “[ISIS] carried out three separate attacks on Egyptian security forces . . . including bombing a police station,” killing at least 12 people.³⁶
- May 2015: ISIS claimed responsibility “for a suicide bombing during midday prayer at a Shiite mosque in eastern Saudi Arabia” that killed at least 21 people and injured more than 120 others.³⁷
- June 2015: A series of car bombings in Sana, Yemen killed at least 30 people.³⁸
- June 2015: An ISIS gunman killed at least 38 people, “most of them British tourists,” at a resort in Tunisia.³⁹

32. Yourish, *supra* note 17.

33. David D. Kirkpatrick & Merna Thomas, *Bomb Attacks at Security Sites in Sinai Kill at Least 26*, N.Y. TIMES (Jan. 29, 2015), <https://www.nytimes.com/2015/01/30/world/middleeast/bombings-of-security-facilities-in-sinai-kill-at-least-26.html> [https://perma.cc/TK28-MYNH].

34. David D. Kirkpatrick, *Ties to Islamic State Cited by Group in Libya Attacks*, N.Y. TIMES (Feb. 20, 2015), <http://www.nytimes.com/2015/02/21/world/middleeast/militants-claiming-isis-ties-say-they-carried-out-libya-bombings.html> [https://perma.cc/B7RB-6YWY].

35. Mohammed Ali Kalfood et al., *Suicide Attacks at Mosques in Yemen Kill More Than 130*, N.Y. TIMES (Mar. 20, 2015), <http://www.nytimes.com/2015/03/21/world/middleeast/suicide-attacks-at-shiite-mosques-in-yemen.html> [https://perma.cc/Q4U2-BB2N].

36. Kareem Fahim & Merna Thomas, *Sinai Group Kills Officers in Bombings*, N.Y. TIMES (Apr. 12, 2015), <http://www.nytimes.com/2015/04/13/world/middleeast/sinai-group-kills-officers-in-bombings.html> [https://perma.cc/Q5CU-TMNX].

37. David D. Kirkpatrick, *ISIS Claims Responsibility for Bombing at Saudi Mosque*, N.Y. TIMES (May 22, 2015), <https://www.nytimes.com/2015/05/23/world/middleeast/suicide-bombing-saudi-arabia-shiites-sunnis-yemen-mosque.html> [https://perma.cc/9JC7-XMUN].

38. Shuaib Almosawa & Saeed Al-Batati, *ISIS Claims Responsibility for Deadly Bombings in Yemen*, N.Y. TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/18/world/middleeast/isis-claims-responsibility-for-deadly-bombings-in-yemen.html> [https://perma.cc/CTP6-6T87].

39. Farah Samti & Carlotta Gall, *Tunisia Attack Kills at Least 38 at Beach Resort Hotel*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/world/africa/gunmen-attack-hotel-in-sousse-tunisia.html> [https://perma.cc/MQ74-ESUW].

- July 2015: A suicide bomber “killed at least 32 people” in southeastern Turkey. The Turkish government believed the bomber had ties to ISIS.⁴⁰
- September 2015: Two bombings at a mosque in Sana, Yemen “killed at least 25 people . . . during prayers.”⁴¹
- October 2015: Bombings at a peace rally in Ankara, Turkey killed at least 95 people, at the time making it “the deadliest terrorist attack in modern Turkey’s history.”⁴²
- November 2015: ISIS claimed responsibility for bombing a Russian charter jet, “which killed all 224 people aboard.”⁴³
- November 2015: ISIS claimed responsibility for a double suicide bombing in Beirut, Lebanon that killed “at least 43 people . . . and [wounded] more than 200.”⁴⁴
- November 2015: Three coordinated attacks in Paris killed at least 130 civilians⁴⁵ and wounded 352 others.⁴⁶
- December 2015: A car bombing in Yemen killed a provincial governor and eight of his bodyguards.⁴⁷

40. Ceylan Yeginsu, *Suicide Bomber in Suruc Is Said to Be a Turk With Possible Ties to ISIS*, N.Y. TIMES (July 22, 2015), <http://www.nytimes.com/2015/07/23/world/europe/turkey-suruc-bombing.html> [<https://perma.cc/PB4F-VXVF>].

41. Shuaib Almosawa, *Bombings at Mosque in Yemen Kill at Least 25*, N.Y. TIMES (Sept. 24, 2015), <https://www.nytimes.com/2015/09/25/world/middleeast/sana-yemen-mosque-suicide-attack.html> [<https://perma.cc/9FS3-4W6F>].

42. Ceylan Yeginsu & Tim Arango, *Explosions During Peace Rally in Ankara, Turkey’s Capital, Kill Scores*, N.Y. TIMES (Oct. 10, 2015), <http://www.nytimes.com/2015/10/11/world/europe/ankara-turkey-explosion-deaths.html> [<https://perma.cc/YJ9B-2YZM>].

43. See David D. Kirkpatrick, *ISIS Ally in Egypt Emerges as Key Suspect in Russian Jet Crash*, N.Y. TIMES (Nov. 9, 2015), <http://www.nytimes.com/2015/11/10/world/middleeast/suspects-in-russian-jet-crash-risk-exposing-their-isis-allies-to-a-backlash.html> [<https://perma.cc/Q9RH-LC5T>] (remarking that the bombing of the Russian charter jet, which killed all 224 individuals on board, is the responsibility of the Sinai Province of the Islamic State, a branch of ISIS).

44. See Anne Barnard & Hwaida Saad, *ISIS Claims Responsibility for Blasts That Killed Dozens in Beirut*, N.Y. TIMES (Nov. 12, 2015), <http://www.nytimes.com/2015/11/13/world/middleeast/lebanon-explosions-southern-beirut-hezbollah.html> [<https://perma.cc/ER2F-Q76P>] (identifying ISIS as the group responsible for an attack in a predominately Shiite neighborhood in Beirut, Lebanon that killed at least 43 people).

45. Jaime Fuller, *Paris Attacks Death Toll Rises to 130*, N.Y. MAG. (Nov. 20, 2015, 3:01 PM), <http://nymag.com/daily/intelligencer/2015/11/paris-attacks-death-toll-rises-to-130.html> [<https://perma.cc/Q7NQ-SM43>].

46. See Adam Nossiter, Aurelien Breeden, & Katrin Bennhold, *Three Teams of Coordinated Attackers Carried Out Assault on Paris, Officials Say; Hollande Blames ISIS*, N.Y. TIMES (Nov. 14, 2015), <http://www.nytimes.com/2015/11/15/world/europe/paris-terrorist-attacks.html> [<https://perma.cc/49XW-FMHP>] (describing the three coordinated attacks in Paris—beginning with the suicide bomb outside the gates of a soccer stadium and ending with authorities storming the concert hall—that left 129 dead, 352 wounded, and the international community vowing to come together against ISIS).

47. See Saeed Al-Batati & Kareem Fahim, *Car Bomb Kills Governor in Aden, Yemeni Security Official Says*, N.Y. TIMES (Dec. 6, 2015), <http://www.nytimes.com/2015/12/07/world/middleeast/car-bomb-kills>

- March 2016: Multiple bombings throughout the city of Brussels killed at least 30 civilians.⁴⁸
- May 2016: ISIS claimed responsibility for a shooting in Cairo that claimed the lives of eight plainclothes police officers.⁴⁹
- June 2016: The Turkish government attributed a series of bombings at Istanbul's international airport to ISIS. The bombings killed at least 44 people and injured 238 others.⁵⁰
- July 2016: ISIS claimed responsibility for a truck attack in Nice, France that killed at least 84 civilians and injured 303 others.⁵¹ ISIS called the attacker "a soldier of the Islamic State," but authorities question this claim, as there was "no evidence suggesting the driver was radicalized, or had even been exposed to the Islamic State's propaganda."⁵²

While the frequency of terror attacks claimed by ISIS has increased over the past couple of years, recently, the group has been losing significant ground in both Iraq and Syria.⁵³ Indeed, as former President Obama has noted, the weakening of ISIS "domestically" has directly contributed to the increase in the frequency of terrorist attacks carried out or inspired by the group in Europe and the United States.⁵⁴ In July

governor-in-aden-yemeni-security-official-says.html [https://perma.cc/A9KF-5Q5V] (highlighting the last of a series of assassinations against Sunnis in Aden, Yemen that left a governor and his eight body guards dead; al-Qaeda and ISIS are believed to be behind the attacks, with ISIS taking on an increasingly lethal role and tone).

48. See Alissa J. Rubin, Aurelien Breeden, & Anita Raghavan, *Strikes Claimed by ISIS Shut Brussels and Shake European Security*, N.Y. TIMES (Mar. 22, 2016), <http://www.nytimes.com/2016/03/23/world/europe/brussels-airport-explosions.html> [https://perma.cc/CBQ2-2ZAT] (reporting that ISIS is responsible for the bombings that left at least 30 dead and more than 230 wounded at a Brussels airport and subway station).

49. See Declan Walsh, *Ambush Kills 8 Police Officers in Egypt*, N.Y. TIMES (May 8, 2016), <http://www.nytimes.com/2016/05/09/world/middleeast/cairo-egypt-policemen-killed.html> [https://perma.cc/CCV3-UTDB] (giving an account of the deadly attack in Cairo, which is believed to be an act of ISIS, that left eight plainclothes police officers in a minibus dead; ISIS's claim of responsibility at the time of this article's publication was not independently verified).

50. See Ceyland Yeginsu & Rukmini Callimachi, *Turkey Says Airport Bombers Were from Kyrgyzstan, Russia and Uzbekistan*, N.Y. TIMES (June 30, 2016), <http://www.nytimes.com/2016/07/01/world/europe/istanbul-airport-attack-turkey.html> [https://perma.cc/F3KR-NKB9] (finding that while no group has claimed responsibility for the attacks at a Turkish airport that produced 44 fatalities, Turkish officials say ISIS is responsible). According to Turkish officials, the three suicide bombers were from Kyrgyzstan, Russia, and Uzbekistan; the recruitment of fighters from Central Asian stations is a result of government suppression against Muslim organizations and widespread poverty. *Id.*

51. See Alissa J. Rubin & Aurelien Breeden, *ISIS Claims Truck Attacker in France Was Its 'Soldier'*, N.Y. TIMES (July 16, 2016), <http://www.nytimes.com/2016/07/17/world/europe/isis-nice-france-attack.html> [https://perma.cc/5X59-UEZK] (exploring ISIS's claim of responsibility for truck attack in Nice, France and identifying terrorist responsible for the 84 fatalities as a "soldier of the Islamic State").

52. *Id.*

53. Angela Dewan & Hamdi Alkhshali, *Jubilation in Syria's Manbij as ISIS Loses Control of Key City*, CNN (Aug. 14, 2016), <http://www.cnn.com/2016/08/13/middleeast/syria-isis-manbij/> [https://perma.cc/VF7K-RLNT].

54. Stephen Collinson & Kevin Liptak, *Obama: Trump's Warning on Elections is 'Ridiculous'*, CNN

and August 2016, the local, U.S.-assisted forces in Iraq and Syria “made significant progress against ISIL . . . [by] tak[ing] key territory from [the group],”⁵⁵ including Fallujah⁵⁶ and the Qarayyah airfield.⁵⁷ Perhaps most significantly, in January 2017 Iraqi forces, “aided by American air support and military advisors,” reclaimed control of the eastern half of Mosul.⁵⁸ At the time of this writing, efforts to salvage the entire city remain ongoing. Iraqi Prime Minister Haidar al-Abadi has announced “[an] Iraqi offensive to retake the western half of Mosul,”⁵⁹ and on February 18, 2017, “Iraqi planes dropped millions of leaflets on western Mosul warning residents that the battle to dislodge [ISIS] was imminent . . . [and] told the jihadists to surrender ‘or face a fatal end.’”⁶⁰ U.S. Secretary of Defense James Mattis reaffirmed U.S. commitment to the operation, stating “[t]he coalition forces are in support of this operation and we will continue . . . with the accelerated effort to destroy ISIS.”⁶¹

In Syria, an aerial campaign is being waged against ISIS targets in the city of Raqqa. On August 12, 2016, a coalition of local forces—backed by U.S. special operations forces and airstrikes—liberated Manbij, a city in northern Syria, which had been described by former President Obama as “a gateway for ISI[S] fighters coming in and terrorists heading out to attack Europe.”⁶² ISIS had been using the town “as a hub for recruiting and processing foreign fighters . . . [and] for dispatching operatives across the Turkish border for potential use in external operations.”⁶³ The seizure of the town provides a significant strategic advantage for the coalition fighting ISIS, as it “essentially blocks a supply route ISIS has between its heartland of Raqqa and Turkey.”⁶⁴

ISIS leaders have acknowledged the group’s weakening position.⁶⁵ Yet, ISIS continues to control western Mosul in Iraq and Raqqa in Syria, the group’s primary

(Aug. 5, 2016), <http://www.cnn.com/2016/08/04/politics/obama-trump-pentagon-isis/> [<https://perma.cc/U7PZ-UQ4T>] (“[T]he decline of ISIL in Syria and Iraq appears to be causing it to shift to . . . encouraging high-profile terrorist attacks, including in the United States.”) (quoting former President Barack Obama).

55. Jim Garamone, *ISIL Knows It Will Lose, Already Shifting Strategy, Obama Says at Pentagon*, U.S. DEP’T DEF. (Aug. 4, 2016), <https://www.defense.gov/News/Article/Article/905447/isil-knows-it-will-lose-already-shifting-strategy-obama-says-at-pentagon> [<https://perma.cc/HKE2-VWY7>].

56. *Id.*

57. Euan McKirdy & Barbara Starr, *Ash Carter: U.S. Sending More Troops to Iraq*, CNN (July 11, 2016), <http://edition.cnn.com/2016/07/11/politics/ash-carter-baghdad/> [<https://perma.cc/DJ4F-D78V>].

58. Rick Gladstone, *Iraqi Forces Take Eastern Mosul from Islamic State*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/world/middleeast/iraq-mosul-isis.html> [<https://perma.cc/XK5F-Z43V>].

59. Colin Dwyer, *Iraq Opens Offensive on Western Mosul in New Push to Reclaim ISIS Stronghold*, NPR (Feb. 19, 2017), <http://npr.org/sections/thetwo-way/2017/02/19/516080820/iraq-opens-offensive-on-western-mosul-in-new-push-to-reclaim-isis-stronghold>.

60. Maher Chmaytelli & Isabel Coles, *Iraq Launches Offensive on Last Islamic State Stronghold in Mosul*, REUTERS (Feb. 19, 2017, 1:05 AM), <http://www.reuters.com/article/us-mideast-crisis-iraq-mosul-idUSKBN15Y06O> [<https://perma.cc/N7PF-3C24>].

61. *Id.*

62. President Barack Obama, The President’s New Conference at the Pentagon in Arlington, Virginia (Aug. 4, 2016) (transcript available at the U.S. Government Publishing Office).

63. Dewan & Alkshali, *supra* note 53 (quoting, in part, Pentagon Deputy Press Secretary Gordon Trowbridge).

64. *Id.*

65. Joby Warrick & Souad Mekhennet, *Inside ISIS: Quietly Preparing for the Loss of the ‘Caliphate’*, WASH. POST (July 12, 2016), https://www.washingtonpost.com/world/national-security/inside-isis-quietly-preparing-for-the-loss-of-the-caliphate/2016/07/12/9a1a8a02-454b-11e6-8856-f26de2537a9d_story.html?tid=a_inl [<https://perma.cc/Q5HC-6HCU>] (“In public messages and in recent actions in Syria, [ISIS’s] leaders

nerve centers.⁶⁶ In addition, experts caution that even the destruction of ISIS's command network and strongholds would not immediately end the group's global threat since "[ISIS's] highly decentralized nature ensures that it will remain dangerous for some time to come."⁶⁷

II. OPERATION INHERENT RESOLVE

ISIS was designated as a foreign terrorist organization by the U.S. State Department in May 2014.⁶⁸ On August 8, with tensions escalating throughout the summer, President Barack Obama launched operation "Inherent Resolve" with a series of airstrikes directed against ISIS targets in Iraq.⁶⁹ One month later, the scope of the operation expanded and the United States began striking targets in Syria.⁷⁰

The United States has continued to increase the number of its troops dedicated to fighting ISIS. In April 2016, the BBC reported that the United States was committing 200 additional special forces troops, bringing the total number of U.S. personnel deployed in Iraq to about 4,100.⁷¹ Additionally, in 2016, the United States pledged to provide more than \$400 million in assistance to Kurdish Peshmerga forces fighting ISIS in the region.⁷² In July 2016, Defense Secretary Ash Carter announced another troop increase, adding 560 new U.S. personnel to bring the total number of deployed personnel in Iraq up to 4,647.⁷³ CNN reported that this troop increase was to assist the Iraqi troops with the logistics and recapturing of Mosul.⁷⁴ Secretary Carter stated that "[t]hese additional U.S. forces will bring unique capabilities to the campaign and provide critical enabler support to Iraqi forces at a key moment in the fight."⁷⁵

Throughout 2016, significant goals have been achieved in the fight against ISIS. In March, U.S. operations in the Middle East killed ISIS's second-in-command, Abd al-Rahman Mustafa al-Qaduli and ISIS's "defense minister," Omar al-Shishani.⁷⁶ These operations were part of the United States' plan to "systematically eliminat[e]

are acknowledging the terrorist organization's declining fortunes on the battlefield while bracing for the possibility that its remaining strongholds could fall.".)

66. Carol E. Lee & Paul Sonne, *Barack Obama Says Islamic State Is Losing Ground Militarily, Turning More to Terrorism*, WALL ST. J. (Aug. 4, 2016), <http://www.wsj.com/articles/barack-obama-says-islamic-state-is-losing-ground-militarily-turning-more-to-terrorism-1470348932> [https://perma.cc/B5M3-ZSXR].

67. Warrick & Mekhennet, *supra* note 65.

68. Gregory A. Wagner, *Warheads on Foreheads: The Applicability of the 9/11 AUMF to the Threat of ISIL*, 46 U. MEM. L. REV. 235, 236 (2015).

69. *Id.* at 237.

70. Eric Posner, *Obama Can Bomb Pretty Much Anything He Wants To*, SLATE (Sept. 23, 2014), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/09/war_against_isis_in_syria_obama_legal_and_political_justifications.html [https://perma.cc/YG27-3CFD].

71. *US Extra Troops to Boost Fight against IS in Iraq*, BBC NEWS (Apr. 18, 2016), <http://www.bbc.com/news/world-us-canada-36075452> [https://perma.cc/6J3Y-UD3S].

72. *Id.*

73. McKirdy & Starr, *supra* note 57.

74. *Id.*

75. *Id.* (quoting the Secretary of Defense, Ash Carter).

76. David Smith, Martin Chulov, & Spencer Ackerman, *ISIS Second in Command Killed in US Raid, Pentagon Says*, GUARDIAN (Mar. 25, 2016), <https://www.theguardian.com/world/2016/mar/25/islamic-state-second-in-command-killed-us-raid-syria> [https://perma.cc/AS3V-NU26].

ISIS's cabinet."⁷⁷ In August 2016, the United States began an aerial bombing campaign against ISIS targets in Libya.⁷⁸ The Libyan operation has been characterized as "a sustained offensive against the militant group" that does not have "an end point at this particular point of time."⁷⁹ The initial focus of the Libya bombings is on targets in Sirte⁸⁰ with the stated goal to "provide a decisive advantage to the [GNA] attackers and help break the stalemate along the fighting fronts in the southern and western part of the city."⁸¹

Actions against ISIS in Iraq and Syria have continued into August 2016.⁸² As of January 31, 2017, the United States has spent \$11.4 billion on Operation Inherent Resolve.⁸³ As of August 3, 2016, a total of 14,235 strikes have been conducted against ISIS forces in Iraq and Syria by the United States and its coalition allies.⁸⁴ These strikes have collectively destroyed more than 26,000 strategic ISIS targets in Iraq and Syria⁸⁵ and are estimated to have killed "as many as 45,000 ISIS-linked fighters."⁸⁶ There has also been increased ground combat between U.S. troops and ISIS fighters.⁸⁷

77. *Id.* (quoting, in part, the Secretary of Defense, Ash Carter) (internal quotation marks omitted).

78. Alex Emmons, *U.S. Says New Bombing Campaign Against ISIS in Libya Has No "End Point at This Particular Moment"*, INTERCEPT (Aug. 1, 2016, 4:35 PM), <https://theintercept.com/2016/08/01/u-s-says-new-bombing-campaign-against-isis-in-libya-has-no-end-point-at-this-particular-moment/> [https://perma.cc/L47D-RKF5]. This was not the first instance of the United States using force against ISIL in Libya. Al Jazeera reported that "[o]n February 19, the US carried out air strikes on an ISIL camp in Sabrathaf, Libya] in concert with the UK, France and Italy, killing dozens, Tunisians for the most part." Olivier Guitta, *US Starts Its Long-Awaited Anti-ISIL Campaign in Libya*, AL JAZEERA (Aug. 2, 2016), <http://www.aljazeera.com/indepth/opinion/2016/08/starts-long-awaited-anti-isis-campaign-libya-160802131907056.html> [https://perma.cc/R2LZ-EL2X].

79. Trevor Timm, *The US Is Bombing Libya Again. It's a Too-Familiar Vicious Cycle*, GUARDIAN (Aug. 2, 2016, 7:00 AM), <https://www.theguardian.com/commentisfree/2016/aug/02/us-bombing-libya-isis-strongholds-vicious-cycle> [https://perma.cc/PY44-5SH5].

80. Austin Wright, *U.S. Strikes ISIL in its Libyan Stronghold*, POLITICO (Aug. 1, 2016, 11:42 AM), <http://www.politico.com/story/2016/08/us-isis-strikes-226505> [https://perma.cc/RUA9-UWB6]; see also *Libya Makes Gains against ISIL in Sirte Fighting*, AL JAZEERA (Aug. 8, 2016), <http://www.aljazeera.com/news/2016/08/libya-gains-isis-sirte-fighting-160808152702720.html> [https://perma.cc/L92Z-HXB2] ("Sirte has been an ISIL stronghold since June [2015].").

81. Helene Cooper, *U.S. Conducts Airstrikes Against ISIS in Libya*, N.Y. TIMES (Aug. 1, 2016), <http://www.nytimes.com/2016/08/02/us/politics/us-conducts-airstrikes-against-isis-in-libya.html> [https://perma.cc/6SGG-8CVA]; see also Dewan & Alkhshali, *supra* note 53 (citing Brett McGurk, the Special Presidential Envoy for the Global Coalition to Counter ISIL, that ISIL "was losing ground in its Libyan stronghold, Sirte").

82. *Military Strikes Continue Against ISIL Terrorists in Syria, Iraq*, U.S. DEP'T OF DEF. (Aug. 9, 2016), <http://www.defense.gov/News/Article/Article/908760/military-strikes-continue-against-isis-terrorists-in-syria-iraq> [https://perma.cc/9UBS-TH6T].

83. *Operation Inherent Resolve: Targeted Operations Against ISIL Terrorists*, U.S. DEP'T OF DEF. [hereinafter *Operation Inherent Resolve*], http://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve [https://perma.cc/8FJY-SRWA] (last visited Feb. 28, 2016).

84. Lee & Sonne, *supra* note 66; see also *id.* (explaining that the coalition includes forces from Australia, Bahrain, Belgium, Canada, Denmark, France, Jordan, the Netherlands, Saudi Arabia, Turkey, the United Arab Emirates, and the United Kingdom).

85. *Operation Inherent Resolve*, *supra* note 83.

86. *Nearly 45,000 ISIS-linked Fighters Killed in Past 2 Years, US Military Official Says*, FOX NEWS (Aug. 10, 2016), <http://www.foxnews.com/world/2016/08/10/nearly-45000-isis-linked-fighters-killed-in-past-2-years-us-military-official-says.html> [https://perma.cc/S2VK-ZJ9E].

87. See Mark Mazzetti & Helene Cooper, *Another Combat Death in Iraq May Presage Future U.S. Role*, N.Y. TIMES (May 4, 2016), http://www.nytimes.com/2016/05/05/us/another-combat-death-in-iraq-may-presage-future-us-role.html?_r=0 (stating that daily firefights between U.S. and ISIL forces are becoming "routine []").

III. INTERNATIONAL LAW AND OPERATION INHERENT RESOLVE

Several theories have been offered to justify the use of force by the United States against ISIS forces in Iraq and Syria (and later, also in Libya). This section focuses on four of those theories upon which the United States could rely in claiming that Operation Inherent Resolve complies with international law: United Nations Security Council authorization, invitation to intervene, humanitarian intervention, and self-defense.

A. Security Council Authorization

Article 2(4) of the Charter of the United Nations—"[t]he pivot on which the present-day *ius ad bellum* hinges"⁸⁸—contains a prohibition on the threat or use of force among member States. This foundational prohibition is only subject to two exceptions: The "inherent" right of individual or collective self-defense under Article 51 of the Charter and enforcement measures carried out by, or through the authorization of, the UN Security Council.

Article 42 of the UN Charter allows the Security Council to authorize the use of force "as may be necessary to maintain or restore international peace and security" when alternative methods of resolution have proven inadequate.⁸⁹ So far the Security Council has passed two resolutions addressing the threat posed by ISIS. Resolution 2178 declares terrorism "one of the most serious threats to international peace and security,"⁹⁰ but leaves out the essential force authorization language of "all necessary means."⁹¹

This language, "all necessary means," has appeared in all the Security Council resolutions that authorized member States to use military force. It resurfaced, however, in November 2015 when the Security Council unanimously passed Resolution 2249. Paragraph 5 of that resolution provides that the Security Council,

[c]alls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL . . . in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL . . . and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups . . . and to eradicate the safe haven they have established over significant parts of Iraq and Syria.⁹²

88. YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 87 (2011).

89. U.N. Charter art. 42.

90. S.C. Res. 2178 (Sept. 24, 2014).

91. Olivia Gonzalez, Comment, *The Pen and the Sword: Legal Justifications for the United States' Engagement Against the Islamic State of Iraq and Syria (ISIS)*, 39 *FORDHAM INT'L L.J.* 130, 141–42 (2015).

92. S.C. Res. 2249, para. 5 (Nov. 20, 2015).

However, while historically the phrase “all necessary measures” has been considered as tantamount to an authorization to use armed force,⁹³ several challenges face those who may wish to rely on Resolution 2249 as a legal basis to use force against ISIS. For starters, the Resolution does not “authorize” member States to take all necessary measures.⁹⁴ Nor does it even use the verb “decide” that would indicate a Security Council exercising its authority to adopt a decision that would be binding on all the member States.⁹⁵ Rather, the resolution simply “calls upon Member States” to act.⁹⁶ As Dapo Akande and Marko Milanovic note, “[t]his difference in language itself suggests that though the Council contemplates, and perhaps would even welcome, the use of force by [S]tates, it does not authorize such action.”⁹⁷ Equally significant is that “for the resolution to have those [binding and operative] effects the Council must actually decide to do something or to authorize something.”⁹⁸ Calling upon States to take action is entirely different from authorizing States to so act, and thus Resolution 2249 has little, if any, operative impact.⁹⁹ Moreover, in contradistinction to previous Security Council resolutions authorizing the use of force, which have invoked the Security Council’s authority under Chapter VII of the Charter (e.g., by incorporating the phrase “acting under Chapter VII of the Charter”),¹⁰⁰ Resolution 2249 is silent on the matter and Chapter VII is nowhere mentioned.¹⁰¹ The absence of any such mention of Chapter VII, it is argued, means that a Security Council authorization to use force is, at least at present, off the table.¹⁰² Thus, as Ashley Deeks argues, while “[m]ost UNSCRs that authorize force . . . contain a preambular paragraph that specifically

93. Paulina Starski, ‘Legitimized Self-Defense’ – *Quo Vadis Security Council?*, BLOG EUR. J. INT’L L. (Dec. 10, 2015), <http://www.ejiltalk.org/legitimized-self-defense-quo-vadis-security-council/> [<https://perma.cc/5T7X-WENM>].

94. See *id.* (noting that the Resolution does not authorize all measures due to lack of certain required language).

95. See Nicolas Boeglin, *Arguments Based on UN Resolution 2249 in Prime Minister’s Report on Airstrikes in Syria: Some Clarifications Needed*, HUM. RTS. INVESTIGATIONS (Dec. 4, 2015), <https://humanrightsinvestigations.org/2015/12/04/arguments-based-on-un-resolution-2249-in-prime-ministers-report-on-airstrikes-in-syria-some-clarifications-needed/> [<https://perma.cc/NSQ9-9A6L>] (explaining that the lack of the word “decide” means there is no specific authorization for the use of force).

96. S.C. Res. 2249, *supra* note 92, para. 5.

97. Dapo Akande & Marko Milanovic, *The Constructive Ambiguity of the Security Council’s ISIS Resolution*, BLOG EUR. J. INT’L L. (Nov. 21, 2015), <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> [<https://perma.cc/CSL2-Z2KY>].

98. *Id.* (emphasis omitted).

99. See Harriet Moynihan, *Assessing the Legal Basis for UK Military Action in Syria*, ROYAL INST. INT’L AFF. (Nov. 26, 2015), <https://www.chathamhouse.org/expert/comment/assessing-legal-basis-uk-military-action-syria> [<https://perma.cc/TU7J-MBYV>] (“In order to provide legal authority for the use of force against ISIS under international law, a Security Council resolution would need to constitute a decision, taken under Chapter VII of the UN Charter, that states could use all necessary measures in their action against ISIS. Although resolution 2249 determines that ISIS is a ‘global and unprecedented threat to international peace and security’ and refers to ‘all necessary measures’, the language used in the operative part of the resolution is merely hortatory (‘calls upon’) and does not refer to Chapter VII. For those who are looking for specific UN authorization for the use of force, this is not it.”).

100. See, e.g., S.C. Res. 1267 (Oct. 15, 1999) (stating that the Security Council is “[a]cting under Chapter VII of the Charter of the United Nations”); S.C. Res. 1973 (Mar. 17, 2011) (demonstrating the reference to Chapter VII of the UN Charter).

101. See generally S.C. Res. 2249, *supra* note 92, para. 5.

102. See Sharmine Narwani, *Breaking International Law in Syria*, RT (Nov. 25, 2015), <https://www.rt.com/op-edge/323396-uncs-isis-syria-us/> [<https://perma.cc/W3KK-KWWB>] (arguing that the lack of Chapter VII language in the Resolution means that use of force is not in accordance with international law unless States have other means to render use of force compliant).

invokes Chapter VIII[,] . . . use the word ‘decides’ as the active verb in the paragraph that authorizes force [, and] . . . use the term ‘all necessary means’ or ‘all necessary measures’ as the code for force authorization.”¹⁰³ Only the third of these elements is present in Resolution 2249, making it clear that the Resolution “is not intended to serve as a stand-alone authorization for using force against ISIS in Syria and Iraq.”¹⁰⁴

What, then, is the significance of Resolution 2249 according to this view? For those who reject the position that the resolution authorizes member States to use force against ISIS, the resolution is nothing more than a restatement that member States may only use force against ISIS if, and only if, they are already permitted to do so legally, namely in exercising their inherent right of individual or collective self-defense in accordance with Article 51 of the Charter.¹⁰⁵ In fact, Resolution 2249 may also be construed as suggesting that “if a state has a legal basis, compatible with the UN Charter, to take military action, and if it has capacity to do so, then it is encouraged to act.”¹⁰⁶ According to this view, the resolution legitimizes “the options taken by major stakeholders involved in the Syrian conflict”¹⁰⁷ without giving any further legal authorization to such actions. It is also worth noting that Resolution 2249 “dodges the question of whether outsiders can use force against IS in Syria without the explicit permission of the Syrian government.”¹⁰⁸ Such a crucial question is highly unlikely to have gone unaddressed in a resolution authorizing military force.

The combination of the factors noted above has led many to conclude that Resolution 2249 reflects a political compromise that prevents any reading of that resolution as independently authorizing force against ISIS in Syria or Iraq. As Ashley Deeks notes,

Russia is acting against ISIS in Syria with Assad’s consent, and asserts that other bases for using force in Syria are inconsistent with international law. The United States, France, Canada, Australia, Turkey, and other states are using force in Syria on a theory of collective self-defense of Iraq or of national self-defense or both. OP5 neither rejects nor accepts the legitimacy of any particular legal theory. Instead, it indicates approval for states to use force in Syria and Iraq as long as that force is consistent with the UN Charter. That allows states to continue to rely on their existing theories for

103. Ashley Deeks, *Threading the Needle in Security Council Resolution 2249*, LAWFARE (Nov. 23, 2015, 3:25 PM), <https://www.lawfareblog.com/threading-needle-security-council-resolution-2249> [https://perma.cc/96UV-K7GM].

104. *Id.*

105. See Marc Weller, *Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups*, EJIL: TALK! (Nov. 25, 2015), <http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/> [https://perma.cc/LZS2-JVEC] (stating that the Resolution cannot authorize use of force beyond what is already permitted and giving the example of France’s use of Article 51 in the aftermath of the Paris attacks).

106. Moynihan, *supra* note 99.

107. Peter Hilpold, *The Fight Against Terrorism and SC Resolution 2249 (2015): Towards a More Hobbesian or a More Kantian International Society?*, 55 INDIAN J. INT’L L. 535, 537 (2015), <http://link.springer.com/article/10.1007/s40901-016-0028-1>.

108. David Bosco, *UK’s Parliament Debates What the UN Security Council Said*, LAWFARE (Dec. 2, 2015, 12:24 PM), <https://www.lawfareblog.com/uks-parliament-debates-what-un-security-council-said> [https://perma.cc/S2L5-9JA6].

using force—which each state asserts is consistent with the Charter—without having to resolve the legal dispute between Russia and the other states using force.¹⁰⁹

Yet, even if one accepts this reading of Resolution 2249, I would suggest that its significance goes beyond the immediate issue of whether member States are authorized by the Security Council to use force, or merely encouraged to do so based on their individual or collective right of self-defense. For, as the resolution clearly indicates, the target for such use of force is not a State but rather ISIS, a non-State terrorist organization.¹¹⁰ In acknowledging the possibility that member states will take “all necessary measures” against such a non-State entity, the Security Council seems to recognize that force can be legally used against terrorist groups.¹¹¹ And if, as suggested by the view above, all Resolution 2249 does is encourage member States to exercise their right of self-defense against ISIS, then it essentially confirms that self-defense may indeed be used against terrorist groups and similar non-State actors. This, in and of itself, is a significant point, the true meaning of which is explored further below.

Moreover, the view of Resolution 2249 as political encouragement, rather than legal authorization, does not go uncontested. The resolution calls on States to “eradicate the safe haven [ISIL has] established over significant parts of Iraq and Syria.”¹¹² It is hard to construe the word “eradicate” in any way other than authorizing military force. Furthermore, the resolution contains other allusions to Chapter VII powers, such as the phrase “[the Council] regards all such acts of [ISIL] terrorism as a threat to peace and security,”¹¹³ which harkens back to the language appearing in Article 39 of the Charter.¹¹⁴ Indeed, “[a]s the [International Court of Justice]’s *Namibia Advisory Opinion* makes clear, “the lack of reference to Chapter VII in a resolution does not mean that it is not to be regarded as binding nor does it mean that the resolution does not have operative legal effect.”¹¹⁵

The treatment of Resolution 2249 by several member States blurs the answer to the question of encouragement versus authorization further still. Thus, for example, the French government has taken the view that the resolution “authorise[d] collective self-defence [sic] against an armed attack . . . and immediately announced it was tripling air strikes against I[SIL].”¹¹⁶ Similarly, the German Parliament decided to

109. Deeks, *supra* note 103. It is noteworthy that as part of that compromise, Russia managed to add language “protecting Bashar-al Assad’s role in a political transition, [so] the text cannot be used to justify attacking government positions.” Rob Crilly, *UN Approves Syria Resolution-What Does it Mean?*, TELEGRAPH (Nov. 21, 2015), <http://www.telegraph.co.uk/news/worldnews/islamic-state/12010091/UN-approves-Syria-resolution-what-does-it-mean.html> [<https://perma.cc/48XA-ZWD5>].

110. See S.C. Res. 2249, *supra* note 92, para. 5 (Nov. 20, 2015) (stating that it calls on member States to renew their efforts against ISIS, not a State organization).

111. *Id.*

112. *Id.*

113. *Id.* para. 1.

114. See U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace . . .”).

115. Dapo Akande & Marko Milanovic, *The Constructive Ambiguity of the Security Council’s ISIS Resolution*, EJIL: TALK! (Nov. 21, 2015), <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> [<https://perma.cc/DDK9-KYFR>].

116. Crilly, *supra* note 109.

approve the government's formal request to send up to 1200 troops to combat ISIS.¹¹⁷ The international legal basis for the deployment decision, as officially claimed by the Government, is "collective [] self-defence under Art. 51 of the UN Charter [as] covered by [SC Res.] 2249 (2015)."¹¹⁸ In his November 2015 report to Parliament, former British Prime Minister David Cameron adopted a more robust view of Resolution 2249 when he quoted it, stating that, "[t]here [was] a clear legal basis for military action against ISIL in Syria."¹¹⁹ He then strongly implied that the existence of the resolution would dispel the "political, legal, and military risks" that would otherwise come from using force against ISIS.¹²⁰ Following the Prime Minister's lead, Parliament voted (by a 397-223 margin) to approve airstrikes against ISIS in Syria despite the earlier view of many members that such action could not, in fact, be legally justified.¹²¹ Since then, "the UK [and] the United States [have joined] in bombing ISIS targets throughout Syria."¹²² However, for its part, the United States has not relied expressly on Resolution 2249 to justify its military operations against ISIS in Iraq and Syria.¹²³

B. *Invitation to Intervene*

Customary international law incorporates the principle of non-intervention in other States' internal affairs as a reflection of respect for their sovereignty.¹²⁴ However, international law recognizes a qualified right of a government to request foreign assistance, including by way of military intervention, to suppress rebels acting against the government.¹²⁵ The invitation doctrine allows a foreign State to "legally send troops to another State upon invitation for certain limited operations."¹²⁶

In a speech given on April 1, 2016 before the annual meeting of the American Society of International Law, Brian Egan, the State Department Legal Advisor, stated:

As a matter of international law, the United States has relied on both consent and self-defense in its use of force against ISIL Beginning in the summer of 2014, the United States'

117. Anne Peters, *German Parliament Decides to Send Troops to Combat ISIS—Based on Collective Self-Defense "in Conjunction with" SC Res. 2249*, EJIL: TALK! (Dec. 8, 2015), <http://www.ejiltalk.org/german-parliament-decides-to-send-troops-to-combat-isis-%E2%88%92-based-on-collective-self-defense-in-conjunction-with-sc-res-2249/> [<https://perma.cc/2J89-LAJT>].

118. *Id.*

119. Memorandum to the Foreign Affairs Select Committee, Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria 15 (Nov. 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480073/PM_Response_to_FAC.pdf [<https://perma.cc/HS3S-83S6>].

120. *Id.*

121. Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT'L L. 15, 65 (2016).

122. *Id.*

123. *Id.* at 66.

124. U.N. Charter art. 2, para. 7.

125. *See id.* arts. 39–51 (discussing UN procedures for requesting military assistance with respect to "threat[s] to the peace, breach[es] of the peace, [and] act[s] of aggression").

126. Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRITISH Y.B. INT'L L. 189, 189 (1985).

actions in Iraq against ISIL have been premised on Iraq's request for, and consent to, U.S. and coalition military action against ISIL on Iraq's territory in order to help Iraq prosecute the armed conflict against the terrorist group.¹²⁷

Indeed, the Iraqi Defense Minister Khaled al-Obeidi acknowledged that his country had "asked for help from many countries that we have a strategic relationship with, and that includes the United States We are in a state of war, and we look to our friends to help us in this confrontation."¹²⁸ In a letter submitted by the government of Iraq to the Security Council on September 20, 2014, Iraq states,

[W]e, in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the Constitution, have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent. The aim of such strikes is to end the constant threat to Iraq, protect Iraq's citizens and, ultimately, arm Iraqi forces and enable them to regain control of Iraq's borders.¹²⁹

However, relying exclusively on Iraq's invitation would permit a narrower course of conduct than the United States would likely prefer,¹³⁰ since under this theory, the continuation of U.S. military operations against ISIS will depend on Iraq's on-going consent, which, as Ashley Deeks correctly notes, "it could withdraw."¹³¹ Moreover, as the International Court of Justice held in the *Democratic Republic of Congo v. Uganda* case, when one State gives its consent to another to carry out military operations in the territory of the former, such operations must be limited and restricted within the parameters of such consent.¹³²

No express invitation has been extended to the United States, unlike Russia, which was asked by Syria to act against ISIS forces.¹³³ Although some have argued that the United States might claim Syrian "implied consent" based upon the Syrian government's passivity in allowing U.S. operations on and in Syrian territory,¹³⁴ the

127. Egan, *supra* note 1.

128. Missy Ryan, *U.S. Urges Iraq to Ensure Coalition Aid is Effective Against Islamic State*, WASH. POST (Mar. 9, 2015), https://www.washingtonpost.com/world/middle_east/us-urges-iraq-to-ensure-coalition-aid-is-effective-against-islamic-state/2015/03/09/8ef90302-c67a-11e4-b2a1-bed1aeea2816_story.html [<https://perma.cc/XED9-LSMQ>].

129. Permanent Rep. of Iraq to the U.N., Letter dated Sep. 20, 2014 from the Permanent Rep. of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 22, 2014).

130. Ashley Deeks, *U.S. Airstrikes Against ISIS in Syria? Possible International Legal Theories*, LAWFARE (Aug. 23, 2014, 3:04 PM), <https://www.lawfareblog.com/us-airstrikes-against-isis-syria-possible-international-legal-theories> [<https://perma.cc/8BPT-LHTL>].

131. *Id.*

132. Armed Activities on the Territory of the Congo (Dem. Rep. of Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, para. 52 (Dec. 19).

133. Douglas Cantwell, *The ETF and the Legality of U.S. Intervention in Syria Under International Law*, LAWFARE (Mar. 28, 2016, 9:28 AM), <https://lawfareblog.com/etf-and-legality-us-intervention-syria-under-international-law> [<https://perma.cc/F2DR-X8JL>]; Bill Chappell, *Russia Begins Airstrikes in Syria after Assad's Request*, NPR (Sept. 30, 2015), <http://npr.org/sections/thetwo-way/2015/09/30/444679327/russia-begins-conducting-airstrikes-in-syria-at-assads-request>.

134. Louise Arimatsu & Michael Schmitt, *The Legal Basis for the War against ISIS Remains Contentious*, GUARDIAN (Oct. 6, 2014), <http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis>

notion of “implied invitation” is not accepted in international law and would be particularly dangerous due to its inherent manipulability.¹³⁵

Traditionally, only the established, internationally recognized government can extend such an invitation. Thus, while international law permits a country to intervene in a fellow nation on the request of that fellow nation’s government, the validity of a request by the Libyan government is complicated by the fact that there are currently rival governments in Libya, namely the Government of National Accord (GNA) and the House of Representatives (HoR).¹³⁶ The GNA is backed by the United Nations,¹³⁷ while the HoR has some western support, including France.¹³⁸ While the GNA appears to be the stronger of the two governments, “on the domestic front, the GNA still has to gain recognition and earn its legitimacy from many—including the powerful eastern tribes and . . . the most powerful man in the country, General Haftar.”¹³⁹ The GNA requested foreign assistance,¹⁴⁰ but the U.S. airstrikes have been declared “illegal and unconstitutional” by members of the HoR.¹⁴¹ While the United States argues that the GNA has been characterized as “the internationally recognized government of Libya,”¹⁴² if it “still lacks power within the country and has been unable to create a truly national unified government[.]” it is a dubious claim to suggest the GNA has the authority under international law to request foreign assistance.¹⁴³ Indeed, while Pentagon Press Secretary Peter Cook noted that “the head of the GNA . . . specifically requested [the U.S.] strikes as part of the GNA’s campaign to defeat ISIL,”¹⁴⁴ the U.S.

syria-islamic-state [<https://perma.cc/9ZRP-FT46>].

135. See Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT’L L.J. 337, 349–50 (2011) (stating that interventions without explicit consent “raise difficult questions, particularly regarding whether the consent was freely given”).

136. Ken Hanly, *Op-Ed: Why Did the U.S. Decide to Bomb ISIS in Libya?*, DIG. J. (Aug. 9, 2016), <http://www.digitaljournal.com/news/world/op-ed-why-did-usa-decide-to-bomb-the-islamic-state-in-sirte-libya/article/472102> [<https://perma.cc/NY5Y-6YJQ>].

137. *Id.*

138. *Id.* (“[R]ecently the French have been discovered as supporting the [GNA] rival House of Representatives (HoR) government and its forces under General Haftar. Three French agents were killed when a helicopter crashed or was shot down while on a reconnaissance mission for Haftar.”); John Pearson, *French Support of Rival General Threatens Libya’s UN-Backed Government*, NATIONAL (July 23, 2016, 1:48 PM), <http://www.thenational.ae/world/middle-east/french-support-of-rival-general-threatens-libyas-un-backed-government> [<https://perma.cc/AA74-J35Z>] (“The GNA is struggling to control the capital in the country’s west The realisation that Gen Haftar has French backing further undermines its credibility, leaving Libyans on all sides questioning whether it should stay in office.”).

139. Guitta, *supra* note 78.

140. *Id.* (“The [U.S.] bombing [campaign] was in response to the request of the Government of National Accord (GNA), whose Prime Minister Fayez al-Sarraj had previously said Libya did not need foreign intervention.”).

141. Reda Elhadi Fhelboom & Jacob Wirtschafter, *Libya Discord Threatens to Overshadow Military Successes Against Islamic State*, WASH. TIMES (Aug. 11, 2016), <http://www.washingtontimes.com/news/2016/aug/11/libya-discord-threatens-to-overshadow-military-suc/> [<https://perma.cc/S99S-7X39>].

142. Press Release, U.S. Dept. of Def., Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room (Aug. 1, 2016), <http://www.defense.gov/News/Transcripts/Transcript-View/Article/882676/departement-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in> [<https://perma.cc/Z333-B4UV>] (quoting Pentagon Press Secretary Peter Cook).

143. Hanly, *supra* note 136.

144. Press Release, *supra* note 142; see also Timm, *supra* note 79.

government, perhaps due to the uncertain status of the GNA within Libya, has not relied solely on the GNA's request to justify its intervention.

C. Humanitarian Intervention

The United States's first air strikes against ISIS came on the heels of news reports describing the critical condition of tens of thousands of Yazidis trapped on Mount Sinjar.¹⁴⁵ Michael Scharf suggests that such military actions could have been framed in terms of humanitarian intervention.¹⁴⁶ However, from a legal standpoint, arguments about humanitarian intervention are rather weak since, under positive international law, unilateral humanitarian intervention (i.e., one carried out by a State or a group of States without an authorization from the UN Security Council) is unlawful.¹⁴⁷

Unilateral humanitarian intervention does not fulfil the conditions for a lawful self-defense,¹⁴⁸ and, by definition, it lacks Security Council approval. Since these are the only two exceptions to the prohibition on the use of force under Article 2(4), the UN Charter does not recognize a unilateral right of a member State to use force against another, regardless of the aims of such intervention. The International Court of Justice accepted this position in its decision in the *Nicaragua v. United States* case holding that the United States could not invoke Nicaragua's human rights record to justify American military activities.¹⁴⁹ However, this state of affairs creates a sharp schism between the strictures of positive international law and the need to address urgent humanitarian appeals and prevent or stop mass atrocities. As Thomas Franck argues, "the law's legitimacy is surely [] undermined if, by its slavish implementation, it produces terrible consequences. The paradox arises from the seemingly irreconcilable choice, in such hard cases, between consistency and justice."¹⁵⁰

While this paradox has led some proponents of humanitarian intervention to couch their arguments in moral terms, seeking to bypass "capricious legalistic

145. Helene Cooper, Mark Lander, & Alissa J. Rubin, *Obama Allows Limited Airstrikes on ISIS*, N.Y. TIMES (Aug. 7, 2014), http://www.nytimes.com/2014/08/08/world/middleeast/obama-weighs-military-strikes-to-aid-trapped-iraqis-officials-say.html?_r=0 [<https://perma.cc/5GLX-TSXX>].

146. Scharf, *supra* note 121, at 55–62.

147. Oren Gross, *Applying the Extra-Legal Measures Model to Humanitarian Interventions: A Reply to Devon Whittle*, 26 EUR. J. INT'L L. 699, 701 (2015).

148. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 4–6 (1999).

149. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, para. 129 (June 27); see also Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L. Q. 321, 332 (1989). But see Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L L. 1005, 1013 (1998) (interpreting the ICJ's ruling as merely finding that, in the particular circumstances before the ICJ, there was no right of intervention in support of an opposition within another state because states had not justified their conduct by reference to a new right of intervention, and thus there was no possibility of demonstrating the emergence of a new customary norm on the matter).

150. THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 175 (2002).

logomachy”¹⁵¹ by direct appeals to moral legitimacy,¹⁵² I have suggested elsewhere¹⁵³ that the extra-legal measures model, which I developed in the context of emergency powers,¹⁵⁴ could be utilized to offer an alternative for States to undertake unilateral humanitarian intervention while, at the same time, maintaining the strong principle of prohibiting the use of force and the integrity of the UN Charter’s collective security system.¹⁵⁵ This model involves the possibility that when the circumstances on the ground are truly exceptional, the Security Council is unwilling or unable to act, and no other alternatives for action exist, unilateral action could be undertaken. Such action would violate international law, and a state would acknowledge that violation, rather than attempting Orwellian legal interpretations, reasoning, and justifications for action.

The debate surrounding the legality of unilateral humanitarian intervention was rekindled just as this Article went to print. On April 6, 2017, U.S. destroyers launched 59 Tomahawk missiles against a Syrian airfield from which the Syrian regime had earlier conducted a chemical weapons attack.¹⁵⁶ In the aftermath of the attacks, a number of scholars argued in support of unilateral humanitarian intervention of the kind carried out by the United States.¹⁵⁷ Others reiterated the view that unilateral humanitarian intervention is illegal under existing international law.¹⁵⁸ For my part, I

151. NIKOLAOS K. TSAGOURIAS, *JURISPRUDENCE OF INTERNATIONAL LAW: THE HUMANITARIAN DIMENSION* 64 (2000).

152. See, e.g., Michael J. Smith, *Humanitarian Intervention: An Overview of the Ethical Issues*, 12 *ETHICS & INT’L AFF.* 63, 75–79 (1998) (“I regard it still as a moral imperative to prevent or mitigate evil when one has the capacity to do so. Thus as an ethical imperative, the issue of humanitarian intervention demands our deepest attention and response.”); ALLEN BUCHANAN, *HUMAN RIGHTS, LEGITIMACY, AND THE USE OF FORCE* 298 (2010) (“Most would agree that the international legal system has undergone significant moral improvements since 1945.”).

153. See generally Oren Gross, *Applying the Extra-Legal Measures Model to Humanitarian Interventions: A Reply to Devon Whittle*, 26 *EUR. J. INT’L L.* 699 (2015).

154. See generally Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011 (2003).

155. See also Michael Byers, *Letting the Exception Prove the Rule*, 17 *ETHICS & INT’L AFF.* 9, 16 (2003) (suggesting that the mitigation approach (a sub-category of ELM) is not intended to provide an alternative system for regulating the use of force in international affairs; it simply recognizes that circumstances will invariably arise when the existing rules cannot be made to work—in such circumstances, it seems unwise to change longstanding and largely effective rules to accommodate the exception, rather than simply letting the exception prove the rule).

156. Michael D. Shear, *U.S. Missile Attack on Syria: What We Know and Don’t Know*, *N.Y. TIMES* (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/what-we-know-and-dont-know-about-the-syria-airstrikes.html?_r=0.

157. See, e.g., Harold Hongju Hoh, *Not Illegal: But Now the Hard Part Begins*, *JUST SECURITY* (Apr. 7, 2017, 6:09 AM), <https://www.justsecurity.org/39695/illegal-hard-part-begins/> [<https://perma.cc/9UWZ-F557>] (arguing that the Trump administration must “use whatever opening may be created by the strike to pivot to a longer-term ‘smart power’ approach to Syrian diplomacy”); Jens David Ohlin, *Two Visions of the UN Charter*, *OPINIO JURIS* (Apr. 13, 2017, 11:50 AM), <http://opiniojuris.org/2017/04/13/two-visions-of-the-un-charter/> [<https://perma.cc/68M4-CE2C>] (“I don’t think that international security is promoted and enhanced when we give a free pass to allow governments to mistreat their own citizens, and treat this as a ‘lesser problem’—subject only to non-military measures—than the problem of international conflict, which is subject to unilateral military measures.”).

158. E.g., Kevin Jon Heller, *Why Unilateral Humanitarian Intervention Is Illegal and Potentially Criminal*, *OPINIO JURIS* (Apr. 20, 2017, 3:46 AM), <http://opiniojuris.org/2017/04/20/against-unilateral-humanitarian-intervention-and-why-it-can-be-criminal/> [<https://perma.cc/T8YN-MNG4>]; Ryan Goodman, *Humanitarian Military Options for Syrian Chemical Weapons Attack: “Illegal but not Unprecedented”*, *JUST SECURITY* (Apr. 6, 2017, 9:56 AM), <https://www.justsecurity.org/39658/humanitarian-military-options->

remain steadfast in the position that the American military action was, indeed, unlawful yet, much like its 1999 Kosovo precursor, legitimate and morally justified.

D. Self-Defense

Article 51 of the Charter states that, “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a [member State], until the Security Council has taken measures necessary to maintain international peace and security.”¹⁵⁹ The United States has relied on the doctrines of individual and collective self-defense to justify its military operations against ISIS under international law. In his speech before the American Society of International Law (ASIL) at its annual meeting, Brian Egan commented that, “[u]pon commencing air strikes against ISIL in Syria in September 2014, the United States submitted a letter to the UN Security Council explaining the international legal basis for our use of force in Syria in accordance with Article 51 of the UN Charter.”¹⁶⁰ In the letter mentioned, which was submitted to the President of the Security Council on September 23, 2014, the United States noted that, “States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.”¹⁶¹

1. The Inherent Right of Individual or Collective Self-Defense

The United States, like all other States who submitted similar letters to the Security Council, invoked primarily the right of collective self-defense based on an explicit request by the government of Iraq for military assistance in its fight against ISIS.¹⁶² For its part, Iraq, the target of numerous armed attacks by ISIS, invoked its inherent right of individual self-defense and requested military assistance by other countries.¹⁶³

Interestingly, in his ASIL speech, Brian Egan suggested:

Consistent with the inherent right of *individual* and collective self-defense, the United States initiated necessary and proportionate actions in Syria against ISI[S]... although the United States maintains an individual right of self-defense against ISI[S], it has not

syrian-chemical-weapons-attack-illegal-unprecedented/ [https://perma.cc/N6BC-K5WR]. For a summary of the various positions, see generally Rebecca Ingber, *International Law is Failing Us in Syria*, JUST SECURITY (Apr. 12, 2017, 11:06 AM), <https://www.justsecurity.org/39895/international-law-failing-syria/> [https://perma.cc/N2NZ-PSDH].

159. U.N. Charter, art. 51.

160. Egan, *supra* note 1.

161. Scharf, *supra* note 121, at 34.

162. See *infra* Section II.D.3 for discussion of those letters.

163. Missy Ryan, *U.S. Urges Iraq to Ensure Coalition Aid Is Effective Against Islamic State*, WASH. POST (Mar. 9, 2015), https://www.washingtonpost.com/world/middle_east/us-urges-iraq-to-ensure-coalition-aid-is-effective-against-islamic-state/2015/03/09/8ef90302-c67a-11e4-b2a1-bed1aeea2816_story.html [https://perma.cc/8W68-SB5S].

relied solely on that international law basis in taking action against ISI[S]. In Iraq, U.S. operations against ISI[S] are conducted with Iraqi consent and in furtherance of Iraq's own armed conflict against the group. And in Syria, U.S. operations against ISI[S] are conducted in individual self-defense and the collective self-defense of Iraq and other States.¹⁶⁴

However, despite the repeated mention of the United States's right of individual self-defense, Brian Egan has not elaborated further on the factual and legal bases behind its invocation, leaving one to wonder what precisely is the armed attack perpetrated by ISIS against the United States that would justify the exercise of that inherent right of self-defense.

At the time Brian Egan made his speech, it seems that the only events that could have conceivably amounted to armed attacks by ISIS against the United States would have been the 2014 beheadings of two American journalists,¹⁶⁵ the 2015 attack in San Bernardino,¹⁶⁶ and the 2016 attack in Orlando,¹⁶⁷ though there is still "no consensus on what type of attack by a non-state actor against a sovereign state could trigger the latter's right of self-defense."¹⁶⁸ More likely, the United States would have argued that its military intervention in Syria and Iraq was justified on the basis of preemptive self-defense.¹⁶⁹ The United States has taken the approach that terrorists, by their nature, "pose a continuing and imminent threat to the American people."¹⁷⁰ Specifically, as of April 2016, ISIS had attacked U.S. citizens both abroad and within the United States, and the organization continued to grow in wealth, territory, and power,¹⁷¹ as well as made "credible threats . . . against the United States."¹⁷² However, as Marty Lederman notes:

164. Egan, *supra* note 1.

165. Greg Miller, *FBI Director: U.S. Has Identified the Killer of Two Beheaded American Journalists*, WASH. POST (Sept. 25, 2014), https://www.washingtonpost.com/world/national-security/the-fbi-director-says-us-has-identified-the-killer-of-two-beheaded-american-journalists/2014/09/25/8ff52052-44dd-11e4-9a15-137aa0153527_story.html [<https://perma.cc/88NG-QYB8>].

166. Missy Ryan et al., *Both San Bernardino Attackers Pledged Allegiance to the Islamic State, Officials Say*, WASH. POST (Dec. 8, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/12/08/both-san-bernardino-attackers-pledged-allegiance-to-the-islamic-state-officials-say> [<https://perma.cc/LHJ7-RW3L>].

167. Jared Malsin, *What We Know About ISIS's Role in the Orlando Shooting*, TIME (June 12, 2016), <http://time.com/4365507/orlando-shooting-isis-claims-responsibility-terror/> [<https://perma.cc/N8YF-B9L3>] ("ISIS claimed responsibility for the mass shooting attack in an Orlando gay club on Sunday that left at least 50 people dead.").

168. Milena Sterio, *The Legality of ISIS Air Strikes Under International Law*, INTLAWGRRLS (Sept. 12, 2014), <https://ilg2.org/2014/09/12/the-legality-of-isis-air-strikes-under-international-law/> [<https://perma.cc/2SAA-7BLH>].

169. See Gonzalez, *supra* note 91, at 151 (noting that the United States would have been required to show a threat to personnel or global peace to obtain approval).

170. President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), <https://www.obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

171. See Gonzalez, *supra* note 91, at 149 ("The growing wealth and territorial expansion of ISIS has led the United States to view it as a credible national security threat."). This trend has now reversed. Sarah Almuthtar et al., *ISIS Has Lost Many of the Key Places It Once Controlled*, N.Y. TIMES (July 3, 2016), https://www.nytimes.com/interactive/2016/06/18/world/middleeast/isis-control-places-cities.html?_r=2.

172. Gonzalez, *supra* note 91, at 150; see Jim Michaels, *Islamic State Releases Video Threatening Attack*

Because ISI[S] has not yet actually engaged in an armed attack against the United States, this assertion suggests that the U.S. believes that ISI[S]’s presence in Syria presents an “imminent” threat of an attack on the United States. This might or might not be correct; but, as far as I know, the government has not (yet) publicly offered any specific evidence . . . to support such an “imminent threat of attack on the U.S.” theory.¹⁷³

Jack Goldsmith suggests that Brian Egan’s speech constitutes the

final stage of the Obama administration’s normalization of once-controversial Bush-era doctrines about the conduct of war [T]he Obama administration[] official[ly] embraced the same preemption doctrine that justified the invasion of Iraq If anything, Egan announces a broader principle than Bush’s, since he (unlike the Bush team) applies it in the context of threats short of the weapons of mass destruction that motivated Bush.¹⁷⁴

Daniel Bethlehem rejects Goldsmith’s hypothesis, claiming that, “the policy [Egan] outlined . . . is some distance, and materially different, from the broad, unilateralist brush of the Bush doctrine of preemption and its associated policies of the non-application of the *ius in bello* and the global war on terror.”¹⁷⁵ Bethlehem believes the imminence elements outlined by Egan provide “a more rigorous and transparent framework of legal enquiry for assessing whether a State had a right to use force by way of anticipatory self-defence in the face of a threat from a non-State actor,” which contrasts strongly with the Bush administration approach of “invent[ing] new language . . . suggest[ing] that the United States was moving away . . . from established tenets of international law.”¹⁷⁶ To Bethlehem, Egan’s speech outlined a policy that ensured continued compliance with “the last resort character of the use of force and the principles of necessity and proportionality.”¹⁷⁷

on New York City, USA TODAY (Nov. 19, 2015), <http://www.usatoday.com/story/news/world/2015/11/18/isil-releases-video-threatening-attack-new-york-city/76021908/> [<https://perma.cc/MXG2-7XZ8>] (reporting that ISIS “released a new propaganda video threatening attacks on New York City . . . [and] also released a video threatening to attack Washington, D.C., in the wake of the Paris attacks”).

173. Marty Lederman, *ASIL Speech by State Legal Adviser Egan on International Law and the Use of Force Against ISIL*, JUST SECURITY (Apr. 4, 2016, 6:06 PM), <https://www.justsecurity.org/30377/asil-speech-state-legal-adviser-international-law-basis-for-limits-on-force-isil/> [<https://perma.cc/6UXZ-J3ZG>].

174. Jack Goldsmith, *Obama Has Officially Adopted Bush’s Iraq Doctrine*, TIME (Apr. 6, 2016), <http://time.com/4283865/obama-adopted-bushs-iraq-doctrine/> [<https://perma.cc/4JG4-ZDD5>]. Goldsmith’s greater concern, however, is that “the fact that [the preemption theory] is articulated by an administration known to be friendly to international law . . . will be influential,” allowing future U.S. and global leaders to “[not] invoke the doctrine used in the disastrous Iraq war[, but instead] adopt the functionally identical principle that the Obama administration normalized and legitimated.” *Id.*

175. Daniel Bethlehem, *Not By Any Other Name: A Response to Jack Goldsmith on Obama’s Imminence*, LAWFARE (Apr. 7, 2016, 1:51 PM), <https://www.lawfareblog.com/not-any-other-name-response-jack-goldsmith-obamas-imminence> [<https://perma.cc/HQG6-VVQE>].

176. *Id.*

177. *Id.*

2. May a State Legally Exercise Force in Self-Defense Against a Non-State Actor?

Traditionally, the UN Charter provisions that handle use of force are premised on States using force against other States.¹⁷⁸ However, the rapidly growing capabilities of non-State actors have challenged these traditional notions.¹⁷⁹ Interpretations of Article 51 range from permitting,¹⁸⁰ not expressly prohibiting,¹⁸¹ and prohibiting use of force without Security Council approval against non-State actors.¹⁸²

In his ASIL speech, Brian Egan stated the United States's official position that, "the inherent right of individual and collective self-defense recognized in the UN Charter is not restricted to threats posed by States."¹⁸³ However, this position seems to run against the decisions of the International Court of Justice (ICJ). The ICJ famously defined "armed attack" in its 1986 *Nicaragua* case as including actions by regular armed forces across an international border as well as "the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces."¹⁸⁴ The criticisms of the Court's "scale and effects" language (criticisms which I share) notwithstanding,¹⁸⁵ the Court makes it absolutely clear that for there to be an "armed attack" for the purposes of Article 51, the relevant military operation must be attributable to a State.¹⁸⁶ In its 2004 *Legal Consequences of the Construction of a Wall in the Occupied*

178. See, e.g., Olivia Flasch, *The Legality of the Air Strikes Against ISIL in Syria: New Insights on the Extraterritorial Use of Force Against Non-State Actors*, 3 J. ON USE FORCE & INT'L L. 37, 39 (2016) ("Does Article 51, then, extend to collective self defence against non-state actors . . . ?").

179. *Id.* at 49; see also Kimberley N. Trapp, *Actor-Pluralism, the 'Turn to Responsibility' and the Jus ad Bellum: 'Unwilling or Unable' in Context*, 2 J. ON USE FORCE & INT'L L. 199, 205–07 (2015) (outlining responses of the Security Council and others to non-State actors in a way that implies that non-State actors are participants in the international legal principles of use of force).

180. Trapp, *supra* note 179, at 200 (explaining that a purely "inter-state-rights-based approach" is not sustainable and that Article 51 supports consideration of a pluralism of actors); see, e.g., Annalise Lekas, Comment, *#ISIS: The Largest Threat to World Peace Trending Now*, 30 EMORY INT'L L. REV. 313, 347 (2015) (arguing that the UN Charter must evolve and respond to contemporary armed attacks, such as by non-state actors).

181. Claus Krieb, *The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force Against 'IS' in Syria*, JUST SECURITY (Feb. 17, 2015, 8:45 AM), <https://www.justsecurity.org/20118/claus-krieb-force-isil-syria/> [<https://perma.cc/94ZY-E6GK>] (arguing that Article 51 interpretation does not expressly prohibit invoking the right of self-defense to take military action against destructive non-state actors without Security Council approval).

182. Gareth D. Williams, *Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the 'Unwilling or Unable' Test*, 36 U. NEW S. WALES L.J. 619, 621–23 (2013); see Deborah Pearlstein, *The Unwilling Part of "Unwilling or Unable"*, OPINIO JURIS (Nov. 9, 2015, 3:14 PM), <http://opiniojuris.org/2015/11/09/the-unwilling-part-of-unwilling-or-unable/> [<https://perma.cc/R63Z-B9QP>] (asserting that the doctrine is "irreconcilable" with Article 2(4)).

183. Egan, *supra* note 1; see also U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL 47–48 (2015) (detailing the U.S. method of responding to an attack).

184. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, para. 195 (June 27).

185. See, e.g., ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 250–51 (1994) (commenting on the ICJ's "unworkable" standard to determine how much force states may permissibly use and when they may use it to repel an armed attack).

186. Flasch, *supra* note 178, at 49; Kevin Jon Heller, *The "Unwilling or Unable" Standard for Self-*

Palestinian Territory advisory opinion, the ICJ opined similarly that, “[a]rticle 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.”¹⁸⁷ The ICJ thus rejected the contention that a victim State may respond by invoking its inherent right of self-defense when the claim is that the relevant armed attack had been carried out by a non-State actor.¹⁸⁸ The ICJ also maintained this position in *DRC v. Uganda*, where it found that, “the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present.”¹⁸⁹ The Court ruled, among other things, that Uganda had failed to prove “the involvement in [the] attacks, direct or indirect, of the Government of the DRC. The attacks [carried out against Uganda by a rebel group opposed to the Ugandan government with bases in the DRC] did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC.”¹⁹⁰

This position of the Court has been controversial and, I believe, was erroneous when originally put forward, and is no longer tenable.¹⁹¹ Unlike Article 2(4) of the Charter, which refers to “Members” as both resorting to threat of, or using force, Article 51 only speaks of a “Member” as the target of an armed attack that “occurs.”¹⁹² No mention is made therein of the origin of that attack.¹⁹³ In her Separate Opinion in *Wall*, Judge Higgins rejected the Court’s strict reading of Article 51, proclaiming that, “[t]here is . . . nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State.”¹⁹⁴ Similarly, Judge Buergenthal declared that the Court’s position was “legally dubious.”¹⁹⁵ Furthermore, the ICJ’s 2004 advisory opinion should be examined against the background of the terrorist attacks of September 11, 2001 and the international reaction to those attacks. As Yoram Dinstein argues, “the concerted reaction of the international community in 2001” to the attacks was “the defining moment that should have dispelled all lingering doubts concerning the application of Article 51 to non-State actors.”¹⁹⁶ Most significant in this context are two Security Council resolutions—Resolution 1368 (2001) and Resolution 1373 (2001)¹⁹⁷—both of which reaffirm the inherent right of

Defense, OPINIO JURIS (Sept. 17, 2011, 2:42 AM), <http://opiniojuris.org/2011/09/17/the-unwilling-or-unable-standard-for-self-defense-against-non-state-actors/> [<https://perma.cc/C94Y-KHS3>].

187. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, para. 139 (July 9).

188. *But see* Flasch, *supra* note 178, at 49 (discussing the ICJ’s “ambiguous” findings and “reluctance to pronounce” on the legality of using force in self-defense against non-state actors).

189. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, para. 147 (Dec. 19).

190. *Id.* para. 146.

191. *See generally* Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT’L L. 244, 245–46 (2011).

192. U.N. Charter art. 2, para. 4; art. 51.

193. Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 50 (2002).

194. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, para. 33 (separate opinion by Higgins, J.).

195. *See id.* paras. 5–6 (declaration by Buergenthal, J.) (“[T]he United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State . . .”).

196. DINSTEIN, *supra* note 88, at 227.

197. *See id.* at 228 (discussing the importance of the two Security Council resolutions).

individual or collective self-defense against Al-Qaeda,¹⁹⁸ as well as the North Atlantic Council decision to consider the 9/11 attacks as falling within the ambit of Article 5 of the Washington Treaty (later clarified to be the North Atlantic Treaty),¹⁹⁹ which proclaims that an armed attack against one NATO member is considered as an attack against all members.²⁰⁰ Indeed, recognizing the importance of these resolutions and the realities of the struggle against terrorism²⁰¹ has led other judges of the ICJ to part ways with the Court's decision.²⁰² Thus, in his separate opinion in *DRC v. Uganda*, Judge Kooijmans stated forcefully that,

a phenomenon which in present-day international relations has unfortunately become as familiar as terrorism, viz. the almost complete absence of government authority in the whole or part of the territory of a State. If armed attacks are carried out by irregular bands from such territory against a neighboring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defense merely because there is no attacker State, and the Charter does not so require.²⁰³

In yet another separate opinion, Judge Simma added:

Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court . . . Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as “armed attacks” within the meaning of Article 51.²⁰⁴

198. See Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 839–40 (2001) (discussing the right to self-defense under the Charter); Ranj Alaaldin & Bilal Khan, *Airstrikes on Isis Targets in Syria and Iraq are Legal Under International Law*, LONDON SCH. ECON.: US CTR. (Oct. 1, 2014), <http://blogs.lse.ac.uk/usappblog/2014/10/01/airstrikes-on-isis-targets-in-syria-and-iraq-are-legal-under-international-law/> [<https://perma.cc/K8RM-SSCN>] (discussing how self-defense is used in light of Security Council resolutions 1368 and 1373).

199. DINSTEIN, *supra* note 88, at 228–29.

200. *Id.*

201. See Rosa Brooks, *Lessons for International Law from the Arab Spring*, 28 AM. U. INT'L L. REV. 713, 725 (2013) (“Unsurprisingly, post-9/11 counterterrorism concerns triggered the rapid emergence of normative and legal argument for expanding the basis for using force within the territory of other states.”); Lekas, *supra* note 180, at 328 (acknowledging that after 9/11 there is an inherent right of self-defense against non-state actors); John F. Murphy, *International Law in Crisis: Challenges Posed by the New Terrorism & the Changing Nature of War*, 44 CASE W. RES. J. INT'L L. 59, 66–67 (2011) (discussing how after 9/11, there has been a shift away from the criminal justice approach as a way of handling terrorism and a shift towards a military model of counter-terrorism); Reinold, *supra* note 191, at 252 (discussing how the rules governing the use of force have changed in a post-9/11 world).

202. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, 313–14, paras. 27–29 (Dec. 19) (separate opinion by Kooijmans, J.) (explaining why Judge Kooijmans disagrees with the Advisory Opinion of July 9, 2004).

203. *Id.* at 314, para. 30 (separate opinion by Kooijmans, J.).

204. *Id.* at 337, para. 11 (separate opinion by Simma, J.).

Moreover, any arguments that could have been made to the effect that in both Resolution 1368 and Resolution 1373, the inherent right of self-defense is only referred to in the preamble and not in the operative language of those resolutions, have been fully and completely laid to rest with the adoption of Resolution 2249. That resolution, as noted above, expressly accepts the possibility that member States will take “all necessary measures” against a non-State entity,²⁰⁵ acknowledging that force can be legally used against terrorist groups. Indeed, even if all that Resolution 2249 does is encourage member States to exercise their right of self-defense against ISIS, then it is as much as confirming that self-defense may indeed be used against terrorist groups and similar non-State actors. In that, Resolution 2249 surely ought to confirm the application of Article 51 to non-State actors.

3. “Unable or Unwilling”

Even if one accepts, as suggested above, that a State may invoke its inherent right of self-defense whenever it is subject to an armed attack, regardless of the origin of that attack, there still remains a separate question of where the victim State may exercise its right of self-defense. Specifically, when the armed attack is committed by a non-State actor, may the victim State respond by military force against that actor in the territory of another State to whom the violent actions of the non-State actor are not attributable and who does not give its consent to such use of force by the victim State?²⁰⁶

International law has long recognized the obligation of every State “not to allow knowingly its territory to be used for acts contrary to the rights of other States.”²⁰⁷ All States have the obligation to ensure through the exercise of due diligence that illegal non-State actor uses of force are not emanating from their borders or, if such actions do take place, to apprehend and punish the perpetrators of the attack.²⁰⁸ Yoram Dinstein argues that if the State from whose territory the armed attack is carried out fails to exercise the requisite degree of due diligence, either because it is unable or unwilling to do so, the victim State may do that which the former State should have done had it possessed the means and disposition to perform its duty.²⁰⁹ Under such circumstances, the victim State may engage in a particular category of self-defense that Dinstein calls extra-territorial law enforcement, i.e., “recourse in self-defence to cross-border counter-force against terrorists and armed bands . . . Utopia is entitled to enforce international law extra-territorially if and when Arcadia is *unable or unwilling* to prevent repetition of that armed attack.”²¹⁰ Under the “unable or unwilling” doctrine, a State which is victim of an armed attack is “permitted to use force in the territory of a host state where the host state is either ‘unwilling or unable’ to do so.”²¹¹

205. S.C. Res. 2249, para. 5 (Nov. 20, 2015).

206. On use of force by state consent, see generally Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1 (2013).

207. *Corfu Channel (U.K. & N. Ir. v. Alb.)*, Merits, 1949 I.C.J. Rep. 4, para. 22 (April 9).

208. Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770, 776 (2012); Paulina Starski, *Right to Self-Defence, Attribution and the Non-State Actor—Birth of the ‘Unable and Unwilling’ Standard?*, 75 HEIDELBERG J. INT'L L. 455, 474–75 (2015); DINSTEIN, *supra* note 88, at 269.

209. DINSTEIN, *supra* note 88, at 271.

210. *Id.* at 272 (emphasis added).

211. Williams, *supra* note 182, at 620. See also Ashley S. Deeks, “Unwilling or Unable”: *Toward a*

In recent years, the notion of “unable or unwilling”²¹² has become “a well-settled part of the U.S. government’s legal position.”²¹³ Ashley Deeks identifies the origins of the “unable or unwilling” doctrine in the 1837 *Caroline* case, in which Canadian rebels used U.S. territory to attack British forces in Canada,²¹⁴ and suggests numerous other instances in which the doctrine was applied, even if tacitly,²¹⁵ culminating in the American raid on Osama bin Laden’s compound in Abbottabad, Pakistan—without Pakistan’s consent.²¹⁶ In his ASIL speech, Brian Egan set out the United States view regarding the unable or unwilling doctrine:

[I]n the case of ISIL in Syria, as indicated in our Article 51 letter, we could act in self-defense without Syrian consent because we had determined that the Syrian regime was unable or unwilling to prevent the use of its territory for armed attacks by ISIL. This “unable or unwilling” standard is, in our view, an important application of the requirement that a State, when relying on self-defense for its use of force in another State’s territory, may resort to force only if it is necessary to do so—that is, if measures short of force have been exhausted or are inadequate to address the threat posed by the non-State actor emanating from the territory of another State . . . applying the standard ensures that force is used on foreign territory without consent only in those exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using its territory as a base for attacks and related operations against other States.²¹⁷

The United States has invoked the unable or unwilling test to justify its military intervention in Syria. Samantha Power, the American Ambassador to the United Nations, sent a letter to the President of the Security Council to justify U.S. air strikes in Syria, notifying the president:

States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.²¹⁸

Normative Framework for Extraterritorial Self-Defense, 52 VA. INT’L L. REV. 483, 486 (2012) (using the Pakistan-U.S. relationship and others as an example of how the “unable or unwilling” test is applied).

212. Douglas Cantwell, “Unwilling or Unable” in the Legal Adviser’s ASIL Speech, LAWFARE (Apr. 12, 2016, 3:46 PM), <https://www.lawfareblog.com/unwilling-or-unable-legal-advisers-asil-speech> [https://perma.cc/ZYY3-JJHD] (citing Brian Egan’s 2016 ASIL speech) (“The two criteria must be identified and analyzed independently.”).

213. Samantha Arrington Sliney, *Right to Act: United States Legal Basis Under the Law of Armed Conflict to Pursue the Islamic State in Syria*, 6 U. MIAMI NAT’L SECURITY & ARMED CONFLICT L. REV. 1, 20 (2015).

214. Deeks, *supra* note 211, at 502.

215. *Id.* at 549–50 (Appendix I).

216. Murphy, *supra* note 201, at 69–71 (quoting John Bellinger in a 2006 speech that employs the unwilling or unable test with respect to the United States acting against al Qaida).

217. Egan, *supra* note 1.

218. See Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT’L L. 15, 34, 44 (2016) (asserting that these justifications find legal basis also in the Hague Conventions (V)); see also Johan D. van der Vyver, *The ISIS Crisis and the Development of International Humanitarian Law*, 30 EMORY INT’L L. REV. 531, 558 (2016) (quoting Letter from Samantha Power, U.S. Representative

With regards to the “unable” prong of the test, Brian Egan provided concrete example in his ASIL speech:

[I]nability perhaps can be demonstrated most plainly, for example, where a State has lost or abandoned effective control over the portion of its territory from which the non-State actor is operating. This is the case with respect to the situation in Syria. By September 2014, the Syrian government had lost effective control of much of eastern and northeastern Syria, with much of that territory under ISIL’s control.²¹⁹

For his part, Egan relied extensively on an article published by Daniel Bethlehem, the former principal Legal Advisor to the British Ministry of Foreign Affairs, in which Bethlehem suggested that inability exists when “there is a reasonable and objective basis for concluding that the [host] state is unable to effectively restrain the armed activities of the nonstate actor.”²²⁰ The United States also questioned how “willing” Syria was in supporting the United States’s exercise of its right of self-defense, since ISIS had established a “safe haven” in areas of Syria.²²¹ In that respect, States may be deemed as “unwilling” when they fail to comply with international law standards of due diligence or reasonableness in undertaking measures to prevent or punish dangerous internal conduct.²²²

On the other hand, Sharmine Narwani questions the validity of the U.S. argument that Syria is “unwilling and unable” to combat ISIS in light of Russia’s involvement in the country. Russia “began to launch widespread airstrikes against terrorist targets inside Syria” on September 30, 2015.²²³ Narwani observes that “Russia is operating [in Syria] due to a direct Syrian government appeal for assistance, [making] the Russian military role in Syria . . . perfectly legal.”²²⁴ Given that Syria is able to combat ISIS *vis-à-vis* the Russian military, it becomes harder for the United States to reasonably claim Syria is unable to strike back against ISIS. Furthermore, the fact that “the Russian intervention has assisted the Syrian state in going on the offensive against ISIS” makes it very difficult to claim that Syria is “unwilling” to attack ISIS.²²⁵ Thus, there is a genuine debate over whether Syria can fairly be characterized as “unwilling or unable.” In August 2014, Ryan Goodman cited the Syrian government as stating “that it is willing and able to cooperate with the United States in carrying out strikes against ISIS.”²²⁶ As Goodman then asks, “[w]hat is the international law when a host state (Syria) is willing and able to deal with a nonstate group (ISIS) through military cooperation with the threatened state (the United States), but the threatened state

to UN, to Ban Ki-Moon, U.N. Secretary-General (Sept. 23, 2014)).

219. Egan, *supra* note 1.

220. Bethlehem, *supra* note 208, at 776.

221. Tom Ruys & Luca Ferro, *Divergent Views on the Content and Relevance of the Jus Ad Bellum in Europe and the United States? The Case of the U.S.-Led Military Coalition Against ‘Islamic State’* 9–10 (Feb. 10, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731597 [<https://perma.cc/8L5N-SR2L>].

222. See Starski, *supra* note 208, at 479–80 (explaining how states failing to exercise due diligence in preventing acts of terrorism could be held accountable).

223. Narwani, *supra* note 102.

224. *Id.*

225. *Id.*

226. Ryan Goodman, *International Law on Airstrikes against ISIS in Syria*, JUST SECURITY (Aug. 28, 2014, 12:27 PM), <https://www.justsecurity.org/14414/international-law-airstrikes-isis-syria/> [<https://perma.cc/Y8X8-4ZRJ>].

doesn't want to associate itself with the host state . . . ?"²²⁷ There appears to be no international consensus on this issue. However, a counterpoint to Syria's assertion that they are willing to cooperate is that the proper question should not be whether Syria is willing to assist, but whether they are actually capable of effectively suppressing ISIS on their own. Furthermore, is it appropriate to leave the capability determination to the forum State, or should the victim State(s) be allowed to make the evaluation? As Mahira N. Khan writes, "that the regime may be willing to tackle ISIS is not enough to prevent Iraq or its allies from invoking the self-defense doctrine."²²⁸ This viewpoint is supported by the UN Secretary-General's statement from September 2014 that "Syria had over two years to dismantle ISIS and the [U.S.] strikes 'took place in areas no longer under the effective control of [the Syrian government].'"²²⁹ Some have taken this quote to be "an implicit endorsement" of U.S. actions,²³⁰ though the opinion of the UN Secretary-General is not dispositive on the question of international legality.

More generally, the American legal position is not without its critics and the doctrine remains highly controversial today, with a significant number of scholars rejecting it as part of international law's *lex lata*.²³¹ The doctrine, as it is currently touted by its proponents, lacks needed limitations.²³² The test can easily fall into a pattern of dangerous circular reasoning: If a host State does not comply with a victim State's desired route for self-defense, then the host State is deemed "unable or

227. *Id.*

228. Mahira N. Khan, *Legality of the War Against ISIS: Still Disputable*, LEGISLATION & POLICY BRIEF (Oct. 31, 2014), <http://www.legislationandpolicy.com/1697/legality-for-the-war-against-isis-still-disputable/> [<https://perma.cc/7G3Y-MFLR>].

229. *Id.* (quoting, in part, UN Secretary General Ban Ki-moon) (emphasis added).

230. Marc Weller, *Striking ISIL: Aspects of the Law on the Use of Force*, ASIL INSIGHTS (Mar. 11, 2015), <https://www.asil.org/insights/volume/19/issue/5/striking-isil-aspects-law-use-force> [<https://perma.cc/CD4B-HWLN>].

231. Flasch, *supra* note 178, at 52–53; Kevin Jon Heller, *The Absence of Practice Supporting the "Unwilling or Unable" Test*, OPINIO JURIS (Feb. 17, 2015, 2:53 PM) [hereinafter Heller, *The Absence of Practice Supporting the "Unwilling or Unable" Test*], <http://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/> [<https://perma.cc/ML39-YF8T>]; see, e.g., Starski, *supra* note 208, at 486 (stating that "severe doubts" remain that base the standard in international law); Jack Goldsmith, *Thoughts on the Latest Round of Johnson v. Koh*, LAWFARE (Sept. 16, 2011, 8:43 AM), <https://www.lawfareblog.com/thoughts-latest-round-johnson-v-koh> [<https://perma.cc/6MHA-6QV8>] (discussing the debate over "the scope of the president's authority to target members" of terrorist groups); see also Heller, *supra* note 186 (showing that for many American international law scholars, "it is meaningless to distinguish between the *lex lata* and the *lex ferenda*—international law is simply whatever the U.S. says it is"). For a short discussion of the opposing sides to this debate, see Kevin Jon Heller, *Ashley Deeks' Problematic Defense of the 'Unwilling or Unable' Test*, OPINIO JURIS (Dec. 15, 2011), <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> [<https://perma.cc/X867-F44W>].

232. Kinga Tibori-Szabó, *The 'Unwilling or Unable' Test and the Law of Self-Defence*, in FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW 73, 95 (Christophe Paulussen et al. eds., 2016) (calling for clarification of the test); Goldsmith, *supra* note 231 (urging that lawyers' disagreements at the margins of the doctrine will prove to be "politically devastating"); Heller, *The Absence of Practice Supporting the "Unwilling or Unable" Test*, *supra* note 231; Jonathan Horowitz, *Does the Unwilling/Unable Test Hang on Territorial Control?: A Response to Michael Lewis*, JUST SECURITY (Sept. 12, 2014, 2:49 PM), <https://www.justsecurity.org/14953/unwillingunable-test-hang-territorial-control-response-michael-lewis/> [<https://perma.cc/3XBM-3ZG2>] (advocating for a "fact-based test," rather than a "generalized rule").

unwilling.”²³³ Moreover, at least according to the United States’ official position, the judgment as to whether a host State is, in fact, “unable or unwilling” is in the hands of the victim State with little, if any, meaningful control or checks.²³⁴ In contrast, some have argued that the Security Council should act as a fact-finder to determine unwillingness or inability instead of the victim State.²³⁵ Only once the victim State receives confirmation from the Security Council that the host State has indeed been “unable or unwilling” may it proceed against the non-State actor operating in and from the territory of the host State.²³⁶

Ashley Deeks argues that “centuries of state practice” support the unwilling or unable doctrine.²³⁷ In the context of the fight against ISIS, several States have invoked the doctrine to justify their use of force against the organization in Syrian territory. In their letters to the President of the Security Council, the United States,²³⁸ Australia,²³⁹ and Turkey²⁴⁰ have expressly invoked the “unable or unwilling” doctrine. Thus, for example, the letter sent by Australia to the Security Council declares:

States must be able to act in self-defence when the Government of the State where the threat is located is unwilling or unable to prevent attacks originating from its territory. The Government of Syria has, by its failure to constrain attacks upon Iraqi territory originating from ISIL bases within Syria, demonstrated that it is unwilling or unable to prevent those attacks.²⁴¹

Other countries—such as Germany²⁴² and Belgium²⁴³—have not resorted to the “unwilling” prong of the test, but have invoked the “unable” prong in addition to other justifications for military operations, such as collective self-defense. Thus, for example, the letter sent on December 10, 2015 from the Permanent Mission of Germany to the President of the Security Council states that,

233. Brooks, *supra* note 201, at 728 (explaining that if a territorial state does not completely agree with a victim state’s intended self-defense tactics, then the victim state can easily label the former as “unwilling or unable”).

234. Egan, *supra* note 1.

235. Dawood I. Ahmed, *Defending Weak States Against the “Unwilling or Unable” Doctrine of Self-Defense*, 9 J. INT’L L. & INT’L REL. 1, 26–28 (2013).

236. *Id.* at 27.

237. Deeks, *supra* note 211, at 483, 497–501.

238. Permanent Rep. of the U.S. to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

239. Permanent Rep. of Austl. to the U.N., Letter dated Sept. 9, 2015 from the Permanent Rep. of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015).

240. Charge d’Affaires a.i. of the Permanent Mission of Turk. to the U.N., Letter dated July 24, 2015 from the Charge d’Affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015).

241. Permanent Rep. of Austl. to the U.N., Letter dated Sept. 9, 2015 from the Permanent Rep. of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015).

242. Chargé d’Affaires a.i. of the Permanent Mission of Germany to the U.N., Letter dated Dec. 10, 2015 from Heiko Thoms, Charge d’affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015).

243. Ambassador and Permanent Representative of Belg. to the U.N., Letter dated June 7, 2016 from Bénédicte Frankinet, the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/523 (June 7, 2016).

ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic.²⁴⁴

However, others have been unable (or unwilling) to identify consistent State practice that reflects the test.²⁴⁵ Unlike the countries mentioned above, others, such as Norway,²⁴⁶ Denmark,²⁴⁷ and France,²⁴⁸ have only invoked the right of collective self-defence in response to a request from the government of Iraq as justification for taking military action against ISIS.²⁴⁹ Interestingly enough, in its letters to the Security Council, the United Kingdom has also only resorted to the argument about collective self-defence, without invoking the “unable or unwilling” test.²⁵⁰ The “nebulous

244. Chargé d’Affaires a.i. of the Permanent Mission of Germany to the U.N., *supra* note 242.

245. Kevin Jon Heller, *The Seemingly Inexorable March of “Unwilling or Unable” Through the Academy*, OPINIO JURIS (Mar. 6, 2015, 6:44 AM), <http://opiniojuris.org/2015/03/06/the-seemingly-inexorable-march-of-unwilling-or-unable-through-the-academy/> [<https://perma.cc/EQ7Z-7JFE>] (stating that to argue otherwise would mean to de-formalize the custom creation process, which substantiates Western interests); Heller, *The Absence of Practice Supporting the “Unwilling or Unable” Test*, *supra* note 231; Pearlstein, *supra* note 182; *see also* Flasch, *supra* note 178, at 52–54 (describing the “highly controversial theory that has been brewing in the discourse on the use of force for some decades is that of the ‘unwilling or unable’ test”); Ruys & Ferro, *supra* note 221, at 14 (explaining that European states were hesitant to make a stance initially, but they gradually recognized that the cross-border activities of ISIS “g[a]ve rise to an ‘armed attack’ triggering the right of self-defence”); Starski, *supra* note 208, at 486–87 (observing that “severe doubts remain as to the *lex lata* status of an attribution standard based on unwillingness or inability”).

246. Ambassador and Permanent Rep. of Nor. to the U.N., Letter dated June 3, 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/513 (June 3, 2016).

247. Permanent Rep. of Den. to the U.N., Letter from the Permanent Representative of Denmark dated January 11, 2016 addressed to the President of the Security Council, U.N. Doc. S/2016/34 (Jan. 13, 2016).

248. Permanent Rep. of Fr. to the U.N., Letter from the Permanent Representative of France to the United Nations dated Sept. 8, 2015 addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 9, 2015).

249. Ashley Deeks, *The UK’s Article 51 Letter on the Use of Force in Syria*, LAWFARE (Dec. 12, 2014, 9:53 AM), <https://www.lawfareblog.com/uks-article-51-letter-use-force-syria> [<https://perma.cc/9AXF-RLNB>] (“[S]tates such as Jordan, Bahrain, Qatar, and the UAE, which also have undertaken airstrikes in Syria, presumably are relying on the same legal theory as the United States and UK . . . states such as France, Denmark, and Belgium only have provided support to strikes against ISIS within Iraq, not Syria.”). *Contra* Kevin Jon Heller, *Do Attacks on ISIS in Syria Justify the “Unwilling or Unable” Test?*, OPINIO JURIS (Dec. 13, 2014, 11:58 AM), <http://opiniojuris.org/2014/12/13/attacks-isis-syria-justify-unwilling-unable-test/> [<https://perma.cc/44FY-2HKJ>] (asserting that “the US and UK clearly support the ‘unwilling or unable’ test; Jordan, Bahrain, Qatar, and the UAE are likely basing their willingness to attack ISIS in Syria on Syrian consent; . . . and France, Denmark, and Belgium seem to reject the test, even if they have not done so explicitly”).

250. Permanent Rep. of the U.K. to the U.N., Letter dated November 25, 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2014/851 (Nov. 25, 2014); Permanent Rep. of the U.K. to the U.N., Letter dated September 7, 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/688 (Sept. 7, 2015); Permanent Rep. of the U.K. to the U.N., Letter dated December 3, 2015 from the Permanent Representative of the United

parameters” of the doctrine make measuring State practice challenging, and consensus of clear State practice (besides the acts of the United States) is fleeting.²⁵¹ Indeed, the argument is made that the doctrine can be, and has been, invoked in practice by militarily strong States to push their agendas at the expense of weaker States.²⁵² By privileging the rights of States that have been victim to non-State actor attacks that originate from weaker host States²⁵³ over the sovereignty of the host States,²⁵⁴ the doctrine could allow victim States to breach other States’ sovereignty in a manner far greater than international law intended.²⁵⁵ If a host State does not consent to the plan that the victim State envisions for self-defense, the classification of the host State as “unable or unwilling” is an easy way for the victim State to proceed.²⁵⁶ Such concerns about sovereignty and States rushing to invoke the “unable or unwilling” test have led several scholars and practitioners to suggest that a victim State seek consent of the host State to carry out actions against the non-State actor operating in the territory of the host State before resorting to the “unable or unwilling test.”²⁵⁷ It should also be noted that attempts to fit the test within existing international law frameworks, such as through the principle of necessity or by indirect attribution to a State’s acts,²⁵⁸ or

Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/928 (Dec. 3, 2015). *But see* Deeks, *supra* note 249 (arguing that the U.K. endorsed the unable or unwilling test when it expressed general support for the United States’s actions, but admitting, though, that the U.K.’s support of the doctrine was implied from its support of U.S. air strikes in Syria generally).

251. *See* Williams, *supra* note 182, at 620 (characterizing the “unable or unwilling” test as an emerging norm).

252. Ntina Tzouvala, Symposium, *TWAIL and the “Unwilling or Unable” Doctrine: Continuities and Ruptures*, 109 AM. J. INT’L L. UNBOUND 266, 268 (2015) (“[I]t attempts to (re)introduce a classification of states that differentiates the degree of their sovereignty based on the way that they are internally organized and on the antiterrorist policies that they have chosen to implement.”).

253. Ahmed, *supra* note 235, at 17–18.

254. *See id.* at 25 (“Even states that are not harmed by the defection of another state should have an incentive to punish states that violate the rules, for fear that violations will spread and international peace and security may be jeopardized.”).

255. *See* Fionnuala Ní Aoláin, *International Law à la Carte: Brian Egan’s Jus ad Bellum Doctrine*, JUST SECURITY (Apr. 8, 2016, 2:44 PM), <https://www.justsecurity.org/30481/international-law-a-la-carte-brian-egans-ad-bellum-doctrine/> [<https://perma.cc/UHE8-D6UZ>] (arguing that the “introduction of ‘unwilling or unable’ terminology . . . when justifying action on a nation’s territory without its permission . . . does not meet a threshold test for rigor or legitimacy in the law of armed conflict”).

256. *See id.* (quoting Brian Egan, Legal Adviser, State Department) (“[T]here will be cases in which there is a reasonable and objective basis for concluding that the territorial State is unwilling or unable to effectively confront the non-State actor in its territory so that it is necessary to act in self-defense against the non-State actor in that State’s territory without the territorial State’s consent.”).

257. *See* Bethlehem, *supra* note 175 (discussing legal dialogue with the Bush administration seeking to identify a more rigorous and transparent framework of legal inquiry for assessing whether a State had a right to use force by way of anticipatory self-defense in the face of a threat from a non-State actor); Benjamin Wittes, *State Department Legal Adviser Brian Egan’s Speech at ASIL*, LAWFARE (Apr. 8, 2016, 8:30 AM), <https://www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil> [<https://perma.cc/EDT3-94TX>] (providing a transcript of Egan’s speech); *see also* Horowitz, *supra* note 232 (explaining that seeking consent and cooperation from the host state aids in slowing down hasty reactions from the victim state); Michael Lewis, *What Does the “Unwilling or Unable” Standard Mean in the Context of Syria?*, JUST SECURITY (Sept. 12, 2014, 9:05 AM), <https://www.justsecurity.org/14903/unwilling-unable-standard-context-syria/> [<https://perma.cc/C9S3-JASN>] (arguing that “the phrase ‘unable or unwilling’ describes the host/target state’s capacity to control its own territory”).

258. Flasch, *supra* note 178, at 54–55.

attempts to draw links and comparisons between it and the similarly legally-suspect humanitarian intervention²⁵⁹ have been rejected.²⁶⁰

CONCLUSION

The United States's war against ISIS is now in its third year. It is a "most peculiar war . . . [with] an eye-watering U.S.-to-ISIS 'kill ratio' of 15,000-to-1."²⁶¹ "[R]arely," notes *Time* magazine, "has the U.S. been killing so many while risking so few."²⁶² Yet, despite ISIS's recent loss of ground and territory both in Iraq and Syria, many still question the American strategy and ultimate goals in the fight against the terrorist organization.²⁶³ Not less challenging are the legal questions concerning the American military intervention, particularly in Syria and Libya, where the intervened-in State has not given its consent to such use of force in its territory.²⁶⁴ The military intervention raises vexing questions both on the domestic and international planes. As this Article has shown, there is a plausible case to be made that the intervention is justified by Security Council Resolution 2249. In addition, international law, as it currently stands, has clearly moved away from the position that States may not exercise their inherent right of self-defense in circumstances in which the armed attacked against them has been perpetrated by a non-State actor whose actions cannot be attributed to any other State. The option to exercise self-defense (or, more likely, collective self-defense) is available to the United States, as well as to other countries carrying the fight to ISIS, on the basis that countries such as Syria are unable or unwilling to fight ISIS.

259. See Oren Gross, *Applying the Extra-Legal Measures Model to Humanitarian Interventions: A Reply to Devon Whittle*, 26 EUR. J. INT'L L. 699, 705–06 (2015) (stating that unilateral action when a state is unwilling or unable to act violates international law and that unilateral humanitarian intervention remains illegal and is openly acknowledged as such).

260. Flasch, *supra* note 178, at 56–57; see also Brooks, *supra* note 201, at 727–28 (explaining that the standard is similar to humanitarian intervention because states have a responsibility to ensure lawful conduct within their borders, but that applying the standard to this doctrine "makes a mockery" of traditional state non-intervention principles); Lekas, *supra* note 180, at 348 (concluding that the "unwilling or unable rationale" is insufficient "to justify armed intervention in Syria to end the ISIS threat"); Jens David Ohlin, *The Unwilling or Unable Doctrine Comes to Life*, OPINIO JURIS (Sept. 23, 2014, 8:10 PM), <http://opiniojuris.org/2014/09/23/unwilling-unable-doctrine-comes-life/> [<https://perma.cc/Q76L-GYWX>] (stating that the unwilling or unable test is not the current state of the law but soon may be).

261. Mark Thompson, *Former U.S. Commanders Take Increasingly Dim View of War on ISIS*, TIME (Aug. 31, 2016), <http://time.com/4474910/isis-retired-generals/> [<https://perma.cc/K6HA-WY37>].

262. *Id.*

263. See *id.* (providing examples of several U.S. generals expressing disapproval of the U.S. strategy against ISIS).

264. See, e.g., Karine Bannelier-Christakis, *Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent*, 29 LEIDEN J. INT'L L. 743, 759 (2016) (stating that the theory of consent is extremely difficult, if not impossible, to use regarding the operations of the U.S.-led coalition in Syria).

Losing the “War of Ideas:” A Critique of Countering Violent Extremism Programs

SAHAR F. AZIZ*

TABLE OF CONTENTS

INTRODUCTION256

I. THE DUELING DEFINITIONS OF COUNTERING VIOLENT EXTREMISM258

II. CVE PROGRAMS SECURITIZE MUSLIM COMMUNITIES AND VALIDATE TERRORISTS’ NARRATIVES THAT AMERICA IS AT WAR WITH ISLAM.....261

III. CVE SIGNALS THAT MUSLIMS ARE A SUSPECT COMMUNITY LEGITIMIZING DISCRIMINATION AND HATE CRIMES264

IV. CVE PROGRAMS ARE UNNECESSARY TO PREVENT DOMESTIC TERRORISM.....269

V. CVE PROGRAMS WASTE GOVERNMENT RESOURCES272

VI. FUNDS FOR COMMUNITY DEVELOPMENT AND RESILIENCE SHOULD BE MANAGED BY SOCIAL SERVICE AGENCIES WITHOUT LAW ENFORCEMENT CONTROL.....276

CONCLUSION278

* Professor of Law, Texas A&M University School of Law and nonresident fellow at Brookings Doha Center. This Article is based on Congressional testimony I delivered to the United State House of Representatives Homeland Security Committee, Subcommittee on Oversight and Management Efficiency on September 22, 2016. Sahar F. Aziz, Professor of Law, Texas A&M University School of Law, Witness Testimony before the House Oversight and Management Efficiency Subcommittee (Sept. 22, 2016), <https://homeland.house.gov/hearing/identifying-enemy-radical-islamist-terror/> [<https://perma.cc/7MPH-8TNM>]. I thank Professors Shirin Sinnar and Amna Akbar for their insightful feedback. I also thank Kyle Carney, Callie Dodson, and Roxie McCormick for their diligent research assistance.

INTRODUCTION

American national security is a priority that crosses partisan lines. Americans of all races, ethnicities, and religions are equally concerned with ensuring our country is safe from violence—whether politically-motivated terrorism, state violence, or violent crime.¹ And, we all share an interest in preventing violence before it occurs. Toward that end, as citizens and elected officials we have a responsibility to carefully examine whether the methods we use to prevent terrorism are effective.

In 2011, the Obama Administration initiated a Countering Violent Extremism program (CVE) purportedly aimed at tackling the underlying causes that may contribute to terrorism domestically and abroad.² According to the White House, “CVE efforts address the root causes of extremism through community engagement”³ and

[t]he underlying premise of the approach to countering violent extremism in the United States is that (1) communities provide the solution to violent extremism; and (2) CVE efforts are best pursued at the local level, tailored to local dynamics, where local officials continue to build relationships within their communities through established community policing and community outreach mechanisms.⁴

In January 2017, the Trump Administration announced that it would change the name of the program to “Countering Islamic Extremism” to reflect his Administration’s intentions to focus exclusively on terrorism committed by individuals claiming to be Muslim, while excluding terrorism committed by others including white supremacists.⁵ Notwithstanding the outcry surrounding the Trump Administration’s renaming of the program by civil rights advocates, CVE has always been focused on

1. Although there is no single definition of terrorism in U.S. or international law, I define terrorism here as an attack on civilians for larger political objectives, whether couched in religious or secular narratives. See Annual Country Reports on Terrorism, 22 U.S.C. § 2656f(d)(2) (2004) (defining terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”); DOJ Federal Bureau of Investigation Rules, 28 C.F.R. § 0.85 (2011) (defining terrorism as including “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives”); U.S. DEP’T OF DEFENSE, Instruction 2000.12, 36 (Mar. 1, 2012), <http://www.dtic.mil/whs/directives/corres/pdf/200012p.pdf> [<https://perma.cc/PBP9-BGWZ>] (defining “terrorist threat” as “[a]n expression of intention, by an individual or group, to commit an act or acts of violence to inflict injury or damage in pursuit of political, religious, or ideological objectives”); Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV. 1715, 1718 n.10 (2010) (explaining the concept of homegrown terrorism); see also Joshua Sinai, *How to Define Terrorism*, 2 PERSP. ON TERRORISM 9, 9–11 (2008) (explaining the difficulty of defining terrorism).

2. Press Release, Office of the Press Secretary, The White House, FACT SHEET: The White House Summit on Countering Violent Extremism (Feb. 18, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/18/fact-sheet-white-house-summit-countering-violent-extremism> [<https://perma.cc/E3PU-V8YZ>] [hereinafter Fact Sheet] (discussing community engagement with religious leaders and communities).

3. *Id.*

4. *Id.*

5. Julia Edwards Ainsley, et al., *Exclusive: Trump to Focus Counter-Extremism Program Solely on Islam* – Sources, REUTERS (Feb. 2, 2017, 10:51 AM), <http://www.reuters.com/article/us-usa-trump-extremists-program-exclusiv-idUSKBN15G5VO> [<https://perma.cc/4QJ7-2KYD>].

Muslim communities in the United States. Trump's actions merely validated what critics of the program claimed all along.⁶

These CVE programs are fundamentally flawed for three reasons: They are counterproductive, unnecessary, and a waste of government resources. Accordingly, this Article addresses four fundamental flaws with CVE: 1) CVE programs securitize Muslim communities and validate terrorists' narratives that America is at war with Islam; 2) CVE programs are unnecessary to prevent domestic terrorism; 3) CVE programs are a waste of government resources; and 4) government funds for community development and resilience should be funded and administered by social service agencies without law enforcement control.

First, CVE programs managed and funded by the U.S. Department of Homeland Security and the U.S. Department of Justice securitize government-community relations such that Muslims are perceived and engaged primarily through a security lens.⁷ Such securitized treatment of an entire religious community is counterproductive. CVE programs put the civil liberties of innocent Americans at risk, signal to the public that Muslims warrant collective suspicion, and confirm international terrorists' narratives that America is at war with Islam.⁸ In turn, terrorists point to such religious profiling and selective targeting of Muslims in their international recruiting efforts to gain followers and sympathy for their perverse political agenda.⁹

Second, CVE programs are unnecessary to preserve American national security. Muslims are no different from other Americans, and need no special government community relations program to encourage reporting of suspicious criminal activity. Indeed, a Duke University report found that Muslim communities across the country have a "positive relationship with their local police or express a willingness to engage with police departments based on principles of fairness and equal treatment."¹⁰ Furthermore, according to the New America Foundation, approximately 60% of

6. See Arun Kundnani, *Spooked! How Not to Prevent Violent Extremism*, INST. OF RACE RELATIONS 6, 35 (2009), <http://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2017/04/26154810/spooked.pdf> [<https://perma.cc/YU3W-B2PN>]; Hina Shamsi, *Will White House Violent Extremism Summit Address Pressing Civil Rights Concerns?*, AM. C.L. UNION (2015), <https://www.aclu.org/blog/national-security/will-white-house-violent-extremism-summit-address-pressing-civil-rights-conce> [<https://perma.cc/4YDX-KGKR>]; Faiza Patel and Meghan Koushik, *Countering Violent Extremism*, BRENNAN CTR. FOR JUSTICE (2017). See generally Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT'L SECURITY J. 147, 147-224 (2014) [hereinafter Aziz, *Policing Terrorists*].

7. See generally ISLAMOPHOBIA IN AMERICA: THE ANATOMY OF INTOLERANCE (Carl W. Enst ed., 2013); JEFFREY L. THOMAS, *SCAPEGOATING ISLAM: INTOLERANCE, SECURITY, AND THE AMERICAN MUSLIM* (2015).

8. See generally Aziz, *Policing Terrorists*, *supra* note 6; Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429 (2011/12) [hereinafter Aziz, *Caught in a Preventive Dragnet*].

9. See, e.g., Tiffany Ap, *Al-Shabaab Recruit Video with Trump Excerpt: U.S. Is Racist, Anti-Muslim*, CNN (Jan. 3, 2016, 9:20 AM), <http://www.cnn.com/2016/01/02/middleeast/al-shabaab-video-trump/> [<https://perma.cc/GHY8-PZYZ>] (describing an Al Qaeda affiliate recruitment video highlighting U.S.'s history of racism and discrimination of the Muslim community). See generally Aziz, *Caught in a Preventive Dragnet*, *supra* note 8.

10. DAVID SCHANZER ET AL., *THE CHALLENGE AND PROMISE OF USING COMMUNITY POLICING STRATEGIES TO PREVENT VIOLENT EXTREMISM* 3 (2016), <https://sites.duke.edu/tcts/files/2016/05/The-Challenge-and-Promise-of-Using-Community-Policing-Strategies-to-Prevent-Violent-Extremism.pdf> [<https://perma.cc/7BBH-9CP6>].

terrorism plots have been prevented due to traditional investigative methods, including about 18% by initial tips from Muslim communities without the need for costly and counterproductive CVE programs.¹¹

Third, the tens of millions of dollars budgeted for CVE programs would be better spent on programs administered through social services agencies with the expertise to assist the multitude of American communities in need of job training, mental health services, domestic violence prevention, English language training, refugee resettlement, youth after-school programs, tutoring, and other services that promote safe and healthy communities.¹² To the extent that the U.S. government seeks to engage in good faith efforts to support diverse Muslim American communities, resources should be managed by institutions whose missions are to develop communities, not prosecute and incarcerate individuals based on racial and ethnic stereotypes.

I. THE DUELING DEFINITIONS OF COUNTERING VIOLENT EXTREMISM

Countering Violent Extremism is a term often invoked but rarely defined. Proponents and opponents of CVE disagree on its strengths and weaknesses while implicitly assuming there is agreement on the definition of CVE.¹³ As such, a brief summary of the dueling definitions is warranted.

In general, there are two definitions of CVE that influence stakeholders' positions on such programs. The first definition is effectively the soft-arm of counterterrorism that supplements anti-terrorism surveillance, prosecution, and convictions.¹⁴ The second definition treats CVE as separate, though complementary, to counterterrorism insofar as it is more focused on providing long-term social services.¹⁵ Both definitions presume that stopping so-called "radicalization" of

11. PETER BERGEN ET AL., NEW AM. FOUND., DO NSA'S BULK SURVEILLANCE PROGRAMS STOP TERRORISTS? 4-5 (2014), https://static.newamerica.org/attachments/1311-do-nsa-bulk-surveillance-programs-stop-terrorists/IS_NSA_surveillance.pdf [<https://perma.cc/C7BQ-UG5R>] Michael Hirsh, *Inside the FBI's Secret Muslim Network: While Candidates Stoke Fears of Islam, a Little-Known Counterterror Program has been Going Exactly the Other Way*, POLITICO (Mar. 24, 2016), <http://www.politico.com/magazine/story/2016/03/fbi-muslim-outreach-terrorism-213765> [<https://perma.cc/JB3A-N9B9>].

12. See Jana Kasperkevic, *Welfare Programs Shown to Reduce Poverty in America*, GUARDIAN (Nov. 12, 2014 1:39 PM), <https://www.theguardian.com/money/us-money-blog/2014/nov/12/social-welfare-programs-food-stamps-reduce-poverty-america> [<https://perma.cc/75TN-FWYT>] (showing that social welfare programs have been successful in improving lives of America's poor).

13. See THE COUNCIL ON AMERICAN-ISLAMIC RELATIONS, BRIEF ON COUNTERING VIOLENT EXTREMISM (2015), <https://www.cair.com/government-affairs/13063-brief-on-countering-violent-extremism-cve.html> [<https://perma.cc/6E5P-U3GQ>] (explaining the disagreement concerning the definition of "CVE").

14. See EXEC. OFFICE OF THE PRESIDENT, STRATEGIC IMPLEMENTATION PLAN FOR EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES 2 (2016), https://www.dhs.gov/sites/default/files/publications/2016_strategic_implementation_plan_empowering_local_partners_prev.pdf [<https://perma.cc/UNM9-8ERJ>] [hereinafter STRATEGIC IMPLEMENTATION PLAN] ("Fundamentally, CVE actions intend to address the conditions and reduce the factors that most likely contribute to recruitment and radicalization by violent extremists. Where possible, CVE should be incorporated into existing programs related to public safety, resilience, inclusion, and violence prevention.").

15. See John D. Cohen, *The Next Generation of Government CVE Strategies at Home: Expanding Opportunities for Intervention*, 668 ANNALS AM. ACAD. POL. & SOC. SCI. 118, 120 (2016) ("Initially, efforts

individuals to engage in terrorism is the ultimate goal of CVE.¹⁶ Furthermore, both definitions accept that certain communities are targeted by CVE based on those communities' common identities with perpetrators of terrorism; for example, in the post-9/11 era under both Obama and Trump, those targeted communities have been exclusively Muslim, Arab, and South Asian.¹⁷ This is notwithstanding the documented rise of white supremacist groups in the United States.¹⁸

Implicitly adopting the soft counterterrorism definition, the White House Initiative on Countering Violent Extremism under Obama concluded "family members, friends, or close acquaintances are the most likely to observe activities or behaviors suggesting an individual is being radicalized or has violent intent."¹⁹ And accordingly, the government's newly created CVE Interagency Task Force

will coordinate the development and dissemination of resources describing possible warning signs as well as steps families and friends can take if they believe someone close to them is becoming recruited or radicalized to violence. The resources will include information for trusted members of local communities who those families and friends may call upon for guidance or assistance.²⁰

According to John Cohen, former Undersecretary for Intelligence and Analysis and the Counterterrorism Coordinator in the United States Department of Homeland Security:

In most cases, those radicalized to violence exhibit behaviors of concern that are observed by those who associate with that individual. This is why the United States law enforcement and homeland security officials have sought to develop and employ locally based prevention strategies designed to aid authorities in detecting those on the verge of ideologically motivated violence These programs have become known as "countering violent extremism"²¹

Cohen tellingly stated that CVE "is an operational model informed by long-standing behavioral risk assessment and threat management techniques employed by organizations such as the United States Secret Service and involves incorporating CVE

to prevent ideologically motivated violence was a matter to be handled by law enforcement authorities who leveraged traditional investigative strategies to disrupt or investigate after the acts of violence were committed. Over time and based on growing concerns over al-Qaeda-or ISIS-inspired attacks, national CVE efforts expanded to include engagement and outreach campaigns directed at mostly Muslim and Arab American community organizations. The goal of these outreach and engagement activities was to foster greater collaboration in an effort to better detect potential threats from within those communities.").

16. See Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 137 (2012) (characterizing rationalization for counter-radicalism as preventive measure against future terrorist attacks).

17. Muslim Advocates, *Countering Violent Extremism (CVE)*, <https://www.muslimadvocates.org/cve-countering-violent-extremism/> [<https://perma.cc/ZH6X-8FHL>].

18. See Mark Potok, *The Year in Hate and Extremism*, SOUTHERN POVERTY LAW CTR. (Feb. 17, 2016) <https://www.splcenter.org/fighting-hate/intelligence-report/2016/year-hate-and-extremism> [<https://perma.cc/S2NU-FXUT>] (describing the rise in number of hate groups).

19. STRATEGIC IMPLEMENTATION PLAN, *supra* note 14, at 11.

20. *Id.*

21. Cohen, *supra* note 15, at 119.

into community-based, multidisciplinary activities intended to prevent targeted violent activity and mass casualty attacks more broadly.”²²

The second competing definition of CVE proffers that social services should be deployed to address long term challenges facing communities whose members are believed to be more prone to joining terrorist groups or engaging in terrorism as lone wolves.²³ Accordingly, terrorism should not be countered exclusively with intelligence, police, and military means;²⁴ but also through a focus on the “structural causes of violent extremism . . . including intolerance, government failure, and political, economic, and social marginalization.”²⁵ As such, CVE in the domestic context is similar to those working on human rights, development, and peacebuilding in the international conflict resolution context.²⁶ This definition assumes that CVE programs provide opportunities for marginalized communities to bring their concerns to police and federal law enforcement officials.

As a result, engagement between local communities, civil society, and government agencies make communities more resilient and governments more responsive to those communities’ concerns. Such efforts are operationalized through town hall meetings and roundtable discussions. Furthermore, implementing this CVE model provides safe spaces for discussions on sensitive civic and religious topics without fear of stigma or shame. Despite the stated community capacity building goal of this second definition of CVE, the objectives are similar to the first soft counterterrorism definition—to stop terrorism in the short term. In doing so, social service agencies and community members in CVE should engage in 1) intervention to dissuade at-risk youth from engaging in violence; 2) interdiction to stop individuals taking tangible steps toward violent action; and 3) rehabilitation of individuals released into the public after incarceration for a terrorism related crime.²⁷

Former Deputy National Security Advisor Denis McDonough appears to adopt the second definition; however, his rhetoric sends mixed messages. On the one hand, McDonough states that as CVE devotes more resources to research and analytics, the government would also expand “our engagement with local communities that are being targeted by terrorist recruiters,” as well as have other departments such as education, health, and human services join with communities “to better understand and address the social, emotional and economic challenges faced by young people”²⁸ This would occur in addition to U.S. Attorneys “leading a new coordinated federal effort to deepen our partnerships with communities on a host of

22. *Id.* at 120.

23. *See id.* (noting that CVE efforts are best pursued at the community level and tailored to local dynamics).

24. *See* Alejandro J. Beutel et al., *What is CVE (Countering Violent Extremism)?*, PATHEOS (Nov. 1, 2016), <http://www.patheos.com/blogs/altmuslim/2016/11/what-is-cve-countering-violent-extremism/> [<https://perma.cc/R8TL-5P6K>] (stating that the “CVE can be government-led and sourced, it can [be] civil society-led and sourced or it can be some mix of the two”).

25. Owen Frazer & Christian Nünlist, *The Concept of Countering Violent Extremism*, 183 *CSS ANALYSES IN SEC. POL’Y* 1, 1 (2015).

26. *Id.* at 3.

27. Beutel et al., *supra* note 24.

28. Denis McDonough, Deputy Nat’l Sec. Advisor, Remarks on Partnering with Communities to Prevent Violent Extremism in America (Mar. 6, 2011) (transcript available at <http://www.cfr.org/terrorism/remarks-denis-mcdonough-deputy-national-security-advisor-partnering-communities-prevent-violent-extremism-america-march-2011/p24313> [<https://perma.cc/FA8P-EE7M>]).

issues.”²⁹ On the other hand, McDonough highlights that community partnerships are a crucial component of effective counterterrorism that in turn allows the government to “discover and thwart many [terrorist] plots before they could kill.”³⁰ As such, the government should “work[] to empower local communities with the information and tools they need to build their own capacity to disrupt, challenge and counter propaganda, in both the real world and the virtual world.”³¹ McDonough further stated that the federal government is expanding our coordination with state and local governments, including law enforcement, which work directly with communities every day” by developing and expanding “training for law enforcement, counterterrorism fusion centers, and state officials.”³² Hence, CVE programs encourage Muslim communities to support the government’s counterterrorism efforts.

This Article adopts the first definition of CVE—that it is a soft tool in law enforcement’s arsenal of counterterrorism methods ultimately aimed at maximizing the number of individuals investigated, prosecuted, and convicted for terrorism-related crimes. And as a result, it poses a serious threat to targeted communities’ civil liberties.

II. CVE PROGRAMS SECURITIZE MUSLIM COMMUNITIES AND VALIDATE TERRORISTS’ NARRATIVES THAT AMERICA IS AT WAR WITH ISLAM

Terrorists thrive on narratives of oppression and injustice as a means of recruiting vulnerable individuals.³³ The particular narrative selected is context-specific to the political, social, and economic circumstances that give rise to a terrorist group.³⁴ For Al Qaeda and Da’esh (also known as ISIS or ISIL) based in the Middle East, a crucial component of their recruitment narrative is that the West, America in particular, is at war with Islam.³⁵ Terrorists claim that Muslims are victims of Western hegemony in the Middle East through American military intervention and financial support of

29. *Id.*

30. *Id.*

31. *Id.*; see also Hedieh Mirahmadi, *Building Resilience Against Violent Extremism: A Community-Based Approach*, 668 ANNALS AM. ACAD. POL. & SOC. SCI. 129, 137 (2016) (noting how increasing community engagement efforts can serve counterterrorism objectives through early intervention in the radicalization process).

32. McDonough, *supra* note 28.

33. See Edward Newman, *Exploring the “Root Causes” of Terrorism*, STUD. CONFLICT & TERRORISM, 749, 750 (2006) (explaining the tactics terrorists use to recruit others to their cause). See generally CLINT WATTS, *RADICALIZATION IN THE U.S. BEYOND AL QAEDA: TREATING THE DISEASE OF THE DISCONNECTION* (2012), <http://www.fpri.org/article/2012/08/radicalization-in-the-U-S-beyond-al-qaeda/> [<https://perma.cc/Y9GK-5HXS>].

34. Newman, *supra* note 33, at 751 (stating that terrorists used “factors such as poverty, social inequality and exclusion, dispossession and political grievance, oppression and human rights abuse, population explosion, and demographical factors”).

35. See Madiha Afzal, *How We All Reinforce a Narrative of Islam Versus the West*, BROOKINGS: ORDER FROM CHAOS (Aug. 4, 2016), <https://www.brookings.edu/blog/order-from-chaos/2016/08/04/how-we-all-reinforce-a-narrative-of-islam-versus-the-west/> [<https://perma.cc/WQZ3-WPQP>] (explaining how rhetoric of American politicians reinforces the terrorist recruiters’ narrative that America is at war with Islam).

dictators that violently repress their Muslim citizens.³⁶ Da'esh portrays its violence as part of a defensive rather than offensive war where its leaders are the “heroic defenders of the Muslim world . . . against Western colonization.”³⁷ In turn, Da'esh makes a call to arms for Muslims to kill civilians and topple governments that it unilaterally declares as enemies.

Notwithstanding Da'esh and other terrorist groups' attempts to use religion as a justification for their politically-motivated violence, their claims are rejected by many Muslims across the world.³⁸ An oft-overlooked fact that contributes to Da'esh's fringe status among the world's Muslims is that the majority of victims of terrorism are Muslim. According to the National Counterterrorism Center's 2011 *Report on Terrorism*, in cases where the religious affiliation of terrorism casualties could be determined, Muslims suffered between 82% and 97% of terrorism-related fatalities during the prior five years, and Muslim countries bore the brunt of the attacks involving 10 or more deaths.³⁹

Debunking Da'esh's specious claims on the theological merits has already been done by hundreds of credible, mainstream Muslim scholars from across the world in the *Open Letter to Baghdadi*, among other documents.⁴⁰ As a result, among Da'esh's declared enemies are mainstream American Muslim leaders who have openly and repeatedly condemned Da'esh and rebuked its misinterpretation of Islamic principles.⁴¹ Moreover, Muslim communities and leaders across the United States have rejected Da'esh's warped misappropriation of Islamic doctrine for violent political ends.⁴²

36. See Cristina Archetti, *Narrative Wars: Understanding Terrorism in the Era of Global Interconnectedness*, in FORGING THE WORLD: STRATEGIC NARRATIVES AND INTERNATIONAL RELATIONS 218, 218 (Alister Miskimmon et al. eds., 2017) (explaining that Al Qaeda recruiters promote the narrative of “oppression and victimhood”).

37. Alex P. Schmid, *Challenging the Narrative of the “Islamic State”*, in COUNTERING VIOLENT EXTREMISM: DEVELOPING AN EVIDENCE-BASE FOR POLICY AND PRACTICE 67, 69 (Sara Zeiger & Anne Aly eds., 2015) https://www.nla.gov.au/sites/default/files/webform/draft_cve_developing_an_evidence-based_for_policy_and_practice.pdf [<https://perma.cc/G3N3-2N7G>].

38. See Willa Frej, *How 70,000 Muslim Clerics Are Standing Up to Terrorism*, HUFFINGTON POST (Dec. 11, 2015), http://www.huffingtonpost.com/entry/muslim-clerics-condemn-terrorism_us_566adfa1e4b009377b249dea [<https://perma.cc/5JCC-HH8N>] (describing how nearly 1.5 million attendees at an annual gathering of South Asian Sunni Muslims signed a document protesting global terrorist activity).

39. NAT'L COUNTERTERRORISM CTR., 2011 REPORT ON TERRORISM 14 (2012), <https://fas.org/irp/threat/nctc2011.pdf> [<https://perma.cc/SE3U-5C2P>].

40. OPEN LETTER TO DR. IBRAHIM AWWAD AL-BADRI, ALIAS 'ABU BAKR AL-BAGHDADI', AND TO THE FIGHTERS AND FOLLOWERS OF THE SELF-DECLARED 'ISLAMIC STATE' (2014), <http://www.lettertobaghdadi.com/> [<https://perma.cc/V8AQ-GZ6H>]; see also Zulfiqar Ali Shah, *Muslim Leaders Refute ISIS Ideology*, FIQH COUNCIL OF N. AM., <http://www.fiqhcouncil.org/node/69> [<https://perma.cc/U93A-47CH>] (last visited Apr. 18, 2017) (providing the executive summary of THE OPEN LETTER TO AL-BAGHDADI, signed by more than 120 international scholars of Islam and Muslim leaders refuting the ideology of the terrorist group ISIS); Emily Feldman, *How Muslim Groups, Scholars Have Been Fighting ISIS*, NBC CHICAGO (Dec. 9, 2015), <http://www.nbcchicago.com/news/national-international/Muslim-Scholars-Groups-Against-ISIS-Speal-Out-361309791.html> [<https://perma.cc/2W83-X2T7>] (describing the messaging strategies that counter-ISIS groups have used to speak out against the extremist message of the Islamic State).

41. See Ian Reifowitz, *Anti-ISIS Muslims Face Death threats. Is that 'Enough' for Hannity and Trump Lackey Ben Carson?*, DAILY KOS (May 15, 2016), <http://www.dailykos.com/story/2016/5/15/1525349/-Anti-ISIS-Muslims-face-death-threats-Is-that-enough-for-Hannity-and-Trump-lackey-Ben-Carson> [<https://perma.cc/4JKV-AJZ9>] (providing examples of Western Muslim leaders who denounce Da'esh).

42. See, e.g., Stoyan Zaimov, *Muslim-Americans Condemn ISIS in Phoenix Billboard, Say Islam Is*

Thus, the issue before us today is not whether Da'esh represents the 1.6 billion Muslims across the world or the over 3 million Muslims in America⁴³ – the evidence is clear that it does not.

Rather, the issue that should be of concern to the American government and the public is ensuring that the government does not adopt counterproductive policies or practices that validate terrorists' claims of a "clash of civilization" between the West and Islam.⁴⁴ Religious profiling, racialized counterterrorism enforcement, and discrimination against Muslims not only infringe on the civil rights and liberties of Muslims, but they are also utilized by terrorist groups to claim that Muslims are under attack to generate sympathy for their cause.⁴⁵

This is why America's CVE programs are highly problematic. The government portrays CVE as a means to build community resilience and development, separate from the dominant prosecution-driven counterterrorism model.⁴⁶ However, the record clearly shows that CVE is an integral part of counterterrorism.⁴⁷ Law enforcement

Religion of Peace, Not Terror, CHRISTIAN POST (Aug. 24, 2016, 11:17 AM), <http://www.christianpost.com/news/muslim-americans-condemn-isis-phoenix-billboard-islam-religion-peace-not-terror-168487/> [https://perma.cc/89XN-UWHE] (describing Muslim-Americans' anti-ISIS messages, including a billboard reading "hey ISIS, you suck!!!"); Omar Jimenez, *Baltimore Muslims: Islam Condemns ISIS, Terror Attacks*, WBAL-TV (Mar. 23, 2016, 6:16 PM), <http://www.wbal.com/article/baltimore-muslims-islam-condemns-isis-terror-attacks/6946995> [https://perma.cc/93WA-YQEN] (describing the efforts of Baltimore citizens, especially those in the Muslim community, to counter the unfavorable view of Islam caused by the Islamic State's violent activities); Alexandra Limon, *Muslims Rally Outside White House Condemning ISIS, Terrorism*, FOX 5-DC (Nov. 20, 2015, 11:30 PM), <http://www.fox5dc.com/news/local-news/52446799-story> [https://perma.cc/9S99-2UH] (detailing a rally in the Washington, D.C. area whose message was that American Muslims do not support terrorism and that ISIS does not represent Islam); Tatiana Sanchez, *San Diego Muslims Condemn Paris Attacks*, SAN DIEGO UNION-TRIB. (Nov. 14, 2015, 8:38 PM), <http://www.sandiegouniontribune.com/news/sdut-cair-anniversary-banquet-islamic-2015nov14-story.html> [https://perma.cc/9LKC-B56D] ("Muslim leaders are actively educating the community in order to distinguish Muslims who understand and practice their faith properly from radical criminals who use the Islamic texts as justification to commit acts of terrorism."); Shanika Gunaratna, *Muslim Americans Rush to Condemn Orlando Massacre*, CBS NEWS (June 13, 2016, 12:52 PM), <http://www.cbsnews.com/news/orlando-shooting-pulse-nightclub-muslims-condemn-attack/> [https://perma.cc/WBL6-9F55] (describing the clear message sent by the Muslim community after the Orlando attack that ISIS does not represent their faith).

43. Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RESEARCH CTR. (Feb. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/02/27/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/> [https://perma.cc/B5C7-DJD2].

44. See Schmid, *supra* note 37, at 76 (arguing that the fight against ISIS requires "a concerted and systematic approach, based on synergetic inter-disciplinary team-work, aimed at developing counter-messages, counter-speech, counter-arguments and counter-narratives"); see also Terrence McCoy, *The Apocalyptic Magazine the Islamic State Uses to Recruit and Radicalize Foreigners*, WASH. POST (Sept. 16, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/09/16/the-apocalyptic-magazine-the-islamic-state-uses-to-recruit-and-radicalize-foreigners/> [https://perma.cc/48R3-TNGS] (describing the divisive, apocalyptic rhetoric used in Islamic State propaganda to recruit new members).

45. See ABBAS BARZEGAR, SHAWN POWERS & NAGHAM EL KARHILI, CIVIC APPROACHES TO CONFRONTING VIOLENT EXTREMISM: SECTOR RECOMMENDATIONS AND BEST PRACTICES 22 (Sept. 2016), http://www.britishcouncil.us/sites/default/files/civic_approaches_to_confronting_violent_extremism_-_digital_release.pdf [https://perma.cc/Y6VW-XAEK] ("Extremists groups thrive on the idea that their radical violence is justified because their religion is under attack.").

46. Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834, 856–857 (2015).

47. See Aziz, *Policing Terrorists*, *supra* note 6, at 211 ("Community policing does not challenge the counterterrorism paradigm; it accommodates it. The exclusive focus on Muslim communities, as opposed to community policing in a particular geography where certain social services are most needed, reinforces that Muslims are a suspect community."); see also Akbar, *supra* note 46, at 887–88 ("[T]he White House's

agencies, not social services agencies, are leading and funding CVE nationwide; in fact, Department of Homeland Security (DHS), U.S. Attorneys, and the Federal Bureau of Investigation (FBI) lead government meetings with Muslim communities across the country.⁴⁸ The institutional agendas of FBI agents, federal prosecutors, and DHS officials—not social service agencies—shape CVE programs. For these reasons, the leading agencies of the federal interagency task force on CVE rotate between DHS and Department of Justice (DOJ)—whose missions are to investigate, prosecute, and convict criminal suspects.

U.S. Attorneys leading federal outreach efforts at the local level raises concerns about the relationship between counterterrorism enforcement and community engagement given that U.S. Attorneys are also the lead prosecutors of anti-terrorism laws.⁴⁹ Their participation as lead conveners of CVE meetings aggravates the inherent divergence between Muslim communities' interests in protecting their civil liberties and a prosecutors' mandate to prosecute and show tangible results in the form of convictions. That is, law enforcement-led programs signal to Muslim communities that their community development and resilience is not the government's priority. Rather, the objective appears to be to deputize Muslims to spy on each other, thereby breeding distrust and divisiveness within Muslim communities.⁵⁰

III. CVE SIGNALS THAT MUSLIMS ARE A SUSPECT COMMUNITY LEGITIMIZING DISCRIMINATION AND HATE CRIMES

Like the United Kingdom's (U.K.) Prevent Program, which is the blueprint on which the U.S. CVE program is based, the U.S. CVE programs target Muslim communities based on the false premise that Muslims are a suspect community and fifth column in the United States.⁵¹ The U.K. House of Commons found that the Prevent Programs exclusive focus on Muslims was stigmatizing, alienating, and counterproductive.⁵² The European Parliament also found that soft counterterrorism programs through counter-radicalization initiatives (which effectively describes CVE) are detrimental to fostering community cohesion and fail in their stated objectives to

various counterradicalization, CVE, and community-government partnerships have . . . charg[ed] all American Muslims with the task of protecting the nation against terrorist threats.”)

48. *Don't Be A Puppet: Pull Back the Curtain on Violent Extremism*, FEDERAL BUREAU OF INVESTIGATION, <https://cve.fbi.gov/home.html> [<https://perma.cc/LQ2Y-5JGC>] (last visited Apr. 18, 2017); Hirsh, *supra* note 11; *see also* Akbar, *supra* note 46, at 857 (stating that the “community engagement plan leans heavily on law enforcement”).

49. Laura Yuen, *Muslims Fear Anti-Terror Program Could Spy on Their Communities*, MPR NEWS (Jan. 30, 2015, 6:37 AM), <http://www.mprnews.org/story/2015/01/30/anti-terror-program> [<https://perma.cc/AP2D-P27A>]; Mike German, *Is the FBI's Community Outreach Program a Trojan Horse?*, AM. C.L. UNION (Feb. 15, 2013, 3:33 PM), <https://www.aclu.org/blog/fbis-community-outreach-program-trojan-horse> [<https://perma.cc/3V2P-5YQW>]; Paul McEnroe, *Twin Cities Muslim Leaders Challenge Federal Outreach Effort as Cloak for Spying*, MINNEAPOLIS STAR TRIBUNE (Feb. 17, 2015, 11:32 PM), <http://www.startribune.com/area-muslim-leaders-call-federal-outreach-cloak-for-spying/292307031/> [<https://perma.cc/B9QJ-BDDZ>].

50. Aziz, *Policing Terrorists*, *supra* note 6, at 189–90.

51. *See generally* ARUN KUNDNANI, *THE MUSLIMS ARE COMING: ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR* (2014).

52. COMMUNITIES AND LOCAL GOVERNMENT COMMITTEE, *PREVENTING VIOLENT EXTREMISM*, 2009–10, HC 65, at 3 (UK).

prevent terrorism.⁵³ Professor Arun Kundnani, an expert on U.K. counterterrorism policy, warns that the U.S. CVE program would “suffer from the same problems, such as drawing non-policing professionals into becoming the eyes and ears of counterterrorism surveillance, and thereby undermining professional norms and relationships of trust among educators, health workers, and others.”⁵⁴

CVE also legitimizes discrimination against Muslims. In the United States, numerous polls show a rise in anti-Muslim bias that is manifesting into tangible hate crimes, mosque vandalism, employment discrimination, and bullying of Muslim kids in schools.⁵⁵ A 2015 poll in North Carolina, for example, reported 72% of Republicans said that a Muslim should not be allowed to be president of the United States and 40% said that Islam should be illegal.⁵⁶ A 2015 study by LifeWay Research found that 27% of Americans believe ISIS represents what the Islamic religion really is—along with 45% of 1,000 “Protestant senior pastors.”⁵⁷ Another survey by the Economist/YouGov poll, found that 52% of Americans think Islam is more likely than other religions to encourage violence.⁵⁸ That same poll also found that three-fourths of Americans—73%—think American Muslims face a great deal or a fair amount of discrimination.⁵⁹

53. *Countering Violent Extremism: Myths and Fact*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/sites/default/files/analysis/102915%20Final%20CVE%20Fact%20Sheet.pdf> [<https://perma.cc/8H3V-XW2E>] (last visited Apr. 19, 2017).

54. Murtaza Hussain & Jenna McLaughlin, *FBI's "Shared Responsibility Committees" to Identify "Radicalized" Muslims Raise Alarms*, INTERCEPT (April 9, 2016, 10:46 AM), <https://theintercept.com/2016/04/09/fbis-shared-responsibility-committees-to-identify-radicalized-muslims-raises-alarms/> [<https://perma.cc/KB9R-QTHM>]

55. See, e.g., *Islamophobia: Understanding Anti-Muslim Sentiment in the West*, GALLUP, <http://www.gallup.com/poll/157082/islamophobia-understanding-anti-muslim-sentiment-west.aspx> [<https://perma.cc/TJ53-63Q7>] (last visited Apr. 19, 2017) (“In the U.S., about one-half of nationally representative samples of Mormons, Protestants, Catholics, Muslims, and Jews agree that in general, most Americans are prejudiced toward Muslim Americans. Specifically, 66% of Jewish Americans and 60% of Muslim Americans say that Americans in general are prejudiced toward Muslim Americans.”); Jonathan Easley, *SC Exit Poll: 75 Percent Agree with Trump's Muslim Ban*, HILL (Feb. 20, 2016, 6:17 PM), <http://thehill.com/blogs/ballot-box/presidential-races/270156-sc-exit-poll-75-percent-agree-with-trumps-muslim-ban> [<https://perma.cc/5ZHX-JL7S>] (“Three-fourths of Republicans participating in Saturday's South Carolina GOP primary say they support presidential hopeful Donald Trump's proposal to ban all Muslims from entering the U.S., according to an exit poll. A CBS News exit poll of Palmetto State primary voters found that 75 percent said they support Trump's proposal, while 23 percent said they oppose it.”); Tom Benning, *Most Texas Voters Support Donald Trump's Border Wall and Muslim Ban*, POLL SAYS, DALL. MORNING NEWS (June 28, 2016), <http://www.dallasnews.com/news/politics/headlines/20160628-most-texas-voters-support-donald-trumps-border-wall-and-muslim-ban-poll-says.ece> [<https://perma.cc/Z9L4-ZMBB>] (“Nearly 52 percent of respondents said they strongly or somewhat support a wall along the Mexican border, compared with about 40 percent who oppose it. The numbers were similar in response to the idea of banning noncitizen Muslims from entering the U.S.”).

56. PUB. POLICY POLLING, TRUMP STEADY IN NORTH CAROLINA; BIDEN POLLS WELL 2 (2015), http://www.publicpolicypolling.com/pdf/2015/PPP_Release_NC_92915.pdf [<https://perma.cc/5G3E-YXF4>].

57. *One in Three Americans Worry About Sharia Law Being Applied in America*, LIFEWAY (Feb. 11, 2015), <http://lifewayresearch.com/2015/02/11/1-in-3-americans-worry-about-sharia-law-being-applied-in-america/> [<https://perma.cc/DE6X-FRLH>].

58. Kathy Frankovic, *Muslim Americans Widely Seen as Victims of Discrimination*, YOUNG (Feb. 20, 2015, 7:15 AM), <https://today.yougov.com/news/2015/02/20/muslim-americans-widely-seen-victims-discrimination/> [<https://perma.cc/X56E-ZEMH>].

59. *Id.*

Such pervasive prejudice has produced tangible civil rights violations against innocent Muslims across the country.⁶⁰ A recent report by the Center for the Study of Hate and Extremism at California State University in San Bernardino found that anti-Muslim hate crimes increased 78% from 110 hate crimes in 2014 to 196 in 2015.⁶¹ Anti-Arab hate crimes rose by 219% from 21 in 2014 to 67 in 2015. Similarly, the civil rights organization Muslim Advocates, reported that since the November 2015 Paris attacks, at least 100 hate crimes against Muslims in America have been reported.⁶² However, these stark numbers likely do not reflect the entirety of anti-Muslim discrimination. The U.S. Department of Justice Bureau of Statistics reported that only 44% of hate crimes are reported to the police⁶³, and in 2013, the Bureau found that nearly two-thirds of all hate crimes were unreported.⁶⁴

The following cases from 2015 and 2016 provide a sampling of the types of violence Muslims and those perceived as Muslim are experiencing: 1) Two Muslim women pushing their children in strollers were attacked in Brooklyn by an assailant who spewed anti-Muslim slurs (Sept. 10, 2016);⁶⁵ 2) a man set fire to the Islamic Center of Fort Pierce, Florida (Sept. 12, 2016);⁶⁶ 3) a Muslim man was assaulted and beaten after leaving a mosque resulting in five broken bones, a concussion, and fractured ribs (June 1, 2016);⁶⁷ 4) a delivery driver was brutally beaten by a passenger who called him a “Muslim a—hole” before pulling the driver to the ground and punching and stomping on him (May 21, 2016);⁶⁸ 5) a Sikh temple was vandalized by a man who said he thought it was a mosque and affiliated with terrorists (Mar. 3, 2016);⁶⁹ 6) a Muslim

60. Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. TIMES (Sept. 17, 2016), <http://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html> [https://perma.cc/B49Y-RMX3].

61. CTR. FOR THE STUDY OF HATE & EXTREMISM, CAL. STATE UNIV., SPECIAL STATUS REPORT: HATE CRIME IN THE UNITED STATES 6 (2016).

62. See *Map: Recent Incidents of Anti-Muslim Hate Crimes*, MUSLIM ADVOC., <https://www.muslimadvocates.org/map-anti-muslim-hate-crimes/> [https://perma.cc/CK49-3GHR] (last visited Apr. 19, 2017) (showing map that details the exact location and events of over 100 hate crimes against Muslims).

63. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HATE CRIME REPORTED BY VICTIMS AND POLICE 4 (2005), <https://www.bjs.gov/content/pub/pdf/hcrvp.pdf> [https://perma.cc/Y2HQ-4SH9].

64. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NEARLY TWO-THIRDS OF HATE CRIMES WENT UNREPORTED TO POLICE IN RECENT YEARS 1 (2013), <https://ojp.gov/newsroom/pressreleases/2013/ojppr032113.pdf> [https://perma.cc/U3G3-BWWM]. For a theoretical analysis of the myriad ways Muslim women are disproportionately harmed by post-9/11 discrimination, see generally Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women Caught in the Crosshairs of Intersectionality*, 9 HASTINGS R. & POV. L.J. 1 (2012) [hereinafter Aziz, *Muslim-American Women*].

65. Lauren del Valle, *2 Muslim Women, Babies Attacked in Alleged Hate Crime in New York*, CNN (Sept. 10, 2016, 12:49 AM), <http://www.cnn.com/2016/09/10/us/brooklyn-muslim-women-attacked/> [https://perma.cc/E8TA-3F3Q].

66. Lindsey Bever, *Arrest Made in Arson at Orlando Gunman's Mosque, Authorities Say*, WASH. POST (Sept. 14, 2016), <https://www.washingtonpost.com/news/acts-of-faith/wp/2016/09/12/arson-suspected-in-fire-at-florida-mosque-attended-by-pulse-shooter-omar-mateen/> [https://perma.cc/5MVF-X5EX].

67. Laurel Raymond, *Assault of Muslim Man in NYC Comes amid Rising Islamophobia Nationwide*, THINKPROGRESS (June 6, 2016), <http://thinkprogress.org/justice/2016/06/06/3785049/muslim-man-attackedqueens/> [https://perma.cc/S8VB-YB2Q].

68. Rocco Parascandola, *Bronx Livery Driver Repeatedly Punched in the Face by Passenger Who Called Him 'Muslim Driver A—hole'*, N.Y. DAILY NEWS (May 25, 2016), <http://www.nydailynews.com/newyork/bronx-livery-driver-punched-called-muslim-driver-a-hole-article-1.2648669> [https://perma.cc/GYF3-JWEK].

69. Ajay Ghosh, *Hate Crime Charged Against Pittman for Spokane Gurdwara Vandalism*, UNIVERSAL NEWS NETWORK, (Mar. 15, 2016), <http://theunn.com/2016/03/hate-crime-charged-against-pittman-for->

woman had hot liquid poured on her by another woman shouting “f—ing Muslim trash” (April 21, 2016);⁷⁰ 7) while a Muslim family was shopping for a home, a man in the neighborhood pointed a gun at them saying they “should all die” because they are Muslim (Feb. 21, 2016);⁷¹ 8) an elderly Sikh man was stabbed to death while working at a convenience store;⁷² 9) in two separate incidents, one American Muslim female was shot at as she was leaving an Islamic center, and another woman was nearly run off the road by someone throwing rocks at her car as she left the mosque (Dec. 11, 2015);⁷³ 10) a taxi driver—a 38-year-old Moroccan immigrant—was shot and injured by one of his passengers after being asked about his background (Nov. 26, 2015).⁷⁴

Among the most troubling forms of anti-Muslim discrimination is the bullying of Muslim children taking place in our schools. In 2010, a study in Northern Virginia found that 80% of Muslim youth were subjected to taunts and harassment at school.⁷⁵ In 2014, a survey of Muslim children in third through twelfth grade in Maryland found that nearly one-third “said they had experienced insults or abuse at least once because of their faith.”⁷⁶ That same year, a statewide survey of more than 600 Muslim American students ages 11–18 in California found that 55% of respondents reported being bullied or discriminated against, twice the number of students nationally who reported being bullied.⁷⁷ Additionally, 29% of Muslim female students who wore a headscarf experienced offensive touching or pulling off their hijab.⁷⁸

These findings are consistent with a 2016 report published by Georgetown University finding approximately 180 reported incidents of anti-Muslim violence

spokane-gurdwara-vandalism/ [https://perma.cc/ML4R-VJAS].

70. Steve Birr, *Police Release Video of Assault on Muslim Woman Outside DC Starbucks*, DAILY CALLER (May 3, 2016, 9:19 AM), <http://dailycaller.com/2016/05/03/police-release-video-of-assault-on-muslim-woman-outside-dc-starbucks/> [https://perma.cc/456X-YBX9].

71. Kevin Killeen, *Update: Affton Man Charged with Anti-Muslim Hate Crime*, CBS ST. LOUIS (Feb. 29, 2016, 2:15 PM), <http://stlouis.cbslocal.com/2016/02/29/muslims-wait-for-bob-mcculloch-to-file-charges/> [https://perma.cc/VXC4-F6FB].

72. Charles Lam, *Sikh Man Stabbed to Death in Robbery of Central California Convenience Store*, NBC NEWS (Jan. 5, 2016, 3:57 PM), <http://www.nbcnews.com/news/asian-america/sikh-man-stabbed-death-robberycentral-california-convenience-store-n490786> [https://perma.cc/CJ62-7Q3P].

73. Travis Gettys, *Muslim Woman Shot at and Another Nearly Run Off the Road in Tampa After Leaving Mosques*, RAW STORY (Dec. 11, 2015, 2:26 PM), <https://www.rawstory.com/2015/12/muslim-woman-shot-at-and-another-nearly-run-off-the-road-in-tampa-after-leaving-mosques/> [https://perma.cc/DD6X-8F8G].

74. Dan Majors, *Muslim Taxi Driver Shot on Thanksgiving in Hazelwood Calls Attack a Hate Crime*, PITT. POST GAZETTE (Nov. 28, 2015, 11:00 PM), <http://www.post-gazette.com/local/city/2015/11/29/Muslim-taxi-driver-shot-on-Thanksgiving-in-Pittsburgh-calls-attack-a-hate-crime/stories/201511290154> [https://perma.cc/6EAQ-6XYR].

75. *Protecting the Civil Rights of Muslim Americans: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 15 (2011) (statement of Farhana Khera, President & Executive Director Muslim Advocates).

76. Donna St. George, *During a School Year of Terrorist Attacks, Muslim Students Report Bullying*, WASH. POST (June 14, 2016), https://www.washingtonpost.com/local/education/during-a-school-year-of-terrorist-attacks-muslim-students-report-bullying/2016/06/14/1b066a44-3220-11e6-8758-d58e76e11b12_story.html?utm_term=.093F06FFC5a7 [https://perma.cc/H58Y-MNXC].

77. COUNCIL ON AMERICAN-ISLAMIC RELATIONS, MISLABELED: THE IMPACT OF SCHOOL BULLYING AND DISCRIMINATION ON CALIFORNIA MUSLIM STUDENTS 4 (2015), <https://ca.cair.com/sfba/wp-content/uploads/2015/10/CAIR-CA-2015-Bullying-Report-Web.pdf> [https://perma.cc/VAF2-MR94].

78. *Id.*

between March 2015 and March 2016.⁷⁹ Among the incidents reported are 12 murders, 34 physical assaults, 56 acts of vandalism or destruction of property, 9 cases of arson, and 8 shootings or bombings.⁸⁰

Because of the troubling rise in anti-Muslim discrimination and hate crimes, Muslims believe their public safety concerns are not adequately addressed. At law enforcement led community outreach meetings, law enforcement agents are primarily interested in knowing if Muslims have any knowledge of potential terrorist plots.⁸¹ A comprehensive empirical study published in 2016 by Duke's Center for Terrorism also found that interviewees believed law enforcement agencies have broken communities' trust in the past by violating civil liberties of Muslims who worked with them.⁸²

These broken promises have produced a deep distrust that stifles coordination between civil society and law enforcement. For example, an American Civil Liberties Union (ACLU) Freedom of Information Act (FOIA) request uncovered documents showing that the FBI was keeping records of conversations and activities within mosques and other Muslim organizations from 2004 through 2008, as well as information provided by federal employees engaged in the outreach programs.⁸³ This discovery contradicted multiple statements by law enforcement assuring concerned citizens that intelligence was not being collected at community outreach meetings.⁸⁴ In 2009, an FBI initiative exploited community outreach to collect information on Muslim communities and build a "baseline profile of Somali individuals that are vulnerable to being radicalized."⁸⁵ And in 2012, another ACLU FOIA request uncovered FBI and NYPD systemic surveillance of Middle Eastern and Muslim communities in Michigan, San Francisco, and New York City.⁸⁶

79. ENGY ABDELKADER, BRIDGE INITIATIVE, WHEN ISLAMOPHOBIA TURNS VIOLENT: THE 2016 PRESIDENTIAL ELECTIONS 1–2, 11 (2016).

80. *Id.* at 11.

81. See FED. BUREAU OF INVESTIGATION, 188A-HQ-C1243327, IMPLEMENTATION OF SPECIALIZED COMMUNITY OUTREACH TEAM 2–3 (2009) (detailing using community outreach programs as a cover to conduct investigation of Somali communities for counter-terrorism purposes in seven cities).

82. See DAVID SCHANZER ET AL., TRIANGLE CTR. ON TERRORISM AND HOMELAND SECURITY, THE CHALLENGE AND PROMISE OF USING COMMUNITY POLICING STRATEGIES TO PREVENT VIOLENT EXTREMISM: A CALL FOR COMMUNITY PARTNERSHIPS WITH LAW ENFORCEMENT TO ENHANCE PUBLIC SAFETY 28 (2016) (presenting testimony about alleged issues with entrapment by law enforcement in Muslim communities).

83. See generally German, *supra* note 49.

84. See, e.g., H.G. Reza, *FBI Tries to Reassure Muslims in Irvine*, L.A. TIMES (June 7, 2006), <http://articles.latimes.com/2006/jun/07/local/me-muslim7> [<https://perma.cc/RGK3-GA9E>] (describing statements made by FBI officials at community outreach events with respect to monitoring of Muslim communities); see also Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. CIV. RIGHTS-CIV. LIBERTIES. L. REV. 289, 348–52 (2015) (discussing community engagement activity as counterterrorism strategy).

85. Cora Currier & Murtaza Hussain, *Letter Details FBI Plan for Secretive Anti-Radicalization Committees*, INTERCEPT (Apr. 28, 2016, 12:02 PM), <https://theintercept.com/2016/04/28/letter-details-fbi-plan-for-secretive-anti-radicalization-committees/> [<https://perma.cc/6ERC-A5EU>].

86. See generally *Eye on the FBI: Exposing Misconduct and Abuse of Authority*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/national-security/eye-fbi-exposing-misconduct-and-abuse-authority> [<https://perma.cc/U4GG-5838>] (last visited Oct. 20, 2016). See also ACLU EYE ON THE FBI: THE FBI IS ENGAGED IN UNCONSTITUTIONAL RACIAL PROFILING AND RACIAL "MAPPING", AM. C.L. UNION (Oct. 20, 2011), <https://www.aclu.org/aclu-eye-fbi-fbi-engaged-unconstitutional-racial-profiling-and-racial-mapping> [<https://perma.cc/TCD3-3H3C>] (describing the FBI's unconstitutional and widespread stereotyping, which attributes certain types of crimes to entire racial and ethnic communities); *ACLU Eye on the FBI Alert – Mosque Outreach for Intelligence Gathering*, AM. CIVIL LIBERTIES UNION (Mar. 27, 2012),

Similarly, Muslim community leaders who engaged with law enforcement later discovered they were targets of investigations and surveillance. For example, the emails of Faisal Gill were subject to surveillance from 2006 to 2008 despite his service in the U.S. Navy and as a senior policy advisor in the U.S. Department of Homeland Security under George W. Bush.⁸⁷ Such cases are further evidence that CVE programs are a ruse for counterterrorism practices that cause collective suspicion of millions of Muslims in America for the criminal acts of individuals with whom they have nothing in common.⁸⁸ While prosecution-driven counterterrorism is an integral part of criminal enforcement, it should be conducted in accordance with civil and constitutional rights. Specifically, law enforcement should conduct investigations based on individualized suspicion arising from predicate acts of criminal activity, not a broad (and false) assumption that Muslim communities en masse are "at risk" or "vulnerable" to terrorist recruitment and susceptible to engaging in terrorism.

In sum, purported community engagement and CVE programs by law enforcement agencies have proven to be a failure in their stated objectives. They have alienated and stigmatized Muslim communities and legitimized anti-Muslim prejudice within our society. Consequently, racialized and rights violating government practices are then exploited by terrorists to corroborate their apocalyptic recruitment narrative that America wants to destroy Islam.

IV. CVE PROGRAMS ARE UNNECESSARY TO PREVENT DOMESTIC TERRORISM

Not only are CVE programs counterproductive, they are unnecessary. Like their fellow Americans, Muslim communities report suspicious criminal activity about which they have knowledge without the need for a multi-million dollar government program.⁸⁹ According to Peter Bergen at the New America Foundation, nearly 20% of terrorism plots have been prevented due to initial tips from Muslim communities and family members.⁹⁰ Studies by the Duke Triangle Center on Terrorism and

<https://www.aclu.org/other/aclu-eye-fbi-alert-mosque-outreach-intelligence-gathering?redirect=aclu-eye-fbi-alert-mosque-outreach-intelligence-gathering> [<https://perma.cc/5V7E-4A6N>] (describing the FBI's "mosque outreach" program through which it compiled intelligence on American Muslim religious organizations and their leaders' and congregants' constitutionally protected beliefs and activities, without any suspicion of wrongdoing).

87. James Gordon Meek, Brian Ross & Rhonda Schwartz, *Feds Spied on Prominent Muslim-Americans, Report Claims*, ABC NEWS (July 9, 2014, 7:36 AM), <http://abcnews.go.com/Blotter/feds-spied-prominent-muslim-americans-report-claims/story?id=24370482> [<https://perma.cc/DSR2-6ZNF>]; see also Faisal Gill, *I was Targeted Because of my Faith*, CNN (July 10, 2014, 4:48 PM), <http://www.cnn.com/2014/07/10/opinion/gill-unwarranted-surveillance-muslim> [<https://perma.cc/2EA2-PVD5>] (noting other Muslim leaders subject to surveillance include Asim Ghafoor, a well-known lawyer, Hooshang Amirahmadi, a professor at Rutgers University, and Agha Saeed, a political science professor at California State University).

88. See Waleed S. Ahmed, *Spying on American Muslim Leaders Betrays Advocates of Civic Engagement*, MUSLIM MATTERS (July 16, 2014), <http://muslimmatters.org/2014/07/16/spying-on-american-muslim-leaders-betrays-advocates-of-civic-engagement/> [<https://perma.cc/LGB3-MPS9>] (discussing NSA surveillance based on group identification).

89. JESSICA STERN & J.M. BERGER, *ISIS: THE STATE OF TERROR* 248–49 (2015) (noting that there is "a near-total lack of evidence that [CVE programs] actually prevent violent extremism in any meaningful way").

90. See PETER BERGEN ET AL., *supra* note 11; Mohammed A. Malik, *I Reported on Omar Mateen to*

Homeland Security also found that American Muslim communities have been a large source of information about terrorist plots since 9/11.⁹¹

Hence, CVE programs, which overtly aim to recruit Muslims to report potential terrorist plots,⁹² are a waste of government resources. Muslim Americans know less about potential plots than law enforcement agencies with a sophisticated array of investigative tools at their disposal.⁹³ Most cases charging Muslims with violating anti-terrorism laws are driven by undercover agents and informants outside the knowledge of community leaders or the individual's family.⁹⁴

A 2016 George Washington Report on Extremism reported that over half of the individuals they researched were arrested after an investigation involving an informant or undercover law enforcement officer.⁹⁵ Out of the 71 individuals charged with ISIS-related activities in 2015, 55% were arrested in an operation involving an informant or undercover agent.⁹⁶ For these reasons, some Muslims worry that their engagement with law enforcement may lead to their youth being targeted for sting operations that put them on the path to prosecution.⁹⁷

Such concerns are not farfetched. A report by Human Rights Watch and Columbia Law School's Human Rights Institute in 2014 found that "in some cases, the Federal Bureau of Investigation may have created terrorists out of law-abiding individuals by conducting sting operations that facilitated or invented the target's willingness to act."⁹⁸ According to the Center on National Security at Fordham University School of Law, approximately 60% of cases against Americans in Da'esh-related charges have involved informants as compared to 30% of all terrorism indictments since 9/11.⁹⁹ These results are unsurprising in light of the FBI's widespread

the FBI. Trump Is Wrong that Muslims Don't Do Our Part, WASH. POST (June 20, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/06/20/i-reported-omar-mateen-to-the-fbi-trump-is-wrong-that-muslims-dont-do-our-part/> [<https://perma.cc/J759-39T2>] (providing a firsthand account of a Muslim American who reported the Orlando shooter, Omar Mateen, to the FBI in 2014 after observing suspicious behavior).

91. CHARLES KURZMAN, TRIANGLE CTR. ON TERRORISM & HOMELAND SECURITY, SANDFORD SCH. OF PUB. POLICY, DUKE UNIV., *MUSLIM-AMERICAN TERRORISM IN 2013* (Feb. 5, 2014), https://sites.duke.edu/tcths/files/2013/06/Kurzman_Muslim-American_Terrorism_in_20131.pdf [<https://perma.cc/YC2K-EUE4>].

92. *See, e.g.*, Fact Sheet, *supra* note 2 (discussing community engagement with religious leaders and communities).

93. *See* PEW RESEARCH CTR., *MUSLIM AMERICANS: NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM 1* (2011), <http://www.people-press.org/files/legacy-pdf/Muslim%20American%20Report%2010-02-12%20fix.pdf> [<https://perma.cc/8DLR-JWR6>] (noting that only about 20% of Muslims even perceive support for extremism among the American Muslim community).

94. Eric Lichtblau, *F.B.I. Steps Up Use of Stings in ISIS Cases*, N.Y. TIMES (June 7, 2016), <https://www.nytimes.com/2016/06/08/us/fbi-isis-terrorism-stings.html> [<https://perma.cc/BRC8-MMP8>].

95. LORENZO VIDINO & SEAMUS HUGHES, GEO. WASH. UNIV., PROGRAM ON EXTREMISM, *ISIS IN AMERICA: FROM RETWEETS TO RAQQA 7* (2015), <https://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/ISIS%20in%20America%20-%20Full%20Report.pdf> [<https://perma.cc/M9HF-SLXX>].

96. *Id.* at xi.

97. Glenn Greenwald, *Why Does the FBI Have to Manufacture Its Own Plots if Terrorism and ISIS Are Such Grave Threats?*, INTERCEPT (Feb. 26, 2015), <https://theintercept.com/2015/02/26/fbi-manufacture-plots-terrorism-isis-grave-threats/> [<https://perma.cc/9NAY-TN3P>].

98. HUM. RTS. WATCH & HUM. RTS. INST., *ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS 2* (2014), <https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions> [<https://perma.cc/BX56-Y7US>].

99. Nicole Hong, *In U.S. ISIS Cases, Informants Play a Big Role*, WALL ST. J. (Apr. 21, 2015, 7:08 PM),

use of informants, estimated at 15,000 domestically as of 2008, which is reportedly 10 times the number of informants active during the era of J. Edgar Hoover and COINTELPRO.¹⁰⁰

In the cases where a Muslim (often a young male) is targeted by bona fide Da'esh recruiters, the process occurs online, in secret, and without the knowledge of the community leaders and family members.¹⁰¹ A New America Foundation report found that of the 62 cases examined, there was no evidence of physical recruitment by a militant operative, cleric, returning foreign fighter, or radicalization in prison.¹⁰² Moreover, studies of terrorism suspects show Da'esh recruits' knowledge of Islam is negligible. A 2008 study of hundreds of individuals involved in terrorism and terrorism finance by the British intelligence agency MI-5 found that most of them were "religious novices," and that a "well-established religious identity actually protects against violent radicalization."¹⁰³ A recent leak of Da'esh documents showed that 70% of recruits had a remedial understanding of Islam, and often were alienated from mainstream Muslim communities.¹⁰⁴ And yet, Director of Community Partnerships at DHS George Selim's statement in a Reuters article that "[g]iven the current scope of the threat, we believe family members, friends, coaches, teachers are best placed to potentially prevent and intervene in the process of radicaliz[ation]" is unsupported by the evidence.¹⁰⁵ Unless the government wants Muslims to actively spy on each other's online activities in contravention of fundamental American values, CVE programs will only waste government resources and alienate otherwise well integrated American communities.¹⁰⁶

<http://www.wsj.com/articles/in-u-s-isis-cases-informants-play-a-big-role-1429636206>

[<https://perma.cc/Z9JT-9HJ2>].

100. Cora Currier & Murtaza Hussain, *supra* note 85.

101. See *The Rise of Radicalism: Growing Terrorist Sanctuaries and the Threat to the U.S. Homeland: Joint Hearing Before the U.S. House Comm. on Homeland Security and the House Comm. on Foreign Affairs*, 114th Cong. (2015) (testimony by Peter Bergen), <http://docs.house.gov/meetings/FA/FA00/20151118/104199/HHRG-114-FA00-Wstate-BergenP-20151118.pdf> [<https://perma.cc/XGY4-AQH4>] ("Around nine out of 10 American militants are active in online jihadist circles."). See generally David Talbot, *Fighting ISIS Online*, MIT TECH. REV. (Sept. 30, 2015), <https://www.technologyreview.com/s/541801/fighting-isis-online/>; Rukmini Callimachi, *ISIS and the Lonely Young American*, N.Y. TIMES (June 27, 2015), http://www.nytimes.com/2015/06/28/world/americas/isis-online-recruiting-american.html?_r=0 [<https://perma.cc/G65T-YRBC>].

102. *Texas Shooting Sign of Lone Wolf Attacks to Come in US - Experts*, REUTERS (May 7, 2015), <http://www.reuters.com/article/usa-shooting-texas-socialmedia-idINKBN0NS1Z020150507> [<https://perma.cc/W36R-6H8M>] ("The New America Foundation identified 62 people . . . [o]f those, he said, there were no clear cases of physical recruitment by a militant operative, radical cleric, returning foreign fighter or radicalisation in prison.").

103. Alan Travis, *MI5 Report Challenges Views on Terrorism in Britain*, GUARDIAN (Aug. 20, 2008, 2:01 PM), <https://www.theguardian.com/uk/2008/aug/20/uksecurity.terrorism1> [<https://perma.cc/KR7Z-P7EV>].

104. Claire Bernish, *Religion of Terror? Leaked ISIS Docs Show 70% of Recruits Don't Even Know What Islam Is*, FREE THOUGHT PROJECT (Aug. 15, 2016), <http://thefreethoughtproject.com/isis-docs-recruits-ignorant-islam/> [<https://perma.cc/VJ5N-66WA>].

105. Yasmeen Abutaleb & Kristina Cooke, *A Teen's Turn to Radicalism and the U.S. Safety Net that Failed to Stop It*, REUTERS (June 6, 2016, 2:20 PM), <http://www.reuters.com/investigates/special-report/usa-extremists-teen/> [<https://perma.cc/3VDF-57RG>].

106. See Hirsh, *supra* note 11 (noting Harvard terrorism expert Jessica Stern's conclusion that the relative prosperity and assimilation of American Muslims starkly contrasts with Muslims in Europe, where the latter experience disparities in employment and wages as well as over policing).

In the end, irrational prejudices animate the false assumption that each Muslim has knowledge of and is responsible for all other Muslims' actions. Like all other Americans, Muslims deserve to be presumed innocent and treated as individuals, not collectively guilty based on the criminal acts of a few individuals who misappropriate religious doctrine to engage in politically-motivated violence.¹⁰⁷

V. CVE PROGRAMS WASTE GOVERNMENT RESOURCES

Senior government officials have gone on the record stating that the threat of Americans joining Da'esh is diminishing. According to Francis Taylor, Undersecretary of the Office of Intelligence and Analysis for DHS, in 2015 there was no specific, credible, imminent threat to the homeland from Da'esh.¹⁰⁸ In October 2015, FBI Director James Comey testified before Congress that fewer Americans are attempting to travel to Syria to join Da'esh.¹⁰⁹

Moreover, the data does not corroborate a sufficient security threat to warrant a nationwide CVE program. The FBI estimates that approximately 200 Muslim Americans (out of 3 to 6 million)¹¹⁰ have attempted to join Da'esh in Syria and Iraq.¹¹¹ In 2015, a George Washington University report by the Project on Extremism estimated that out of 25,000 foreign fighters worldwide, the total number of Americans who have traveled to Syria and Iraq since 2011 was 250, whereas over 5,000 fighters came from Europe.¹¹²

In the United States, there has only been one reported case of a fighter returning and allegedly plotting an attack.¹¹³ Speaking to the Council on Foreign Relations in March 2015, Director of National Intelligence James Clapper stated that approximately 40 individuals have returned from Syria, and: "we have since found they went [home] for humanitarian reasons or some other reason that don't relate to plotting."¹¹⁴ Similarly, the New America Foundation found that no American fighter

107. See ELLIOT FRIEDLAND, THE CLARION PROJECT, SPECIAL REPORT: THE ISLAMIC STATE 6 (2015), <http://www.clarionproject.org/sites/default/files/islamic-state-isis-isil-factsheet-1.pdf> [<https://perma.cc/5GZJ-VF84>] (explaining that Da'esh is a political organization that uses religion to justify its goals).

108. *Countering Violent Islamist Extremism: The Urgent Threat of Foreign Fighters and Homegrown Terror. Before the H. Comm. on Homeland Sec.*, 114th Cong. (2015) (statement of Francis Taylor, Under Secretary for Intelligence and Analysis, Department of Homeland Security) ("At present, we are unaware of any specific, credible, imminent threat to the Homeland . . .").

109. Del Quentin Wilber, *FBI Says Fewer Americans Now Try to Join Islamic State*, L.A. TIMES (May 11, 2016, 2:49 PM), <http://www.latimes.com/nation/la-na-comey-fbi-20160511-snap-story.html> [<https://perma.cc/Y59C-PPR3>].

110. S. POVERTY L. CTR., *American Muslims in the United States*, TEACHING TOLERANCE, <http://www.tolerance.org/publication/american-muslims-united-states> [<https://perma.cc/L3FM-FMW5>].

111. See Julian Hattem, *FBI: More than 200 Americans Have Tried to Fight for ISIS*, HILL, (July 8, 2015, 4:36 PM), <http://thehill.com/policy/national-security/247256-more-than-200-americans-tried-to-fight-for-isis-fbi-says> [<https://perma.cc/P98Q-SUL8>] ("The head of the FBI told Senate lawmakers on Wednesday that more than 200 Americans have tried to join Islamic extremists in Iraq and Syria.").

112. VIDINO & HUGHES, *supra* note 95, at 3-6.

113. *ISIS Online: Countering Terrorist Radicalization & Recruitment on the Internet & Social Media: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on the Homeland Sec.* 114th Cong., at 3-4 (2016) (testimony by Peter Bergen), http://www.hsgac.senate.gov/download/bergen-testimony_psi-2016-07-05 [<https://perma.cc/FA9S-D87Z>].

114. Karl Vick, *New Study Says U.S. Threat from Returning Jihadis Is Low*, TIME (Mar. 25, 2016), <http://time.com/4272307/isis-foreign-jihadis-threat/> [<https://perma.cc/RM2L-NXMC>] (alteration in original); Julian Hattem, *Spy Chief: No Threat From Americans Who Aided Militants in Syria*, HILL (Mar.

who fought in the conflict in Somalia returned to plot an attack in the United States; most either died there or were taken into custody upon their return to the United States.¹¹⁵

To be sure, domestic terrorism is a security issue that must be taken seriously. And our law enforcement agencies have myriad legal and investigative tools at their disposal to counter terrorism based on individualized suspicious activity indicative of criminal wrongdoing. Casting a wide net of suspicion, surveillance, and investigation on Muslim communities, however, is a waste of resources that distracts agents from real security threats—not to mention a violation of constitutional and civil rights.

Furthermore, CVE programs are likely to be as wasteful as fusion centers. In 2012, a bipartisan investigation by the U.S. Senate Permanent Subcommittee on Investigations found that "DHS's support of fusion centers has little, if any, benefit to federal counterterrorism efforts." Specifically, the Permanent Committee found that intelligence produced by fusion centers was of "uneven quality—oftentimes shoddy, rarely timely, sometimes endangering citizens' civil liberties and Privacy Act protections, occasionally taken from already-published public sources, and more often than not unrelated to terrorism."¹¹⁶ There was no evidence that fusion centers assisted in disrupting or preventing terrorism. The same government waste and civil liberties violations are likely to occur with CVE programs.

Government resources and policies, therefore, should be guided by the degree of the threat based on credible data. Between 9/11 and June 2015 there have been an estimated 50 fatalities as a result of terrorist attacks conducted by Muslim-Americans against targets in the United States,¹¹⁷ compared with 279,976 violent gun deaths that occurred between 2005 and 2013.¹¹⁸ In 2015 alone, 475 people were killed in mass shootings in the United States.¹¹⁹ According to the Combating Terrorism Center at West Point, the risk of death at the hands of terrorists in the United States approaches lottery-winning odds.¹²⁰ Meanwhile, the Southern Poverty Law Center has found that there have been at least 100 plots, conspiracies and racist rampages since 1995 aimed at waging violence against the United States government.¹²¹ The National Consortium

2, 2015 1:52 PM), <http://thehill.com/policy/defense/234322-spy-chief-no-threat-from-returning-americans-who-fought-in-syria> [<https://perma.cc/4AZK-2AKF>].

115. *The Impact of ISIS on the Homeland and Refugee Resettlement: Hearing Before the Sen. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 13 (2015) (testimony of Peter Bergen), <http://www.hsgac.senate.gov/hearings/lessons-from-the-paris-terrorist-attacks-ramifications-for-the-homeland-and-refugee-resettlement> [<https://perma.cc/G8GW-QJEH>].

116. *Id.*

117. CHARLES KURZMAN & DAVID SCHANZER, LAW ENFORCEMENT ASSESSMENT OF VIOLENT EXTREMISM THREAT 7–9 (2015), https://sites.duke.edu/tcths/files/2013/06/Kurzman_Schanzer_Law_Enforcement_Assessment_of_the_Violent_Extremist_Threat_final.pdf [<https://perma.cc/F7QS-CQZF>].

118. Linda Qiu, *Fact-Checking a Comparison of Gun Deaths and Terrorism Deaths*, POLITIFACT (Oct. 5, 2015, 11:55 AM), <http://www.politifact.com/truth-o-meter/statements/2015/oct/05/viral-image/fact-checking-comparison-gun-deaths-and-terrorism/> [<https://perma.cc/L99E-LM3D>].

119. Abbey Oldham, *2015: The Year of Mass Shootings*, PBS NEWSHOUR (Jan. 4, 2016, 11:30 AM), <http://www.pbs.org/newshour/rundown/2015-the-year-of-mass-shootings/> [<https://perma.cc/KY5J-392P>].

120. Brian Michael Jenkins, *Fifteen Years On, Where Are We In the "War on Terror"?*, CTC SENTINEL 1, 8 (2016), https://www.ctc.usma.edu/v2/wp-content/uploads/2016/09/CTC-SENTINEL_Vol9Iss92.pdf [<https://perma.cc/6KUL-FW7U>].

121. *Terror From the Right: Plots, Conspiracies, and Racist Rampages Since Oklahoma City*, S. POVERTY LAW CTR. (2015), <https://www.splcenter.org/20100126/terror-right> [<https://perma.cc/5C6W->

for the Study of Terrorism and Responses to Terrorism found that between 1990 and 2014, far-right domestic extremists perpetrated nearly four times as many ideologically based homicidal incidents than extremists associated with Al Qaeda and associated groups.¹²²

From 2000 to 2015, the number of hate groups has increased by 56%, which include a large number of anti-immigrant, anti-LGBT, anti-Muslim, and anti-government “Patriot” groups. And from 2014 to 2015 the number of radical right-wing groups increased by 14%.¹²³ For example, Ku Klux Klan chapters increased from 72 in 2014 to 190 in 2015. Self-described “Patriot” groups with an anti-government agenda grew from 874 in 2014 to 998 in 2015.¹²⁴ Stormfront, a White Nationalist online hate forum, had more than 300,000 registered members in 2015 with an average annual increase of 25,000 new users.¹²⁵ White supremacist online forums also radicalized Dylann Roof, the shooter in the massacre of nine African Americans at Charleston’s Emanuel African Methodist Episcopal Church on June 17, 2015.¹²⁶ And yet we are not seeing government CVE programs targeting single white males in their thirties and forties who are the most common demographic committing mass murder.¹²⁷ Nor are we seeing CVE programs for Christians due to right wing groups’ misappropriation of Christian doctrine in furtherance of their violent political ends. Government hearings are not being held to debate whether violence perpetrated by the Ku Klux Klan, the Army of God, or the Lord’s Resistance Army” should be called “radical Christian terrorism.”¹²⁸

The rise in right-wing violent extremism has resulted in 337 attacks per year in the decade after 9/11, causing a total of 254 fatalities, according to a study by Arie Perliger, a professor at the United States Military Academy’s Combating Terrorism Center.¹²⁹ One chilling case in January 2011 involved a neo-Nazi who hid a bomb

B5NJ].

122. WILLIAM S. PARKIN, STEVEN M. CHERMAK, JOSHUA D. FREILICH, & JEFF GRUENEWALD, TWENTY-FIVE YEARS OF IDEOLOGICAL HOMICIDE VICTIMIZATION IN THE UNITED STATES OF AMERICA, REPORT TO THE OFFICE OF UNIVERSITY PROGRAMS, SCIENCE AND TECHNOLOGY DIRECTORATE, U.S. DEP’T OF HOMELAND SEC. 7 (2016), https://www.start.umd.edu/pubs/START_CSTAB_ECDB_25YearsofIdeologicalHomicideVictimizationUS_March2016.pdf [<https://perma.cc/WS6Q-PD58>].

123. Potok, *supra* note 18.

124. *Id.*

125. *Id.*

126. Morris Dees & J. Richard Cohen, *Opinion: White Supremacists Without Borders*, N.Y. TIMES (June 22, 2015), <http://www.nytimes.com/2015/06/22/opinion/white-supremacists-without-borders.html> [<https://perma.cc/3DQU-QMHK>].

127. See N.R. Kleinfield et al., *Mass Murders Fit Profile, as Do Many Others Who Don’t Kill*, N.Y. TIMES (Oct. 3, 2015), <http://www.nytimes.com/2015/10/04/us/mass-murderers-fit-profile-as-do-many-others-who-dont-kill.html> [<https://perma.cc/3EHG-ZAH6>] (discussing the difficulty with the profile of a mass shooter that fits a majority class).

128. See generally Harry J. Bentham, *ISIS Isn’t Islamic as the Lord’s Resistance Army Isn’t Christian*, BELIEF NET, <http://www.beliefnet.com/columnists/lordre/2014/11/isis-islam-lords-resistance-army-christianity-extremism.html> [<https://perma.cc/PL3H-GUX6>] (last visited June 3, 2017). See also Julia Edwards Ainsley, et al., *supra* note 5 (explaining that the Trump Administration has changed the CVE program to focus purely on Muslim individuals, and that organizations such as the KKK have been removed from these programs).

129. See ARIE PERLIGER, CHALLENGERS FROM THE SIDELINES: UNDERSTANDING AMERICA’S VIOLENT FAR-RIGHT, COMBATING TERRORISM CENTER AT WEST POINT 100 (2012); Charles Kurzman & David Schanzer, *The Growing Right Wing Terror Threat*, N.Y. TIMES (June 16, 2015), <http://www.nytimes.com/2015/06/16/opinion/the-other-terror-threat.html> [<https://perma.cc/S7LC-MELY>]

packed with fishing weights coated with rat poison in a backpack on the route of the Martin Luther King Day parade in Spokane, Washington.¹³⁰ In June 2014, a violent extremist associated with the right wing Sovereign Citizens movement shot police officers with an assault rifle during an attack in a courthouse in Forsyth County, Georgia.¹³¹ That same year in Nevada, anti-government militants associated with the Sovereign Citizens movement shot two police officers in a restaurant and placed over their bodies a “Don’t Tread on Me” flag, a swastika-stamped manifesto, and a note that read “This is the start of the revolution.”¹³² In early 2016, 150-armed white Christian “militia” members occupied a federal building and took over several acres of federal land.¹³³

In comparison, an average of nine Muslims per year—out of 3 to 6 million—have been involved in an annual average of six terrorism-related plots against targets in the United States.¹³⁴ While most were disrupted, the 20 plots that were carried out accounted for 50 fatalities between 2001 and 2014, excluding the 9/11 terrorist attacks.¹³⁵ Thus, it comes as no surprise that a 2015 Duke University research study found that over 74% of 382 local and state agencies rated anti-government extremism as one of the top three terrorist threats in their jurisdiction.¹³⁶ This is compared to 39% rating Al Qaeda or like-minded terrorists as a top threat.¹³⁷ When asked to rank 1 to 5 the terrorist threat in their jurisdiction, 45% of the jurisdictions surveyed ranked “other” forms of terrorism as a higher threat than Al Qaeda and associated terrorism.¹³⁸ Similarly, only 3% identified the threat of Muslim violent extremists as a severe threat, as compared to 7% for anti-government and other forms of violent extremists.¹³⁹

When Duke University researchers asked law enforcement agencies why they did not have a CVE program tailored for right wing extremist groups, agents noted it would be a waste of time because the right wing extremists live in the shadows and do

[hereinafter Kurzan & Schanzer, *Right-Wing Terror*].

130. *Official: Bomb Found on King Day in Spokane had Rat Poison, Pellets*, CNN (Jan. 27, 2011, 3:49 PM), <http://www.cnn.com/2011/CRIME/01/27/washington.mlk.parade.bomb/> [<https://perma.cc/5BTQ-S7RZ>]; Bill Morlin, *The Spokane Bomb Attempt: Who is Kevin William Harpham*, S. POVERTY LAW CTR. (Mar. 10, 2011), <https://www.splcenter.org/hatewatch/2011/03/10/spokane-bomb-attempt-who-kevin-william-harpham> [<https://perma.cc/MR9Y-W5JJ>].

131. *See generally Forsyth Deputy Shot, Suspect Dead, Courthouse Evacuated*, ATLANTA J.-CONST. (June 6, 2014, 9:20 PM), <http://www.ajc.com/news/news/police-activity-around-forsyth-courthouse/ngFsz> [<https://perma.cc/P84V-HSVE>].

132. JJ MacNab, *What Las Vegas Police Killings Show about Evolving Sovereign Movement*, FORBES (June 13, 2014), <http://www.forbes.com/sites/jjmacnab/2014/06/13/what-las-vegas-police-killings-show-about-evolving-sovereign-movement/#2e27c38d57be> [<https://perma.cc/8UQF-J2NC>].

133. Carissa Wolf, et al., *Armed Men, Led by Bundy Brothers, Take Over Federal Building in Rural Oregon*, WASH. POST (Jan. 3, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/01/03/armed-militia-bundy-brothers-take-over-federal-building-in-rural-oregon/?utm_term=.72d2b63a4e19 [<https://perma.cc/2YKE-WPG5>].

134. Kurzman & Schanzer, *Right-Wing Terror*, *supra* note 130.

135. *Id.*

136. KURZMAN & SCHANZER, *supra* note 118, at 3.

137. *Id.*

138. *Id.* at 5.

139. *Id.*

not communicate their criminal activity to white communities.¹⁴⁰ The same reality applies to terrorism plotters who claim to be Muslims—they do not tell Muslim community leaders or family members about their criminal plans, nor do they become recruited by international terrorists in open forums where interventions by civilians are a possibility.¹⁴¹ Indeed, Muslims interviewed in the Duke University study were asked about the efficacy of CVE programs, and respondents expressed frustration that the government and fellow Americans expected them to have knowledge of every fringe element that claims to share their faith, whereas other faith traditions are not imposed with the same burden.¹⁴² Not only are such expectations impractical, they are un-American. We are a country founded on the rule of law where each individual is responsible for her individual acts, not for the acts of others who happen to share the same race, ethnicity, gender, religion, or other characteristics. CVE programs contravene this fundamental American principle.

To be sure, we should not be creating CVE programs based on religious identities—whether Christian, Muslim, Jewish, or otherwise. But the unabashed focus on Muslims in government efforts to counter politically motivated violence in America demonstrates the government's disparate treatment of faith communities.

VI. FUNDS FOR COMMUNITY DEVELOPMENT AND RESILIENCE SHOULD BE MANAGED BY SOCIAL SERVICE AGENCIES WITHOUT LAW ENFORCEMENT CONTROL

Muslims communities are among the most diverse in America. Comprised of various races and ethnic backgrounds, the diversity of Muslim American communities is a testament to America's rich cultural heritage. About 63% of Muslim Americans are foreign born and 20% are African American.¹⁴³ For decades, Muslim engineers, doctors, lawyers, professors, and other professionals have contributed their skills and strong work ethic toward America's economic prosperity.¹⁴⁴ Similarly, Muslims are entrepreneurs who operate businesses, which create jobs and grow our economy.¹⁴⁵

As a result, 14% of Muslims earn a household income over \$100,000 compared to 16% of the general population and 13% of Muslim households earn \$50,000 to \$74,999 compared to 15% of the general population.¹⁴⁶ Accordingly, a Pew Research Center study found that Muslims are mostly mainstream and well-integrated into American society.¹⁴⁷

140. SCHANZER ET AL., *supra* note 82, at 21–22.

141. *Id.* at 20.

142. *Id.*

143. PEW RESEARCH CTR., *supra* note 93, at 13.

144. *See, e.g.,* Daniel Pipes & Khalid Durán, *Muslim Americans in the United States*, CTR. FOR IMMIGRATION STUD. (Aug. 2002), <http://cis.org/USMuslimImmigrants> [<https://perma.cc/4DGV-VPKV>] (“Immigrant Muslims tend to concentrate in the professional and entrepreneurial vocations, and especially in engineering and medicine, which jointly employ about one-third of Muslims in the United States. With such high educational levels, it comes as no surprise that many members of this community have done well; average income for Muslims appears to be higher than the U.S. national average.”).

145. *Id.*

146. PEW RESEARCH CTR., *supra* note 93, at 6.

147. *Id.* at 33.

However, like many other American communities, Muslim American communities include low income families. In 2001, the Pew Research Forum found that 45% of Muslim households earned less than \$30,000 compared to 36% of the general public and only 33% of Muslims were homeowners compared to 58% of the general public.¹⁴⁸ With the poverty line at approximately \$28,000 for a family of five and \$32,000 for a family of six,¹⁴⁹ a third of Muslims in America are on the verge of poverty. Moreover, 29% of Muslims were unemployed or working part-time compared to 20% of the general public.¹⁵⁰

At a time when Islamophobia has reached unprecedented levels the treatment of low income Muslims in America demonstrates the need for social services in many Muslim American communities.¹⁵¹ Professor Khaled Beydoun notes that "Muslim Americans—as a standalone faith group—are comparatively poorer than the broader American polity."¹⁵² In some Muslim communities, the poverty rate is alarmingly high. For example, 82% of the estimated 30,000 to 80,000 Somali Americans living in Minnesota are near or below the poverty line.¹⁵³ In Brooklyn, nearly 54% of Bangladeshi Americans are low-income or below the poverty line, and many Yemeni American families who live in high cost cities such as New York, Detroit, and the Bay Area are low income.¹⁵⁴

The consequent social and economic challenges faced by some Muslims in America should determine how we spend government resources, rather than inflated terrorism threats based on fear and prejudice. For example, some Muslim leaders such as Los Angeles-based cleric Jihad Saafir believe "local gangs pose the most immediate threat to community safety, not homegrown violent extremists."¹⁵⁵ As such, government resources are more wisely spent on investing in education, employment, health, and other social services that empower diverse Muslim communities to thrive and prosper. Funds currently allocated to CVE should be redirected to social service agencies with the expertise and institutional mission to assist new immigrant and low income communities. Law enforcement should only get involved if there is individualized suspicion of predicate criminal acts.¹⁵⁶ Decoupling law enforcement

148. *Id.* at 13, 18.

149. Annual Update to the HHS Poverty Guideline, 82 Fed. Reg. 19 (Jan. 31, 2017).

150. PEW. RESEARCH CTR., *supra* note 93, at 18.

151. See Khaled A. Beydoun, *Between Indigence, Islamophobia, and Erasure: Poor and Muslim in "War on Terror" America*, 104 CAL. L. REV. 1463, 1501 (2016) ("Addressing the dire shortage of Muslim American organizational work within poor and working-class spaces, prominent Islamic scholar Sherman Jackson commented, '[t]he plight of poor people in America, even poor Muslims in America, has not been on the radar screen of the immigrant Muslim community. They have been much more interested in monument-building.'").

152. *Id.* at 1471.

153. *Id.* at 1477.

154. *Id.* at 1478.

155. Alejandro Beutel, *Using Local Public-Private Partnerships to Reduce Risk of Violent Extremism*, BRINK NEWS (Aug. 6, 2015), <http://www.brinknews.com/using-local-public-private-partnerships-to-reduce-risk-of-violent-extremism/> [https://perma.cc/U4JZ-MTUU].

156. See *Permanent Provisions of the Patriot Act: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary 112th Cong.* 4–5 (2011) (statement of Michael German, Senior Policy Counsel, American Civil Liberties Union), https://www.aclu.org/files/assets/ACLU_Testimony_Before_the_HJC_Regarding_the_Patriot_Act.pdf [https://perma.cc/P8G7-4Y74] (arguing that the government should not arbitrarily involve itself unless there is a violation of constitutional rights).

from community development is consistent with Pentagon officials' determination that civilian programs abroad led by the U.S. Agency for International Development were more effective in mitigating the circumstances that may lead some vulnerable youth to being recruited by terrorist groups.¹⁵⁷

Government programs funded and controlled by state and federal social service agencies, such as the departments of education and health and human services, will also facilitate community involvement by setting the agenda based on the needs of diverse communities; thereby bolstering community-government partnerships. Communities can focus on working with qualified social services experts in addressing community development challenges rather than worry that their involvement will be exploited by law enforcement to surveil their communities, violate their civil liberties, and legitimize discrimination by private actors.

CONCLUSION

We live in a world where opportunities and conflicts cross borders with ease. New technologies and advances in international travel have created unprecedented possibilities for citizens across the world to interact and exchange ideas for the common good.

Violent non-state actors with political agendas are exploiting new technologies and seamless borders to manipulate vulnerable individuals.¹⁵⁸ They use myriad ideological doctrines to lend credence to their perverse political motivations. In confronting these violent actors, we cannot afford to adopt an "us versus them" approach. We must unite as Americans to ensure we are all safe and secure from both state and non-state violence. Doing so entails staying true to our fundamental American values. The most pertinent of which is our commitment to individual responsibility for individual wrongdoing, regardless of one's religion, race, or creed.

Unfortunately, CVE programs undermine rather than promote these values. The securitization of Muslim communities as potential terrorists legitimizes the pervasive anti-Muslim prejudice and bigotry infecting our society today. Consequently, private actors are emboldened to harass, assault, and even kill fellow citizens who are or perceived to be Muslim.¹⁵⁹ Meanwhile, CVE programs have yet to address the rise of right wing extremists—who often target Muslims in hate crimes.¹⁶⁰ All of which is exploited by Da'esh to validate its twisted narrative that America is at war with Islam.

157. See James Stavridis & John R. Allen, *Expanding the U.S. Military's Smart-Power Toolbox*, WALL ST. J. (June 9, 2016, 12:03 PM), <http://www.wsj.com/articles/expanding-the-u-s-militarys-smart-power-toolbox-1465425489> [<https://perma.cc/Q7B9-2MGQ>] (noting that civilian programs lead by the U.S. Agency for International Development "were clearly reducing support for violent extremism").

158. See, e.g., Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 654–62 (forthcoming 2017) (outlining the dangers of terrorist speech and new terrorist recruitment approaches made through social media).

159. See, e.g., Aziz, *Muslim-American Women*, *supra* note 64, at 245–46 (arguing that Muslims, especially women, face increased discrimination in the wake of the 9/11 attacks).

160. See PETER ROMANIUK, DOES CVE WORK? LESSONS LEARNED FROM THE GLOBAL EFFORT TO COUNTER VIOLENT EXTREMISM 2 (2015), http://www.globalcenter.org/wp-content/uploads/2015/09/Does-CVE-Work_2015.pdf [<https://perma.cc/G5MG-VZAP>] ("CVE objectives will be high on the agenda for future counterterrorism practitioners. Governments across the globe face complex blends of terrorism and insurgency, especially in the developing world, along-side FTFs and homegrown threats, social media-savvy religious extremists, and resurgent right-wingers, all of which require flexible and innovative

In addition, the data does not support the need for a law enforcement-led CVE program targeting Muslim communities. Long before the White House CVE initiative in 2010, Muslims in America have informed law enforcement when they have knowledge of criminal activity. Indeed, Muslims have also actively stopped attempted terrorism by other Muslims. For example, a Muslim vendor in New York City was the first to spot smoke coming out of an SUV in the Times Square attempted bombing.¹⁶¹ His immediate communication with other vendors who alerted law enforcement was instrumental in preventing the loss of life.¹⁶² Thus, spending tens of millions of dollars on CVE programs especially for Muslim communities is not only stigmatizing, it is unnecessary and wasteful.

Independent of flawed CVE programs and specious radicalization theories, our government resources are better spent investing in new immigrant and low income communities who face unique social and economic challenges. As a country that prides itself in offering the opportunity for social mobility to citizens willing and able to work hard, investing in community development is a worthy endeavor.

Funds that would otherwise be wasted on ill-fated CVE programs instead should be given to social services agencies with the expertise to support the diverse Muslim American communities in need of job training, physical and mental health services, youth programs, educational opportunities, and other services that build community resilience. And rather than making such programs available only to a particular religion or race, they should be available to communities based on need.

Fifteen years after the tragic 9/11 attacks, most Muslims in America are actively and constructively engaged in American society.¹⁶³ They welcome working with their government and fellow citizens to ensure all Americans have equal opportunity to thrive and be safe. But they are thwarted from doing so by racialized government programs that treat them as outsiders and fifth columns rather than partners and equal citizens.

Rethinking our counterterrorism policies and practices to make them less discriminatory and more compliant with our constitution is long overdue. Failing to do so not only impedes America's relative success in integrating communities of all faiths, races, and immigrant status; it also puts us on the losing end of the terrorists' "war of ideas."

responses For these reasons, one might expect that the uptick of interest in CVE will continue into the future and that the role of civil society actors will be extended and refined over time.").

161. Anjali Kamat & Alioune Niass, *Muslim Vendor, in Times Square Gets No Credit In Helping to Foil Times Square Bomb Plot*, DEMOCRACY NOW (May 6, 2010), http://www.democracynow.org/2010/5/6/muslim_vendor_gets_no_credit_in [<https://perma.cc/MA25-ZJEN>].

162. *Id.*

163. See generally Amaney Jamal, *The Political Participation and Engagement of Muslim Americans: Mosque Involvement and Group Consciousness*, 33 AM. POL. RES. 521, 521–44 (2005).

Analyzing the Causes of Statelessness in Syrian Refugee Children

David M. Howard*

TABLE OF CONTENTS

INTRODUCTION	282
I. CITIZENSHIP.....	285
A. <i>Citizenship and Statelessness</i>	286
B. <i>Effects of No Jus Soli</i>	287
C. <i>Registration Problems</i>	289
II. COMPARING CITIZENSHIP IN THE U.K., GERMANY, CANADA, TURKEY, AND SYRIA.....	291
A. <i>United Kingdom</i>	291
B. <i>Germany</i>	294
C. <i>Sweden</i>	296
D. <i>Canada</i>	298
E. <i>Turkey</i>	300
F. <i>Syria</i>	302
G. <i>Comparison of These Countries' Statelessness Laws</i>	305
III. U.N. AND EUROPEAN STATES' RESPONSES TO STATELESSNESS AND SYRIAN REFUGEES	307
A. <i>How Surrounding Countries Are Responding to the Influx of Syrian Refugees</i>	308
B. <i>Birthright Citizenship Can Be the Solution</i>	310
C. <i>U.N. Citizenship</i>	311
CONCLUSION	312

* J.D. 2017, The University of Texas School of Law. The author would like to dedicate this Note to his wonderful fiancée, Jingjing Liang. The author would like to thank the Texas International Law Journal for their hard work in editing this Note, particularly Marisa Joyce and Jacqueline Groves.

INTRODUCTION

*A man can lead a reasonably full life without a family, a fixed local residence, or a religious affiliation, but if he is stateless he is nothing. He has no rights, no security, and little opportunity for a useful career. There is no salvation on earth outside the framework of an organized state.*¹

The discriminatory nationality laws in countries such as Syria, the lack of birthright citizenship in European countries, and the loss of documentation due to the Syrian conflict all combine to create a myriad of problems, not least of which is imposing statelessness on children born to Syrian refugees outside of Syria. Syrian law does not guarantee women the right to pass down their Syrian nationality to their children,² and as no country in Europe currently provides for unconditional birthright citizenship,³ these children could become an “invisible” generation.

Immigration and national security are the main drivers behind state citizenship policies, and both are inextricably connected.⁴ Many citizenship laws function as a control on immigration,⁵ and changes to the concept of citizenship are often influenced by citizens’ reactions to immigrants.⁶ Although every country has its own laws regarding citizenship, there are generally two categories into which these laws fall. In the first category, *jus sanguinis*—the principle of blood—descent and heritage play a pivotal role in defining who is or can become a citizen.⁷ The second category, known as *jus soli* or birthright citizenship, defines citizens as those born within the country’s borders, regardless of the citizenship of the parents.⁸ Under unconditional *jus soli*, children are given the citizenship of the place of birth except in rare circumstances—such as when the children of diplomats are denied citizenship.⁹ There are more restrictive variations of *jus soli*, where children born in the country to non-citizen parents are only citizens if they satisfy certain conditions.¹⁰

1. JOSEPH R. STRAYER, ON THE MEDIEVAL ORIGINS OF THE MODERN STATE 3 (1970).

2. Legislative Decree No. 276 of 1969, art. 3(A) (Syria).

3. Nick Petree, *Born in the USA: An All-American View of Birthright Citizenship and International Human Rights*, 34 HOUS. J. INT’L L. 147, 159 (2011).

4. See Fiona B. Adamson, *Crossing Borders: International Migration and National Security*, 31 INT’L SECURITY 165, 166 (2006) (stating that migration has long been viewed as “closely linked to national security concerns” and that, traditionally, immigration policies respond to a nation’s security and economic interests); *id.* at 169 (“States . . . have amended long-standing migration and citizenship policies to adjust to the realities of contemporary migration flows.”).

5. Amitai Etzioni, *Citizenship Tests: A Comparative, Communitarian Perspective*, 78 POL. Q. 353, 356 (2007).

6. *Id.* at 355.

7. *Jus Sanguinis*, BLACK’S LAW DICTIONARY (10th ed. 2014).

8. *Jus Soli*, BLACK’S LAW DICTIONARY (10th ed. 2014).

9. Brooke Kirkland, Note, *Limiting the Application of Jus Soli: The Resulting Status of Undocumented Children in the United States* 12 BUFF. HUM. RTS. L. REV. 197, 199 (2006); ALEXANDRA M. WYATT, CONGRESSIONAL RESEARCH SERVICE, BIRTHRIGHT CITIZENSHIP AND CHILDREN BORN IN THE UNITED STATES TO ALIEN PARENTS: AN OVERVIEW OF THE LEGAL DEBATE 1 (2015), <https://fas.org/sgp/crs/misc/R44251.pdf> [<http://perma.cc/F2QP-CAVB>] (stating that the limited exceptions to birthright citizenship in the United States, “such as for children of diplomats and foreign ministers . . . flows from the English common law doctrine of *jus soli*”).

10. ISEULT HONOHAN, *JUS SOLI CITIZENSHIP* 2 (2010), <http://eudo-citizenship.eu/docs/jus-soli-policy-brief.pdf> [<http://perma.cc/U3VL-B33R>]; see also Kirkland, *supra* note 9, at 197–98 (addressing proposals to deny birthright citizenship to the children of undocumented immigrants who are born in the United States).

Citizenship laws . . . are among the most fundamental of political creations. They distribute power, assign status and define political purposes. They create the most recognized political identity of the individuals they embrace, one displayed on passports scrutinized at every contested border. They also assign negative identities to the “aliens” they fence out.¹¹

Citizenship and national security are also interconnected, as the “first priority of any Government is to ensure the security and safety of the nation and all members of the public.”¹² Countries often restrict the attainment of citizenship during times of threatened or actual war in order to protect the security of their citizens.¹³ The process of attaining citizenship in a different country varies significantly by region, and developments in citizenship policies have evolved globally throughout the 20th century.¹⁴

The emigration of Syrian refugees is at the heart of both immigration and citizenship policies today. Due to the conflict in Syria, many have left the country to find protection in nearby states, particularly Turkey and Europe.¹⁵ But this emigration has increased strains on surrounding countries and intensified problems for Syrian refugees, most drastically for refugee children. One of the many problems Syrian refugees face is statelessness.¹⁶ Children of refugees from countries such as Syria can often be born stateless, as the child is born outside the parent’s country, and nationality laws do not allow the mother’s citizenship to be passed to the child.¹⁷ Additionally, the parents may be unable to bring documentation from Syria, making it difficult to register the birth of their child in another country. Without such documentation, the child may never be registered and thus may be denied access to basic services, including healthcare.¹⁸ While lacking documentation alone does not make a child stateless, without proof of birth or identity of parents, the child has a significantly

11. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN US HISTORY* 30–31 (1997).

12. Gordon Brown, *Forward to HER MAJESTY’S GOVERNMENT, THE UNITED KINGDOM’S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM* 6, 6 (corrective reprint 2009), <http://tna.europarchive.org/20100419081706/http://security.homeoffice.gov.uk/news-publications/publication-search/contest/contest-strategy/contest-strategy-2009?view=Binary> [<http://perma.cc/3LBM-E5G5>].

13. See Arthur H. Garrison, *National Security and Presidential Power: Judicial Deference and Establishing Constitutional Boundaries in World War Two and the Korean War*, 39 CUMB. L. REV. 609, 614 (2009) (describing the restriction of citizenship to prevent those of Japanese ancestry from attaining U.S. citizenship).

14. *Infra* Part II.

15. Nicole Ostrand, *The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom, and the United States*, 3 J. MIGRATION & HUM. SECURITY 255, 255 (2015).

16. *Syria’s Refugee Crisis in Numbers*, AMNESTY INT’L (Feb. 3, 2016), <https://www.amnesty.org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/> [<http://perma.cc/2M3J-RTA3>].

17. See Maya Gebeily & Felipe Jacome, *A Right to Exist: The Stateless Syrian Children*, AL JAZEERA (Dec. 18, 2015), <http://www.aljazeera.com/indepth/features/2015/12/exist-stateless-syrian-children-151217071355039> [<http://perma.cc/4464-NL4N>] (“Children who are born in Lebanon but not legally registered within the first year of their lives are at risk of becoming stateless.”).

18. INT’L HUM. RTS. CLINIC & NORWEGIAN REFUGEE COUNCIL, *REGISTERING RIGHTS* 4–5 (2015), <http://hrp.law.harvard.edu/wp-content/uploads/2015/11/Registering-rights-report-NRC-IHRC-October20151.pdf> [<http://perma.cc/3DTF-L4BU>].

higher risk of being stateless.¹⁹ So far, statelessness has affected over 10 million people worldwide,²⁰ and continues to cause incredible problems, as those without a nationality suffer racism and discrimination but have little to no protection.

According to the United Nations Refugee Agency (UNHCR), a stateless child is born every ten minutes, and three million children are already stateless—140,000 of them due to the Syrian crisis.²¹ Children born out of Syria to a Syrian parent may become part of a stateless generation due to the combined effect of lack of birthright citizenship laws in European countries, discriminatory Syrian nationality laws, and loss of registration paperwork in the Syrian conflict.²² While the Universal Declaration of Human Rights proclaims that everyone has a right to a nationality,²³ and several international treaties require countries to enforce this right,²⁴ many European governments either do not have fully inclusive safeguards or have gaps in their protections for stateless children.²⁵

Many have called for European countries to do more to protect Syrian refugees.²⁶ “[T]his crisis is on Europe’s ‘doorstep’ [and] could result in serious destabilisation of the entire region. Numerous governments and organisations have emphasised the need for European and other countries to provide more aid to the countries neighboring Syria and to offer resettlement or admission to more refugees from Syria.”²⁷ Countries also need to provide citizenship to stateless children born out of the Syrian conflict, but current citizenship policies in the majority of European countries still prevent the acquisition of citizenship by stateless persons.²⁸ “[W]hether it is gaining access to the labour market or forging social connections, citizenship is

19. LUCY GREGG ET AL., ASYLUM AID & UNITED NATIONS HIGH COMM’R FOR REFUGEES, MAPPING STATELESSNESS IN THE UNITED KINGDOM 23 (2011), <http://www.unhcr.org/en-us/protection/basic/578dffae7/unhcr-mapping-statelessness-in-the-united-kingdom.html> [<http://perma.cc/5LF7-B36E>].

20. Amit Sen et al., U.N. High Comm’r for Refugees, Born in Exile, Syrian Children Face Threat of Statelessness (Nov. 4, 2014), <http://www.unhcr.org/en-us/news/latest/2014/11/54589fb16/born-exile-syrian-children-face-threat-statelessness.html> [<http://perma.cc/THJ7-57DS>].

21. Michael Pizzi, *A Stateless Child is Born Every 10 Minutes, UN Refugee Agency Says*, AL JAZEERA AM. (Nov. 3, 2015), <http://america.aljazeera.com/articles/2015/11/3/unhcr-stateless-child-born-every-10-minutes.html> [<http://perma.cc/YFK8-Z6AJ>].

22. Louise Osborne & Ruby Russell, *Stateless in Europe: ‘We Are No People With No Nation’*, GUARDIAN (Dec. 27, 2015), <https://www.theguardian.com/world/2015/dec/27/stateless-in-europe-refugee-crisis-we-are-no-people-with-no-nation> [<http://perma.cc/45QX-VW9T>].

23. G.A. Res. 217A (III) A, Universal Declaration of Human Rights art. 15(1) (Dec. 10, 1948).

24. See, e.g., G.A. Res. 44/25, annex, Convention on the Rights of the Child, art. 7(1) (Nov. 20, 1989) (stating that children shall have a right to a nationality at birth).

25. EUR. NETWORK ON STATELESSNESS, NO CHILD SHOULD BE STATELESS 12–13 (2015), http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf [<http://perma.cc/QK4S-GEV5>].

26. See, e.g., *EU: Act Now to Help Syria’s Refugees*, HUM. RTS. WATCH (Mar. 17, 2014, 4:58 AM), <https://www.hrw.org/news/2014/03/17/eu-act-now-help-syrias-refugees> [<http://perma.cc/B26J-SL8R>] (detailing an open letter sent by several nongovernmental organizations calling for action by European countries to aid Syrian refugees).

27. CYNTHIA ORCHARD & ANDREW MILLER, REFUGEE STUDIES CTR., FORCED MIGRATION POLICY BRIEFING 10: PROTECTION IN EUROPE FOR REFUGEES FROM SYRIA 15 (2014), <https://www.rsc.ox.ac.uk/files/publications/policy-briefing-series/pb10-protection-europe-refugees-syria-2014.pdf> [<https://perma.cc/6G9Y-GEZ8>].

28. Osborne & Russell, *supra* note 22.

seen as an essential part of refugee integration[.]”²⁹ therefore birthright citizenship can be a solution to many problems involving refugees, especially in preventing statelessness.³⁰

Part I of this Note will discuss birthright citizenship policies and rationale, including the importance of birthright citizenship. Part II will compare the citizenship laws and policies of the United Kingdom (U.K.), Germany, Sweden, Canada, Turkey, and Syria, focusing on each country’s protections for statelessness and how these have affected Syrian refugees. Part III will look at the states’ policies regarding Syrian refugees and how birthright citizenship or loosening citizenship policies can prevent statelessness.

I. CITIZENSHIP

Before analyzing the policies behind birthright citizenship, “citizenship” must be defined, which as one scholar notes, is “like trying to grab a fog bank.”³¹ Some scholars define citizenship as “the status of having the right to participate in and to be represented in politics.”³² Others have used a similarly broad definition: “A citizen is a member of a political community who enjoys the rights and assumes the duties of membership.”³³ T.H. Marshall considered citizenship to be “a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed.”³⁴ Likewise, the U.S. Supreme Court has said “[c]itizenship is membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society.”³⁵ But whatever the definition, “[c]itizenship implies ‘full membership’ in a political community,” and provides a group of civil, political, and social rights for the citizen.³⁶

29. Emma Stewart & Gareth Mulvey, *Seeking Safety Beyond Refuge: The Impact of Immigration and Citizenship Policy upon Refugees in the UK*, 40 J. ETHNIC & MIGRATION STUD. 1023, 1026 (2014); see also Steven Vertovec, *The Emergence of Super-Diversity in Britain* 18 (Univ. of Oxford Ctr. on Migration, Policy & Soc’y, Working Paper No. 25, 2006) (“And not surprisingly, those with a temporary or precarious status may actually have greater difficulties entering into positive relations with established residents than those heading for permanent residence.”) (internal quotation marks omitted).

30. EUR. NETWORK ON STATELESSNESS, *supra* note 25, at 11.

31. Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 56 (1997).

32. Andrew Linklater, *Globalization and the Transformation of Political Community*, in *THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS* 617, 621 (John Baylis & Steve Smith eds., 2001).

33. *Citizenship*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 1, 2011), <https://plato.stanford.edu/entries/citizenship/>.

34. David Grant, *Citizenship and Justice: Issues in Globalization*, in *ESSAYS IN ECONOMIC GLOBALIZATION, TRANSNATIONAL POLICIES AND VULNERABILITY* 101, 106 (Alexander Kouzmin & Andrew Hayne eds., 1999).

35. *Luria v. United States*, 231 U.S. 9, 22 (1913).

36. Helen Elizabeth Hartnell, *Belonging: Citizenship and Migration in the European Union and in Germany*, 24 BERKELEY J. INT’L L. 330, 343 (2006).

A. *Citizenship and Statelessness*

So why is citizenship so important? Citizenship is the threshold through which individuals gain rights.³⁷ Citizenship is necessary for freedom of movement, participation in political processes, and access to many basic economic and social rights.³⁸ Chief Justice Warren described citizenship as the “right to have rights.”³⁹ Without citizenship, one is left without any form of protection and is essentially excluded. Citizens are protected by their state, while non-citizens are generally given limited, if any, rights: “Failure to acquire status under the law can have a negative impact on many important elements of life, including the right to vote, to own property, to have health care, to send one’s children to school, to work, and to travel to and from one’s country of residence.”⁴⁰

If citizenship is inclusion in a nation and protection by its government, statelessness is the absence of citizenship: “Statelessness is a condition, caused by governments, that occurs when no state recognizes a person as its citizen under the operations of its law.”⁴¹ In other words, an individual is stateless if one is not considered a national by any state under the operation of its law.⁴² Being stateless is a most “severe and dramatic deprivation of the power of an individual” because stateless people have no nationality, and thereby lack any protections provided by a government.⁴³ States generally do not secure or protect the rights of refugees or stateless persons, and states have little incentive to enforce the rights of the stateless.⁴⁴ There are two types of statelessness: De jure statelessness—when the laws of no state recognize the person as a citizen—and de facto statelessness—when the person is entitled to citizenship under a state’s nationality laws, but the law is applied in such a way that the person is not recognized as a citizen.⁴⁵ These people still have citizenship, but it is ineffective because of a specific situation,⁴⁶ such as the Syrian conflict.

Not all refugees are stateless, just as not all stateless people are refugees, but there is significant overlap between the two groups. Article 1(A) of the Convention Relating

37. Rhoda E. Howard-Hassmann, *Introduction: The Human Right to Citizenship*, in *THE HUMAN RIGHT TO CITIZENSHIP* 1, 1 (Rhoda E. Howard-Hassmann & Margaret Walton-Roberts eds., 2015).

38. David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 *HUM. RTS. Q.* 245, 267 (2006); Allison Bartlett, Comment, *An Endless Quest for a Home: The Gap in Protection Between Stateless Persons and Refugees*, 33 *IMMIGR. & NAT'LITY L. REV.* 445, 447 (2012).

39. *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

40. Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 *INT'L J. REFUGEE L.* 156, 159 (1998).

41. Lia G. Melikian, *No Country for Some Men?: Statelessness in the United States and Lessons from the European Union*, 43 *GA. J. INT'L & COMP. L.* 281, 285 (2014).

42. Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117; U.N. HIGH COMM'R FOR REFUGEES, *THE STATE OF THE WORLD'S REFUGEES: A HUMANITARIAN AGENDA* ch. 6 (1997), <http://www.unhcr.org/3eb7ba7d4.pdf> [<https://perma.cc/9NU7-Y8JC>].

43. Myres S. McDougal et al., *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 *YALE L.J.* 900, 960 (1974).

44. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 290–302 (1951).

45. Hugh Massey (Senior Legal Adviser, UNHCR Geneva), *Legal and Protection Policy Research Series: UNHCR and De Facto Statelessness*, at i, U.N. Doc. LPPR/2010/01 (Apr. 2010), <http://www.refworld.org/pdfid/4bbf387d2.pdf> [<http://perma.cc/6RG3-GT5D>]; CANADIAN COUNS. FOR REFUGEES, *Statelessness and Citizenship in Canada* (Mar. 2009), <http://ccrweb.ca/en/statelessness> [<https://perma.cc/E226-ZX3k>].

46. See Jay Milbrandt, *Stateless*, 20 *CARDOZO J. INT'L & COMP. L.* 75, 82 (2011) (claiming de facto stateless persons essentially lack an effective nationality).

to the Status of Refugees defines a refugee as any person who holds the “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, . . . who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”⁴⁷ While the line between stateless persons and refugees is blurry, refugees exhibit many of the same hallmarks as stateless people: “Two aspects of the situation of the stateless carry important lessons for advocates for migrants and refugees today: first, that the stateless themselves had no voice and had to rely on the advocacy of sympathizers and allies; and second, that sheer numbers can overwhelm even well-intentioned humanitarian efforts.”⁴⁸

Even though many stateless persons are not refugees, and refugees generally have both citizenship and a national identity, neither stateless persons nor refugees can rely on their own state to provide the most basic protections.⁴⁹ Sometimes, however, refugees, such as many in the Syrian conflict, are also stateless.⁵⁰ Without citizenship, these stateless refugees have no legal protections and cannot return to the country they once called home due to conflict or war. Statelessness intensifies the problems refugees face, as they are already vulnerable to exploitation in the countries in which they are now residing.⁵¹ Many even believe statelessness “is a form of punishment more primitive than torture.”⁵² In the words of Hannah Arendt: “[O]nce they had left their homeland, they were homeless, once they had left their state, they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth.”⁵³

B. *Effects of No Jus Soli*

Citizenship can be gained in four ways: Birth, marriage, adoption, or naturalization. Birthright citizenship, or *jus soli*, has generated much debate and controversy throughout the world, and there are several different approaches to birthright citizenship. The first approach is the simplest because it is unconditional: “a child becomes a citizen of the country in which that child is born.”⁵⁴ But the second approach, conditional *jus soli*, limits citizenship rights to individuals born in a state to parents admitted for permanent residence and requires continued presence in that

47. Convention Relating to the Status of Refugees, art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

48. Susan Gzesh, *The Human Rights of Migrants: From Treaty to Reality: Reflections on Hannah Arendt*, 47 N.Y.U. J. INT’L L. & POL. 529, 533 (2015).

49. Maryellen Fullerton, *Comparative Perspectives on Statelessness and Persecution*, 63 U. KAN. L. REV. 863, 864 (2015).

50. Laura Van Waas, Amal de Chickera, & Zahra Albarazi, *The World’s Stateless: A New Report on Why Size Does and Doesn’t Matter*, EUR. NETWORK ON STATELESSNESS (Dec. 15, 2014), <http://www.statelessness.eu/blog/world%E2%80%99s-stateless-new-report-why-size-does-and-doesn%E2%80%99t-matter> [<http://perma.cc/9WUN-V75N>].

51. Pizzi, *supra* note 21.

52. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

53. ARENDT, *supra* note 44, at 267.

54. Michael Moritz, *The Value of Your Ancestors: Gaining “Back-Door” Access to the European Union through Birthright Citizenship*, 26 DUKE J. COMP. & INT’L L. 231, 236 (2015).

state after birth.⁵⁵ Today, there are roughly 30 countries that have maintained unconditional birthright citizenship, and none are in Europe.⁵⁶ Ireland was the last remaining European country to have unconditional birthright citizenship, but it was repealed by the Irish Nationality and Citizenship Act of 2004.⁵⁷

Many believe removing birthright citizenship would “create a self-perpetuating class that would be excluded from social membership for generations.”⁵⁸ For example, researchers at Pennsylvania State University and the Migration Policy Institute (“MPI”) “found that ending birthright citizenship for U.S. babies with two unauthorized immigrant parents would increase the existing unauthorized population by 4.7 million people by 2050,” creating an “insurmountable barrier to this intergenerational progress.”⁵⁹ Germany, a country without birthright citizenship until recently, had this issue of creating a stateless class of people.⁶⁰ As described below in Part II, Germany invited hundreds of thousands of foreigners into the country as part of its guest worker program in the 1960s, including roughly 750,000 people from Turkey.⁶¹ While residence was meant to be temporary, many guest workers stayed past the termination of the program and today, around 2.5 million people in Germany have Turkish heritage.⁶² However, Germany’s strict citizenship laws created a large class of second- and third-generation Turkish immigrants who still struggle for equal rights and protection due to racism and discrimination to this day.⁶³ The lack of birthright citizenship in Germany established some deep-rooted problems: “Second-generation students are more likely to go to worse schools, [] foreign-born workers

55. Matthew Lister, *Citizenship, in the Immigration Context*, 70 MD. L. REV. 175, 206 (2010).

56. Petree, *supra* note 3, at 154.

57. See Irish Nationality and Citizenship Act § 6A(1) (Act No. 38/2004) (Ir.) (“A person born in the island of Ireland to Irish shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person’s birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years.”).

58. Michael Fix, *Repealing Birthright Citizenship: The Unintended Consequences*, MIGRATION POLICY INST. (Aug. 2015), <http://www.migrationpolicy.org/news/repealing-birthright-citizenship-unintended-consequences> [<http://perma.cc/ZEF7-44A4>].

59. *Id.*

60. See *infra* Part II.

61. See Hartnell, *supra* note 36, at 384 (“The first wave of post-war immigration consisted of the so-called *Gastarbeiter* (guest workers) who came between 1955 and 1973. These workers . . . were expected to be temporary residents.”); see also Klaudia Prevezanos, *Turkish Guest Workers Transformed German Society*, DEUTSCHE WELLE (Oct. 3, 2011), <http://www.dw.com/en/turkish-guest-workers-transformed-german-society/a-15489210> [<http://perma.cc/HZD5-QWZM>] (“Between 1961 and 1973, around 2.7 million Turks applied for a job in Germany, but only around 750,000 were actually accepted. Half of those who came returned to Turkey, according to estimates. The other half remained in Germany.”); Charlotte Alfred et al., *These Countries Show Why Losing Birthright Citizenship Could Be A Disaster*, HUFFINGTON POST (Aug. 27, 2015), http://www.huffingtonpost.com/entry/birthright-citizenship-other-countries_us_55df2a82e4b08dc0948699f3 [<http://perma.cc/9SX8-GB5S>] (“Germany invited hundreds of thousands of foreigners into the country as part of its guest worker program in the 1960s, including an estimated 750,000 people from Turkey. It was meant to be a temporary measure to address labor shortages, and the workers did not receive German citizenship. But around half of the Turkish workers stayed and had children and grandchildren in the country. Today, around 2.5 million of Germany’s population of 82 million have Turkish heritage.”).

62. See Prevezanos, *supra* note 61 (“Today, around 2.5 million people with a Turkish background live in Germany, meaning either they or their parents were born in Turkey, making them the largest migrant group in the country. Around 700,000 Turkish migrants have German citizenship.”).

63. See Alfred et al., *supra* note 61 (“Germany’s stringent citizenship laws created a vast underclass of second- and third-generation Turkish migrants, who still struggle today for equal opportunities and protection from racism.”).

have lower median incomes . . . [, and] German Turks fear mounting racism and Islamophobia. . . .”⁶⁴ There are millions of “invisible kids,”⁶⁵ largely due to lack of *jus soli*, and there will be millions more if countries fail to provide citizenship to the children of Syrian refugees.

C. Registration Problems

When Syrian refugees reach another country, they do not necessarily have protections provided to citizens of that country. Children born outside of Syria can face a lifetime of statelessness, where no country will claim them as its own. Since 2011, more than 30,000 Syrian children have been born in Lebanon and over 60,000 have been born in Turkey.⁶⁶ Many of these children may become stateless due to Syrian law.⁶⁷ Syrian nationality law is gender-discriminatory, and nationality can only be passed to a child by proving the nationality of the father.⁶⁸ In Syria, Lebanon, and Jordan, if the father is absent, the newborn may not be able to register and may become stateless.⁶⁹ For example, in Jordan, roughly 85,000 Jordanian women are married to non-citizens, and these families include more than 338,000 children.⁷⁰ For Syrian babies born outside of the country, it is of paramount importance to acquire a birth certificate that records the father’s name.⁷¹ It is estimated, however, that 25% of Syrian refugee households are fatherless, as many fathers have died, gone missing, or been separated from their families, and without the father’s physical presence, there is no proof of nationality other than the birth certificate.⁷² UNHCR urges host-countries to simplify registration procedures for Syrian refugees.⁷³

While birth registration does not have a direct impact on the acquisition of citizenship, it can be crucial to recognition of the child by the state of the parent’s

64. *Id.*

65. U.N. HIGH COMM’R REFUGEES, ENDING STATELESSNESS IN 10 YEARS 8 (2014), <http://www.unhcr.org/en-us/546217229.pdf> [<http://perma.cc/JX83-9B3K>].

66. Louis Osborne & Ruby Russell, *Refugee Crisis Creates ‘Stateless Generation’ of Children in Limbo*, GUARDIAN (Dec. 27, 2015), <https://www.theguardian.com/world/2015/dec/27/refugee-crisis-creating-stateless-generation-children-experts-warn> [<https://perma.cc/H5E9-MHPP>].

67. John Davison, *A Generation of Syrian Children Who Don’t Count*, REUTERS (May 3, 2016), <http://www.reuters.com/investigates/special-report/syria-refugees-stateless/> [<https://perma.cc/7A6F-YECU>].

68. Legislative Decree 276 of 1969, art. 3(A)-(B) (Syria).

69. Omer Karasapan, *The State of Statelessness in the Middle East*, BROOKINGS INST. (May 15, 2015), <https://www.brookings.edu/blog/future-development/2015/05/15/the-state-of-statelessness-in-the-middle-east/> [<https://perma.cc/J2D6-J8PS>].

70. Angelina Theodorou, *27 Countries Limit a Woman’s Ability to Pass Citizenship to Her Child or Spouse*, PEW RES. CTR. (Aug. 5, 2014), <http://www.pewresearch.org/fact-tank/2014/08/05/27-countries-limit-a-womans-ability-to-pass-citizenship-to-her-child-or-spouse/> [<https://perma.cc/SM48-QHVA>].

71. See EUR. NETWORK ON STATELESSNESS, *supra* note 25, at 11 (explaining that children born outside of Syria can only claim Syrian citizenship through their father).

72. Osborne & Russell, *supra* note 66.

73. *The Loss of a Nation*, ECONOMIST (Oct. 23, 2014), <http://www.economist.com/news/middle-east-and-africa/21627729-thousands-syrian-refugees-are-risk-having-no-recognised-nationality-loss-nation> [<https://perma.cc/BF3U-98HV>].

nationality.⁷⁴ People without documentation, including Syrian refugees who could not bring documentation when they left because it was lost or destroyed, are reportedly exposed to harassment and exploitation, and can lack access to basic services, like healthcare.⁷⁵ “If you look at the number of births that have happened . . . I think we can be talking about hundreds of thousands who are potentially not registered in the [Middle Eastern] region as a whole,” notes Daryl Grisgraber, senior advocate for the Middle East at Refugees International.⁷⁶ UNHCR Director of International Protection Volker Türk also said that many “Syrian refugee children had not been able to acquire documentation which proved they were Syrian nationals[, and] unless this can be resolved at a later date, these children may be left stateless.”⁷⁷

A 2013 Iraqi survey found that around 10% of Syrian Kurdish refugees are stateless.⁷⁸ Many were forced to flee Syria before they could apply for nationality, and others were not eligible for citizenship because they had never been registered by Syrian authorities.⁷⁹ Furthermore, Syrian refugees have trouble crossing international borders to return to Syria, or any other country, if they do not have identity documents.⁸⁰ Some believe ISIL is destroying Syrian documents and passports.⁸¹ Chris Nash, director of the European Network on Statelessness, noted: “The sheer volume of exodus of Syrian refugees, coupled with obstacles to birth registration as well as destroyed civil registries and gender discriminatory nationality laws, constitute a toxic mix and a ticking time bomb in terms of the risk of childhood statelessness.”⁸²

Furthermore, Syrian children may not be recorded on the government birth rolls if born in territories outside the regime-controlled area.⁸³ And children born outside the country often cannot be registered, leading to registration problems for the child, and precluding the child from becoming a citizen of another country.⁸⁴ Additionally, Syria is neither a party to the Convention Relating to the Status of Stateless Persons nor to the Convention on the Reduction of Statelessness, which bind contracting states

74. Zahra Albarazi & Laura van Waas, *Statelessness and Displacement*, NORWEGIAN REFUGEE COUNCIL (NRC) 1, 19 (2015), http://www.institutesi.org/stateless_displacement.pdf [<https://perma.cc/4ACE-A9Q2>].

75. *Id.* at 23; EUR. NETWORK ON STATELESSNESS, *supra* note 25, at 10–11.

76. *See* Davison, *supra* note 67.

77. *See* Sen et al., *supra* note 20 (explaining the ongoing crisis involving Syrian refugee children and their lack of Syrian citizenship documentation).

78. Amit Sen, *Lacking a Nationality, Some Refugees from Syria Face Acute Risks*, U.N. HIGH COMMISSIONER FOR REFUGEES (Dec. 20, 2013), <http://www.unhcr.org/en-us/news/latest/2013/12/52b45bbf6/lacking-nationality-refugees-syria-face-acute-risks.html> [<https://perma.cc/26TV-NBMX>].

79. *Id.*

80. Elena Fiddian-Qasmieh, *What 2017 Could Bring for Millions of Displaced Syrians*, PRI (Jan. 4, 2017), <https://www.pri.org/stories/2017-01-04/what-2017-could-bring-millions-displaced-syrians> [<https://perma.cc/YC34-4G3A>].

81. Sarnata Reynolds & Tori Duos, *A Generation of Syrians Born in Exile Risk a Future of Statelessness*, EUR. NETWORK ON STATELESSNESS (July 15, 2015), <http://www.statelessness.eu/blog/generation-syrians-born-exile-risk-future-statelessness> [<https://perma.cc/C5CD-H2A5>].

82. Tania Karas, *Not Syrian, Not Turkish: Refugees Fleeing War Lack Documentation*, AL JAZEERA AMERICA (Sept. 24, 2015, 9:00 AM), <http://america.aljazeera.com/articles/2015/9/24/not-syrian-not-turkish.html> [<https://perma.cc/46PL-ZPVH>].

83. *See id.* (finding that children born outside of Syria are not recorded in the Syrian birth rolls).

84. *See id.* (detailing the hardship surrounding children born outside of Syria in their efforts to attain Syrian citizenship).

to “grant its nationality to a person born in its territory who would otherwise be stateless.”⁸⁵

II. COMPARING CITIZENSHIP IN THE U.K., GERMANY, CANADA, TURKEY, AND SYRIA

Current citizenship policies are primarily the product of a country’s legal origins, evolving history, and recent immigration sentiments, particularly regarding national security.⁸⁶ Western European countries are generally considered countries of immigration, where foreign immigrant populations have permanently settled and the majority of the population is considered to have existed for centuries not descended from immigrants.⁸⁷ But this generalization does not cover every country, as “a nation’s citizenship laws are so bound up with its self-identity, alterations to those laws can only be fully understood through a rich historicizing of each new permutation.”⁸⁸ Thus, even though many countries have some similarities, citizenship policies vary throughout Europe and the Middle East.

The U.K., Germany, Sweden, Canada, Turkey, and Syria all have different citizenship laws, including provisions on preventing statelessness. A comparison of these nationality laws highlights the current difficulties faced by Syrian refugees. I chose to compare these countries because they have been where the most Syrian refugees have attempted asylum⁸⁹—significantly affecting the receiving state’s citizenship and immigration policies. Furthermore, Syrian nationality law prevents the passing of citizenship to a person’s children in certain circumstances. The effects of the Syrian conflict affect these countries’ citizenship and immigration policies.

A. United Kingdom

Before 1981, “territorial underpinnings were the basis for over 375 years of birthright citizenship within the United Kingdom.”⁹⁰ This common-law policy is

85. Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175; Convention Relating to the Status of Stateless Persons, Introductory Note, 360 U.N.T.S. 117 (entered into force June 6, 1960).

86. See generally *Ciro Avitabile et al., The Effect of Birthright Citizenship on Parental Integration Outcomes*, 56 J.L. & ECON. 777 (2013).

87. Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 17, 21 (Thomas Alexander Ateinkoff & Douglas B. Klusmeyer eds., 2001) (defining and distinguishing between “countries of immigrants” and “countries of immigration”).

88. See Spencer Wolff, *Uniting the Volk: A Plea for Thick Historicizing in Analyses of Citizenship Laws*, 15 COLUM. J. EUR. L. 299, 319 (2009) (emphasizing the importance of a nation’s evolution of citizenship).

89. See Michael Martinez, *Syrian Refugees: Which Countries Welcome Them, Which Ones Don’t*, CNN (Sept. 10 2015), <http://www.cnn.com/2015/09/09/world/welcome-syrian-refugees-countries/> [https://perma.cc/26Z2-DPA6] (listing where Syrian refugees are fleeing from, where they currently are, and where they hope to go).

90. See Michael Robert W. Houston, *Birthright Citizenship in the United Kingdom and the United States: A Comparative Analysis of the Common Law Basis for Granting Citizenship to Children Born of Illegal Immigrants*, 33 VAND. J. TRANSNAT’L L. 693, 693 (2000) (asserting that prior to 1981 citizenship was linked to territory).

grounded in centuries of English history, where territory was the basis of the feudal system, and the boundaries of countries were considered under the protection of the king.⁹¹ This connection is best described as:

Every one born within the dominions of the King of England, whether here or in his colonies or dependencies (*x*), being under the protection of—therefore, according to our common law, owes allegiance to—the king, and is subject to all the duties and entitled to enjoy all the rights and liberties of an Englishman.⁹²

Under the common law of England, a person became a British subject when born within the “allegiance of the Crown,” and this allegiance was derived from the fact that the territory on which the person was born was owned by the Crown.⁹³ This included Commonwealth territories, as subjects born under British rule, whether in the U.K. or its empire, were British citizens.⁹⁴ But as the 20th century wore on and as travel became easier, British citizenship laws evolved, and anti-immigrant sentiment rose. After World War II, anti-immigrant sentiment in Britain increased dramatically as people became alarmed about cultural influx, decreasing jobs, and a straining economy.⁹⁵ And unlike Germany, where migration was encouraged, this post-war migration into the U.K. was generally unwanted.⁹⁶ We continue to see a similar trend in this hostility towards immigrants today, as it was a major driver behind England leaving the European Union.⁹⁷

The United Kingdom no longer provides for unconditional birthright citizenship.⁹⁸ Children born in the U.K. are British citizens only if their birth father or mother is a British citizen⁹⁹ or “settled” in the U.K.¹⁰⁰ When a child is born to non-citizen parents, that child may register as a British citizen: If either parent becomes a British citizen while the child is a minor;¹⁰¹ if a parent is, or becomes, a member of the British armed forces;¹⁰² or if the child lives in the U.K. for the first ten years of his life

91. See Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 74 (1997) (noting that one born within the English territory became English and subject to English laws and to the English King).

92. HERBERT BROOM, *CONSTITUTIONAL LAW VIEWED IN RELATION TO COMMON LAW, AND EXEMPLIFIED BY CASES* 31 (London, W. Maxwell & Son, 1885).

93. J. MERVYN JONES, *BRITISH NATIONALITY LAW AND PRACTICE* 37 (1947).

94. PAUL FOOT, *IMMIGRATION AND RACE IN BRITISH POLITICS* 124 (1965).

95. Kevin C. Wilson, *And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons from Great Britain's Past*, 24 GA. J. INT'L & COMP. L. 567, 568 (1995).

96. RANDALL HANSEN, *CITIZENSHIP AND IMMIGRATION IN POSTWAR BRITAIN* 4 (2000).

97. Simon Tilford, *Britain, Immigration and Brexit*, CER BULLETIN (Dec. 2015–Jan. 2016), https://www.cer.org.uk/sites/default/files/bulletin_105_st_article1.pdf [<https://perma.cc/C3K8-YRH4>]; Rowena Mason, *How Did UK End Up Voting to Leave the European Union?*, GUARDIAN (June 24, 2016), <http://www.theguardian.com/politics/2016/jun/24/how-did-uk-end-up-voting-leave-european-union> [<https://perma.cc/Q2BE-BH2S>].

98. Houston, *supra* note 90, at 696.

99. British Nationality Act 1981, c. 61, § 1 (Eng.).

100. See *id.* § 50(2) (noting that “settled” requires the person to reside in the U.K. without being subject under British immigration laws to any restriction on the period for which the person may remain).

101. *Id.* § 1(3).

102. *Id.* § 1(3A)(a).

with limited leave outside the U.K.¹⁰³ However, children born stateless in the U.K. can obtain U.K. citizenship through a registration process, provided that the child: (1) is born in the U.K.; (2) is and always has been stateless; and (3) lived within the U.K. for the preceding five years before registration and has not been absent for more than 450 days.¹⁰⁴ Another exception to the general law that children born in the U.K. to non-citizen parents are not citizens is when the child is found abandoned.¹⁰⁵ As part of the country's effort to reduce the statelessness of children, an abandoned child is deemed to be a British citizen by the presumption that their parents were citizens.¹⁰⁶ The "settled rule" under the British Nationality Act, however, is that children "born of illegal immigrants are not British citizens."¹⁰⁷

Between 1993 and 2015, the foreign-born population in the U.K. more than doubled from 3.8 million to around 8.7 million, and the number of foreign citizens increased dramatically.¹⁰⁸ Like Germany around the year 2000, this change in demographics prompted British officials to finally acknowledge that Britain had long been a nation of migrants.¹⁰⁹ The Home Secretary, David Blunkett, officially instituted this acknowledgment and desire to manage migration in the U.K. White Paper, stating: "Migration is an inevitable reality of the modern world and it brings substantial benefits. But to ensure that we sustain the positive contribution of migration to our social well-being and economic prosperity, we need to manage it properly."¹¹⁰

But in the wake of 9/11, the debate regarding citizenship flared once again. In 2002, the U.K. passed the Nationality, Asylum and Immigration Act, which required non-citizens applying for citizenship to pass an English language test and instituted a citizenship ceremony that included an oath of allegiance to England.¹¹¹ In 2009, the Borders, Citizenship and Immigration Act introduced the idea of probationary citizenship, tied the length of residency to an "active citizenry," and implemented a good character requirement for applicants.¹¹² These changes especially affected refugees living in the U.K.,¹¹³ and some believed that the "new citizenship agenda 'pander[ed] to xenophobic sentiments', reinforce[d] 'ideological assumptions about

103. *Id.* § 1(4).

104. *Id.* § 36, sch. 2 para. 3.

105. British Nationality Act 1981, c. 61, § 1(2).

106. *Id.*

107. Houston, *supra* note 90, at 716.

108. Cinzia Rienzo & Carlos Vargas-Silva, *Migrants in the UK: An Overview*, MIGRANT OBSERVATORY (Feb. 21, 2017), <http://www.migrationobservatory.ox.ac.uk/resources/briefings/migrants-in-the-uk-an-overview/#kp1> [<https://perma.cc/59PF-LHP3>].

109. Asa Bennett, *Immigration Nation: Where are the Britain's Migrants Coming From, and Why?*, TELEGRAPH (May 22, 2015), <http://www.telegraph.co.uk/news/general-election-2015/politics-blog/11622718/Immigration-nation-where-are-the-Britains-migrants-coming-from-and-why.html> [<https://perma.cc/9HJQ-SA8C>].

110. HOME OFFICE, SECURE BORDERS, SAFE HAVEN: INTEGRATION WITH DIVERSITY IN MODERN BRITAIN 5 (2002).

111. Nationality, Immigration and Asylum Act 2002, c. 41, § 1 (Eng.).

112. Borders, Citizenship and Immigration Act 2009, c. 11, § 39(2) (Eng.).

113. Emma Stewart & Gareth Mulvey, *Seeking Safety Beyond Refuge: The Impact of Immigration and Citizenship Policy upon Refugees in the UK*, 40 J. ETHNIC & MIGRATION STUD. 1023, 1026–27 (2014).

the essential homogeneity of existing citizens and of the alien otherness of newcomers’.”¹¹⁴

B. Germany

Unlike the U.K., Germany has exhibited a different trend over the past century, moving from more restrictive to less restrictive citizenship policies, promoting the integration of immigrants into Germany society.¹¹⁵ The original idea of *jus sanguinis* in Germany developed not as an idea based on political values, but as an “organic cultural, linguistic, or racial community . . . [making] nationhood [] an ethnocultural, not a political fact.”¹¹⁶ Throughout the second half of the 20th century, Germany became a country of immigrants like the U.K., even if its leaders were at first reluctant to admit.¹¹⁷ Migration was the driving factor in changing citizenship policies in Germany, and after 1989, “the collapsing bi-polar postwar order and new wars—both inside Europe and beyond its borders—set even more migrants into motion.”¹¹⁸ But in the decades following World War II, guest-worker recruitment (including individuals from Turkey), subsequent family reunification, and an economically-driven, mass movement into the country created an unwanted immigrant trend,¹¹⁹ resulting in Germany having one of the largest foreign resident populations by the end of the 20th century.¹²⁰ Around 7.3 million of the 84 million people living in Germany were foreigners, with more than half living in Germany for over a decade.¹²¹ With the mass immigration of people claiming German heritage, the country imposed measures designed to restrict the flow of immigrants.¹²²

Before 1999, many criticized Germany for having an “outdated and impractical [policy]” on citizenship, and prior to the country’s reform, it was unthinkable to grant automatic citizenship to immigrants.¹²³ But in 1998, the Social Democrats and Greens won the national election, and pressure for citizenship reform dramatically increased from disparate parties.¹²⁴ Additionally, the need to attract highly-skilled workers to Germany required a change in citizenship policies, as the country’s selective

114. Elizabeth Meehan, *Active Citizenship: For Integrating Immigrants*, in ACTIVE CITIZENSHIP: WHAT COULD IT ACHIEVE AND HOW? 112, 112 (Bernard Crick & Andrew Lockyer eds., 2010).

115. Kay Hailbronner, *Germany*, in 2 ACQUISITION AND LOSS OF NATIONALITY: POLICIES AND TRENDS IN 15 EUROPEAN COUNTRIES 213, 213–14, 219–20, 243 (Rainer Bauböck et al. eds., 2006).

116. ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 1 (1992).

117. See Anne Marie Seibel, Note, *Deutschland Ist Doch Ein Einwanderungsland Geworden: Proposals to Address Germany’s Status as a “Land of Immigration,”* 30 VAND. J. TRANSNAT’L L. 905, 920 (1997) (“German political leaders have long maintained that Germany is ‘kein Einwanderungsland’—not a land of immigration.”).

118. Hartnell, *supra* note 36, at 337.

119. Kay Hailbronner, *Fifty Years of the Basic Law—Migration, Citizenship, and Asylum*, 53 SMU L. REV. 519, 522 (2000).

120. *Id.* at 519.

121. Daniel Boettcher, *German Government Considers Changing Citizenship Laws, but Original Proposals Meet Fierce Opposition.*, 13 GEO. IMMIGR. L.J. 339, 339 (1999).

122. See Marc Morjé Howard, *Germany’s Citizenship Policy in Comparative Perspective*, 30 GERMAN POL. & SOC’Y, 39, 47–48 (2012) (describing the implementation of anti-immigrant measures after two decades of liberalization).

123. *Id.* at 43.

124. *Id.* at 44.

immigration policies restricted its ability to compete in the international labor market.¹²⁵

Germany finally liberalized its approach towards birthright citizenship in 2000, bestowing citizenship by birth in two scenarios: (1) Child born to a German parent, or (2) child born to aliens if one parent has had his or her habitual domicile in Germany for at least eight years and either has a permanent German residence permit or is a national of Switzerland or has a residence permit that entitles him or her to reside in Germany.¹²⁶ While this change did not affect the basic rule that German citizenship is passed by descent or lineage, it created an additional avenue to attain citizenship for a child born to non-citizens residing permanently in the country. Practically, however, it ruled out many foreigners because the permits are difficult to obtain.¹²⁷ But this inclusion of a conditional version of *jus soli* represented a major change from over a century of policy.¹²⁸ Additionally, while German nationality law provides that a child born abroad to a German parent who continues to live outside Germany is not a German citizen, the child would be German if he otherwise would be stateless.¹²⁹ However, unlike the U.K., Germany does not have a specific provision for providing citizenship to stateless children born in the country other than the country's general citizenship provisions.¹³⁰

In regards to dual citizenship, children born to non-German parents could have two nationalities, but they would have to choose one nationality by the time they turn 23.¹³¹ This law significantly affected Turkish nationals living in Germany, since Turkish inheritance laws were primarily based on citizenship, many nationals were reluctant to surrender their Turkish passports.¹³² However, Germany has recently passed a law allowing for dual citizenship under certain conditions, including that a child of foreign parents must have lived in Germany for eight years by their 21st birthday to obtain dual citizenship.¹³³ Furthermore, the law lessened the residency requirement for naturalization from fifteen years to eight years.¹³⁴ For immigrants who are not fluent

125. See Veysel Oezcan, *Germany: Immigration in Transition*, MIGRATION POLICY INST. (July 1, 2004), <http://www.migrationpolicy.org/article/germany-immigration-transition> [<https://perma.cc/97QK-QVJU>] (noting Germany's increased focus on increasing its highly skilled labor force starting in 2000).

126. LOUIS DESIPIO & RODOLFO O. DE LA GARZA, U.S. IMMIGRATION IN THE TWENTY-FIRST CENTURY: MAKING AMERICANS, REMAKING AMERICA 170 (2015).

127. Brooke Huley, *Automatic Birthright Citizenship: How Europe Has Fallen and Why We Should Not Follow*, 19 SW. J. INT'L L. 351, 364 (2013).

128. See Hailbronner, *Germany*, *supra* note 115, at 213 (describing the novelty of conditional *jus soli* present in the recent immigration reform).

129. Nationality Staatsangehörigkeitgesetz [StAG] [Nationality Act], July 22, 1913, Reichsgesetzblatt [RGL] at 583, as amended, § 4(4) (Ger.).

130. See generally *id.* § 4.

131. *Id.* § 4(1).

132. Boettcher, *supra* note 121, at 340–41; BARBARA PUSCH, ISTANBUL POLICY CTR. DUAL CITIZENSHIP IN THE TRANSANTIONAL GERMAN-TURKISH SPACE: NOTES FROM GERMANY 3 (2015), http://ipc.sabanciuniv.edu/wp-content/uploads/2015/02/Barbara-push-feb_son1.pdf [<https://perma.cc/6PY6-46SV>].

133. Naomi Conrad, *Dual Citizenship Law Takes Effect in Germany*, DEUTSCHE WELLE (Dec. 19, 2014), <http://www.dw.com/en/dual-citizenship-law-takes-effect-in-germany/a-18143002> [<https://perma.cc/32RE-AEFA>].

134. Nationality Act, *supra* note 129 § 10(1).

in German but want to become citizens, they must attend 600 hours of German language classes.¹³⁵

German Chancellor Angela Merkel and the Social Democratic Party of Germany (SPD) stated: “Germany is a cosmopolitan country. We view immigration as an opportunity, without overlooking the challenges associated with it.”¹³⁶ This position is a major turnaround from the insistence that Germany was “not a country of immigration” just two decades prior.¹³⁷ And Germany truly is a country of immigrants, with over 21% of the population having an immigrant background.¹³⁸ In 2015, the United Nations’ International Migration Report recognized that Germany hosted the second highest number of migrants,¹³⁹ and “the new Immigration Act (including its amendments to the Citizenship Act) aims to balance the needs of Germany’s labor market against its security needs, by making it easier for the authorities to deport people who are suspected of supporting political violence.”¹⁴⁰ Some believe the quick acceptance of refugees and the country’s fervent support comes at least partly from Germany’s history and an attempt to “purposefully cultivate[] a national culture of remembrance and rectification.”¹⁴¹

C. Sweden

Sweden has been described as having the most liberal citizenship laws in Europe,¹⁴² but the new Swedish Nationality Act in 2001 still marked a change in Swedish nationality law, with the purpose of updating the law to more modern standards.¹⁴³ Since the prior Act enacted in 1950, there have been several developments in Sweden: Domicile gained greater importance than citizenship alone, society in Sweden became more internationalized, and Sweden joined the EU in 1997, resulting in increased immigration from other EU states.¹⁴⁴ While the primary basis for the country’s nationality laws has been *jus sanguinis* since the first Citizenship Act

135. Ariel Loring, *The Meaning of Citizenship: Tests, Policy, and English Proficiency*, 24 CATESTOL J. 198, 217 (2013).

136. Harriet Torry, *Germany Opens Up to Dual Citizenship*, WALL ST. J. (Nov. 27, 2013, 8:57 AM), <http://www.wsj.com/articles/SB1000142405270230332904579223591691471628> [<https://perma.cc/F5Z3-JCU8>].

137. See Michael Minkenberg, *The Politics of Citizenship in the New Republic*, 26 W. EUR. POL. 219, 220 (“[S]ince 1977 successive [German] governments have proclaimed that, contrary to the facts, Germany was not an immigration country.”).

138. *Bevölkerung Mit Migrations Hintergrundauf Rekordniveau*, DE STATIS: STATISTISCHES BUNDESAMT (Sept. 19, 2016), https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2016/09/PD16_327_122.html [<https://perma.cc/U258-MMFB>].

139. U.N. DEP’T OF ECON. AND SOC. AFFAIRS, INTERNATIONAL MIGRATION REPORT 2015: HIGHLIGHTS, at 1, U.N. Doc. ST/ESA/SER.A/375 (2016).

140. Hartnell, *supra* note 36, at 389.

141. Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUMAN. 51, 100 (2016).

142. Barzoo Eliassi, *Conceiving Citizenship and Statelessness in the Middle East and Sweden: The Experiences of Kurdish Migrants in Sweden*, in CITIZENSHIP, BELONGING, AND NATION-STATES IN THE TWENTY-FIRST CENTURY 85, 86 (Nicole Stokes-DuPas & Ramona Fruja eds., 2016).

143. HEDVIG BERNITZ, EUR. U. INST., EUDO CITIZENSHIP OBSERVATORY COUNTRY REPORT: SWEDEN 8 (2012).

144. George Arnett, *Twenty Years Since Sweden Voted to Join the EU - What’s Changed?*, GUARDIAN (Nov. 13, 2014), <https://www.theguardian.com/news/datablog/2014/nov/13/twenty-years-since-sweden-voted-to-join-the-eu-whats-changed> [<https://perma.cc/J97T-K5QZ>].

in 1894, which stated that a child born to a Swedish parent acquires the parent's Swedish nationality¹⁴⁵, the Act in 2001 put the principle importance on domicile rather than solely on lineage.¹⁴⁶ Furthermore, the Act accepted dual citizenship for the first time.¹⁴⁷

Sweden also has more paths to citizenship for stateless people than most other countries.¹⁴⁸ Since 2001, the state provides for birthright citizenship when a child born in Sweden is stateless at birth.¹⁴⁹ Even if the child is not born in the country, Sweden has protections for stateless children. The law provides that a child acquires Swedish citizenship if the child (1) has a permanent resident card, and (2) has been domiciled in Sweden for five years, but if the child is stateless, three years.¹⁵⁰ Even if the child is between the ages of 18 and 20, the person can become a Swedish citizen if the person (1) holds a permanent Swedish residence permit, and (2) has been domiciled in Sweden since reaching the age of 13 or, if the child is stateless, 15.¹⁵¹ Similarly, the domicile requirement for Swedish naturalization for stateless persons and refugees was lowered from five to four years.¹⁵² If an alien becomes a Swedish citizen, then that person's unmarried children under the age of 18 years old and domiciled in Sweden also become Swedish citizens if the alien has sole custody or joint custody with another Swedish citizen.¹⁵³ Furthermore, there are no categories of citizenship, as every person with Swedish citizenship has the same rights and legal duties,¹⁵⁴ and unlike Germany, Sweden does not have a language requirement.¹⁵⁵

Sweden has long received a large number of asylum seekers—over 160,000 asylum applications in 2015 alone¹⁵⁶—and is third in receiving asylum applications following Germany and Hungary.¹⁵⁷ In 2013, Sweden became the first country to offer permanent residency to all Syrian refugees in the country,¹⁵⁸ putting them on the path to acquiring Swedish citizenship.¹⁵⁹ Citizens and foreigners, including permanent residents and refugees, generally have the same rights, except the right to vote.¹⁶⁰ In

145. 1 § LAG OM SVENSKT MEDBORGARSKAP (Swedish Citizenship Act) (Svensk fär fattnings-samling [SFS] 2001:82) (Swed.).

146. Hedvig Lokrantz Bernitz & Henrik Bernitz, *Sweden*, in ACQUISITION, *supra* note 115, at 517.

147. *Id.* at 526.

148. *See id.* at 528 (discussing the different paths to citizenship in Sweden).

149. 6 § SWEDISH CITIZENSHIP ACT (SFS 2001:82) (Swed.).

150. *Id.* § 7.

151. *Id.* § 8.

152. *Id.* § 11(4).

153. *Id.* § 10.

154. Bernitz & Bernitz, *supra* note 148, at 518.

155. *See generally* § 1 SWEDISH CITIZENSHIP ACT (SFS 2001:82) (Swed.).

156. *Applications for Asylum Received, 2015*, MIGRATIONSVERKET (Jan. 1, 2016), <http://www.migrationsverket.se/download/18.7c00d8e6143101d166d1aab/1448974429957/Inkomna+ans%C3%B6kningar+om+asyl+2015+-+Applications+for+asylum+received+2015.pdf> [<https://perma.cc/L97D-S7CY>].

157. Phillip Connor, *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RES. CTR. (Aug. 2, 2016), <http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/> [<https://perma.cc/BR2V-S9Y8>].

158. Chris Morris, *Sweden's Asylum Offer to Refugees from Syria*, BBC NEWS (Oct. 23, 2013), <http://www.bbc.com/news/world-europe-24635791> [<https://perma.cc/62KM-PEYJ>].

159. *Id.*

160. Bernitz & Bernitz, *supra* note 146, at 545.

late 2015, however, the government implemented temporary border restrictions due to the steep increase in asylum seekers entering Sweden.¹⁶¹ The reasoning behind these border restrictions was a concern that the number of refugees had strained the Swedish economy.¹⁶² Spending on refugees has increased dramatically in the past several years, causing tension between the citizens of Sweden and the rising number of refugees.¹⁶³ The refugee-friendly policies of the Swedish government may be turning around as many asylum applications are being denied and refugees are having to leave the country.¹⁶⁴

D. Canada

It is useful to compare European nationality laws to Canada's laws due to the general difference in policies. Countries in the Western Hemisphere, particularly the United States and Canada, are generally viewed as countries of immigrants because the majority of the population either immigrated or descended from immigrants.¹⁶⁵ "[C]hanges in the institution of citizenship were much more dramatic in Western Europe than in North America . . . , simply because European citizenship regimes were much less geared to the reality of mass immigration. . . ."¹⁶⁶ To demonstrate this, over the past several years, Canada has been integral in the resettlement of refugees from Syria, and continues to take in refugees when many other countries refuse to do so.¹⁶⁷

Before 1946, Canada generally followed the common-law nationality policies defining British citizenship.¹⁶⁸ But at the start of the 20th century, as Canada began working towards independence, the country began creating its own definition of Canadian citizens, establishing this in the Immigration Act of 1910 and the Canadian Nationals Act of 1921.¹⁶⁹ But Canada only provided a definition for Canadian citizenship in the 1947 Act, "officially creat[ing] the concept of a 'Canadian,' ultimately creating a distinct sort of membership within the world."¹⁷⁰ In 1977, Canada passed its second major citizenship reform, which removed the more favorable treatment of British citizens, lowered the age of majority to 18, and permitted dual citizenship.¹⁷¹

161. Amanda Billner & Matthew Campbell, *Too Generous for Its Own Good? Sweden's Welcome Mat in Tatters*, BLOOMBERG (March 17, 2016), <http://www.bloomberg.com/news/features/2016-03-17/too-generous-for-its-own-good-sweden-s-welcome-mat-in-tatters> [https://perma.cc/GKV7-775T].

162. *Id.*

163. *Id.*

164. Keith Moore, *Sweden's Open-Arm Stance on Refugees Challenged by More than 160,000 Asylum Claims in 12 Months*, INT'L BUS. TIMES (June 22, 2016), <http://www.ibtimes.co.uk/swedens-open-arm-stance-refugees-challenged-by-more-160000-asylum-claims-12-months-1566880> [https://perma.cc/AX6U-P882].

165. Weil, *supra* note 87, at 21.

166. CHRISTIAN JOPPKE, *CITIZENSHIP AND IMMIGRATION* vii (2010).

167. *Canada to Accept Additional 10,000 Syrian Refugees*, GUARDIAN (Mar. 31, 2016, 3:37 PM), <https://www.theguardian.com/world/2016/mar/31/canada-10000-syria-refugees-john-mccallum> [https://perma.cc/MF78-MMAV].

168. J. Donald Galloway, *The Dilemmas of Canadian Citizenship Law*, 13 GEO. IMMIGR. L.J. 201, 211 (1999).

169. *Id.*

170. Stacey A. Saufert, *Taylor v. Canada (Minister of Citizenship and Immigration): Discrimination, Due Process, and the Origins of Citizenship in Canada*, 45 ALTA. L. REV. 521, 526 (2007).

171. MARGARET YOUNG, PARLIAMENTARY RESEARCH BRANCH, CANADIAN CITIZENSHIP ACT AND

Now under the Canadian Citizenship Act, if a child is born in Canada (after February 14, 1977), then the child is a Canadian citizen.¹⁷² So if a child of a Syrian refugee were born in Canada, the child would be Canadian due to the state's birthright citizenship laws. Additionally, through *jus sanguinis*, if the child is born outside of Canada, the child is a citizen if one of the parents is a Canadian citizen.¹⁷³ "The 1947 Canadian Citizenship Act operated on the principle that the granting of citizenship was a privilege . . . [but t]he 1977 Act made citizenship a right which could be enjoyed by anyone once the requirements . . . were met."¹⁷⁴

However, the viewing citizenship as a right seems to have reversed in recent years. Unlike the U.S., Canada has little precedent on the right to citizenship,¹⁷⁵ and has only reformed its citizenship law a few times.¹⁷⁶ Until 2009, little legislation had been passed to change citizenship requirements in Canada.¹⁷⁷ The 2009 legislation restored or gave Canadian citizenship to many living in Canada who had never had Canadian citizenship or who had lost it due to previous legislation, and limited Canadian citizenship by descent to the first generation born outside Canada.¹⁷⁸

The first major comprehensive citizenship reform came in 2014 under the Strengthening Canadian Citizenship Act.¹⁷⁹ This bill changed much of the Citizenship Act, including expanding the age group of applicants who were required to demonstrate language and knowledge skills and increasing the residency requirement before application.¹⁸⁰ The Act also eliminated the ability to apply time spent in Canada as a non-permanent resident towards the residency requirement, required an intent to reside in Canada after obtaining citizenship, expanded the criminal prohibitions to bar applicants, and significantly expanded the authority to revoke citizenship of dual citizens.¹⁸¹ Some hailed the Act as necessary, including Chris Alexander, the Minister of Citizenship and Immigration at the time, who stated, "Canadian citizenship is more than a passport of convenience. It's a pledge of mutual responsibility, a shared commitment to values rooted in our history."¹⁸² The Citizenship and Immigration

CURRENT ISSUES (1998), <http://publications.gc.ca/Collection-R/LoPBdP/BP/bp445-e.htm> [<https://perma.cc/JDJ6-2QQQ>].

172. Citizenship Act, R.S.C., 1985, c. C-29 § 3(1)(a) (Can.).

173. *Id.* § 3(1)(b).

174. IRENE BLOEMRAAD, *BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA* 25 (2006).

175. Chris Forcese, *A Tale of Two Citizenships: Citizenship Revocation for "Traitors and Terrorists"*, 39 *QUEEN'S L.J.* 551, 570 (2014).

176. *History of Citizenship Legislation*, GOV'T OF CAN. (July 6, 2015), <http://www.cic.gc.ca/english/resources/tools/cit/overview/hist.asp> [<https://perma.cc/FDW9-YBPB>].

177. *Id.*

178. *Id.*

179. *Id.*

180. *Strengthening Canadian Citizenship Act: A Before and After View of the Key Changes to the Citizenship Act*, GOV'T. OF CAN. (June 5, 2015), <http://news.gc.ca/web/article-en.do?nid=985219> [<https://perma.cc/FP4F-GY75>].

181. *Id.*

182. Chris Alexander, Canadian Minister of Citizenship and Immigration, Address at Citizenship Week Ceremony (Oct. 21, 2013) (transcript available at <http://www.cic.gc.ca/english/department/media/speeches/2013/2013-10-21a.asp> [<https://perma.cc/85HQ-VZC9>]).

Minister prior to Alexander, Jason Kenney, similarly urged, “Canadian citizenship is predicated on loyalty to this country.”¹⁸³

However, the Act has often been described as restricting the path to citizenship, and even as “anti-Canadian.”¹⁸⁴ Many of the 2014 amendments were met with public distaste, and in the campaign leading to the 2015 elections, the Liberal Party in Canada promised to reverse these changes.¹⁸⁵ After winning the election, the party initiated a bill designed to revoke many of the conservative amendments.¹⁸⁶ As this Note is being written, the bill has passed both the Canadian House and Senate and is expected to take effect in 2017.¹⁸⁷ The new bill would remove the grounds to revoke Canadian citizenship when it relates to national security, remove the requirement that an applicant intended to continue to reside in Canada after becoming a citizen, and reduce the physical presence in Canada requirement before applying for citizenship.¹⁸⁸

E. Turkey

To explain why nationality law in Europe is vital to the Syrian refugees, the citizenship laws in Syria and surrounding countries, particularly Turkey, must also be analyzed. Roughly 27 countries, including Qatar, Iran, and Syria,¹⁸⁹ either preclude or limit a woman’s ability to pass her citizenship to her children.¹⁹⁰ While countries such as Turkey, Kenya, and Morocco have taken steps to change this, Syria still significantly restricts a Syrian woman’s ability to pass her citizenship to her children.¹⁹¹

Recently, Turkey has experienced an increase in immigration, largely due to its booming economy and the Syrian refugee migration.¹⁹² Turkey revised its citizenship laws in 2009 to address this increase in migration, taking into account the influx of

183. Stewart Bell, *Jason Kenney Suggests New Legislation Needed to Strip Citizenship of Dual Nationals Involved in Terrorism*, NAT’L POST (Feb. 6, 2013), <http://news.nationalpost.com/news/canada/canadian-politics/jason-kenney-suggests-new-legislation-needed-to-strip-citizenship-of-dual-nationals-involved-in-terrorism> [<https://perma.cc/C8H6-NY76>].

184. Debra Black, *Court Challenge Slams New Citizenship Act as ‘Anti-Canadian’*, TORONTO STAR (Aug. 20, 2015), <https://www.thestar.com/news/immigration/2015/08/20/court-challenge-slams-new-citizenship-act-as-anti-canadian.html> [<https://perma.cc/485H-KS4W>].

185. Scott Bell, *Changes Coming to the Citizenship Act*, LEXOLOGY (June 21, 2016), <http://www.lexology.com/library/detail.aspx?g=3d3d0efa-08db-4098-af85-84678bdc0e10> [<https://perma.cc/BHG4-SF6D>].

186. An Act to Amend the Citizenship Act, C-6, 42nd Parl. (2015) (Can.), <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C6&Parl=42&Ses=1> [<https://perma.cc/J2YN-JZYN>].

187. *Id.*

188. Julie Bécharde & Sandra Elgersma, *Legislative Summary of Bill C-6: An Act to Amend the Citizenship Act and to Make Consequential Amendments to Another Act*, PARLIAMENT OF CAN., LEGAL AND SOCIAL AFFAIRS DIV. (May 5, 2016), http://www.lop.parl.gc.ca/About/Parliament/Legislative_Summaries/bills/_ls.asp?Language=E&ls=C6&Mode=1&Parl=42&Ses=1&source=library_prb [<https://perma.cc/9Q75-L7EG>].

189. Somini Sengupta, *A Mother’s Love? Of Course. Her Citizenship? Not So Fast*, N.Y. TIMES (Aug. 3, 2016), http://www.nytimes.com/2016/08/04/world/what-in-the-world/mothers-citizenship-laws.html?_r=0 [<https://perma.cc/L36W-HY5N>].

190. Theodorou, *supra* note 70.

191. *Id.*

192. Rebecca Kilberg, *Turkey’s Evolving Migration Identity*, MIGRATION POLICY INST. (July 24, 2014), <http://www.migrationpolicy.org/article/turkeys-evolving-migration-identity> [<https://perma.cc/SBC2-SR4P>].

Syrian refugees.¹⁹³ Like most countries, Turkey generally provides citizenship through *ius sanguinis* if the child is born to a Turkish parent.¹⁹⁴ However, the country also provides protection for stateless children: When a child is born in Turkey, but unable to acquire citizenship from the mother or father, the child acquires Turkish citizenship at birth.¹⁹⁵ Foreigners can also naturalize, by either residing for five years uninterrupted in Turkey (in addition to satisfying several other requirements),¹⁹⁶ or by marrying a Turkish citizen.¹⁹⁷ Marriage has become one of the most used avenues of attaining citizenship for Syrian refugees.¹⁹⁸ But this may be eclipsed after 2016, as many Syrian refugees are nearing the five-year residency requirement in Turkey.¹⁹⁹ Many Syrians have been in Turkey for so long that they can no longer be considered guests.²⁰⁰ However, Turkey is the sole country that recognizes European nationals exclusively as refugees, so the state does not give any refugee protection to the millions of Syrian refugees within its borders.²⁰¹

Turkey's first law to address asylum, its first comprehensive immigration act, was adopted in 2014: The Law on Foreigners and International Protection (Law No. 6458).²⁰² The law divides qualifying foreigners into three key categories: (1) Refugees, (2) conditional refugees, and (3) individuals under subsidiary protection.²⁰³ The law specifically institutes protections for stateless persons, even allowing stateless persons to apply for residence permits.²⁰⁴ The law lists six types of residence permits: Short-term, long-term, family, student, humanitarian, and for victims of human trafficking.²⁰⁵ The law also created a specialized institution—the Directorate General of Migration Management, under the Ministry of Interior—to implement related immigration laws.²⁰⁶ Later in 2014, Turkey passed additional legislation—the Regulation on Temporary Protection—applying exclusively to Syrian refugees, making clear this was temporary protection, not permanent residency.²⁰⁷ The High Commissioner for

193. See generally Turkish Citizenship Law, No. 5901 (2009) (Turkey), <http://www.refworld.org/pdfid/4a9d204d2.pdf> [<https://perma.cc/PSG5-R7PK>].

194. See *id.* art. 7(3) (creating a discriminatory provision against women, requiring that if a child is born to a Turkish father and an alien mother out of wedlock, the child is Turkish only “if the principles and procedures regarding the determination of descent are met”).

195. *Id.* art. 8(1).

196. *Id.* art. 11.

197. See *id.* art. 16(1) (stating that a foreign spouse of a Turkish citizen can apply for citizenship after three years of marriage).

198. SONER CAGAPTAY, WASH. INST. FOR NEAR EAST POLICY, THE IMPACT OF SYRIAN REFUGEES ON SOUTHERN TURKEY 9 (2014), http://www.washingtoninstitute.org/uploads/Documents/pubs/PolicyFocus130_Cagaptay_Revised3s.pdf [<https://perma.cc/LT4A-RL2A>].

199. *Id.*

200. Feyzi Baban, Suzan Ilcan, & Kim Rygiel, *Syrian Refugees in Turkey: Pathways to Precarity, Differential Inclusion, and Negotiated Citizenship Rights*, 43 J. ETHNIC & MIGRATION STUD. 41, 45 (2017).

201. 2015–16 Symposium Transcript: *The Global Refugee Crisis*, 31 CONN. J. INT'L L. 281, 293 (2016).

202. Kilberg, *supra* note 192.

203. Law on Foreigners and International Protection, Law No. 6458, arts. 61–63 (2013) (Turkey), <http://www.refworld.org/docid/5167fbb20.html> [<https://perma.cc/RX25-7VA7>].

204. *Id.* art. 51(1)(a).

205. *Id.* art. 22(1).

206. *Id.* art. 1(1).

207. Meltem Ineli-Ciger, *Implications of the New Turkish Law on Foreigners and International Protection and Regulation No. 29153 on Temporary Protection for Syrians Seeking Protection in Turkey*, 4

Refugees proclaimed this law “as a reflection of Turkey’s strong commitment to humanitarian values and principles.”²⁰⁸

While Turkey provides some protections for Syrian refugees, because the status of “subsidiary protection” is only temporary and refugees are generally not treated the same as foreign nationals, refugees are often subject to exploitation. Unlike many European countries, Turkey has not recognized key parts of the U.N. Conventions pertaining to refugees, so Turkey does not provide Syrians refugee-status protection.²⁰⁹ As a result, “Syrians have already become an exploited underground labor force, as evidenced by rapidly falling wages for workers in industries such as construction, textile manufacturing, heavy industry, and agriculture.”²¹⁰ Thousands of children are being used as illegal child labor in several industries,²¹¹ and some women and children refugees have been subjected to sexual exploitation.²¹² Furthermore, because many countries’ laws do not allow Syrian refugees to work, refugee children are even more at risk of exploitation.²¹³ While the Turkish government announced that many Syrian refugees in the country could become Turkish citizens, there has been significant political backlash in Turkey, and the issue continues to be controversial.²¹⁴

F. Syria

At the heart of this citizenship problem is the Syrian conflict. Syria became an independent country in 1946 when the French withdrew.²¹⁵ Rapid changes due to the Depression and World War II altered the fundamental structure of the country.²¹⁶ Modern political organizations, including the Muslim Brotherhood and the Ba’ath

OXFORD MONITOR FORCED MIGRATION 28, 29 (2014).

208. Melissa Fleming, *UNHCR Welcomes Turkey’s New Law on Asylum*, U.N. HIGH COMM’R FOR REFUGEES (Apr. 12, 2013), <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&skip=9&docid=5167e7d09&query=turkey> [<https://perma.cc/6QXV-LGBD>].

209. Carmen Gentile & Nish Nalbandian, *Turkish Rules Leave Syrian Refugee Children in Limbo*, NPR (Aug. 24, 2016, 9:48 AM), <http://www.npr.org/sections/parallels/2016/08/24/490079133/turkish-rules-leave-syrian-refugee-children-in-limbo> [<https://perma.cc/DL6N-YLGG>]; Patrick Kingsley, *We Feared the Worst: Turkey’s Failed Coup a Relief for Syrian Refugees*, GUARDIAN (July 21, 2016, 1:00 AM), <https://www.theguardian.com/world/2016/jul/21/we-feared-the-worst-turkeys-failed-coup-relief-for-syrian-refugees> [<https://perma.cc/BYY3-MPRL>].

210. Kemal Kirisci & Raj Salooja, *Northern Exodus: How Turkey Can Integrate Syrian Refugees*, FOREIGN AFF. (April 15, 2014), <https://www.foreignaffairs.com/articles/turkey/2014-04-15/northern-exodus> [<https://perma.cc/TJH6-YJ56>].

211. Frederik Johannisson, *Hidden Child Labour: How Syrian Refugees in Turkey are Supplying Europe with Fast Fashion*, GUARDIAN (Jan. 19, 2016), <https://www.theguardian.com/sustainable-business/2016/jan/29/hidden-child-labour-syrian-refugees-turkey-supplying-europe-fast-fashion> [<https://perma.cc/9J8B-2BJ9>].

212. *Syrian Women in Turkey at Risk*, ECONOMIST (June 14, 2014), <http://www.economist.com/news/europe/21604213-sexual-exploitation-syrian-women-and-children-increasing-risk> [<https://perma.cc/5R7G-GR9B>].

213. *The Least Bad Option: For Many Syrians, Exploitation is the Only Way to Survive*, INT’L CTR. FOR MIGRATION POLICY DEV. (Jan. 14, 2016), <https://www.icmpd.org/news-centre/press-releases/the-least-bad-option-for-many-syrians-exploitation-is-the-only-way-to-survive/> [<https://perma.cc/VL7D-994E>].

214. Laura Pitel, *Turkey Plans to Offer Citizenship to Syrian Refugees*, FIN. TIMES (July 2, 2016), <https://www.ft.com/content/01766166-409d-11e6-b22f-79eb4891c97d> [<https://perma.cc/ATX5-E3C7>].

215. Philip S. Khoury, *Continuity and Change in Syrian Political Life: The Nineteenth and Twentieth Centuries*, 96 AM. HIST. REV. 1374, 1392 (1991).

216. *Id.*

Party, began to compete for control,²¹⁷ and starting in 1949, dictators lasting no more than a few years dominated the Syrian political regime.²¹⁸ But the Arab Socialist Ba'ath Party came to power in a military coup in 1963,²¹⁹ and Bashar al-Assad, and his father prior to him, have ruled Syria since 1970.²²⁰ The Syrian conflict commenced in 2011 with the Arab Spring when protesters opposing the autocratic rule of President Bashar al-Assad took a stand.²²¹ The conflict escalated to a civil war in early 2012.²²² In November 2011, Bashar Assad appointed a committee to draft a new constitution, which was approved on February 27, 2012.²²³ And while it introduced several changes, in reality, the new constitutional framework was designed to keep Assad in power indefinitely.²²⁴

Syrian nationality laws are strict, particularly in practice, and generally make it difficult for children to acquire their mother's nationality. Syrian citizenship law is generally acquired through paternal *jus sanguinis*, passing Syrian citizenship to the child if the father is Syrian, even if the child is born outside the country.²²⁵ A Syrian mother, however, can only pass on her citizenship under limited circumstances: (1) If her child is born in Syria illegitimately;²²⁶ (2) if her child is born in Syria and the child would not be eligible to acquire another nationality;²²⁷ and (3) if she is Syrian and her child has not acquired another nationality and has not applied for Syrian nationality within the deadline.²²⁸ While Syria has this third provision to prevent statelessness of children by allowing the mother to pass on her citizenship, Syria does not implement the provision in practice.²²⁹ Syria thus provides no protection to children who would otherwise be born stateless, which is the clearest example of de facto statelessness.²³⁰ While the U.N. has adopted a multilateral Convention Relating to the Status of Refugees and a Protocol Relating to the Status of Refugees, Syria is not a signatory to

217. *Id.* at 1393.

218. Farid Ghadry, *Syrian Reform: What Lies Beneath*, 12 MIDDLE E.Q. 61, 61 (2005), <http://www.meforum.org/683/syrian-reform-what-lies-beneath> [<https://perma.cc/5DEX-N6Y9>].

219. *Id.*

220. Susan J. Frye, *Nationality Laws and Statelessness After State Breakup: A Comparative Look at the Former SFRY and Sudan, and a Prediction for Postconflict Syria*, 23 TUL. J. INT'L & COMP. L. 177, 199 (2014).

221. David Gritten et al., *Syria: The Story of the Conflict*, BBC NEWS (Mar. 11, 2016), <http://www.bbc.com/news/world-middle-east-26116868> [<https://perma.cc/HU77-Y22L>].

222. *Id.*

223. Qais Fares, *The Syrian Constitution: Assad's Magic Wand*, CARNEGIE MIDDLE E. CTR. (May 8, 2014), <http://carnegie-mec.org/diwan/55541?lang=en> [<https://perma.cc/2ZN4-3SHF>].

224. *Id.*

225. ZAHRA ALBARAZI, TILBURG LAW SCHOOL, THE STATELESS SYRIANS: REPORT OF THE MIDDLE EAST AND NORTH AFRICA NATIONALITY AND STATELESSNESS RESEARCH PROJECT 7 (2013), <http://www.refworld.org/pdfid/52a983124.pdf> [<https://perma.cc/H7EU-KL4L>]; Legislative Decree No. 276 of 1969, art. 3(A) (Syria).

226. Legislative Decree No. 276 of 1969, art. 3(B) (Syria).

227. *Id.* art. 3(D).

228. *Id.* art. 3(E).

229. Laura van Waas & Zahra Albarazi, *Transformations of Nationality Legislation in North Africa*, in ROUTLEDGE HANDBOOK OF GLOBAL CITIZENSHIP STUDIES 205, 208 (Engin F. Isin & Peter Nyers eds., 2014).

230. *Id.*

either agreement.²³¹ Furthermore, women head a large portion of refugee families from Syria, primarily due to death of, divorce from, or simple abandonment by their husbands.²³² In practice, the law as interpreted by the Syrian government “bar[s] citizenship to children who cannot *prove* their father is Syrian.”²³³ The accumulation of these factors exacerbates the problem of statelessness in Syrian children.

Syria also provides for naturalization, with requirements similar to many other countries: An applicant must meet a five-year legal residency requirement before application, have full legal capacity, be free of diseases, have good character, have specialization/expertise or legitimate means to earn a living, and read and write Arabic.²³⁴ However, like the provision for protection from statelessness described above, this provision proves exceptionally difficult to satisfy in practice. The five-year residency requirement has proven problematic for many, as stateless people in Syria—often known as *maktoumeen*, meaning “hidden” in Arabic—have been unable to obtain *legal* residency, and thus unable to apply for citizenship.²³⁵ This has significantly affected stateless Kurds from Syria.²³⁶

While the Syrian constitution provides citizens with equal rights before the law and women with all the opportunities provided to men,²³⁷ Syrian statutes create a great discrepancy in nationality laws between men and women.²³⁸ Syria actually has a history of passing laws that lead to statelessness.²³⁹ For example, “fewer than 3,500 [Palestinians] have acquired Syrian citizenship, largely because Syria will only grant its citizenship to Palestinian women married to Syrian men, but not Palestinian men married to Syrian women.”²⁴⁰ Similarly, Syrian women who marry foreigners cannot pass their Syrian citizenship to their children, the rationale being a “Syrian Arab national’s marriage to a foreigner is likely to weaken the national inclination in children, because foreign mothers do not feel that tendency.”²⁴¹

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides that all women shall have equal rights with men regarding transferring nationality to their children.²⁴² Syria is a signatory to this Convention.²⁴³ Yet the country’s nationality laws do not grant women equal rights with

231. Shadi A. Alshdaifat & Sanford R. Silverburg, *Syrians Displaced by Civil Conflict: What Are the Implications from International Law?*, 31 CONN. J. INT’L L. 141, 144–145 (2016).

232. Emma Batha, *Syrian Refugee Crisis is Changing Women’s Roles: Aid Agency*, REUTERS (Sep. 9, 2016), <http://www.reuters.com/article/us-syria-refugees-women-idUSKCN11G00W?il=0> [<https://perma.cc/VC3F-SMXS>].

233. Lisa Davis, *ISIL, the Syrian Conflict, Sexual Violence, and the Way Forward: Syrian Women’s Inclusion in the Peace Processes*, 48 N.Y.U. J. INT’L L. & POL. 1157, 1180 (2016) (emphasis in original).

234. Legislative Decree No. 276 of 1969 on Nationality Law, art. 4(A)-(F) (Syria).

235. ALBARAZI, *supra* note 225, at 10.

236. Sen, *supra* note 78.

237. SYRIAN CONSTITUTION, 2012, arts. 23, 33(3).

238. SANS KELLY & JULIA BRESLIN, *WOMEN’S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: PROGRESS AMID RESISTANCE* 465 (2010).

239. Davis, *supra* note 233, at 1180.

240. Lewis Saideman, *Do Palestinian Refugees Have a Right of Return to Israel: An Examination of the Scope of and Limitations on the Right of Return*, 44 VA. J. INT’L L. 829, 870 (2004).

241. Legislative Decree No. 272 of November 4, 1969 on Conditions Regarding Marriage of Syrians and Palestinians to Non-Arab Women, Rationale (1)(A) (Syria).

242. Convention on the Elimination of All Forms of Discrimination Against Women, art. 9(1)(2), Dec. 18, 1979, 1249 U.N.T.S. 14.

243. *Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. TREATY

men in passing citizenship to their children. For many, this is of great concern, as these laws can cause women's children to be stateless and expound the problems they and their children face as refugees.²⁴⁴ This shows how gender inequality can create statelessness in children when the children cannot gain the citizenship of their fathers.²⁴⁵ This gender inequality combined with the lack of *jus soli* in European states, can leave many children without state protections.²⁴⁶ In Syria,

[T]he nationality law has devastating impacts on the civil and economic rights of Syrian women and their children. Children of marriages between Syrian women and foreign spouses cannot inherit property. They lack access to free education and have limited access to health care, social security and other benefits available to nationals, leading to instability and marginalization. It is difficult for them to obtain employment and they are often barred from starting a private business because non-Syrians are ineligible to buy or lease property.²⁴⁷

G. Comparison of These Countries' Statelessness Laws

The countries outlined above, with the exception of Canada, principally rely on *jus sanguinis* as the basis for their citizenship laws, like the majority of the world.²⁴⁸ Turkey and Sweden have both recently implemented *jus soli* principles in efforts to prevent children in their country from being born stateless.²⁴⁹ As mentioned, Syria has a provision to prevent statelessness in children, but it is not enforced and the country's laws cause many children of refugees to lose the protection of having any citizenship at all.²⁵⁰

COLLECTION (Apr. 9, 2017, 5:01 AM), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-&chapter=4&lang=en [<https://perma.cc/A5VD-CNUL>].

244. U.N. HIGH COMMISSIONER FOR REFUGEES, *Background Note on Gender Equality, Nationality Laws, and Statelessness 2014* (Mar. 7, 2014), <http://www.unhcr.org/4f5886306.pdf> [<https://perma.cc/>].

245. *Id.*

246. van Waas & Albarazi, *supra* note 229, at 208.

247. Davis, *supra* note 234, at 1182.

248. *Supra* Part II.

249. *Supra* Parts II. C & E.

250. van Waas & Albarazi, *supra* note 229, at 208.

Country	Article	Summary of Statelessness Law
United Kingdom	British Nationality Act art. 3(2)	A child born in the U.K. and registered under this subsection is entitled to British citizenship if, in five year period following registration resided in the U.K. for more days than outside the country
Germany	Nationality Act, art. 4(3)	If parents are aliens, one parent has to have legally resided in Germany for 8 years and have a permanent residence permit for the child to become a citizen
Sweden	Swedish Citizenship Act, art. 6 art. 7	A child that was born in Sweden and has been stateless since birth acquires Swedish citizenship on notification by the guardian of the child if the child holds a permanent residence permit and is domiciled in Sweden A child must hold a permanent resident card, and has been domiciled in Sweden for five years, but if the child is stateless, then only three years
Canada	Citizenship Act, § 3(1)(a)	Any child born in Canada is a Canadian citizen
Turkey	Turkish Citizenship Law, art. 8(1)	A child born in Turkey, but unable to acquire citizenship from mother or father, acquires Turkish citizenship at birth
Syria	Nationality Law, art. 3(D)	If child is born in Syria and the child would not be eligible to acquire another nationality, then child is a Syrian citizen ²⁵¹
United Nations	U.N. Convention on the Reduction of Statelessness, art. 1	A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless

251. But this provision is not enforced. *Id.*

III. U.N. AND EUROPEAN STATES' RESPONSES TO STATELESSNESS AND SYRIAN REFUGEES

Syrians now constitute the largest population of refugees in the world.²⁵² In July 2013, then U.N. High Commissioner for Refugees António Guterres stated the world has “not seen a refugee outflow escalate at such a frightening rate since the Rwandan genocide almost 20 years ago.”²⁵³ More Syrian refugees remain in neighboring countries, rather than flee to Europe, which has received 123,600 refugees as of June 2014.²⁵⁴ Egypt, Iraq, Jordan, Lebanon, and Turkey host more than 4.8 million Syrian refugees, and an estimated 68–80% of refugees have not registered with the U.N., leading to concerns of increased statelessness.²⁵⁵

The U.N. has repeatedly called on states to take in refugees, asserting: “[W]e cannot respond to refugee crises by closing doors and building fences The world must show solidarity and share this responsibility.”²⁵⁶ But most European countries are still unwilling to accept Syrian refugees.²⁵⁷ Europe has generally tried to contain the refugee crisis within countries bordering Syria, while providing some support for refugees in those countries, and further securing European borders.²⁵⁸ The U.K. instituted the Syrian Vulnerable Person Resettlement Programme in 2014 to allow certain Syrian refugees to remain in the U.K., and further extended this program to bring over 20,000 refugees to the U.K. over five years.²⁵⁹ But in July 2016, roughly a third of councils in the U.K. refused to take Syrian refugees, claiming financial pressure and housing shortages.²⁶⁰ As of September 2016, only 4,414 refugees have been resettled in the U.K.²⁶¹ But there are many calling for the U.K. to do more, including the over 300 lawyers and judges advocating for the significant expansion of the refugee program.²⁶² Similarly, in 2015 more than half of the states in the U.S.

252. See *Global Trends 2015*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/uk/global-trends-2015.html> [<https://perma.cc/9X63-CDH4>] (last visited Apr. 9, 2017) (noting that 4.9 million refugees came from Syria).

253. Leo R. Dobbs, *UNHCR Chief Urges States to Maintain Open Access for Fleeing Syrians*, U.N. HIGH COMM’R FOR REFUGEES (July 16, 2013), <http://www.unhcr.org/51e55cf96.html> [<https://perma.cc/F6UY-PYLJ>].

254. ORCHARD & MILLER, *supra* note 27, at 13.

255. See Davison, *supra* note 67 (citing UNHCR and Norwegian Refugee Council figures showing that 68–80% of refugees either failed to complete a registration process or failed to register at all).

256. Filippo Grandi, U.N. High Comm’r for Refugees, Remarks at High-Level Meeting on Global Responsibility Sharing Through Pathway for Admission of Syrian Refugees (Mar. 30, 2016).

257. *Migrant Crisis: Migration to Europe Explained in Seven Charts*, BBC NEWS (Mar. 4, 2016), <http://www.bbc.com/news/world-europe-34131911> [<https://perma.cc/4WXX-4KB5>].

258. ORCHARD & MILLER, *supra* note 27, at 34.

259. Terry McGuinness, *Briefing Paper Number 06805: The UK Response to the Syrian Refugee Crisis*, HOUSE OF COMMONS LIBRARY (2017).

260. Tamsin Rutter, *How Much Does It Cost UK Councils to Take in Refugees?*, GUARDIAN (July 14, 2016), <https://www.theguardian.com/housing-network/2016/jul/14/cost-uk-councils-take-in-syrian-refugees> [<https://perma.cc/5WF6-9KAQ>].

261. McGuinness, *supra* note 259, at 3.

262. *Migrant Crisis: UK Response Criticised by Senior Former Judges*, BBC NEWS (Oct. 12, 2015), <http://www.bbc.com/news/uk-politics-34502419> [<https://perma.cc/D48Z-9NBF>].

opposed taking in Syrian refugees, even though President Barack Obama planned to bring in over 10,000 Syrian refugees in 2016.²⁶³

Counter to the rest of Europe, Germany has continued its trend toward a less restrictive immigration and citizenship policy by continuing to accept refugees and even criticizing other European countries refusing to do so.²⁶⁴ Similarly, Canada has accepted over 40,000 Syrian refugees,²⁶⁵ and Syrian refugee children are now attending school.²⁶⁶ Canadian Minister of Citizenship and Immigration John McCallum claims this is consistent with Canada's history and acceptance of multiculturalism.²⁶⁷

The United Nations has affirmed this view on refugees and immigration: "Refugees and migrants are not to be seen as a burden; they offer great potential, if only we unlock it."²⁶⁸ However, many have security concerns, especially due to recent terrorist attacks by ISIS and the influx of new refugees from Syria, which has affected some national parties' re-elections, including in Germany.²⁶⁹ Similarly, many in the United States have concerns about potential terrorists masking as refugees.²⁷⁰

A. *How Surrounding Countries are Responding to the Influx of Syrian Refugees*

As shown above, citizenship laws vary greatly between countries and affect Syrian refugees in several ways. Some of the countries neighboring Syria have considered extending citizenship to Syrian refugees, most prominently Turkey.²⁷¹ While many in Turkey oppose taking in Syrian refugees because it has produced a great strain on their economy, Turkish President Recep Tayyip Erdoğan stated:

We are going to help our Syrian friends in offering them the chance, if they want it, to acquire Turkish nationality We regard you as our brothers

263. Ashley Fantz & Ben Brumfield, *More than Half the Nation's Governors Say Syrian Refugees Not Welcome*, CNN (Nov. 19, 2015), <http://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash/> [<https://perma.cc/EM45-J2EJ>].

264. Frank Jordans, *Merkel Rejects Muslim Migrant Ban, Urges Fair Distribution*, ASSOCIATED PRESS NEWS (Aug. 28, 2016, 12:12 PM), <http://bigstory.ap.org/article/ed56e6f1643e4ebb979d3f6c48a79a09/germany-expects-fewer-300000-refugees-year> [<https://perma.cc/6ZHH-4LXD>].

265. #WelcomeRefugees: Key Figures, GOV'T OF CAN. (Feb. 9, 2017), <http://www.cic.gc.ca/english/refugees/welcome/milestones.asp> [<https://perma.cc/>].

266. Emily Ragobeer, *In Canada, Syrian Refugee Children Head Back to School*, ALJAZEERA (Sept. 11, 2016), <http://www.aljazeera.com/indepth/features/2016/09/canada-syrian-refugee-children-head-school-160911025303349.html> [<https://perma.cc/J8JK-RHVN>].

267. *Id.*

268. *UN Summit Commits to Protect Refugee, Migrant Rights*, U.N. HIGH COMM'R FOR REFUGEES (Sept. 19, 2016), <http://www.unhcr.org/en-us/news/latest/2016/09/57dfa1734/un-summit-commits-protect-refugee-migrant-rights.html> [<https://perma.cc/3ZB6-T53G>].

269. Steve Visser & Elizabeth Roberts, *Angela Merkel Admits Immigration Policy Hurt Party in Elections*, CNN (Sept. 5, 2016, 11:47 AM), <http://www.cnn.com/2016/09/04/europe/germany-alternative-fur-deutschland-afd-angela-merkel/> [<https://perma.cc/8YLN-5XMD>].

270. HOMELAND SEC. COMM., SYRIAN REFUGEE FLOWS SECURITY RISKS AND COUNTERTERRORISM CHALLENGES 2 (2015), https://homeland.house.gov/wp-content/uploads/2015/11/HomelandSecurityCommittee_Syrian_Refugee_Report.pdf [<https://perma.cc/4NLJ-5HGK>].

271. Ishaan Tharoor, *Turkey's Bold New Plan for Syrian Refugees: Make Them Citizens*, WASH. POST (July 9, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/07/09/turkeys-bold-new-plan-for-syrian-refugees-make-them-citizens/> [<https://perma.cc/NSZ2-AZKE>].

and sisters. You are not far from your homeland, but only from your homes and your land Turkey is also your homeland.²⁷²

There are two complementary U.N. treaties that address the problem of statelessness, one from 1954 and the other from 1961. The 1961 United Nations Convention on the Reduction of Statelessness requires that a “[c]ontracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.”²⁷³ Yet, while the 1954 Convention is the main human rights treaty dealing with the protections of stateless persons, “the majority of European States that have ratified it have not adopted specific statelessness determination procedures and do not recognize stateless status as a specific protection ground.”²⁷⁴ The 1954 Convention provides minimum standards of treatment, stating that stateless persons have the same rights as citizens with respect to freedom of religion and education of their children.²⁷⁵ For other rights, stateless persons are treated the same as other non-nationals.²⁷⁶

Many countries, like Turkey, have implemented a provision in their nationality laws preventing children, such as those fleeing from Syria, from becoming stateless.²⁷⁷ The U.K. has also implemented this policy,²⁷⁸ but it was not until 2013 that the U.K. created a statelessness procedure to allow stateless people to remain in the country.²⁷⁹ To be eligible, the person must be in the U.K. and unable to return to another country because they are stateless, and if the person’s “leave to remain” application is granted, the stateless person may remain in the U.K. for up to two years and six months.²⁸⁰ But only 39 applications were granted as of April 2016, with significant delays in decisions by the government, and a lack of legal aid for the stateless applicants.²⁸¹

Germany, however, has not implemented a nationality law to prevent statelessness of children born in Germany.²⁸² Despite the international treaties Germany has signed, “Germany has no specific statelessness determination procedures and does not recognize statelessness as a protection ground in itself.”²⁸³ The only real advantage a stateless person has in seeking naturalization in Germany is

272. *Id.*

273. Convention on the Reduction of Statelessness, art. 1, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975).

274. Katia Bianchini, *On the Protection of Stateless Persons in Germany*, 19 TILBURG L. REV. 35–36 (2014).

275. Convention Relating to the Status of Stateless Persons, Introductory Note, 360 U.N.T.S. 117 (entered into force June 6, 1960).

276. *Id.*

277. Law No. 5901 of May 29, 2009, art. 8(1), Resmî Gazete [R.G.] No. 27256 (Dec. 6, 2009) (Turk.).

278. British Nationality Act, c. 61, § 3(2).

279. Cynthia Orchard, *An Update on Statelessness Determination and Status in the UK – “Need for Fair and Timely Decisions,”* EUR. NETWORK ON STATELESSNESS (Sept. 30, 2016), <http://www.statelessness.eu/blog/update-statelessness-determination-and-status-uk-need-fair-and-timely-decisions> [<https://perma.cc/GK4Y-9PFE>].

280. *Apply to Stay in the UK as a Stateless Person*, GOV. U.K., <https://www.gov.uk/stay-in-uk-stateless> [<https://perma.cc/W8HU-XAD8>] (last updated Sept. 26, 2016).

281. Orchard, *supra* note 279.

282. Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, BUNDESGESETZBLATT [BGBl I] at 102–1, last amended by Gesetz [G], Oct. 11, 2016 BGBl 1 art. 3 § 4 (Ger.).

283. Bianchini, *supra* note 274, at 38.

that under Germany's discretionary naturalization process, naturalization authorities have the discretion to grant naturalization after six years rather than eight.²⁸⁴ However, Germany generally treats stateless persons from Syria as equal to Syrian nationals when applying for international protection in Germany.²⁸⁵

Like the Convention on the Reduction of Statelessness, the Arab Charter on Human Rights provides that every person has a right to a nationality, and that states must take measures, in accordance with their domestic laws, to allow a child to acquire the mother's nationality.²⁸⁶ A few countries in the Middle East, like Jordan, Libya, Saudi Arabia, and the United Arab Emirates, provide legal exceptions to allow children with stateless fathers to obtain their mothers' citizenship.²⁸⁷ But some countries, including Qatar and Brunei, do not.²⁸⁸ Many countries in the Middle East are also not signatories to the Geneva Convention on Refugees, and thus often do not have refugee or asylum procedures.²⁸⁹ Furthermore, as described above, while Syrian citizenship law provides an avenue for citizenship for children born in Syria who cannot acquire citizenship through their parentage, "in reality this [provision] is never seen to be executed. This is particularly illustrated by the fact that stateless individuals in Syria, predominantly from the Kurdish and Palestinian communities, are passing on their stateless status to their children."²⁹⁰

B. Birthright Citizenship Can Be the Solution

*[T]he automatic granting of citizenship at birth to children who would otherwise be stateless, is probably the best tool to eradicate statelessness at birth and prevent its transmission from generation to generation.*²⁹¹

The policies for and against birthright citizenship have long been debated²⁹² and are beyond the scope of this Note. This Note simply argues that *jus soli* can be a solution to prevent statelessness to children such as the Syrian refugees. Article 15(1)

284. *Die Ermessenseinbürgerung*, DIE BUNDESREGIERUNG, <https://www.bundesregierung.de/Content/DE/StatistischeSeiten/Breg/IB/Einbuengerung/ee-ermessenseinbuengerung.html> [<https://perma.cc/7Z6Y-GS7C>] (last visited Apr. 22, 2017).

285. EUROPEAN LEGAL NETWORK ON ASYLUM & EUROPEAN COUNCIL ON REFUGEES AND EXILE, INFORMATION NOTE ON SYRIAN ASYLUM SEEKERS AND REFUGEES IN EUROPE 73 (2013), http://www.ecre.org/wp-content/uploads/2016/05/Information-Note-on-Syrian-Refugees-in-Europe-29112013-final_website.pdf [<https://perma.cc/M38Y-E448>].

286. League of Arab States, *Arab Charter on Human Rights*, May 22, 2004, reprinted in 12 INT'L HUM. RTS. REP. 893 (2005) (entered into force March 15, 2008) art. 29(1)-(2).

287. Theodorou, *supra* note 70.

288. *Id.*

289. Kamel Dorai, *Palestinian Refugees and the Current Syrian Conflict: From Settled Refugees to Stateless Asylum Seekers?*, in MIGRATION, MOBILITIES AND THE ARAB SPRING: SPACES OF REFUGEE FLIGHT IN THE EASTERN MEDITERRANEAN 158, 160-61 (Natalia Ribas-Mateos ed., 2016).

290. van Waas & Albarazi, *supra* note 229, at 7.

291. Nils Muižnieks, Comm'r for Human Rights, Council of Europe, Keynote Address at the Global Forum on Statelessness (Sept. 17, 2014).

292. See, e.g., William M. Stevens, Comment, *Jurisdiction, Allegiance, and Consent: Revisiting the Forgotten Prong of the Fourteenth Amendment's Birthright Citizenship Clause in Light of Terrorism, Unprecedented Modern Population Migrations, Globalization, and Conflicting Cultures*, 14 TEX. WESLEYAN L. REV. 337 (2008) (considering alternatives to birthright citizenship); Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54 (1997) (investigating the theoretical foundations of the Constitution's treatment of birthright citizenship).

of the Universal Declaration on Human Rights provides that everyone has the right to citizenship.²⁹³ In fact, the U.N. has created a plan to end statelessness by 2024 that includes a requirement that a state must grant a child its nationality if that child is born within the state's territory and will otherwise be stateless, a conditional version of *jus soli*.²⁹⁴ Scholars have agreed that “[i]f states defined citizenship solely on a *jus soli* theory of citizenship, then statelessness would not be a problem,” because in this situation, all people who would be potentially stateless would merely be citizens of the state of their birth.²⁹⁵

Birthright citizenship is “the most important safeguard that any country can have against statelessness,” says Sarnata Reynolds, senior advisor on human rights at Refugees International, because it means statelessness will always be eliminated within one generation.²⁹⁶ Furthermore, failing to provide for birthright citizenship can actually increase statelessness, as demonstrated by Syrian refugees.²⁹⁷ But under a policy of *jus soli*, “statelessness at least is limited to one generation,” because under birthright citizenship, children of stateless people would become citizens.²⁹⁸ Birthright citizenship ensures everyone has at least one citizenship, embodying the purpose of the U.N. Declaration of Human Rights. Conversely, the use of *jus sanguinis* can lead to many generations of stateless peoples, particularly when combined with strict naturalization laws or residency requirements.²⁹⁹ Furthermore, in a recent empirical test, several economists concluded that in Germany, a country that recently introduced *jus soli* for the first time, the “introduction of the *jus soli* system results in a significant increase in the integration of adults.”³⁰⁰

C. U.N. Citizenship

Another, perhaps more realistic solution is to provide a type of citizenship under the U.N. to stateless Syrians, similar to E.U. citizenship. This transnational citizenship could be a solution to the problem of statelessness. It would provide some type of protection to these stateless children, as they would at least have documentation and a form of citizenship. While U.N. citizenship would not replace a national citizenship, like EU citizenship, it could provide a baseline of rights under the United Nations,

293. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), art. 15(1).

294. U.N. HIGH COMM’R FOR REFUGEES, GLOBAL ACTION PLAN TO END STATELESSNESS 8 (2014), <http://www.refworld.org/docid/545b47d64.html> [<https://perma.cc/8LAS-WGX8>].

295. Stewart E. Forbes, “Imagine There’s No Country”: *Statelessness as Persecution in Light of Haile II*, 61 BUFF. L. REV. 699, 708 (2013).

296. Bryan Schatz, *This Is What Would Happen if We Repealed Birthright Citizenship*, MOTHER JONES (Aug. 26, 2015), <http://www.motherjones.com/politics/2015/08/donald-trump-immigration-birthright-citizenship> [<https://perma.cc/6ZDQ-6CM2>]; see also Polly J. Price, *Stateless in the United States: Current Reality and A Future Prediction*, 46 VAND. J. TRANSNAT’L L. 443, 444 (2013) (arguing that under a policy of *jus soli*, “statelessness at least is limited to one generation”).

297. Laura van Waas, *The Children of Irregular Migrants: A Stateless Generation?*, 25 NETH. Q. HUM. RTS. 437, 446 (2007).

298. Price, *supra* note 296, at 444–45.

299. Lia G. Melikian, *No Country for Some Men?: Statelessness in the United States and Lessons from the European Union*, 43 GA. J. INT’L & COMP. L. 281, 286–87 (2014).

300. Ciro Avitabile et al., *The Effect of Birthright Citizenship on Parental Integration Outcomes*, 56 J.L. & ECON. 777, 802 (2013).

including the right to non-discrimination on the basis of nationality and the right to move and reside freely.³⁰¹ This could be achieved through a treaty between U.N. member states or between states themselves.

However, there are some problems to this solution. As shown above, states have already been reluctant to provide protections for stateless peoples or refugees, particularly in Europe, and it is doubtful they would agree to this treaty, as the states would be required to enforce refugees' rights. Additionally, it is difficult to determine who or where stateless refugees are, as there is turmoil and conflict in the Middle East, and the U.N. is stretched due to the growing number of refugees.³⁰² Moreover, many refugees lack information, fear the authorities, or simply cannot afford to register,³⁰³ adding to the problems with a new registration process.

CONCLUSION

This Note has described how the citizenship laws in countries surrounding Syria have affected Syrian refugees, particularly their children. Syrian refugees have fled to surrounding nations, but due to national security concerns, many countries have been unwilling to accept these refugees. Even if these countries do accept Syrian refugees, their children may be born without the protections of a government. Due to the combination of the lack of birthright citizenship laws in Europe, discriminatory nationality laws in Syria, and loss of registration documents for newborn children, many children born to Syrian refugees face the prospect of becoming stateless. No European country allows unconditional *jus soli* anymore, but some countries, including the U.K. and Sweden, grant birthright citizenship to stateless children born in the country. But other countries, like Germany, do not. Like the U.S., Canada is one of the few countries left that provides for unconditional birthright citizenship, so stateless children born in Canada will have the protection of a nationality. Germany, Sweden, and Turkey have been leaders in accepting Syrian refugees, and have exhibited a trend in expansive citizenship and immigration laws. But children need a nationality and a government for protection, and more countries need to provide citizenship to prevent a child born to a refugee from becoming stateless, regardless of whether the child's parents are citizens or Syrian refugees escaping from conflict.

301. *EU Citizenship*, EUR. COMM'N, <http://ec.europa.eu/justice/citizen/> [<https://perma.cc/A7DL-WJZY>] (last visited Apr. 9, 2017).

302. Davison, *supra* note 67.

303. *See, e.g.*, Sen, *supra* note 78 (explaining that one man's children were not registered because he could not afford to do so).

