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DARK LAW: LEGALISTIC AUTOCRATS, JUDICIAL DEFERENCE, AND THE GLOBAL TRANSFORMATION OF NATIONAL SECURITY

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Democracies are declining worldwide. Lawmaking and judicial review can help to stabilize democracies and protect fundamental rights. But these safeguards can also be misused to facilitate democratic backsliding and empower “legalistic autocrats” who deploy law to circumvent constitutional restraints on their power. This Article compiles empirical data from more than 140 countries to provide a framework for understanding how autocrats repurpose national security law to consolidate power in weak democracies. The Article demonstrates that policymakers worldwide enact amorphous national security statutes. Meanwhile, courts cite deference to executive authority and political questions as they abdicate their responsibilities for judicial review of national security laws. Legalistic autocrats exploit this statutory vagueness and judicial deference to undertake actions counter to democratic principles. The convergence of autocratic politics, statutory vagueness, and judicial deference fosters the emergence of a dangerous liaison that can be described as dark law. In the shadow of consolidated state enforcement powers, dark law allows autocratic leaders—operating under

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the guise of defending national security—to circumvent limitations on their authority and selectively investigate, detain, prosecute, and imprison disfavored groups.

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INTRODUCTION

Democracies are declining worldwide.¹ Leaders in flagging democratic states openly disparage norms and institutions that once shielded democratic populations from autocratic rule.² Legal scholars have described democracy's

¹ See generally STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018) (noting the rise in new forms of authoritarianism and the subversion of democratic norms); DAVID RUNCIMAN, *HOW DEMOCRACY ENDS* (2018) (arguing the current crisis in democracy is unlike those of the past and democracies may fail in different ways); CASS R. SUNSTEIN, *CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA* (2018) (discussing potential threats of authoritarianism in the U.S.); CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018) (documenting global forces and national politics weakening constitutional democracies worldwide).

² SANFORD LEVINSON & JACK M. BALKIN, *DEMOCRACY AND DYSFUNCTION 2* (2019) (summarizing theories of constitutional dysfunction and democratic loss under the Trump Administration).

waning as “recession,”³ “breakdown,”⁴ “retreat,”⁵ “backsliding,”⁶ “deconsolidation,”⁷ “retrogression,”⁸ “constitutional dismemberment,”⁹ and even “constitutional rot.”¹⁰ Constitutional law and judicial review have the potential to steady liberal republics and guard fundamental rights.¹¹ But in times of social uncertainty and political instability, political leaders can also weaponize law to strike at constitutional protections.

Kim Lane Scheppele has previously shown how passing new laws enables autocratic power in weak democracies.¹² State leaders, often elected by voting publics, deploy law to dismantle liberal constitutions and consolidate political authority.¹³ Such “legalistic autocrats” effectively use national security and emergency laws to erode constraints on their power and roll back democratic accountability.¹⁴

This Article builds on Scheppele’s insight that some autocrats consolidate their enforcement powers under the cover of law.¹⁵ It uses original

³ Larry Diamond, *Democracy in Decline: How Washington Can Reverse the Tide*, 95 FOREIGN AFF. 151, 159 (2016).

⁴ Michael Pal, *Breakdowns in the Democratic Process and the Law of Canadian Democracy*, 57 MCGILL L. J. 299, 302 (2011).

⁵ JOSHUA KURLANTZICK, DEMOCRACY IN RETREAT: THE REVOLT OF THE MIDDLE CLASS AND THE WORLDWIDE DECLINE OF REPRESENTATIVE GOVERNMENT 10 (2013).

⁶ Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 5 (2016).

⁷ Roberto Stefan Foa & Yascha Mounk, *The Signs of Deconsolidation*, 28 J. DEMOCRACY 5, 9–10 (2017).

⁸ Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 96 (2018).

⁹ Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT’L L. 1, 2 (2018).

¹⁰ Jack M. Balkin, *Constitutional Rot*, in CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA 19, 19–20 (Cass R. Sunstein ed., 2018).

¹¹ Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. Rev. 1, 5 (2019) (“Judicial review is one of many mechanisms that remove from direct and immediate democratic accountability institutions that may be predictability compromised in the press of political expediency.”).

¹² Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 547 (2018) [hereinafter Scheppele, *Autocratic Legalism*]; Kim Lane Scheppele, *The Legal Complex and Lawyers-in-Chief*, in THE LEGAL PROCESS AND THE PROMISE OF JUSTICE: STUDIES INSPIRED BY THE WORK OF MALCOLM FEELEY 361, 363–64 (Rosann Greenspan, Hadar Aviram & Jonathan Simon eds., 2019) (“[S]ometimes authoritarian leaders trained in law do exactly what one would guess with law’s powerful potential. Such leaders can turn the neutral potential of legal ideas into illiberal law, sometimes even pulling judges and other legal officials along with them.”).

¹³ Scheppele, *Autocratic Legalism*, *supra* note 12, at 547 (“[D]emocracies are not just failing for cultural or economic or political reasons. Some constitutional democracies are being deliberately hijacked by a set of legally clever autocrats, who use constitutionalism and democracy to destroy both.”).

¹⁴ *Id.* at 571.

¹⁵ Kim Lane Scheppele, *Autocracy Under Cover of the Transnational Legal Order*, in

data and analyzes the content of national security laws worldwide. The Article also describes for the first time how political leaders worldwide rely on statutory vagueness in national security legislation and judicial deference in national courts to circumvent constitutional constraints on leaders' political power.

Previous legal scholars have argued persuasively that national security laws broaden the scope of executive power, curtail civil liberties, and ease paths to criminal prosecution for those suspected of national security offenses.¹⁶ Yet for all the scholarly attention devoted to the costs of national security, legal scholarship tends to downplay the global dimensions of contemporary national security lawmaking.¹⁷ Scholars have been disposed to focus on threats of democratic collapse in particular countries rather than on more incremental erosions of democratic liberalism worldwide.¹⁸ Constitutional construction and national security policymaking often are analyzed in isolation from transnational institutions and ideas.

This Article, in contrast, describes global shifts in national security lawmaking. The research widens the aperture of previous case studies and comparative investigations of national security law and contributes to an emerging field of transnational legal studies by developing a relational approach to national security.¹⁹ Building on theories in relational sociology, the Article develops a new relationalist framework for studying national security lawmaking as a process embedded in legislative-judicial-political relations.²⁰

CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 188, 190 (Gregory Shaffer, Tom Ginsburg & Terence C. Halliday eds., 2019).

¹⁶ See LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY* 4 (2008) (“[T]errorism, one type of security threat, forces choices to be made that may restrict civil liberties.”); Terence Taylor, *United Kingdom*, in *COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES* 221 (Yonah Alexander ed., 2002) (describing an EU counterterrorism measure that “[e]nabl[ed] law enforcement agencies to target and track terrorists by requiring carriers to supply information about passengers and freight.”). See generally *COUNTER-TERRORISM AND THE POST-DEMOCRATIC STATE* (Jenny Hocking & Colleen Lewis eds., 2008) (describing national and international counter-terrorism measures in the wake of the United States' war on terror and their potential impacts on democracy).

¹⁷ For an exception to national and comparative legal approaches, see Kim Lane Scheppele, *The International Standardization of National Security Law*, 4 *J. NAT'L SEC. L. & POL'Y* 437, 437 (2010) (“But if nationally specific national security law seemed the norm before 9/11, developments since seriously challenge that view, at least when it comes to fighting terrorism.”).

¹⁸ Bermeo, *supra* note 6, at 14.

¹⁹ For examples of transnational legal studies, see generally Kathryn Sikkink, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011); *TRANSNATIONAL LEGAL ORDERS* (Terence C. Halliday & Gregory Shaffer eds., 2015); Terence C. Halliday & Pavel Osinsky, *Globalization of Law*, 32 *ANN. REV. SOCIO.* 447 (2006); Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 *AM. J. INT'L L.* 1 (2012); Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 *LEIDEN J. INT'L L.* 189 (2015).

²⁰ For an overview of relational sociology, see *THE PALGRAVE HANDBOOK OF RELATIONAL SOCIOLOGY* (François Dépelteau ed., 2018).

The Article further advances the concept of dark law as an analytic for understanding how processes of statutory construction, judicial review, and politics converge in ways that undermine democratic norms and institutions in weak democratic states. Based on content coding of national security laws in 140 countries, the Article documents widespread statutory vagueness in national security legislation. Lawmakers routinely draft legislation with opaque language that is used to suspend ordinary substantive and procedural standards.²¹ This allows political leaders to circumvent deeply rooted constitutional protections. Legalistic autocrats seek to evade constitutional obstacles and consolidate their authority through novel interpretations of amorphous statutory language.

This Article proceeds in four parts. First, it advances a processual and relationalist approach to national security and develops the concept of dark law.²² Second, the Article discusses democracy's decline and the global transformation of national security. Third, the Article documents three converging trends in global national security lawmaking: 1) the enactment of vague legal provisions at the behest of state leaders; 2) the abdication of judicial review in national security cases; and 3) the enforcement of ill-defined national security laws by legalistic autocrats. The Article concludes with a warning about the potential abuse of national security laws in weak democratic states.

I. RELATIONALISM AND DARK LAW

As democracy wanes in many countries, legalistic autocrats have relied on vague legal provisions and weak judicial review to circumvent constitutional limits on their authority. Existing critiques of national security laws in weak democracies have rightfully drawn attention to the curtailment of civil liberties and the expansion of policing powers.²³ However, global

²¹ DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 2–3 (2006); *see also* Fionnuala Ní Aoláin, *The 'War on Terror' and Extremism: Assessing the Relevance of the Women, Peace and Security Agenda*, 92 INT'L AFF. 275, 281 (2016) (“The new measures have enabled democratic states to make use of emergency powers by invoking human rights regimes, and to do so with less justification or excuse than would previously have been deemed necessary.”).

²² Dark law does not reference actual darkness or lightness but rather processes by which vague statutes and weak judicial review undermine legal transparency and democracy. Dark law describes historically contingent webs of legislative-judicial-political relations that obscure unconstitutional or undemocratic state action.

²³ *See generally* COURTS AND TERRORISM: NINE NATIONS BALANCE RIGHTS AND SECURITY (Mary L. Volcansek & John F. Stack Jr. eds., 2011) (examining contemporary judicial responses to national security laws in nine countries); COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES, *supra* note 16 (providing an assessment of ten national counterterrorism

changes in relations between lawmaking, judicial review, and politics have received less scrutiny. By triangulating data on statutory vagueness, judicial deference, and autocratic rule, this Article advances a relationalist framework for understanding the global transformation of national security lawmaking. This relational approach to national security develops a conception of dark law—not as a particular kind of law, but as a set of legislative-judicial-political relations that erode constitutional protections and empower legalistic autocrats.

Legal scholars tend to think about law as either substance or procedure. It follows that most legal analyses focus on discrete principles or procedural standards. However, this Article rejects the study of law extricated from relational processes and contexts.²⁴ Building on insights from relational sociology, the Article envisions the study of law as an empirical investigation of relational interactions between agents and institutions that generate useful insights about social worlds. Such relationalism resists reification of social objects—such as national security law or democracy—and raises awareness about the inescapable interdependency of social agents—including lawmakers, judges, and politicians.²⁵

As an intellectual movement relational sociology has gained influence in recent decades and developed several distinct approaches to social analysis. These include a pragmatist approach inspired by John Dewey and American Pragmatism, a structuralist approach influenced by George Simmel, and a power-conflict approach that builds on the work of Norbert Elias and Pierre Bourdieu.²⁶ This Article draws primarily on Dewey's pragmatic transactionalism and Bourdieu's reflexivity and methodological relationalism.

Four ontological pillars undergird a relational approach to legal analysis. These ontologies are dynamic and subject to change, but orient relationalist scholarship and reveal tendencies in relational thinking. First,

strategies post-9/11); COUNTER-TERRORISM AND THE POST-DEMOCRATIC STATE, *supra* note 16 (describing national and international counter-terrorism measures in the wake of the United States war on terror and their potential impacts on democracy).

²⁴ For more background on relational sociology, see generally THE PALGRAVE HANDBOOK OF RELATIONAL SOCIOLOGY, *supra* note 20; Mustafa Emirbayer, *Manifesto for a Relational Sociology*, 103 AM. J. SOCIO. 281 (1997) [hereinafter Emirbayer, *Manifesto*]; Ann Mische, *Relational Sociology, Culture, and Agency*, in THE SAGE HANDBOOK OF SOCIAL NETWORK ANALYSIS 80 (John Scott & Peter J. Carrington eds., 2011); Mustafa Emirbayer, *Relational Sociology as Fighting Words*, in CONCEPTUALIZING RELATIONAL SOCIOLOGY: ONTOLOGICAL AND THEORETICAL ISSUES 209 (Christopher Powell & François Dépelteau eds., 2013).

²⁵ François Dépelteau, *Relational Sociology, Pragmatism, Transactions, and Social Fields*, 25 INT'L REV. SOCIO. 45, 52–53 (2015).

²⁶ See François Dépelteau, *Relational Thinking in Sociology: Relevance, Concurrence and Dissonance*, in THE PALGRAVE HANDBOOK OF RELATIONAL SOCIOLOGY, *supra* note 20, at 25–26 (discussing “three major sub-currents within [relational sociology]”: pragmatism, structuralism, and “[t]he study of power relations, inequalities and conflicts”).

law exists only through social interactions. Law is not an independent thing, substance, or social fact. Legal reasoning, legal decision-making, and legal writing are profoundly interdependent upon social interactions in particular legal fields.²⁷ Lawyers, statutes, and judges do not and cannot exist outside of particular sets of relations.²⁸ And because there is no law beyond social relations, the study of law requires relational inquiry and empirical investigation of social interactions.

Second, law is not a reflection of objective principles and doctrine. A relational approach rejects modernist dualisms, including dualisms of knowledge and practice, reason and action, and objectivity and subjectivity. Relational legal analysis has the capacity to undermine dualistic distinctions and to study interactions between various processes and legal participants as a means to understand their mutual constitution. Relationalism recognizes that legal relations, and the social prejudice embedded within them, cannot be divorced from reasoning minds. The construction of law cannot be disentangled from everyday social relations and the habitualized actions of legal agents in specific legal fields. Law unfolds through the transactions of legal players as they navigate specific environments. Law is not something fixed beyond individuals; it is something people do together, participate in, and reproduce through their social actions.

Third, law is historically contingent. Statutory construction, for example, depends on dynamic policymaking processes that emerge from historical relations, which are themselves social processes. Legal definitions and procedures—from definitions of deviance to standards of due process—are produced in particular social contexts that condition intersubjective understandings of law. To engage in legal analysis, therefore, is also to engage in historicity. Relational legal scholars must historicize legal agents and institutions.

Finally, a relational approach to law also demands a degree of reflexivity about objects of investigation.²⁹ The very meaning and significance of law derives from its reference to a set of juridical relations in specified contexts.³⁰ Therefore, the content of law should not be presumed or

²⁷ Richard Terdiman, *Translator's Introduction*, in Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 806–07 (1987).

²⁸ Law and legal identities are realized only through social practice. A lawyer becomes a lawyer through interactions with clients and other legal agents. A judge becomes a judge through adjudicative action in relations with other legal participants.

²⁹ PIERRE BOURDIEU & LOÏC J.D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 100 (1992).

³⁰ Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 816 (1987).

preconstructed.³¹ Legal scholars must interrogate their own assumptions about subjects of investigation and relations that constitute social objects, and also grapple with the ways that their identities and social locations impact their analytic categories.³²

The need for reflexivity, however, should not be interpreted as an unequivocal embrace of contextualism that belies efforts to develop more general frameworks or theories to understand lawmaking. A relational approach recognizes that law is continuously made and remade, moment by moment, relation by relation.³³ Law is in a constant state of becoming. However, law's ongoing transformation and adaptation to new situations produces novel logics of practice and social patterns that can be classified and theorized in an effort to address future social problems. The global transformation of national security lawmaking, for example, creates novel opportunities for political mobilization and presents opportunities for state leaders to exercise law differently. State officials have curtailed civil liberties, authorized administrative detention, and rolled back due process protections in criminal prosecutions.³⁴ These new logics in national security lawmaking also produce gaps in the law that sanction previously forbidden state action.³⁵ Relational approaches to legal analysis help to reveal the social consequences of lawmaking by moving away from textualism and towards the study of social processes, transactions, and institutions. At times, this requires the development of new relational concepts, such as dark law.

A. Dark Law

Dark law describes a paradoxical process in which autocratic leaders rely on vague statutory language and judicial passivity to engage in state action counter to the rule of law. It is a relational term that describes processes by which national security policymaking, judicial review, and autocratic politics converge. The study of dark law, therefore, requires methodological relationalism—legal analysis centered on relations and transactions rather than on substantive legal standards or procedural rules.

³¹ See PIERRE BOURDIEU, *PASCALIAN MEDITATIONS* 106 (2000) (“[Social sciences can] undertake to understand and explain their own genesis and, more generally, the genesis of scholastic fields, in other words the processes of emergence (or autonomization) from which they arose, as well as the genesis of the dispositions that were invented as the fields were constituted and which slowly install themselves in bodies in the course of the learning process.”).

³² BOURDIEU & WACQUANT, *supra* note 29, at 160.

³³ Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 879–80 (1988).

³⁴ DONOHUE, *supra* note 16, at 4.

³⁵ See, e.g., Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 2 (2004) (“Even in modern times terrible injustices have been perpetrated in the name of security on thousands who had no effective recourse to law. Too often courts of law have denied the writ of the rule of law with only the most perfunctory examination.”)

Dark law is not a type of law in the traditional sense. It is not a subset of national security law or criminal law. In fact, it is not a kind of law at all but rather a set of relations and processes that constitute lawmaking in weak democracies. Conceptually, dark law describes particular configurations of legislative-judicial-political relations that empower autocrats to clandestinely transform legal language into political power. It is a pernicious outgrowth of vague statutory construction, deferential judicial review, and political opportunism. Authorities brandish national security law as a response to constructed security threats in order to circumvent legal restraints on their power.

National security law consists of relationships and interactions in courts and political contexts. Legislatures enact security statutes, judges interpret them, and police and prosecutors enforce them at particular moments and in particular jurisdictions. Relations between legal agents determine the meanings and consequences of national security lawmaking and enforcement. While legal scholars will acknowledge that substantive law is not simply anterior to procedure, legal analyses still trend towards substantialism—the idea that rigid legal content underlies experiences of law. Methodological relationalism and the concept of dark law challenge this substantialism and urge more empirically grounded relational analysis.

The primary aim of developing dark law to understand national security is to move beyond conceptions of national security legislation as a substantive kind of law and towards a recognition of national security lawmaking as an unfolding series of historicized relationships and intersections with processes of judicial review and political action.³⁶ The concept of dark law illuminates new logics of lawmaking, judicial interpretation, and politics that pool state power to undermine democracy.³⁷ National security lawmaking is conceived as processes, interactions, and relationships rather than substantive statutes and rules. National security law inevitably operates through overlapping legislative, judicial, and political fields, which are empirically interrelated and mutually determinative, but also change over time. Relationalist legal scholars, therefore, should endeavor to identify various kinds of relationships in lawmaking that produce new opportunities for problem-solving. Vague statutory construction, judicial deference, and autocratic rule produce a particular pathology that aids legalistic autocrats in the consolidation of political power. The recognition of these processes aids in developing defenses against autocratic legalism and countering undemocratic effects.

³⁶ See generally PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* (1990) (providing a critique of scholastic reason divorced from practical logics and a model for scientific practice).

³⁷ For more on pooling powers, see Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 213 (2015) (“Pooling blends the legal authorities that different agencies derive from distinct statutory schemes. And it enables the executive to combine one agency’s expertise with legal authority allocated to another.”).

Dark law as an analytic category has three defining features. First, dark law is a series of relationships and exists as an extension of other social processes, including statutory construction, judicial interpretation, and autocratic politics. National security scholars who study jurisprudence and formal statutory law gain valuable insights into curtailment of substantive rights and procedural protections. However, this approach to legal analysis risks myopia to logics, practices, and processes that fundamentally determine law's effects in particular countries and communities. Formal law functions very differently in different places and at different times, and the study of law in isolation from social and institutional relations can discount disparities in legal effects. By adopting a relational approach to legal analysis, legal scholars can better understand practical impacts of national security lawmaking on democracy and constitutional rights.³⁸ Such relationalism endeavors to sidestep what John Dewey called "fixations"—ends and values extracted from social relations.³⁹

Second, dark law should be understood as a complex of legislative-judicial-political relations which exists in social fields that are bounded both temporally and geographically. The concept of fields is a useful way to locate relations between people and institutions.⁴⁰ Fields are social spaces of objective relations that constitute a social environment and condition actors' practices and struggles.⁴¹ Fields emerge from historical processes and gradually gain autonomy from other systems of relations.⁴² As the internal apparatus of a field develops, it cultivates an autonomous bounded space capable of socializing participants into a set of rules and constraints and reproducing a specific symbolic system.⁴³ The field therefore may be thought of as both a positional structure that reproduces social hierarchies and a symbolic structure that defines a particular logic of practice against competing logics of practice in society. Fields may exhibit similar characteristics, or homologies, to other fields even as they remain bounded spaces.⁴⁴ However, fields still remain semi-autonomous sites of social and

³⁸ The focus on process and relations is a common feature of Bourdieusian and relational sociology. See generally Emirbayer, *Manifesto*, *supra* note 24 (exploring the features of a dynamic and continuous social reality).

³⁹ John Dewey, *Creative Democracy—The Task Before Us*, in *THE PHILOSOPHER OF THE COMMON MAN: ESSAYS IN HONOR OF JOHN DEWEY TO CELEBRATE HIS EIGHTIETH BIRTHDAY 220, 227* (1940) ("All ends and values that are cut off from the ongoing process become arrests, fixations. They strive to fixate what has been gained instead of using it to open the road and point the way to new and better experiences.").

⁴⁰ Daniel N. Kluttz & Neil Fligstein, *Varieties of Sociological Field Theory*, in *HANDBOOK OF CONTEMPORARY SOCIOLOGICAL THEORY* 185, 186 (Seth Abrutyn ed., 2016).

⁴¹ BOURDIEU & WACQUANT, *supra* note 29, at 97.

⁴² John Levi Martin, *What is Field Theory?*, 109 *AM. J. SOCIO.* 1, 26–28.

⁴³ NEIL FLIGSTEIN & DOUG MCADAM, *A THEORY OF FIELDS* 3–4 (2012).

⁴⁴ BOURDIEU & WACQUANT, *supra* note 29, at 100.

political struggle that insulate and inculcate, animate and discipline, motivate and constrain. The concept of fields orients empirical researchers to historical forces and institutional dynamics and draws attention to the particular resources—social, cultural, and material—used by actors in those environments to achieve their goals.

Finally, methods for understanding dark law as a set of relations in specific fields should be grounded in empiricism and, whenever possible, rely on evidence triangulated from various sources. The reorientation of legal analysis to relationships in specific social fields calls for more data and investigation. Relational approaches to the study of law move beyond ordinary language to gather information from those people and institutions most affected by legal rules and enforcement. Dark law provides a relationalist framework for the study of national security lawmaking in weak democracies, which should prove useful to researchers seeking to historicize dynamic relationships between statutory construction, judicial review, and legalistic autocrats.

II. DEMOCRATIC DECLINE AND THE GLOBAL TRANSFORMATION OF NATIONAL SECURITY

After the Cold War, a broad coalition of liberal states promoted open economies and greater multilateral cooperation. Lawmakers revised constitutions and democratic institutions proliferated.⁴⁵ Many legal reforms promoted democratic principles, such as fair elections and basic human rights.⁴⁶ With this global diffusion of democratic norms and the corresponding growth of democratic institution, democracy's progressive triumph appeared secure. Every year between 1975 and 2007, the number of democracies worldwide either held steady or multiplied.⁴⁷

However, this floodtide of democratic reform began to ebb in the last decade.⁴⁸ Mounting evidence now shows democracy in retreat.⁴⁹ Every year

⁴⁵ Kristian Skrede Gleditsch & Michael D. Ward, *Diffusion and the Spread of Democratic Institutions*, in *THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY* 261-302 (Beth A. Simmons, Frank Dobbin & Geoffrey Garrett eds., 2008); Frank Dobbin, Beth Simmons & Geoffrey Garrett, *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 *ANN. REV. SOC.* 449, 450 (2007).

⁴⁶ Larry Diamond & Mark F. Plattner, *Introduction*, in *THE GLOBAL RESURGENCE OF DEMOCRACY* xxi–xxiv (Larry Diamond & Mark F. Plattner eds., 1996)

⁴⁷ Larry Diamond, *Facing Up to the Democratic Recession*, 26 *J. DEMOCRACY* 141, 141 (2015).

⁴⁸ KURLANTZICK, *supra* note 5, at 5–7.

⁴⁹ See YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* 2–3 (2018) (discussing the rise of populism and decline of democracy in countries like the United States, Russia, Turkey, Poland, and Hungary, and predicting that “[m]ore countries may soon follow”); DAVID RUNCIMAN, *HOW DEMOCRACY ENDS* 7–9

since 2007, more countries have experienced decreases in freedom.⁵⁰ Democracy even appears under threat in former stalwarts of the liberal order. From Brexit in the United Kingdom to the rise of populism in Europe to growing white nationalism in the United States, norms and institutions in bedrock democracies have come under fire in recent years. Political scientists and legal scholars are still somewhat divided on whether democratization has stalled in recent years or whether these changes indicate a historic decline.⁵¹ But there is an emerging consensus on the crises of public confidence in democratic governance.⁵² Data shows, for example, that millennials in many well-established constitutional democracies now express weaker approval for democratic values.⁵³ Recent trends also suggest a major shift in people's faithfulness to democratic norms.⁵⁴ On a global scale, failed democratic experiments in Iraq and Afghanistan, uneven transitions after the Arab Spring in many Middle Eastern countries, and military coups and electoral fraud have dampened democratic enthusiasm in transitional states.⁵⁵ A growing number of hybrid democratic regimes also seem to be backsliding, including Venezuela, Turkey, Hungary, Poland, and the Philippines.⁵⁶ Meanwhile, shifting global politics have emboldened leaders in non-democracies, including China and Russia.

(2018) (imagining a gradual decline of democracy by exploring potential risks of coup, catastrophe, or technological takeover).

⁵⁰ Larry Diamond, *Democracy Demotion: How the Freedom Agenda Fell Apart*, 98 FOREIGN AFF. 17, 17 (2019).

⁵¹ See generally Anna Lüthmann & Staffan I. Lindberg, *A Third Wave of Autocratization Is Here: What Is New About It?*, 26 DEMOCRATIZATION 1095 (2019) (providing a summary of autocratization events through the twentieth century to show a decline in democracy); ROGER EATWELL & MATTHEW GOODWIN, NATIONAL POPULISM: THE REVOLT AGAINST LIBERAL DEMOCRACY (2018) (tracing the cause of the rise of anti-politics movements to distrust of government, destruction of communal identity, increasing economic inequality, and changes in the relationship between identity and political brands).

⁵² MOUNK, *supra* note 49, at 3.

⁵³ See, e.g., Foa & Mounk, *supra* note 7, at 5 (“American citizens are not just dissatisfied with the performance of particular governments; they are increasingly critical of liberal democracy itself. Among young Americans polled in 2011, for example, a record high of 24 percent stated that democracy is a ‘bad’ or ‘very bad’ way of running the country—a sharp increase both from prior polls and compared to older respondents.”)

⁵⁴ Larry Diamond, *Breaking Out of the Democratic Slump*, 31 J. DEMOCRACY 36, 37–38 (2020).

⁵⁵ See, e.g., Diamond, *supra* note 47, at 144 (“Since 2000, I count 25 breakdowns of democracy in the world—not only through blatant military or executive coups, but also through subtle and incremental degradations of democratic rights and procedures that finally push a democratic system over the threshold into competitive authoritarianism.”).

⁵⁶ Tom Ginsburg, Aziz Z. Huq & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism*, 85 U. CHI. L. REV. 239, 241 (2018) (“Across a range of different geopolitical contexts, an increasing number of countries can appropriately be characterized as ‘hybrid’ democracies, such as competitive authoritarian regimes and ‘democratorship[s].’”).

Contemporaneous with democracy's decline, disenchanted publics are voting for autocratic leaders as alternatives to traditional political party leaders.⁵⁷ Although such leaders may struggle to consolidate political control, their ascent signals a dangerous illiberal trend, particularly in countries where new leaders deploy law to subvert democratic institutions.⁵⁸ The Law and Justice government in Poland, for example, has challenged the legitimacy and autonomy of the country's constitutional court and also used Polish law to target civil society organizations and opposition groups.⁵⁹ According to a 2019 Freedom House Report:

Of the 23 countries that suffered a negative status change over the past 13 years (moving from Free to Partly Free, or Partly Free to Not Free), almost two-thirds (61 percent) had earned a positive status change after 1988. For example, Hungary, which became Free in 1990, fell back to Partly Free this year after five consecutive years of decline and 13 years without improvement.⁶⁰

While reasons for such declines are manifold, democratic publics worldwide appear more open to autocratic forms of leadership, and evidence suggests a willingness on the part of autocrats to exploit law and judicial deference to achieve both personal and political ends.

The global transformation of national security began decades before 9/11 or the rise of legalistic autocrats.⁶¹ In the 1980s and 1990s, for example, numerous countries enacted counterterrorism measures with vague statutory

⁵⁷ See generally Arch Puddington & Tyler Roylance, *The Freedom House Survey for 2016: The Dual Threat of Populists and Autocrats*, 28 J. DEMOCRACY 105 (2017) (describing an increase in the popularity of populist and nationalist politics); Sergei Guriev & Daniel Treisman, *Informational Autocrats*, 33 J. ECON. PERSP. 100 (2019) (assessing the impact of a twenty-first century trend away from brutal dictatorship and toward nonideological autocrats who are elected but consequently dismantle democratic institutions).

⁵⁸ See Guillermo A. O'Donnell, *The Perpetual Crises of Democracy*, 18 J. DEMOCRACY 5 (2007) (describing an increasing trend of authoritarian rulers using democratic institutions like free elections to legitimize their control).

⁵⁹ Kriszta Kovács & Kim Lane Scheppelle, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union*, 51 COMMUNIST & POST-COMMUNIST STUD. 189, 194–98 (2018).

⁶⁰ *Freedom in the World 2019: Democracy in Retreat*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2019/democracy-retreat> [<https://perma.cc/MT9K-8ZYM>] (last visited Feb. 19, 2021); see also Sarah Repucci, *The Freedom House Survey for 2019: The Leaderless Struggle for Democracy*, 31 J. DEMOCRACY 137, 137 (2020) (stating that “Freedom House found that 2019 was the fourteenth consecutive year of decline in global freedom,” caused in part by leaders’ willingness to disregard institutional safeguards and the rights of minority groups).

⁶¹ See Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333, 1361 (2018) (describing how legal divides in approaches to terrorism emerged from a range of legal authorities and predated 9/11).

definitions.⁶² However, 9/11 accelerated changes in national security policymaking worldwide. Lawmakers increasingly drafted expansive legislation aimed at nebulous security threats. The war on terror gave national policymakers permission to target a broad range of events and actions—from intensifying border security to expanding domestic surveillance to increasing regulation of global financial networks.

Democracy's decline breathed new life into many of the national security laws enacted in the shadow of 9/11.⁶³ In the decade after the 9/11 attacks, most countries in the world passed new laws to address potential threats of terrorism.⁶⁴ Even small island nations with no history of terrorism enacted expansive new counterterrorism legislation.⁶⁵ Consequences of the transformation have been far-reaching, particularly for weak or hybrid democratic states. New laws were decoupled from considerations of violence in some countries. They became less rooted in security realities and more dependent on party officials and political rhetoric. Revised national emergency acts and counterterrorism laws, for example, empowered executives to unilaterally declare national crises and unlocked an array of powers.⁶⁶ Under new legislation, leaders could freeze financial assets of those suspected of criminal violations, mobilize military and national guards, restrict travel, and institute forms of martial law.⁶⁷

⁶² See generally BRUCE HOFFMAN, *INSIDE TERRORISM* (2006) (surveying the evolution of foreign and domestic terrorism in the late twentieth and early twenty-first centuries).

⁶³ WILHELM MIROW, *STRATEGIC CULTURE, SECURITISATION AND THE USE OF FORCE: POST-9/11 SECURITY PRACTICES OF LIBERAL DEMOCRACIES* 3–4 (2016).

⁶⁴ See Scheppele, *supra* note 17, at 442 (“Member states overwhelmingly applauded these efforts – and rapid changes in domestic anti-terror laws followed around the world. While international law famously has compliance problems, such problems seemed to disappear here. All 192 U.N. member states filed at least one report with the Security Council’s Counter-Terrorism Committee (CTC), a subsidiary body that was created to monitor and enforce compliance with Resolution 1373.”).

⁶⁵ See generally Amr Abdellatif Aboulatta (Chair of the U.N. Security Council Counter-Terrorism Committee), *Global Survey of the Implementation of Security Council Resolution 1624 (2005) by Member States*, U.N. Doc S/2016/50, annex (Jan. 18, 2016) (providing a survey of counterterrorism measures enacted by UN Member States).

⁶⁶ Babette E.L. Boliek, *Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers*, 81 *FORDHAM L. REV.* 3339, 3373 (2013) (“Many state emergency statutes do not expressly provide whether the initial, agency emergency determination is judicially reviewable.”).

⁶⁷ J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 *YALE L.J.* 1020, 1024 (2020) (“[T]he concept of national security has transformed from its relatively stable Cold War meaning anchored in the context of interstate conflict. Today, national security has evolved to address a range of threats, including nonstate actors and nonmilitary and nonhuman threats, such as economic crises, cybersecurity, infectious disease, climate change, transnational crime, and corruption, which are often unmoored from interstate rivalries. These developments give rise to the ‘new’ national security: a growing

Changes to counterterrorism legislation provide a salient example of this global transformation of national security. Within three weeks of the 9/11 attacks, the United Nations (UN) Security Council passed Resolution 1373, which required all UN member states to adopt new national measures to combat terrorism.⁶⁸ The resolution promoted domestic criminalization of terrorist offenses, mandated counterterrorism reporting, and developed strict regulation of fundraising activities for suspected terrorism-related organizations.⁶⁹ Within two months, United States President George W. Bush signed the expansive USA PATRIOT Act into law, which authorized an array of state surveillance and border security measures.⁷⁰ Less than a decade later, more than 142 countries worldwide had enacted or revised their counterterrorism laws.⁷¹

Global counterterrorism legislation had national effects too. Laws expanded state authority to detain and prosecute a range of people suspected of terrorism-related offenses by minimizing judicial oversight of investigations and restricting suspects access to legal counsel.⁷² In most countries, for example, new legislation heightened screening procedures for those entering the country, expanded domestic surveillance, increased the ability of state officials to track and freeze financial assets, and narrowed the scope of judicial review in terrorism prosecutions.⁷³ Some countries, including the United States, also created special military courts or sanctioned the indefinite detention of suspected terrorists.⁷⁴ Even the COVID-19

collection of security practices agnostic to the source or nature of a threat, unbounded by time and space, and decentered from any overriding great-power or interstate conflict.”).

⁶⁸ S.C. Res. 1373 (Sept. 28, 2001).

⁶⁹ *Id.*

⁷⁰ USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 34, 42, 49, and 50 U.S.C.).

⁷¹ Data compiled by the author in partnership with the Program on Terrorism and Counterterrorism at Human Rights Watch.

⁷² *In the Name of Security: Counterterrorism Laws Worldwide Since September 11*, HUM. RTS. WATCH (June 29, 2012), <https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11> [<https://perma.cc/FCX6-W3EX>].

⁷³ See generally COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES, *supra* note 16 (providing an assessment of ten national counterterrorism strategies post-9/11); COUNTER-TERRORISM AND THE POST-DEMOCRATIC STATE, *supra* note 16 (describing national and international counter-terrorism measures in the wake of the United States war on terror and their potential impacts on democracy); GLOBAL ANTI-TERRORISM LAW AND POLICY (Victor V. Ramraj, Michael Hor & Kent Roach eds., 2005) (providing a summary of domestic and international responses to terrorism in the twenty-first century).

⁷⁴ See generally GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE (Fionnuala Ní Aoláin & Oren Gross eds., 2013) (describing the creation of military courts as a mechanism to prosecute people suspected of terrorism-related offenses).

pandemic has brought increased attention to the need for robust national security and emergencies laws.⁷⁵

The global transformation of national security has not been restricted to a specific kind of political regime. Both democracies and authoritarian states rewrote penal codes, enacted more stringent immigration statutes, and passed financial regulations that provided authorities greater capacity to monitor and halt financial transactions.⁷⁶ Even countries with minimal histories of political violence embraced wide ranging procedural and substantive legal reforms.

However, new national security laws did not universally restrict civil liberties. Some nations—including Canada, Switzerland, and Scandinavian countries—were able to pass laws without curtailing liberties.⁷⁷ The impact of counterterrorism laws and restrictions on domestic legal rights varied by the type of political regime.⁷⁸ In states with moderate levels of repression, for example, new laws had harmful effects on civil liberties.⁷⁹ But these effects diminished in less repressive countries.⁸⁰ This evidence suggests democratic institutions may help to protect residents from violations of substantive and due process rights even where national lawmakers introduce expansive national security reforms. Law's impact depends on political and juridical relations in specific countries.

National security lawmaking also appears to have decoupled from political violence in many countries. According to Global Terrorism Database (GTD), incidents of terrorism that resulted in fifteen or more casualties peaked in the 1980s.⁸¹ Fewer terrorist attacks occurred in the early 2000s.⁸²

⁷⁵ See, e.g., Benjamin Della Rocca, Samantha Fry, Masha Simonova & Jacques Singer-Emery, *State Emergency Authorities to Address COVID-19*, LAWFARE (May 4, 2020, 3:03 PM), <https://www.lawfareblog.com/state-emergency-authorities-address-covid-19> [<https://perma.cc/7XAQ-YJU7>] (summarizing emergency orders that states may use in response to COVID emergency).

⁷⁶ See generally GLOBAL ANTI-TERRORISM LAW AND POLICY, *supra* note 73 (summarizing the legal solutions employed by nations seeking to increase counterterrorism measures); NATIONAL INSECURITY AND HUMAN RIGHTS: DEMOCRACIES DEBATE COUNTERTERRORISM (Alison Brysk & Gershon Shafir eds., 2007) (identifying best practices for enacting legal counterterrorism measures while also protecting human rights).

⁷⁷ Mariaelisa Epifanio, *Legislative Response to International Terrorism*, 48 J. PEACE RSCH. 399, 403 (2011).

⁷⁸ Eran Shor, Leonardo Baccini, Chi-Ting Tsai, Tai-Ho Lin & Titus C. Chen, *Counterterrorist Legislation and Respect for Civil Liberties: An Inevitable Collision?*, 41 STUD. CONFLICT & TERRORISM 339, 352 (2018).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Global Terrorism Database: Information on More than 200,000 Terrorist Attacks*, START, <http://www.start.umd.edu/gtd/> [<https://perma.cc/EQF6-DQSM>] (last visited Feb. 21, 2021).

⁸² Gary LaFree & Laura Dugan, *Research on Terrorism and Countering Terrorism*, 38 CRIME AND JUST. 413, 458 (2009).

In fact, incidents of terrorism declined globally between 1992 and 2004.⁸³ While terrorism incidents fluctuate per year, global trends in terrorism violence do not correlate with patterns of legal reform between 1970–2011.⁸⁴ Although public concerns about national security increased after 9/11, empirical data suggests that most legislative reforms happened independent of incidents of political violence.⁸⁵ Neither the number of terrorist events nor the number of civilians killed significantly correlates with the enactment of new counterterrorism laws, with one exception: there was a higher likelihood that a law would be passed immediately following an attack that killed more than ten civilians.⁸⁶ Therefore, while counterterrorism lawmakers appear to take advantage of policy windows after deadly attacks, most legislative action on national security is not responsive to levels of political violence. Cross-national data on counterterrorism laws from years 1981 and 2009 also show no direct relationship between new laws and a reduction of terrorist violence.⁸⁷ Global national security lawmaking has become more responsive to politics than to violence.⁸⁸ This global transformation of national security lawmaking has created novel opportunities for legalistic autocrats to consolidate their power.

III. TRENDS IN NATIONAL SECURITY LAWMAKING WORLDWIDE

Three trends have accompanied global decoupling of national security lawmaking from political violence. First, national security laws have incorporated vague statutory language. Second, courts have abdicated their responsibility for judicial review of new national security legislation, often citing political questions or deference to executive power in the realm of national security. And third, legalistic autocrats have used new national

⁸³ Eran Shor, *The Spatial Diffusion of Counterterrorist Legislation, 1970-2011*, 64 Soc. PROBS. 106, 106–07 (2016).

⁸⁴ *Id.* at 123.

⁸⁵ *Id.* at 118.

⁸⁶ *Id.* (“The log of each event with at least ten casualties increases the odds of legislation by about 4 percent. The effect further increases following attacks in which more than 100 civilians had died, with the odds for legislation growing by about 10 percent.”)

⁸⁷ Eran Shor, *Counterterrorist Legislation and Subsequent Terrorism: Does it Work?*, 95 Soc. FORCES 525, 529 (2016) (“[C]ounterterrorist legislation may often be no more than an empty declaration, designed to send the message that the state is indeed doing something to fight terrorist threats.”)

⁸⁸ See Elena Pokalova, *Legislative Responses to Terrorism: What Drives States to Adopt New Counterterrorism Legislation?*, 27 TERRORISM & POL. VIOLENCE 474, 475 (2015) (“[B]efore September 11 the decision to adopt new counterterrorism legislation correlated with the number of terrorist organizations operating in the territory of a state. . . . After September 11, however, . . . the only significant predictors of the decision to adopt new counterterrorism legislation turned out to be the presence of previous counterterrorism legislation and the participation of a state in the War on Terror.”)

security laws to consolidate their power and circumvent constitutional restraints on their actions.

A. *Vagueness*

Vagueness surfaces when lawmakers fail to describe legal concepts with precise statutory language.⁸⁹ It is perhaps the most pernicious form of linguistic indeterminacy.⁹⁰ While some vagueness is inevitable in statutory construction, excessively vague statutes invite faulty interpretations and abuse. For these reasons, judges are typically empowered to narrowly interpret and clarify legal language that does not provide the public with adequate notice of its provisions, or, under void-for-vagueness doctrine, strike down statutes that improperly delegate interpretive authority to law enforcement.⁹¹

Judges often rely on the ordinary meanings of language in legislation and escape vagueness problems.⁹² Courts routinely refuse to consider evidence beyond what judges believe to be the text's plain or ordinary meaning.⁹³ Nevertheless, problems associated with vagueness can occur, even with well-drafted legislation.⁹⁴

Courts generally oppose vagueness on two grounds. First, vague statutes provide insufficient notice to publics about the kinds of conduct regulated under the law.⁹⁵ If language in national security legislation is overly vague, citizens may not be able to decipher which acts are illegal and could accidentally commit national security offenses.⁹⁶ Additionally, if publics do not understand which actions are illegal, they may avoid all actions that could

⁸⁹ Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 516 (1994) (“[P]roblems of vagueness will arise whenever we confront a continuum with terminology that has, or aspires to have, a bivalent logic.”).

⁹⁰ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 32–33 (2012) (explaining that vagueness is often intentional).

⁹¹ Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 294–95 (2020).

⁹² See, e.g., *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (using ordinary meaning to discern legislative purpose behind a preemption statute).

⁹³ See, e.g., *Trump v. Hawaii* 138 S. Ct. 2392, 2412 (2018) (“Given the clarity of the text, we need not consider such extra-textual evidence.”).

⁹⁴ See, e.g., Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1138–39 (2017) (noting that while individual pieces of legislation may be well-drafted and clear, their overlap allows prosecutors to “choose from a large ‘menu’ of criminal charges” and exert undue discretion).

⁹⁵ See, e.g., *Smith v. Goguen*, 415 U.S. 566, 572 (1974) (“[T]he court found that the language failed to provide adequate warning to anyone, contained insufficient guidelines for law enforcement officials, and set juries and courts at large.”).

⁹⁶ See, e.g., *King v. Burwell*, 576 U.S. 473, 501 (2015) (Scalia, J., dissenting) (“Ordinary connotation does not always prevail, but the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct.”).

be construed as illegal under the vague statute.⁹⁷ This also has negative effects on the public because it may stifle legal conduct or generate trepidation among lawful citizens.

Vagueness concerns related to notice can be resolved with recourse to the statutory rule of lenity, which allows judges to resolve vagueness problems in favor of defendants.⁹⁸ However, in the context of national security offenses, courts may place less reliance on the rule of lenity or other defendant-friendly procedural protections.⁹⁹

The second reason that courts generally oppose vagueness is a lack of clear standards for enforcement. Vague statutory language gives wide discretion to law enforcement to investigate and detain individuals who they suspect of national security offenses. This discretion risks arbitrary or discriminatory conduct by police, prosecutors, or juries who may interpret legal provisions based on personal suspicions or bias. Further, vagueness can also blur lines of authority and raise questions about the proper standards for judicial review.¹⁰⁰

There is no single approach to statutory vagueness.¹⁰¹ But, in contrast to statutory ambiguity, which involves divergent meanings generally distinguishable in context, vagueness provides extensive latitude to legalistic autocrats who seek to employ laws for unintended ends. Therefore, judicial deference to vagueness can present serious problems for checks on legalistic autocrats in weak democracies, where courts can be exceptionally deferential to executive authorities.

Statutory vagueness is common in national security legislation. Lawmakers worldwide enacted a range of laws as part of the war against

⁹⁷ See, e.g., *Johnson v. United States*, 576 U.S. 591, 595 (2015) (“Our cases establish that the Government violates [due process] by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.”).

⁹⁸ See, e.g., *United States v. Lanier*, 520 U.S. 259, 266 (1997) (“[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.”); *State v. Pena*, 683 P.2d 744, 748–49 (Ariz. Ct. App. 1983), *aff’d*, 683 P.2d 743 (Ariz. 1984) (“[W]here the statute itself is susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant.”).

⁹⁹ See WADIE E. SAID, *CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS* 1 (2015) (noting “a disturbing incursion on the procedural and substantive rights” generally afforded criminal defendants, “often in the name of national security”).

¹⁰⁰ See Goldsmith, *supra* note 91, at 284–86 (discussing rationales underpinning the void-for-vagueness doctrine, including threats to separation of powers and standards of judicial review).

¹⁰¹ Lawrence M. Solan, *Why It Is So Difficult to Resolve Vagueness in Legal Interpretation*, in *VAGUENESS AND LAW* 231, 234 (Geert Keil & Ralf Poscher eds., 2016) (“[T]here really is no single approach to vagueness that transcends the situation, so even the most committed formalist will be forced to shift from one approach to another.”).

terrorism that expanded law enforcement powers and eased paths to prosecution for people suspected of national security offenses. In some cases, lawmakers likely intended to enact vague statutory language. But vagueness was also a byproduct of legislative hastiness and public pressure to over-criminalize activities connected with terrorism.

National security vagueness problems also reveal inconsistencies in how lawmakers define national security. For example, even after a century of multilateral cooperation on counterterrorism, there is no international definition of terrorism.¹⁰² For years, UN officials labored without success to build consensus on what constitutes terrorism.¹⁰³ Informed by sixteen international legal instruments on terrorism, working definitions continuously circulated through UN committees and other international bodies, but produced no general definition. This failure to reach agreement partly reflects opportunities for strategic indeterminacy in national security laws. Under Chapter VII of the UN Charter, for example, Resolution 1373 mandates cooperation among all member states in combating terrorism, but provides no binding definition of terrorism.¹⁰⁴ States can decipher for themselves what acts of political violence rise to the level of terrorism, and political leaders can use variation in definitions across national security laws to bypass constitutional constraints on their authority.¹⁰⁵

Content coding of national counterterrorism laws worldwide shows frequent vagueness problems in terrorism definitions.¹⁰⁶ Lawmakers in eighty-eight countries, for example, define terrorism as acts that threaten “public order,” but these lawmakers rarely provide guidelines for interpreting the meaning of public order or enumerate specific threats to public order. As

¹⁰² See Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B. C. INT’L & COMP. L. REV. 23, 24 (2006) (“Notwithstanding the great concern about terrorism, it is most often said that no universally (or even widely) accepted definition of terrorism exists at international law.”).

¹⁰³ Jane Boulden & Thomas G. Weiss, *Whither Terrorism and the United Nations?*, in *TERRORISM AND THE UN: BEFORE AND AFTER SEPTEMBER 11*, at 3, 4 (Jane Boulden & Thomas G. Weiss eds., 2004).

¹⁰⁴ S.C. Res. 1373 (Sept. 28, 2001).

¹⁰⁵ For an exploration of the undefined nature of the term “terrorism,” see generally Donald Black, *The Geometry of Terrorism*, 22 SOCIO. THEORY 14 (2004); Charles Tilly, *Terror, Terrorism, Terrorists*, 22 SOCIO. THEORY 5 (2004); LISA STAMPNITZKY, *DISCIPLINING TERROR: HOW EXPERTS INVENTED “TERRORISM”* (2013).

¹⁰⁶ In order to assess the substantive content of the counterterrorism laws, the author coded legislative texts of the archived counterterrorism laws with a focus on seven categories. Countries were the primary unit of analysis for the content coding. The seven categories included: 1) Definitions of terrorism; 2) Definitions of terrorist organizations; 3) Prohibitions on material support for terrorism; 4) Limitations on speech that incites, legitimates, or lends support to terrorism; 5) Expanded police powers; 6) Procedures for administrative detention; and 7) The imposition of heightened penalties for terrorism-related offenses.

a result, officials have read counterterrorism laws to prohibit a range of activities—from blocking traffic during public demonstrations to posting information about political protests on social media. Similarly, counterterrorism laws in at least forty states ban acts that cause “public disruptions,” but again few laws define with any specificity those acts which meet the legal threshold for a public disruption. Legislative provisions in at least thirty-six countries exclude any requirement that acts of terrorism cause terror or fear, which jettisons the conceptual distinction between terrorism and other forms of violence.¹⁰⁷ Such ill-defined definitions of terrorism lend themselves to expansive interpretations by state authorities.¹⁰⁸ Ten countries have even enacted counterterrorism laws that lack any definition of terrorism.

Table 1: Differences in Legal Definitions of Terrorism After 9/11, (N=142)¹⁰⁹

	Number of Countries		Number of Countries
Define terrorism	132	No terrorism definition	10
Include harm to property	79	Do not include harm to property	63
Include harm to public order	88	Do not include harm to public order	54
Prohibits public disruptions	40	Does not prohibit public disruptions	102
References ideological motivations	39	No references to ideological motivations	103
Reference fear or terror	108	Does not reference fear or terror	36
Exempts national liberation movements	2	Does not exempt national liberation movements	140
Exempts dissent or political advocacy	15	Does not exempt dissent or political advocacy	127

¹⁰⁷ See Jeff Goodwin, *What Must We Explain to Explain Terrorism?*, 3 SOC. MOVEMENT STUD. 259, 259 (2004) (reviewing JESSICA STERN, *TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL* (2003)) (“Terrorism . . . is but one type of political violence.”).

¹⁰⁸ See, e.g., Noah Bialostozky, *The Misuse of Terrorism Prosecution in Chile: The Need for Discrete Consideration of Minority and Indigenous Group Treatment in Rule of Law Analyses*, 6 NW. U. J. INT’L HUM. RTS. 81, 81 (2007) (“Despite significant progress in its transition to democracy, the prosecution of Mapuche under the Prevention of Terrorism Act (‘Terrorism Act’), for acts not internationally considered to be terrorism, has caused significant erosion of rule of law principles in Chile.”).

¹⁰⁹ Counts based on coded cross-sectional data on counterterrorism laws worldwide in 2009.

Hong Kong's new security law offers a recent example of statutory vagueness in national security legislation.¹¹⁰ The law, which was enacted before it was made public, criminalizes a broad range of ill-defined conduct, including breaking away from the country (secession), undermining the power or authority of the central government (subversion), using violence or intimidation against people (terrorism), and colluding with foreign or external forces.¹¹¹ Under the law, communist party officials in Beijing have authority to interpret the scope of the law and oversee a special national security commission to monitor its enforcement. Trials may be heard behind closed doors and people suspected of violating provisions of the law can be wiretapped and surveilled. Even damage to public transit may be deemed an act of terrorism and punished by life in prison under the legislation. Defendants can be forced to stand trial and be sentenced in mainland Chinese courts. The legislation also authorizes prosecution of nonresidents of Hong Kong, including foreigners who support democracy and independence for Hong Kong.

Hong Kong police have arrested dozens of people under the new national security law, including pro-democracy media magnate Jimmy Lai.¹¹² "In one swoop, the authorities rounded up not only some of the most aggressive critics of the Hong Kong government but also little-known figures who had campaigned on far less political issues," reported journalists at the *New York Times*.¹¹³ The new law has effectively silenced pro-democracy advocates and barred pro-democracy candidates from seeking elected office.¹¹⁴

Hong Kong's national security law evidences the danger posed by indefinite statutory language. Vagueness in national security law provides legalistic autocrats opportunities to sidestep limits on their authority. Absent

¹¹⁰ Javier C. Hernández, *Harsh Penalties, Vaguely Defined Crimes: Hong Kong's Security Law Explained*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/06/30/world/asia/hong-kong-security-law-explain.html> [<https://perma.cc/TH2C-SF6P>].

¹¹¹ *English Translation of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*, XINHUANET (July 1, 2020, 12:50 AM), http://www.xinhuanet.com/english/2020-07/01/c_139178753.htm [<https://perma.cc/ACW9-4TKL>].

¹¹² Austin Ramzy & Tiffany May, *Hong Kong Arrests Jimmy Lai, Media Mogul, Under National Security Law*, N.Y. TIMES (Dec. 3, 2020), <https://www.nytimes.com/2020/08/09/world/asia/hong-kong-arrests-lai-national-security-law.html> [<https://perma.cc/6JR2-HGYX>].

¹¹³ Vivian Wang, Austin Ramzy & Tiffany May, *With Mass Arrests, Beijing Exerts an Increasingly Heavy Hand in Hong Kong*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2021/01/06/world/asia/china-hong-kong-arrests.html> [<https://perma.cc/K7M7-6SMV>].

¹¹⁴ See Austin Ramzy, Elaine Yu & Tiffany May, *Hong Kong Is Keeping Pro-Democracy Candidates Out of Its Election*, N.Y. TIMES (July 29, 2020), <https://www.nytimes.com/2020/07/29/world/asia/hong-kong-arrests-security-law.html> [<https://perma.cc/FK25-WBLM>] ("[T]he city's authorities have taken aggressive steps against the pro-democracy opposition. Officials on Thursday barred 12 candidates, including well-known pro-democracy figures, from the September legislative election.").

meaningful judicial review, vague definitions of national security offenses grant leaders virtually unbridled power to selectively investigate, detain, prosecute, and imprison disfavored groups.

B. Judicial Deference

Judicial review is an important safeguard of democratic principles and institutions for several reasons.¹¹⁵ First, judges invalidate legislation that on its face violates constitutional, international, or customary law.¹¹⁶ Such constitutional review imposes constraints on policymakers based on existing doctrine and legal standards and also delineates the outer boundaries of legitimate policymaking activity. Legal decisions establish a record of judicial reasoning and legal precedent that acts as a counterweight to overzealous lawmaking.

Second, judges strike down, clarify, or revise vague statutory constructions that fail to articulate with specificity the kinds of conduct to be regulated, prohibited, or punished by legislators. Lawmakers often hastily enact laws during crises that endure long after emergencies end.¹¹⁷ By reviewing national security statutes, courts can temper or eliminate unconstitutional effects and maintain rule of law.

Finally, judicial review gives recourse to minority interests that may otherwise be trampled by the tyranny of the majority. Judicial review can aid in the defense of marginalized group rights and may induce politics of compromise and nonviolence. Judicial institutions often are more insulated from political pressures due to pre-established periods for judicial appointment or life tenure and, therefore, are in a stronger position to make unpopular challenges to state power.¹¹⁸

¹¹⁵ See Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1762 n.31, 1767 n.67 (2015) (detailing the independent judiciary's power of judicial review of other government branches).

¹¹⁶ Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 182 (2020).

¹¹⁷ David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2566 (2003) ("Considered over time, judicial review of emergency and national-security measures can and has established important constraints on the exercise of emergency powers and has restricted the scope of what is acceptable in future emergencies."); Wiley & Vladeck, *supra* note 116, at 182 ("[T]he suspension principle is inextricably linked with the idea that a crisis is of finite—and brief—duration. To that end, the principle is ill-suited for long-term and open-ended emergencies like the one in which we currently find ourselves.").

¹¹⁸ For a review of the judiciary's ability to check the other branches of government, see GEOFFREY R. STONE, *WAR AND LIBERTY: AN AMERICAN DILEMMA: 1790 TO THE PRESENT* (2007); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350 (2006); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994);

In these ways, judicial review seeks to preserve democracy's structural integrity as a system of governance and maintains balance of powers between branches of government. Independent courts help to defend existing rights and check autocratic impulses.

However, courts sometimes are unable to restrain state power, particularly in times of emergency.¹¹⁹ David Cole, for example, identifies four reasons judicial review of national security may falter.¹²⁰ First, judges, as government officials, are likely to identify with executive national security interests. When judges review national security cases, they are often highly deferential to executive policy decisions in their holdings.¹²¹ Second, the evaluation of national security, especially during crises and without access to classified information, is very difficult and tends to require judges to balance liberty interests and constitutional rights. In many instances, the mere mention of a national security claim may trigger a distinct set of deferential judicial dispositions. For example, "courts have declined to reach the merits of

Stephen I. Vladeck, *The Unreviewable Executive: Kiyemba, Maqaleh, and the Obama Administration*, 26 CONST. COMMENT. 603 (2010).

¹¹⁹ See generally ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007) [hereinafter POSNER & VERMEULE, *TERROR IN THE BALANCE*] (describing periods of court deference to the legislative branch in times of emergency); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010) [hereinafter POSNER & VERMEULE, *THE EXECUTIVE UNBOUND*] (tracing the rise of the strong executive as characteristic of the modern era); Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422 (2012) (illustrating judicial capacity constraints impacting judicial deference toward political processes); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003) (illustrating the judiciary's deferential approach in reviewing governmental actions and decisions during states of emergency); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, WIS. L. REV. 273 (2003) (exploring judicial behavior during times of crisis, when security needs are sometimes overestimated at the expense of civil liberties).

¹²⁰ Cole, *supra* note 117, at 2570–71.

¹²¹ See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 135 (2007) (analyzing the Supreme Court's decisions post-9/11 and positing that "while the government's losses in the Supreme Court made front-page news, the decisions were really little more than slaps on the wrist" because "[c]ontrary to the Court's civil liberties rhetoric, it did not at that time require the President to alter many of his actions."); Gross, *supra* note 119, at 1060–61 (recounting Chief Justice Chase's view in *Ex parte Milligan* that the government's "[p]owers expanded" and citizens' "rights contracted . . . in times of crisis" and that deference to the government was simply "the price to be paid by society if it were to survive [a] crisis and retain its identity and independence"); Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 125 (2011) (illustrating the Supreme Court's unwillingness "to engage the substance of counterterrorism policies"); Vladeck, *supra* note 118, at 608 (detailing the Supreme Court's tacit agreement (by virtue of denying certiorari) with the Obama administration's argument that the matters disputed in *Kiyemba II* were "best left to the discretion of the political branches in general, and to the Executive in particular").

almost all of the cases challenging executive policies on renditions, detainee treatment and transfers, legal targeting, and warrantless wiretapping.¹²² Third, judicial rulings against executives can create constitutional crises which threaten the legitimacy of the judiciary. Therefore, judicial decisions have tended to skirt substantive issues in favor of procedural critiques of legal decision-making.¹²³ And finally, no judge wants to be responsible for the next attack. A judicial ruling limiting state action may result in serious costs to national security or human life. Judges will uphold executive orders and other policies more readily in light of these factors and deference becomes a mainstay of national security judicial review.¹²⁴

Debates on the scope of judicial review are longstanding.¹²⁵ Under the right conditions, courts undeniably strengthen besieged constitutional democracies by protecting vulnerable groups against political repression.¹²⁶ But judicial review has limitations, particularly during times of crises.¹²⁷ When politics and national security threats depart from ordinary judicial review, scholars have documented pronounced judicial deference to state authorities.¹²⁸ Judicial deference may be appropriate at times. Eric Posner and Adrian Vermeule, for example, have argued that in times of emergency the

¹²² Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 *FORDHAM L. REV.* 827, 829 (2013).

¹²³ *Id.* at 866, 896.

¹²⁴ *See id.* at 855 (“Where the executive generally receives a broad degree of deference, courts will be willing to uphold a wider range of executive policy choices.”).

¹²⁵ *See generally* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *ADMIN. L. REV.* 363 (1986) (undergoing an examination of “court efforts to control agency action and the basic principles of law that govern judicial review of agency action”); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 *STAN. L. REV.* 1 (2000) (providing a detailed explanation of “an overlooked tension between judicial deference to administrative agencies under modern administrative law and the judiciary’s original, influential role in our constitutional design”).

¹²⁶ Samuel Issacharoff, *Fragile Democracies*, 120 *HARV. L. REV.* 1405, 1454 (2007) (“Independent judicial review takes on particular significance in parliamentary systems. There is an ever-present risk in democratic systems that the claimed exigencies necessitating the use of emergency powers, including the power to suppress antagonistic political speech, will become the rule that swallows the exception.”).

¹²⁷ POSNER & VERMEULE, *THE EXECUTIVE UNBOUND*, *supra* note 119, at 33–34.

¹²⁸ Robert M. Chesney, *National Security Fact Deference*, 95 *VA. L. REV.* 1361, 1366–85 (2009); Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 *VA. L. REV.* 765, 776–86 (2016); *see, e.g.*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 329 (1936) (“We deem it unnecessary to consider . . . the several clauses which are said to evidence the unconstitutionality of the Joint Resolution as involving an unlawful delegation of legislative power. It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the re-establishment of peace in the affected countries . . .”).

executive's ability to act swiftly and decisively is both a normative good and a political inevitability.¹²⁹ Other arguments in favor of judicial deference in national security cases involve claims to executive privilege, state secrecy, or judicial abstention from political questions.

Legal black holes and legal grey holes pose yet other problems for judicial review.¹³⁰ Black holes are lawless voids carved out through legislation usually during states of emergency. In a legal black hole, law is totally suspended. Perhaps the most notorious example is the detention of enemy combatants at Guantánamo Bay, Cuba, where United States government officials held detainees in the war on terror and claimed to operate beyond any legal jurisdiction. Such legal voids permit authorities to operate without legal restriction. Along similar lines, legal grey holes are situations where legal restraints exist but judicial review remains too weak to stay state actions.¹³¹ Grey holes rely on judicial abdication or cursory judicial review to expand enforcement discretion where law would otherwise govern executive action.¹³² In both instances, robust judicial review may be required to reestablish substantive constitutional rights.¹³³

Judicial review also falters where judges refuse to scrutinize evidence of mismatch between state motivations and legal justifications. This problem was on display in *Trump v. Hawaii*.¹³⁴ There, the United States Supreme Court applied only rational basis review to decide the legality of the Trump administration's travel bans restricting immigration to the United States by

¹²⁹ POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 119, at 13–15. *See generally* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009) (arguing that administrative law inevitably includes legal black and grey holes).

¹³⁰ DYZENHAUS, *supra* note 21, at 2–3.

¹³¹ *Id.*

¹³² David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2018 (2006) (“A grey hole is a legal space in which there are some legal constraints on executive action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit government to do as it pleases.”).

¹³³ Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029, 1033 (2015) (“National security is becoming less an exceptional zone of limited or nonexistent legal protection and instead more like the domestic sphere where robust judicial review provides significant protections from government overreaching.”).

¹³⁴ 138 S. Ct. 2392, 2402 (2018) (“Plaintiffs’ extrinsic evidence may be considered, but the policy will be upheld so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”); *see also* Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J.F. 641, 650 (2019) (“[C]onstitutional protections can be put on hold if the government asserts a remotely plausible claim of military necessity, and the ugly real motivations for a government policy can be swept under the rug.”).

citizens of eight countries.¹³⁵ The Court refused to evaluate whether the action arose from unconstitutional motives on the part of the administrative officials because of executive claims that the case involved national security.¹³⁶ Although all nine justices expressed misgivings about the administration's purported policy rationales, a majority nonetheless deferred to the President and cast aside any constitutional considerations of well-documented racial and religious animus. They upheld the travel bans because it was not impossible to find a relationship between the bans and legitimate state interests.¹³⁷ Due to the administration's national security claims, the Court's majority doubled down on deference to executive power, even when the travel bans, if reviewed, might have been found to violate constitutional law. Justice Kennedy penned a concurrence in which he argued that "the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise."¹³⁸ Justice Kennedy, in his farewell opinion before leaving the Court, defended the promise of constitutional principles and at the same time refused to consider well-founded allegations of unconstitutionality.¹³⁹ Federal courts are not alone in showing such extreme deference in judicial review of national security.¹⁴⁰

Deference to considered professional judgments has long formed the backbone of national security review.¹⁴¹ Judges, who often lack bureaucratic support, resources, information, and experience in national security, are understandably reluctant to second-guess state authorities with greater access to real-time intelligence on security threats. But such deference often is premised on beliefs in well-reasoned and evidence-based decision-making.¹⁴²

¹³⁵ *Trump*, 138 S. Ct. at 2420 (deciding that, under rational basis review, the Court "will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds").

¹³⁶ *Id.* at 2421.

¹³⁷ *Id.* at 2402 (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("On the few occasions where the Court has struck down a policy as illegitimate under rational basis scrutiny, a common thread has been that the laws at issue were 'divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests.'").

¹³⁸ *Id.* at 2424 (Kennedy, J., concurring).

¹³⁹ *See id.* (arguing that "officials are [not] free to disregard the Constitution and the rights it proclaims and protects" even when their actions are not subject to judicial review).

¹⁴⁰ *See, e.g., Heath, supra* note 67, at 1066 ("[O]utside of a small set of patently abusive security measures, the new national security hinders the ability of tribunals to exercise meaningful review while also maintaining a high degree of deference.")

¹⁴¹ *See, e.g., Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (giving "great deference to the professional judgment of military authorities"); *see also Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (quoting *Goldman* 475 U.S. at 507 for the same proposition).

¹⁴² *See Shirin Sinnar, Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 995 (2018) ("In the Trump era, the President's open animus towards racial

Courts stand down to democratically elected state authorities, at least in part, because judges presume state leaders are seeking to make decisions in the public interest.¹⁴³ Where these presumptions come into question, particularly in regimes flirting with autocratic rule, is when overly deferential courts effectively transform statutory vagueness in national security legislation into state power.¹⁴⁴

Bureaucratic norms, internal opposition from career civil servants, and administrative investigations also constrain autocratic power, even absent juridical review.¹⁴⁵ However, courts are presumed to be sentinels of

and religious minority groups and erratic decision-making will lead some judges, especially in the lower courts, to question executive national security claims more readily than in the past. Yet in cases where judges do not feel able to resolve disputes on the public record, concerns over the disclosure or management of national security information will persist.”).

¹⁴³ See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 797–98 (2008) (“Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.”).

¹⁴⁴ Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1686–87 (2015) (stating that executives may rely upon [1] judicial review as a means of consolidating power; [2] defamation law to induce self-censorship; [3] electoral laws as a means of disenfranchisement; [4] non-political crimes against political opponents; [5] internationally-backed institutions against dissidents; and [6] the abuse of democratic and rule-of-law rhetoric); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 213 (2013) (“[C]onstitutional change can be used to either dismantle or pack institutions serving as strongholds for the opposition. The weakening or removal of opposition figures is instrumental to the construction of competitive authoritarian regimes because it gives incumbents a greatly increased power to rework the state to their advantage.”); Ginsburg, Huq & Versteeg, *supra* note 56, at 241 (“Across a range of different geopolitical contexts, an increasing number of countries can appropriately be characterized as ‘hybrid’ democracies, such as competitive authoritarian regimes and ‘democratorship[s].’”).

¹⁴⁵ See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317–19 (2006) (arguing that bureaucracy is one important aspect of separation of powers); Shirin Sinnar, *Protecting Rights from Within?: Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1029–30 (2013) (“[L]egal scholars also point to executive oversight institutions as necessary to mitigate inadequate judicial review of state national security activities. . . . Congress created [Inspectors General], which now exist in over fifty federal agencies, for the explicit purpose of monitoring agencies.”); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1562 (2007) (“This Article . . . seeks to elevate an essential source of constraint that often is underappreciated and underestimated: legal advisors within the executive branch.”); Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 677 (2005) (“The institutional literature typically projects confidence that the [Solicitor General] and [Office of Legal Counsel] . . . scrupulously protect the Constitution against executive officials distorting the law to advance personal, partisan, or institutionally parochial agendas.”).

the rule of law in liberal democracies and serve as bulwarks to safeguard citizens' rights and freedoms against state encroachment. Judges relinquish this role in national security cases in an effort to protect the public.¹⁴⁶ However, in the present era, where national security legislation often decouples from evidence-based assessments of violence, judges should not always presume that democratically elected leaders will act in good faith or for the public good. Judicial officials have a greater responsibility for thorough judicial review, particularly in countries with legalistic autocrats.

C. Legalistic Autocrats

There has been a resurgence of autocratic leadership amid the current democratic recession.¹⁴⁷ Many autocrats are using law as a means to legitimate their actions and authority. Legalistic autocrats have eroded democratic norms and cowed political opponents in a growing number of states.¹⁴⁸

This rise of legalistic autocrats who rely on national security laws to obscure unlawful practices reflects previous democratic gains. After the Cold War, ideas about human rights and democracy diffused around the globe.¹⁴⁹ The proliferation of liberal values raised costs for political leaders who openly engaged in direct forms of political repression. Bilateral and multilateral sanctions regimes, for example, began to monitor democratic progress and punish heads of state who exercised extra-legal authority.¹⁵⁰ As a result, would-be autocrats in weak democratic states had to search for more legitimate means to consolidate political authority.¹⁵¹ It became harder to suppress political opposition with outright reliance on brute force or state violence.¹⁵²

National security lawmaking emerged as a salient resource for autocrats seeking political cover. According to Aziz Huq and Tom Ginsburg, "hybrid regimes" have become more common in recent decades.¹⁵³

¹⁴⁶ See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (providing that "respect for the Government's conclusions is appropriate" because "national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.").

¹⁴⁷ Diamond, *supra* note 47, at 151–52.

¹⁴⁸ Attila Ágh, for example, has traced Hungary's democratic backsliding in recent decades. Attila Ágh, *Decline of Democracy in East-Central Europe: The Last Decade as the Lost Decade in Democratization*, 7 J. COMP. POL. 4 (2014).

¹⁴⁹ John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World Society and the Nation-State*, 103 AM. J. SOCIO. 144, 174 (1997).

¹⁵⁰ David Landau, *Political Support and Structural Constitutional Law*, 67 ALA. L. REV. 1069, 1093 (2016).

¹⁵¹ Scheppele, *supra* note 15, 188–233.

¹⁵² Kim Lane Scheppele, *Not Your Father's Authoritarianism: The Creation of the "Frankenstate,"* EUR. POL. & SOC'Y (Am. Pol. Sci. Ass'n, Wash., D.C.), Winter 2013, at 5–7.

¹⁵³ Huq & Ginsburg, *supra* note 8, at 94–95.

Democratic declines, they argue, have followed two distinct paths: authoritarian reversion and constitutional retrogression.¹⁵⁴ Huq and Ginsburg predict that the likelihood of authoritarian reversion—the near total collapse of democratic institutions and norms—presents less of a threat to democracies than the risk of constitutional retrogression—the incremental erosion of fair elections, political speech, and law.¹⁵⁵ If this is correct, national security law presents opportunities for legalistic autocrats to legitimate undemocratic state power and expand state enforcement authority.¹⁵⁶

This deepening global crisis of governance increases the danger that heads of state will misuse national security law. Increased enforcement of counterterrorism laws worldwide illustrates this risk and its relationship with democracy. In less than a decade, law enforcement agencies arrested nearly 120,000 individuals for terrorism-related offenses worldwide.¹⁵⁷ Nearly one out of three of these arrests resulted in a conviction, more than 35,000 worldwide.¹⁵⁸ However, counterterrorism enforcement was remarkably uneven across nations.¹⁵⁹

¹⁵⁴ *Id.* at 92.

¹⁵⁵ *Id.* at 168.

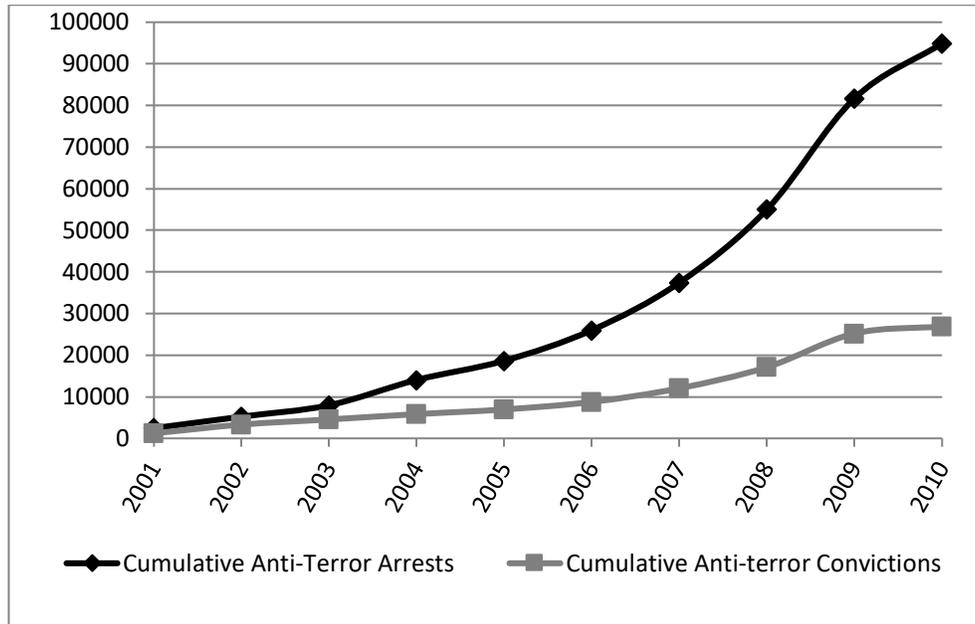
¹⁵⁶ See Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281, 283 (2014) (“Law and courts are frequently deployed to (a) exercise state power vis-à-vis opposition, (b) advance administrative discipline within state institutions, (c) maintain cohesion among various factions within the ruling coalition, (d) facilitate market transitions, (e) contain majoritarian institutions through authoritarian enclaves, (f) delegate controversial reforms, and (g) bolster regime legitimacy.”).

¹⁵⁷ Martha Mendoza, Christopher Torchia, Christopher Bodeen, Paul Schemm & Ciaran Giles, *AP Analysis: 35,000 Worldwide Convicted as Terrorists Since 9/11*, MERCURY NEWS (Aug. 13, 2016, 1:36 PM), <https://www.mercurynews.com/2011/09/05/ap-analysis-35000-worldwide-convicted-as-terrorists-since-911/> [<https://perma.cc/JAR2-DGPL>].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

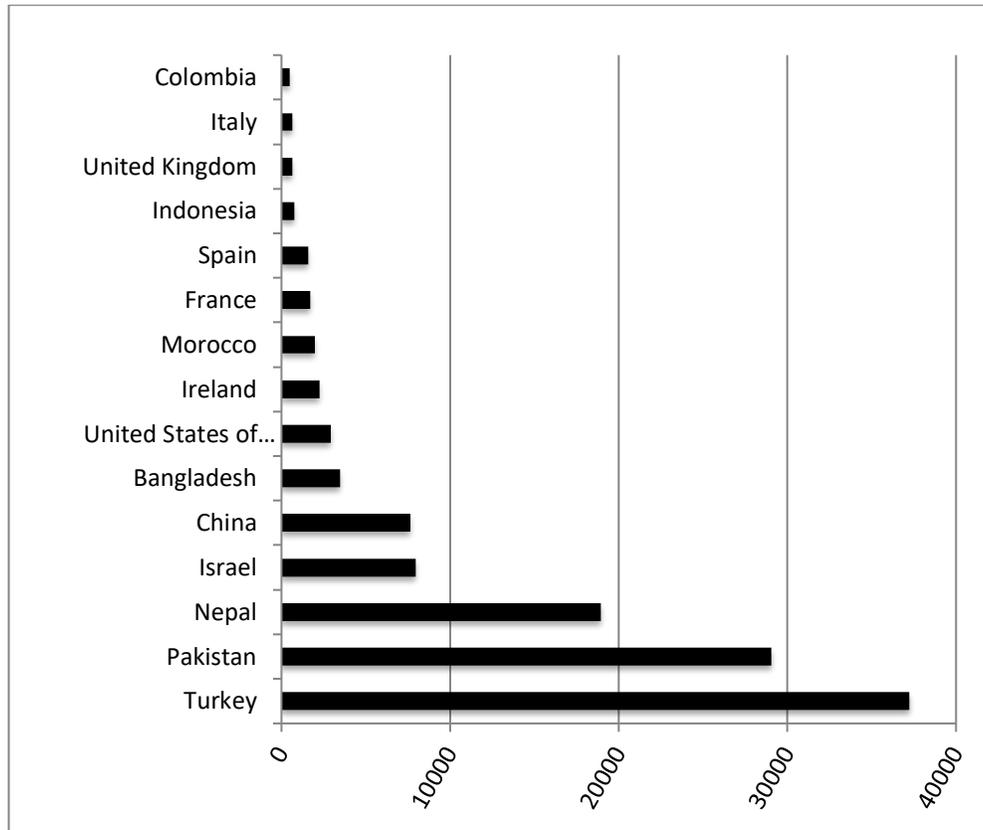
Graph 1: Cumulative Arrests and Convictions Under Counterterrorism Laws Worldwide, 2001–2010 (AP).



Data collected by Associated Press (AP) in 2011 shows that counterterrorism arrests and convictions increased in the decade after 9/11.¹⁶⁰ However, annual fluctuations suggest an irregular pattern of counterterrorism practice worldwide. During 2001–2003, the number of arrests hovered between 2,500 and 3,000 arrests per year worldwide. This figure more than doubled in 2004, to over 6,000 arrests. After a slight decline in 2005, the numbers climb again to more than 7,300 arrests in 2006. In 2007 and 2008, there is another increase to over 11,000 and 17,000 arrests, respectively. The trend continues into 2009, when countries in the sample reported more than 26,000 arrests. The numbers of arrests, however, vary widely by country.

¹⁶⁰ *Id.* The Associated Press team coordinated freedom-of-information act requests in 105 countries with freedom-of-information laws and obtained data for 64 countries. *Id.* For information on sources of data analyzed in this Part, see *infra* methods app. A.

Graph 2: Cumulative Number of Counterterrorism Arrests, 2001–2011 (AP)



Three countries—Nepal, Pakistan, and Turkey—reported more than 85,000 arrests. Eight additional countries reported more than 1,000 arrests during this same period and eight more reported between 100 and 1,000 arrests. The remaining states reported fewer than 100 arrests on terrorism-related charges. Notably, more than a quarter of the countries did not report a single arrest.¹⁶¹ Pervasive statutory vagueness in counterterrorism law provided opportunities for abuse to many state leaders, but data shows enforcement agencies in a select group of weak democratic or autocratic countries were disproportionately responsible for the vast number of arrests and convictions under these laws.

¹⁶¹ 18 countries (N=64) reported no arrests under their anti-terrorism laws during this period.

Table 2: Cumulative Number of Counterterrorism Arrests and Convictions by Country, 2001–2010, (AP)

Country	Arrests	Country	Convictions
Turkey	37242	Turkey	12897
Pakistan	29050	**China	7776
Nepal	18934	Bangladesh	3466
Israel	7971	*Pakistan	2905
**China	7649	United States	2568
Bangladesh	3466	Tunisia	1123
United States	2934	Peru	864
Ireland	2264	Spain	839
Morocco	2000	Indonesia	684
France	1687	Italy	460
Spain	1594	Ireland	357
Indonesia	765	India	209
United Kingdom	660	France	187
Italy	632	Azerbaijan	175
Colombia	493	United Kingdom	126
India	485	Thailand	56
Azerbaijan	199	Germany	52
Macedonia	175	Belgium	39
Chile	108	Montenegro	35
Mexico	86	Netherlands	35
Germany	77	Mexico	29
Uganda	75	Ukraine	27
Belgium	70	Australia	26
Netherlands	67	Denmark	25
Montenegro	45	Macedonia	19
Australia	35	South Africa	18
Portugal	35	Hungary	14
Denmark	27	Canada	13
Georgia	23	Greece	13
Greece	23	Serbia	12
Kyrgyzstan	23	Chile	10
Austria	22	Uganda	10
Romania	19	Costa Rica	9
Hungary	17	Sweden	9

New Zealand	17	Lithuania	8
Serbia	14	Georgia	7
Guatemala	13	Portugal	7
Norway	13	Finland	3
Sweden	12	Austria	2
Slovakia	7	Argentina	1
Bulgaria	5	Croatia	1
Cyprus	3	Guatemala	1
Poland	3	Afghanistan	0
Slovenia	3	Albania	0
Argentina	1	Algeria	0
Lithuania	1	Andorra	0
Armenia	0	Angola	0

* The number of convictions for Pakistan was calculated based on a reported ten percent conviction rate for the total number of individuals arrested.

** The reported number of arrests in China is lower than the reported number of convictions in China, which suggests some error or misrepresentation in the data.

Further, more than half of all convictions for terrorism-related offenses occurred in just two countries, Turkey and China. The top six enforcement regimes also account for nearly ninety percent of the total number of convictions.¹⁶² To put that in perspective, the total number of convictions in Turkey and China was more than four times the combined number of counterterrorism convictions in all reporting countries ranked below sixth.¹⁶³ These stark differences illustrate how autocrats increasingly rely on national security laws.

Disparities in the number of arrests and convictions also suggest the importance of country-level factors in the enforcement of national security law. Relationships between lawmaking, courts, and politics matter a great deal to whether regimes use national security law to investigate, detain, and punish suspects. Statistical correlations between enforcement data and various country-level indicators underscore significant relationships between national security laws, judicial review, and politics.

For example, country-level data suggests that democratic norms and institutions lessen national security enforcement. Statistical regression models show relationships between counterterrorism practices and other country-level measures of terrorism, democracy, development, rule of law,

¹⁶² Six countries account for 30,735 of the 35,117 reported convictions worldwide.

¹⁶³ There were 4,382 convictions under counterterrorism laws excluding the top six countries. Turkey and China accounted for 20,673 convictions.

and organizational associations.¹⁶⁴ Controlling for region and population, the model below reveals a significant statistical relationship between counterterrorism arrests and two variables: 1) the number of fatal incidents of terrorism and 2) the level of democracy.¹⁶⁵ The correlation between arrests and previous fatal attacks in a country suggests that while counterterrorism lawmaking has decoupled from evidence-based assessments of political violence in many countries, terrorism continues to impact domestic counterterrorism enforcement. Not surprisingly, countries with more incidents of terrorism arrest more people on terrorism-related offenses than countries with fewer terrorist attacks. However, the model finds no correlation between fatal acts of terrorism and terrorism convictions. The use of administrative detention to hold suspects without charges or otherwise deny suspects judicial process could explain this lower rate for terrorism convictions.

¹⁶⁴ For a detailed description of the independent variables, see *infra*, methods app. A. The country-level variables were compiled from a number of well-known sources, including the United Nations Development Program (UNDP), the World Bank (WB), the Union of International Associations (UIA), the Economist Intelligence Unit (EIU), and the Global Terrorism Database (GTD).

¹⁶⁵ The threshold for statistical significance is a p-value below .05.

Table 3: Regression of Counterterrorism Arrests and Convictions, 2001–2010, (AP Data).

VARIABLES	Arrests	Convictions
Region (UNDP)	54.1 (430)	-1.54 (116)
Fatal Incidents of Terrorism (GTD)	3.30* (1.33)	0.37 (0.48)
Democracy Index (EIU)	-3,600* (1,386)	-1,002* (387)
Human Development Index (UNDP)	-11,639 (14,933)	1,022 (5,262)
Rule of Law Estimate (WB)	3,820 (2,670)	614 (771)
NGOs (UIA)	0.45 (0.89)	-0.021 (0.33)
IGOs (UIA)	1.23 (7.15)	1.41 (2.62)
Population (UNDP)	-0.0056 (0.0047)	0.0019 (0.0016)
Constant	30,655* (12,986)	5,594 (4,495)
Observations	46	41
R-squared	0.333	0.326
Standard errors in parentheses		
*** p<0.001, ** p<0.01, * p<0.05		

Democratic states are also significantly less likely to arrest and convict suspects, even after controlling for region, population, level of development, rule of law, and associational ties to global society. Counterterrorism enforcement decreases as measures of democracy increase. Controlling again for region and population, the regression model probes the statistical relationships between democracy and counterterrorism arrests and convictions using the Economist Intelligence Unit (EIU) Democracy Index, which comprises data on five spheres of state activity: civil liberties, electoral process and pluralism, government functions, political participation, and political culture.

Table 4: OLS Regression of Anti-terrorism Arrests and Convictions, 2001–2010 (AP).

VARIABLES	Arrests	Convictions
Region (UNDP)	295 (435)	-4.64 (103)
Fatal Incidents of Terrorism (GTD)	2.56* (1.25)	0.28 (0.36)
Civil Liberties (EIU)	-3,972*** (1,070)	-2,298*** (381)
Electoral Process and Pluralism (EIU)	605 (1,007)	736* (300)
Functioning of Government (EIU)	1,654 (1,007)	450 (298)
Political Participation (EIU)	-236 (947)	535 (284)
Democratic Political Culture (EIU)	-620 (1,274)	-935* (423)
Human Development Index (UNDP)	-16,786 (16,624)	-2,424 (4,534)
Rule of Law Estimate (WB)	1,128 (2,990)	1,085 (711)
NGOs (UIA)	0.28 (0.87)	0.19 (0.25)
IGOs (UIA)	2.97 (6.48)	0.40 (1.91)
Population (UNDP)	-0.0097* (0.0043)	-0.000098 (0.0013)
Constant	30,403 (16,340)	13,576** (4,144)
Observations	46	41
R-squared	0.555	0.710
Standard errors in parentheses		
*** p<0.001, ** p<0.01, * p<0.05		

The model shows that a country's rating on the Civil Liberty Index (CLI) correlates with state officials' propensity to enforce counterterrorism laws.¹⁶⁶ Authorities in less democratic states appear more likely to enforce counterterrorism laws even after controlling for histories of violence. The result underscores the politics at play in national security enforcement. The Democratic Political Culture Index and the Electoral Process and Pluralism Index also correlate with terrorism convictions, lending support to the idea that societies with more autocratic leadership or limited electoral participation are more likely to adopt aggressive counterterrorism enforcement practices.

The statistical models provide evidence of greater national security enforcement in less democratic regimes and suggest national security laws cloak repressive tactics in more autocratic states. National studies of counterterrorism enforcement lend support to this conclusion.¹⁶⁷ Legalistic autocrats appear to exploit vague national security laws, particularly in countries with weak democratic norms and institutions, to expand state policing and consolidate their authority.

CONCLUSION

Relying on new empirical data, this Article advances a relational approach to the study of national security lawmaking and develops the concept of dark law. Dark law describes the convergence of statutory vagueness, judicial deference, and autocratic politics. It is a relational process in which legalistic autocrats use vague national security law to sidestep restraints on their power. In recent decades, policymakers worldwide have enacted vague national security statutes. National security lawmaking in some countries has also decoupled from considerations of violence and reasoned assessments of security threats. Meanwhile, judicial authorities customarily defer to legalistic autocrats' interpretations of national security provisions. Dark law emerges from this coalescence of autocratic politics, statutory vagueness, and judicial deference. It represents a shadowy threat to democracy by making it difficult for the public to see autocratic maneuvers that consolidate their hold on state power.¹⁶⁸

¹⁶⁶ The Civil Liberty Index assigns countries a rating based on independent survey and World Value Survey data intended to evaluate the existence of a free press, an independent judiciary, voluntary associations, religious tolerance, equality under the law, basic security of persons and property, and the use of torture by the state.

¹⁶⁷ See generally ANDREW NEAL, *EXCEPTIONALISM AND THE POLITICS OF COUNTER-TERRORISM: LIBERTY, SECURITY AND THE WAR ON TERROR* (2009) (describing the justification of the use of illiberal practices in the name of post-9/11 national security).

¹⁶⁸ See *Detroit Free Press v. Ashcroft* 303 F.3d 681, 683 (6th Cir. 2002) ("Democracies die behind closed doors.")

Dark law is most common in weak democratic states, though it may also be used by state leaders in hybrid or authoritarian regimes. Strong democratic institutions and robust judicial review make a state less vulnerable to dark law. However, courts harbor the power to help stabilize democratic institutions only if they are willing to exercise it. Regrettably, in the absence of democratic and judicial counterweights, legalistic autocrats use law to maintain social control and to enhance regime legitimacy.¹⁶⁹ Legal observers should be aware of the threat posed by legalistic autocrats and stand against efforts to use national security laws to escape judicial oversight and democratic accountability. Otherwise, legalistic autocrats can selectively investigate, detain, prosecute, and imprison disfavored groups under the guise of combating ill-defined national security threats.

METHODS APPENDIX

Relational legal analysis typically requires empirical investigation. However, national security agencies are not known for transparency. Valuable data may be classified, redacted, or destroyed by security officials. Legal provisions are frequently amended or revised and finding reliable translations can prove difficult. These environmental and linguistic challenges create a near perfect storm to navigate as an empirical legal scholar. This research sought to overcome these obstacles by triangulating national security data from different sources. Specifically, the data derives from four datasets: 1) an archive of national counterterrorism laws at Human Rights Watch; 2) content coding of national counterterrorism laws; 3) counterterrorism enforcement data on arrests and convictions under counterterrorism laws from 2001 to 2010; and 4) country-level indicators compiled from the Global Terrorism Database, the World Bank, the United Nations, Economist Intelligence Unit, and the Union of International Organizations. The data focuses on counterterrorism laws as an uncontroversial subset of national security law with well-documented implications for state power.

A. Archival Data

The data collection includes an archive of counterterrorism laws worldwide, compiled in collaboration with attorneys at the Program on Terrorism and Counterterrorism at Human Rights Watch (HRW).¹⁷⁰ This

¹⁶⁹ Tom Ginsburg & Tamir Moustafa, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 21 (Tom Ginsburg & Tamir Moustafa eds., 2008).

¹⁷⁰ *In the Name of Security: Counterterrorism Laws Worldwide Since September 11*, HUM. RTS. WATCH (2012), <https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11> [<https://perma.cc/CNW2-7PFX>].

data included 193 UN-recognized countries. For each country, the author reviewed all documents in the country file at HRW and cross-referenced these documents with legislation, documents, reports, or other texts obtained from six independent data sources:

1. The United Nations Office on Drug Control (UNODC) legislation database;
2. The Legislationline Database;
3. The Interpol Terrorism Database;
4. The CODEXTER country profiles;
5. The Foreign Law Guide Database; and
6. The United Nations Counter-Terrorism Committee (UN CTC) country reports.

The completed archive undercounts the total number of laws worldwide. Many states do not report immigration and financial statutes bearing on counterterrorism practices to the UN CTC or make them available in legislative databases.

B. Content Coding

In order to assess the substantive content of the counterterrorism laws, the author coded the texts of the archived counterterrorism laws with a focus on seven categories. Countries were the primary unit of analysis for the content coding.

1. Definitions of terrorism;
2. Definitions of terrorist organizations;
3. Prohibitions on material support for terrorism;
4. Limitations on speech that incites, legitimates, or lends support to terrorism;
5. Expanded police powers;
6. Procedures for administrative detention;
7. The imposition of heightened penalties for terrorism-related offenses.

For each category, the author created a series of dichotomous variables to provide accurate counts of the substantive features of the laws and allow for statistical analysis. When the archive contained multiple laws for a single country, the author used the most recent counterterrorism statute or legal code for the content analysis. If the most recent statute or legal code did not contain any information on a given variable, the author reviewed the previous statute or legal code and used those standards in the coding with the assumption that the previous legal standard would be applied in practice. If no previous legal standard existed, the variable was left blank. The content coding represents cross-sectional data for the year 2009. All regression

models reflect this 2009 coding of state counterterrorism laws worldwide.

Dichotomous variables measured the presence or the absence of legislative activity with regard to terrorism before and after the 9/11 attacks. The first variable indicated whether a state enacted any counterterrorism laws before 9/11. The second variable indicated whether a state enacted any counterterrorism laws after 9/11. Drawing on documents from the counterterrorism archive, the author coded variables based on reforms to criminal codes or the enactment of terrorism statutes. The UN Committee on Counter-Terrorism encouraged all states to report any counterterrorism actions in country reports. The variables, therefore, captured most counterterrorism laws enacted worldwide, particularly in the post-9/11 period. To assess lawmaking activity, the author also built ordinal variables to capture the number of counterterrorism measures enacted before 9/11 and after 9/11. If documents from the counterterrorism archive showed that a country enacted two new counterterrorism laws before 9/11, the pre-9/11 ordinal variable would be coded "2." Likewise, if a country reported three new counterterrorism laws after 9/11, the corresponding variable would be coded "3." These ordinal variables were broad measures of counterterrorism activity before 9/11 and after 9/11.

Translation problems sometimes complicated coding. UN CTC reports provided English translations which proved useful for substantive coding of post-9/11 laws.¹⁷¹ The reports, however, rarely provided translations of previous laws that had been amended, repealed, or substantially reformed. The difficulty of finding translations of previous laws prevented the construction of a longitudinal dataset.

Counterterrorism laws changed constantly during data collection and analysis. Some of the laws used in the analysis have since been amended or invalidated. The data, therefore, should not be used as a current rendering of counterterrorism law. The work sacrifices some national precision in order to capture global shifts in counterterrorism lawmaking.

C. Arrests and Convictions Data

Gathering reliable data on counterterrorism enforcement is even more challenging than gathering translations of national laws, particularly in countries where information on criminal detentions and prosecutions is not public. For the analysis, the author relied on data collected by a team of 140 Associated Press (AP) journalists in 2011. The journalists collected information on counterterrorism arrests and convictions in sixty-four countries between 2001 and 2011. The AP team requested data on

¹⁷¹ The UN CTC country reports were not available before October of 2001, when the United Nations created the Counter-Terrorism Committee.

counterterrorism enforcement in 105 countries with freedom-of-information laws. Journalists working in-country and generally fluent in the national language vetted the data. Collectively, the AP obtained arrest and conviction numbers from 2001–2011. Although reporting countries represented a minority of states worldwide, these countries included more than three-quarters of the global population.

D. Country-Level Data

The author merged the content coding with country level indicators from a number of sources, including the Global Terrorism Database, the World Bank, the United Nations, the Economist Intelligence Unit, and the Union of International Organizations. Below is a brief description of these country-level variables.

1. Dependent variables

Counterterrorism Content Codes: Substantive features of the laws were coded as dichotomous variables. These variables were organized around seven substantive categories.

Counterterrorism Measures Before 9/11: A dichotomous variable and an ordinal variable captured the number of counterterrorism measures enacted in each country prior to 9/11. In some models, these were control variables.

Counterterrorism Measures After 9/11: A dichotomous variable and an ordinal variable captured the number of counterterrorism measures enacted in each country after to 9/11. In some models, these were control variables.

2. Independent variables

History of Terrorism: Data from the Global Terrorism Database (GTD) was used as a measure for history of terrorism. GTD included information on more than 82,000 domestic and international terrorist attacks between 1970 and 2007.¹⁷² The GTD database identified terrorism incidents from wire services, foreign broadcast services, U.S. State Department reports, US and foreign newspaper reports, and information generated by staff. GTD defined terrorism as events involving “the threatened or actual use of illegal force and violence to attain a political, economic, religious or social goal through fear, coercion or intimidation.”¹⁷³ Because the author used cross-

¹⁷² See *Global Terrorism Database*, *supra* note 81.

¹⁷³ See GLOBAL TERRORISM DATABASE, CODEBOOK: INCLUSION CRITERIA AND VARIABLES 10 (2019), <https://www.start.umd.edu/gtd/downloads/Codebook.pdf> [<https://perma.cc/GLG6-7KXW>].

sectional data on the content of the laws, the author collapsed the years of the GTD database, creating a cumulative count for each individual country across the years 1970–2010. This count acted as an estimate of the domestic impact of terrorism in a country. For the purposes of this general measure, all terrorist incidents in the GTD were treated as equivalent events. For example, three independent bombings of an oil pipeline in Sudan that caused no fatalities would be counted the same as three car bombings in Iraq resulting in two dozen fatalities. To account for differences in the character of terrorism events, the author also created independent measures for terrorist incidents which caused more than one casualty and for terrorist incidents which caused more than fifteen casualties. The author used these measures of fatal terrorist incidents as a means to adjust for the increased rhetorical use of terrorism after 9/11.

Economic Development: Gross Domestic Product (GDP) per capita and the Human Development Index were used as measures of development. The author reported GDP from 2009 in constant 2005 dollars. The author also used the 2009 Human Development Index rating for each country.¹⁷⁴ The two separate measures yielded similar results in regression models.

Rule of Law: The author included the World Bank Rule of Law Estimate (2009) as a way to capture public confidence in rule of law. The variable accounted for the quality of contract enforcement, property rights, policing, and access to the courts, as well as the likelihood of crime and violence. The rule of law estimate was included in statistical models as a control measure.

Population: The author included the Human Development Reports Population total for both sexes (thousands) (2009) as a control variable.

Education: The author included the Human Development Reports Education Index (2009) as a control variable.

Gender: The author included the UN Gender Inequality Index (GII) as a control variable.

Democracy: The author measured democracy using the Economist Intelligence Unit's Index of Democracy (2008). The index measures the current state of democracy worldwide for 165 independent states based on five categories: 1) electoral process and pluralism; 2) civil liberties; 3) the functioning of government; 4) political participation; and 5) political culture. The index also categorizes countries within one of four types of regimes: 1) full democracies; 2) flawed democracies; 3) hybrid regimes; and 4) authoritarian regimes. In the analysis of counterterrorism enforcement, the

¹⁷⁴ For more detailed technical information about the indicators, consult the websites of the respective source agencies at <http://hdr.undp.org/en/statistics> [<https://perma.cc/EQF6-DQSM>].

author also broke down the index and used the measures of the individual categories to provide a more nuanced analysis of the features of a society that correlated with greater counterterrorism enforcement.

Influence of the World Polity: The author measured the influence of the world polity on a given country by the number of INGOs and NGOs in a state. Data from the Union of International Associations (2007) was used to measure the number of organizations.

The triangulation of data from various sources and the documentation of statutory vagueness, judicial review, and enforcement of laws by legalistic autocrats provide insight into the relations, transactions, and processes that shape national security in weak democracies. The data also document global transformations of national security lawmaking.