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FROM HIERARCHIES TO ALGORITHMS: FILLING THE FEDERAL DOMESTIC TERRORISM GAP

Camille A. Cox*

I. INTRODUCTION

In recent years, federal investigations and public reports have connected acts of mass violence not to organized extremist groups, but to individuals radicalized through social media platforms and algorithmically amplified content.[1] These emerging pathways challenge long-standing assumptions about how extremist actors organize and expose a gap in the current federal counterterrorism legal framework.

In the aftermath of September 11, Congress structured federal counterterrorism law around threats associated with foreign organizations and coordinated networks.[2] While lawmakers later defined "domestic terrorism" to describe certain acts of ideologically motivated violence occurring within the United States, they declined to enact a corresponding federal criminal offense.[3] As a result, prosecutors confronting domestic extremism must rely on a patchwork of hate-crime, firearms, conspiracy, and obstruction statutes.[4]

* Juris Doctor Candidate at Southern University Law Center, May 2027. I would like to thank my faculty advisor, Professor Jason Thrower, for his guidance and support. I am also deeply thankful to my mentors, professors, and loved ones for their continued encouragement throughout this process.

1. *See* S. Comm. on Homeland Sec. & Governmental Affairs, 117th Cong., Domestic Terrorism and Social Media: The Federal Government's Response to the Rise of Violent Extremism 8 (Majority Staff Rep. 2022), https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/221116_HSGACMajorityReport_DomesticTerrorism&SocialMedia.pdf (last visited Mar. 2, 2026).

2. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; 18 U.S.C. §§ 2339A–2339B.

3. *See* MARY MCCORD, *FILLING THE GAP IN OUR TERRORISM STATUTES* 2–3 (Program on Extremism, George Washington Univ., 2019), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/McCord%20Filling%20the%20Gap.pdf.

4. *See* MCCORD, *supra* note 3, at 2–3; *see also* S. Comm. on Homeland Sec. & Governmental Affairs, *supra* note 1, at 17.

At the same time, the model of terrorism assumed by federal law has become increasingly outdated. Traditional counterterrorism statutes were built around identifiable leaders, formal hierarchies, and coordinated planning.[5] Today, many extremist actors are radicalized through loosely connected online networks rather than through membership in established organizations.[6] Social-media platforms and recommendation systems are designed to maximize engagement rather than evaluate risk, yet they increasingly function as the primary pathways through which violent ideologies spread.[7] Federal law, however, continues to assume cooperation among human actors and organizational intent, even as emerging threats arise from digital environments where no formal group exists to hold responsible.[8]

This Article argues that closing the domestic terrorism gap requires three complementary reforms: a narrowly tailored federal domestic terrorism statute, a statutory clarification distinguishing algorithmic amplification from passive hosting under Section 230, and enhanced interagency coordination mechanisms. Part II traces how the statutory gap emerged. Part III examines how digital networks have transformed domestic extremism and illustrates the consequences through the January 6 attack and the Buffalo supermarket shooting. Part IV proposes a domestic terrorism statute and examines its constitutional boundaries. Part V addresses platform immunity and algorithmic accountability under Section 230. Part VI proposes interagency coordination mechanisms to integrate the federal response.

5. *See* MCCORD, *supra* note 3, at 2–3.

6. *See U.S. Dep't of Homeland Sec., Office of Intelligence & Analysis, Homeland Threat Assessment 2025, at 2–3 (2024), https://www.dhs.gov/sites/default/files/2024-10/24_0930_ia_24-320-ia-publication-2025-hta-final-30sep24-508.pdf (last visited Feb. 25, 2026).*

7. *See* S. Comm. on Homeland Sec. & Governmental Affairs, *supra* note 1, at 6.

8. *See* MCCORD, *supra* note 3, at 2–3.

II. BACKGROUND

A. Statutory Framework

Federal law recognizes and defines "domestic terrorism," but does not provide a corresponding criminal offense. Congress formally defined domestic terrorism in the USA PATRIOT Act of 2001, which amended the federal criminal code to include the following definition: "[T]he term 'domestic terrorism' means activities that—(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States."[9] Codified at 18 U.S.C. § 2331(5), this provision provides a broad definitional framework but does not create a substantive offense. Instead, it functions as a reference point for federal agencies such as the FBI and the Department of Homeland Security to track and categorize threats, rather than a charge prosecutors may bring in court.[10]

The absence of a domestic terrorism charge stands in distinct contrast to the statutory framework for international terrorism. Under 18 U.S.C. §§ 2339A–2339B, Congress created the material support statutes, which criminalize providing money, training, personnel, or other resources to designated foreign terrorist organizations, even in the absence of direct participation in violent acts.[11] Courts have consistently upheld the range of these statutes against constitutional challenges, most notably in *Holder v. Humanitarian Law Project*, where the Supreme Court rejected First Amendment objections to the ban on providing training and expert advice.[12] Together, these statutes reflect Congress's intent to give prosecutors a range of authority when

9. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 802, 115 Stat. 272, 376 (codified at 18 U.S.C. § 2331(5)).

10. *See Fed. Bureau of Investigation & U.S. Dep't of Homeland Sec., Domestic Terrorism: Definitions, Terminology, and Methodology 1 (2020); McCord, supra* note 3, at 2–3.

11. *18 U.S.C. §§ 2339A–2339B (2018).*

12. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28–36 (2010).

addressing terrorism with a foreign relationship, in contrast to the limited options available in domestic terrorism cases.

This gap in substantive law has produced inconsistencies and disparities in enforcement, as prosecutors have wide discretion to decide whether conduct will be labeled as terrorism or prosecuted as ordinary crimes.[13]

III. THE DIGITAL AGE AND THE EVOLUTION OF DOMESTIC EXTREMISM

The domestic terrorism threat environment in the United States remains high, characterized increasingly by lone offenders radicalized online rather than through membership in organized groups or formal hierarchies.[14] Federal law enforcement now tracks domestic extremism across several ideological threat categories — from racially motivated violence to anti-government extremism — reflecting a landscape far more decentralized than the organized movements of prior decades.[15] Social media platforms, online forums, and algorithm-driven recommendation systems now provide pathways for radicalization that are faster, broader, and more difficult to detect than traditional recruitment methods.[16] This Part examines that transformation by tracing the move from organized extremism to online radicalization, defining the process of algorithmic radicalization, and analyzing its real-world consequences through recent U.S. case studies.

A. Algorithmic Radicalization and the Digital Pathway to Extremism

Digital technologies have fundamentally altered how individuals encounter, consume, and internalize extremist ideas.[17] Unlike earlier forms of online radicalization that required deliberate participation in chatrooms or message boards, algorithmic radicalization occurs when automated recommendation systems expose users to increasingly extreme

13. *See* MCCORD, *supra* note 3, at 1–2.

14. *See* U.S. Dep't of Homeland Sec., *supra* note 6, at 2–3.

15. *See* Fed. Bureau of Investigation & U.S. Dep't of Homeland Sec., *supra* note 10, at 2–3.

16. *See* S. Comm. on Homeland Sec. & Governmental Affairs, *supra* note 1, *at 6,* 82.

17. *Id. at 82.*

content without any intentional search.[18] Social media platforms like YouTube, TikTok, and Facebook rely on engagement-based algorithms that prioritize content most likely to capture attention, often material that is polarizing, sensational, or emotionally charged.[19] Over time, these systems can generate a personalized stream of violent and extremist content that gradually reshapes a user's worldview and increases the risk of radical beliefs and violent intent.[20]

Algorithms are designed to maximize engagement and advertising revenue rather than evaluate the social impact of the content they promote, leading platforms originally built for entertainment and social connection to function as primary pathways for the spread of extremist content.[21]

B. The Offline Impact of Online Extremism

The January 6th attack at the U.S. Capitol and the May 2022 Buffalo supermarket shooting illustrate how this statutory gap produces concrete failures of accountability.[22] Federal investigators found that extremist groups including the Oath Keepers and Proud Boys coordinated via social media to organize and execute the attack on the Capitol.[23] Despite conduct that clearly satisfied the definitional elements of 18 U.S.C. § 2331(5), no participant was charged with domestic terrorism. Federal prosecutors instead relied on obstruction, conspiracy, and assault statutes — tools capable of addressing discrete criminal acts but ill-suited to capturing the ideological nature of the violence.[24] As

18. *See* S. Comm. on Homeland Sec. & Governmental Affairs, *supra* note 1, at 99–100*; see also* REBECCA LEWIS, ALTERNATIVE INFLUENCE: BROADCASTING THE REACTIONARY RIGHT ON YOUTUBE *35–36 (Data & Soc'y Research Inst. 2018), https://datasociety.net/wp-content/uploads/2018/09/DS_Alternative_Influence.pdf (*last visited Mar. 23, 2025*).*

19. *See* S. Comm. on Homeland Sec. & Governmental Affairs, *supra note* 1, at 99–100.

20. *Id.*

21. *Id.*

22. *See* S. Comm. on Homeland Sec. & Governmental Affairs, *supra* note 1, at 17-20.

23. *Id.* at 19.

24. *See* 18 U.S.C. § 2331(5); *see also* McCord, *supra* note 3, at 1–2; Sacco, *supra* note 22, at 1.

Mary McCord has observed, this gap creates a concrete enforcement asymmetry: conduct that would constitute terrorism under federal law if connected to a foreign organization is prosecuted as ordinary crime when it originates domestically.[25]

The Buffalo supermarket shooting presents a parallel failure. The New York Attorney General concluded that the Buffalo shooter was first indoctrinated and radicalized through online platforms, where fringe websites and unmoderated forums exposed him to racist and violent content that deepened his extremist ideology and enabled him to plan and publicize his attack.[26] As in the January 6 prosecutions, federal authorities were limited to hate-crime and firearms charges despite the shooter's explicit ideological motivation and the terroristic impact of the act.[27] Together these cases reveal not a prosecutorial failure but a legislative one — and one that the digital transformation of radicalization has made impossible to ignore.

IV. BRIDGING THE LEGAL GAP: ADAPTING DOMESTIC TERRORISM TO THE DIGITAL AGE

While courts remain constrained by constitutional limits on expanding criminal liability, Congress retains the authority and responsibility to modernize terrorism statutes to reflect how domestic extremism now develops. Existing counterterrorism statutes — including the material support provisions of 18 U.S.C. §§ 2339A–2339B — require either coordinated conduct or a nexus to a designated foreign terrorist organization, leaving no federal charging vehicle for ideologically motivated violence committed by individuals who radicalize outside any formal organizational structure.[28] Filling that gap must navigate the tension between effective counterterrorism enforcement and First Amendment protections. This Part examines those constitutional boundaries

25. McCord, *supra* note 3, at 1–2.

26. N.Y. Att'y Gen., *Investigation into the Role of Online Platforms in the May 14, 2022 Buffalo Shooting* 1–4, 23–26 (2022), https://ag.ny.gov/sites/default/files/buffaloshooting-onlineplatformsreport.pdf (last visited Mar. 8, 2026).

27. *See* S. Comm. on Homeland Sec. & Governmental Affairs, *supra* note 1, at 19–20; *see also* McCord, *supra* note 3, at 1–2.

28. 18 U.S.C. §§ 2339A–2339B (2018); *see also* McCord, *supra* note 3, at 2–3.

and proposes a framework for statutory reform that respects both imperatives.

A. Constitutional Boundaries

The Supreme Court's decision in *Brandenburg v. Ohio* established that government may not punish advocacy of the use of force or violation of law unless such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[29] Any domestic terrorism statute must respect this boundary by requiring proof of specific intent to commit violence and a substantial step toward imminent harm — not mere consumption of extremist content or abstract ideological agreement.[30]

Applied to the digital context, this framework means that consuming extremist content, participating in online forums, or even expressing support for violent ideologies remains protected absent concrete steps toward violence. A properly constructed domestic terrorism statute should treat digital activity as evidence of motive, planning, and intent when paired with actions such as acquiring weapons, surveilling targets, drafting operational plans, or attempting to recruit accomplices, not as an independent basis for liability.[31] Courts routinely admit internet search histories, social media posts, and online communications to establish intent in criminal prosecutions for terrorism, murder, and other violent crimes.[32] Algorithmic radicalization evidence would serve the same evidentiary function: demonstrating the formation and progression of criminal intent, instead of substituting for it.

Three additional constitutional protections are essential. First, the statute must require that the defendant act with at least reckless disregard for the likelihood that their conduct would

29. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

30. *See Scales v. United States*, 367 U.S. 203, 229–30 (1961) (holding that membership in an organization advocating violent overthrow may be punished only where the defendant specifically intends to accomplish the organization's aims by resort to violence); *Noto v. United States*, 367 U.S. 290, 298–300 (1961).

31. *United States v. Abu-Jihaad*, 630 F.3d 102, 133 (2d Cir. 2010) (holding that evidence of pro-jihadist materials was admissible to establish defendant's motive and intent in communicating classified information that could facilitate harm to his own vessel).

32. *See Mehanna*, 735 F.3d at 41; *see also Abu-Jihaad*, 630 F.3d 102.

result in violence — satisfying the constitutional minimum established in *Counterman* — and should ideally demand specific intent to commit violence rather than mere negligence or objective reasonable-person liability.[33] Second, it must incorporate an imminence requirement, limiting liability to cases where the defendant has progressed beyond abstract planning to concrete preparation for imminent harm.[34] Third, it must require proof of a substantial step — such as acquiring weapons, conducting surveillance, or drafting target lists — that corroborates the defendant's intent and distinguishes genuine threats from empty words.[35]

B. Statutory Design

Building on these constitutional foundations, Congress should enact a narrowly tailored domestic terrorism offense: A person commits domestic terrorism if they knowingly engage in conduct that: (1) involves an act dangerous to human life that violates federal or state criminal law; and (2) is committed with the specific intent to: (a) intimidate or coerce a civilian population; (b) influence the policy of a government by intimidation or coercion; or (c) affect the conduct of a government by mass destruction, assassination, or kidnapping.[36]

This framework adopts the definitional structure already codified at 18 U.S.C. § 2331(5) but converts it into a substantive criminal offense.[37] It requires both a predicate criminal act and

33. *See Elonis v. United States*, 575 U.S. 723, 738–40 (2015); *see also Counterman v. Colorado, 600 U.S. 66, 69 (2023).*

34. *See Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (holding that advocacy of illegal action at some indefinite future time is constitutionally protected, and that the First Amendment bars punishment absent evidence that speech was intended and likely to produce imminent disorder).

35. *See generally United States v. Mehanna*, 735 F.3d 32, 41 (1st Cir. 2013) (affirming conviction where defendant's concrete preparatory conduct corroborated intent to provide material support to terrorism); *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008).

36. The proposed offense adapts the definitional elements of 18 U.S.C. § 2331(5) and is modeled in part on the framework proposed in McCord, *supra* note 3, at 3–4. *See also* 18 U.S.C. § 2332b (providing a charging framework for acts of terrorism transcending national boundaries that served as a model for McCord's proposal).

37. 18 U.S.C. § 2331(5) (2018).

proof of terrorism-specific intent, ensuring that ordinary violent crimes are not swept into terrorism liability merely because they produce fear or attract public attention, and guarding against the risk that enforcement could be used to target disadvantaged groups or political protestors.[38] The objection that existing law already punishes all relevant conduct, and that no terrorist has escaped accountability for want of a charging statute, misses the point.[39] Punishment without terrorism accountability is not an adequate substitute. It obscures the ideological nature of the harm, produces inconsistent enforcement, and denies the law its expressive function in treating violence designed to coerce civilian populations or influence government action as categorically distinct from ordinary crime.[40]

Applied to January 6 and Buffalo, this statute would have enabled prosecutors to charge conduct that plainly satisfied its elements — ideologically motivated violence directed at coercing civilian populations or influencing government action — rather than relying on surrogate offenses that obscured the terroristic nature of each attack.[41] That distinction is not merely a matter of

38. *See* McCord, *supra* note 3, at 3–5 (proposing a narrowly tailored statute requiring terrorism-specific intent to distinguish ideologically motivated violence from ordinary violent crime); Sacco, *supra* note 22, at 17–19.

39. Brian Michael Jenkins, *Five Reasons to Be Wary of a New Domestic Terrorism Law*, RAND (Feb. 24, 2021), https://www.rand.org/pubs/commentary/2021/02/five-reasons-to-be-wary-of-a-new-domestic-terrorism.html (last visited Mar. 9, 2026), *quoted in* Sacco, *supra* note 22, at 18; *see also* Sacco, *supra* note 22, at 18 (noting the related argument that existing statutes are sufficient because domestic terrorists have been successfully prosecuted under other federal laws).

40. *See* McCord, *supra* note 3, at 1 (arguing that the statutory gap fails to identify the distinct harm of ideologically motivated violence and produces inconsistent treatment of comparable conduct); Sacco, *supra* note 22, at 17 (noting the argument that a domestic terrorism charge would allow prosecutors to characterize conduct as an issue of national security rather than ordinary crime, reflecting the terroristic nature of the harm).

41. *See* McCord, *supra* note 3, at 1 (noting that perpetrators of ideologically motivated mass violence are charged with "weak" surrogate offenses that fail to reflect the terroristic nature of the conduct); Sacco, *supra* note 22, at 6–7 (documenting that despite FBI characterization of January 6 as domestic terrorism, most federal charges against participants ranged from vandalism to seditious conspiracy and did not include domestic terrorism or a terrorism sentencing enhancement); N.Y. Att'y Gen., *Investigation into the Role of Online Platforms in the May 14, 2022 Buffalo Shooting* (2022), https://ag.ny.gov/sites/default/files/buffaloshooting-onlineplatformsreport.pdf

labels. A terrorism charge carries different sentencing exposure, triggers distinct investigative authorities, and — critically — conveys to the public, to future offenders, and to the historical record that the conduct was not ordinary crime but an attack on democratic society itself.[42] When the law fails to call terrorism by its name, it forfeits both its deterrent function and its expressive capacity to identify the distinct harm at issue.[43]

V. PLATFORM IMMUNITY AND ALGORITHMIC ACCOUNTABILITY

Section 230 of the Communications Decency Act shields platforms from most liability arising from user content, even when algorithmic systems actively shape how that content spreads. Understanding Section 230's scope and its limits is essential to closing the domestic terrorism gap.

A. Section 230's Immunity Problem

Section 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[44] This provision prevents platforms from liability under theories treating them as publishers of third-party content.[45]

But today's platforms operate nothing like the passive hosts Congress envisioned in 1996. Modern platforms do not simply host content — they actively curate what users see through sophisticated recommendation algorithms.[46] When YouTube's

(last visited Mar. 8, 2026) (finding that federal authorities were limited to hate-crime and firearms charges despite the shooter's explicit ideological motivation).

42. Sacco, *supra* note 22, at 6–7, 17.

43. DAN M. KAHAN, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996) (arguing that punishment is not merely a mechanism for inflicting suffering but a social convention that expresses moral condemnation, and that the form of sanction communicates to the community the seriousness of the wrong)

44. 47 U.S.C. § 230(c)(1)

45. *Id.*

46. 47 U.S.C. § 230 (1996); *see* S. Comm. on Homeland Sec. & Governmental Affairs, *supra* note 1 (documenting that major platforms employ recommendation algorithms that actively shape user exposure to content in ways Congress did not contemplate in 1996).

algorithm suggests increasingly extreme videos or Facebook's system prioritizes inflammatory posts, platforms make editorial choices about what to amplify and to whom.[47] Section 230, however, continues to treat these active curation decisions as equivalent to neutral hosting, even when algorithmic systems systematically expose vulnerable users to radicalizing content.[48]

B. Distinguishing Amplification from Hosting

Platforms should retain immunity for content they merely store. This immunity enables platforms to host user speech without becoming insurers against all harms. When a platform's automated system selects specific content to promote to specific users based on predicted engagement, the platform makes an affirmative editorial choice that reflects its own judgment, implemented through code rather than human editors.[49] Where that choice foreseeably facilitates harm — by systematically exposing users to radicalizing content — traditional tort principles would permit liability.[50]

Courts have recently begun recognizing this distinction. In *Lemmon v. Snap, Inc.*, the Ninth Circuit held that Snapchat's "Speed Filter" which overlaid speed on photos and allegedly encouraged dangerous driving did not qualify for Section 230 protection because it constituted the platform's own product design rather than third-party content.[51] The Supreme Court declined to resolve this question in *Gonzalez v. Google LLC*,

47. *See* S. Comm. on Homeland Sec. & Governmental Affairs, *supra* note 1, at 98–116 (documenting that Meta and YouTube employ engagement-based recommendation algorithms that prioritize inflammatory and extreme content).

48. *See* DANIELLE KEATS CITRON & BENJAMIN WITTES, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 417–22 (2017); *see also Gonzalez v. Google LLC, 598 U.S. 617, 622 (2023) (declining to address whether § 230 immunity applies to algorithmic recommendations and resolving the case on narrower Anti-Terrorism Act grounds).*

49. *See* CITRON & FRANKS, *supra* note 54; *see also Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1090–92 (9th Cir. 2021).

50. *See* RESTATEMENT (SECOND) OF TORTS § 302 (1965); *see also* CITRON & WITTES, *supra* note 54, at 417–22 (arguing that § 230 immunity should not extend to platforms that knowingly enable illegal activity or whose business model facilitates harm, and proposing a reasonable steps standard to cabin the immunity).

51. *Lemmon*, 995 F.3d at 1090–92.

leaving significant doctrinal ambiguity.[52] That ambiguity has real consequences: treating algorithmic promotion as indistinguishable from traditional publishing allows platforms to profit from engagement with extremist content while avoiding accountability for the foreseeable effects of their design choices.[53]

Congress could clarify that algorithmic recommendation constitutes a distinct category of conduct — separate from passive hosting — that may give rise to limited liability when it materially contributes to foreseeable harm.[54] Congressional Research Service analysis has confirmed that existing Section 230 doctrine leaves unresolved whether algorithmic recommendations constitute publisher activity subject to immunity or a distinct form of platform conduct outside Section 230's protections.[55] Liability would arise only where the platform's algorithmic system actively amplified content that foreseeably facilitated violence, the platform knew or should have known of this risk, and the amplification was a proximate cause of the harm.[56] This standard imposes no greater burden than ordinary negligence principles applied in any other commercial context.

C. Coordination with Criminal Law Reform

A domestic terrorism statute and Section 230 clarification are mutually reinforcing. The statute defines the conduct that platforms might foreseeably facilitate; Section 230 clarification

52. See Gonzalez v. Google LLC, 598 U.S. 617, 622 (2023) (declining to address Section 230's application to algorithmic recommendations and resolving case on narrower Anti-Terrorism Act grounds).

53. *See JACK M. BALKIN, How to Regulate (and Not Regulate) Social Media, 1 J. FREE SPEECH L. 71 (2021).*

54. *See* DANIELLE KEATS CITRON & MARY ANNE FRANKS, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45 (proposing narrow exceptions to Section 230 immunity for platforms whose design choices foreseeably facilitate harm).

55. *See* Eric N. Holmes, Cong. Rsch. Serv., R47753, *Liability for Algorithmic Recommendations* (Oct. 12, 2023), https://www.congress.gov/crs-product/R47753 (last visited Mar. 15, 2026).

56. *See* FRANCESCA KENNEDY, *Harmful Connections: How Tort Law Can Address Algorithmic Account Recommendation Harms and Protect Youth Social Media Users*, 33 AM. U. J. GENDER SOC. POL'Y & L. 98, 106, 121–22 (2025); *see also* RESTATEMENT (SECOND) OF TORTS § 302 (1965); *cf.* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. L. INST. 2010).

establishes that facilitating such conduct through algorithmic amplification does not qualify for absolute immunity. Congress should also require major platforms to disclose to independent regulators the general logic governing their recommendation systems, publish regular transparency reports measuring user exposure to extremist content, and provide qualified researchers with secure access to anonymized data to study online radicalization patterns.[57] The European Union's Digital Services Act demonstrates that such requirements can be framed as regulatory accountability measures rather than content control.[58] Without such visibility, lawmakers and law enforcement agencies cannot assess when algorithmic amplification meaningfully facilitates extremist mobilization.[59] Such transparency obligations are constitutionally defensible — they regulate platform conduct rather than speech and impose only factual disclosure requirements of the kind courts have consistently upheld.[60]

VI. INTERAGENCY COORDINATION

Effective responses to digitally mediated extremism require more than statutory reform or platform regulation; they require a federal enforcement strategy capable of operating across institutional and jurisdictional boundaries. Responsibility for addressing domestic extremism is currently divided among multiple federal agencies with distinct mandates and operational roles. The Department of Homeland Security (DHS) focuses primarily on threat assessment and prevention, the Federal Bureau of Investigation (FBI) leads criminal investigations, and the Department of Justice (DOJ) controls charging decisions and

57. *See* S. Comm. on Homeland Sec. & Governmental Affairs, *supra* note 1, at 98–116 (recommending platform transparency and researcher data access requirements).

58. Council Regulation 2022/2065, *Digital Services Act*, 2022 O.J. (L 277) 1 (EU).

59. *See* Sacco, *supra* note 22, at 21–22.

60. *See* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985) (holding that compelled disclosure of factual information does not violate the First Amendment where reasonably related to a substantial governmental interest); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249–53 (2010) (applying Zauderer to uphold disclosure requirements as constitutionally valid were directed at preventing consumer deception through accurate factual statements).

prosecutorial strategy.[61] Although these missions frequently overlap in practice, they are often pursued through separate processes and information systems, limiting the government's ability to respond cohesively to emerging threats.

This institutional divide has tangible consequences. The Government Accountability Office (GAO) has repeatedly warned that the absence of a unified federal strategy undermines the government's ability to identify domestic extremist threats early and respond in a timely manner.[62] Information relevant to radicalization trajectories is frequently compartmentalized: DHS may track online trends and emerging extremist narratives, the FBI may possess case-specific investigative intelligence, and DOJ evaluates prosecutorial viability under statutes that were not designed to account for digital facilitation.[63] Without formal mechanisms to integrate these perspectives, early warning signs may never translate into actionable intervention.

These coordination failures are especially pronounced in the digital context. Algorithmic radicalization rarely occurs in a single forum or within a discrete investigative window. Instead, it develops gradually across multiple platforms and over extended periods of time, generating fragmented data that does not align neatly with any one agency's traditional concern.[64] The result is a structural mismatch: the very agencies best positioned to detect early radicalization signals operate under mandates and

61. U.S. Dep't of Homeland Sec., Office of Intelligence & Analysis, *Homeland Threat Assessment 2025*, at 2–5 (2024), https://www.dhs.gov/sites/default/files/2024-10/24_0930_ia_24-320-ia-publication-2025-hta-final-30sep24-508.pdf (last visited Feb. 25, 2026); Fed. Bureau of Investigation & U.S. Dep't of Homeland Sec., *Domestic Terrorism: Definitions, Terminology, and Methodology* (2020), https://www.fbi.gov/file-repository/domestic-terrorism-definitions-terminology-methodology.pdf (last visited Mar. 2, 2026).

62. GAO-23-104720, *supra* note 28, at 52–53.

63. *See* GAO-23-104720, *supra* note 28, at 52–53; McCord, *supra* note 3, at 5–6.

64. U.S. Dep't of Homeland Sec., Office of Intelligence & Analysis, *Homeland Threat Assessment 2025*, at 2-3 (2024), https://www.dhs.gov/sites/default/files/2024-10/24_0930_ia_24-320-ia-publication-2025-hta-final-30sep24-508.pdf (last visited Feb. 25, 2026); N.Y. Att'y Gen., *Investigation into the Role of Online Platforms in the May 14, 2022 Buffalo Shooting* (2022), https://ag.ny.gov/sites/default/files/buffaloshooting-onlineplatformsreport.pdf (last visited Mar. 8, 2026).

information systems that were never designed to communicate with one another about threats that develop gradually, anonymously, and across jurisdictional lines.[65]

The January 6 attack and the Buffalo shooting illustrate this failure concretely. In both cases, relevant warning signs were visible across agency lines before violence occurred. DHS had documented the growth of online extremist networks and the radicalization pathways associated with the ideologies driving each attack.[66] The FBI possessed investigative intelligence regarding specific actors and platforms. Yet charging decisions at DOJ were made under statutes that had no mechanism for incorporating that upstream threat assessment data — because no formal structure required or enabled it.[67] The result in both cases was prosecution of the violent act in isolation, stripped of the ideological and facilitative context that gave it its terroristic character.[68]

As a result, no single agency is structurally positioned to assemble a complete picture of risk before violence occurs. Intelligence about emerging narratives may remain disconnected from investigative leads, while prosecutorial decision-making occurs downstream after harm has already materialized.[69] Scholars and former national security officials have cautioned that this reactive posture leaves federal counterterrorism efforts perpetually one step behind digitally mediated threats, intervening only after violence has occurred rather than disrupting pathways to mobilization.[70]

Congress should establish a standing interagency task force with authority to develop standardized protocols for assessing algorithmic radicalization threats, share intelligence regarding emerging extremist narratives across platforms, and coordinate

65. *See GAO-23-104720, supra note 28, at 52–53 (finding that FBI and DHS track different domestic terrorism information specific to their respective missions and have not assessed whether existing agreements fully reflect their charge to jointly prevent domestic terrorism attacks).*

66. *See* S. Comm. on Homeland Sec. & Governmental Affairs, *supra* note 1, at 38–43; U.S. Dep't of Homeland Sec., Office of Intelligence & Analysis, *Homeland Threat Assessment 2025*, *supra* note 73, at 2–3.

67. *See* GAO-23-104720, *supra* note 28; McCord, *supra* note 3, at 5–6.

68. *See* McCord, *supra* note 3, at 1; Sacco, *supra* note 22, at 6–7.

69. *See* GAO-23-104720, *supra* note 28; Sacco, *supra* note 22, at 21–22.

70. *See McCord, supra* note 3, at 5–6*; Sacco, supra* note 22, at 21–22.

investigative and prosecutorial responses to domestic terrorism cases.[71] Such mechanisms would integrate DHS threat assessments with FBI investigative leads and DOJ charging decisions, enabling federal authorities to assemble a complete picture of risk before violence occurs. Without durable coordination structures that account for the decentralized and algorithmically driven nature of contemporary radicalization, federal counterterrorism policy will remain reactive rather than preventive.[72]

VI. CONCLUSION

On January 6, 2021, thousands of individuals who had never attended a recruitment meeting, never joined a formal organization, and never received direction from an identifiable leader stormed the United States Capitol. Eighteen months later, a young man who had spent months consuming algorithmically amplified racially extremist content on platforms he never deliberately sought walked into a Buffalo supermarket and opened fire. In both cases, federal prosecutors charged what they could — obstruction, conspiracy, hate crimes, firearms offenses — because federal law gave them nothing else. The conduct satisfied the statutory definition of domestic terrorism. The charge did not exist.

That is not a prosecutorial failure. It is a legislative one. Congress defined domestic terrorism in 2001 and then declined to make it a crime, leaving the definition to function as a label rather than a legal tool. In the two decades since, the mechanisms of radicalization have shifted from human recruiters and organizational hierarchies to engagement-driven algorithms that systematically expose users to escalating extremist content without their awareness or consent. Federal law has not moved with them.

71. *See* Michael E. DeVine, John W. Rollins & Lisa N. Sacco, Cong. Rsch. Serv., R47229, *Intelligence Coordination on Domestic Terrorism and Violent Extremism: Background and Issues for Congress* 14 (Sept. 1, 2022), https://www.congress.gov/crs-product/R47229 (last visited Mar. 15, 2026) (documenting congressional proposals to establish interagency task forces with authority to coordinate investigative and prosecutorial responses to domestic terrorism threats); *see also* GAO-23-104720, *supra* note 28, at 53.

72. *See* GAO-23-104720, *supra* note 28, at 53.

The reforms proposed in this Article do not require dismantling the First Amendment or abandoning the architecture of internet law. A domestic terrorism statute grounded in specific intent, imminence, and a substantial step toward violence punishes conduct, not belief. A statutory clarification distinguishing algorithmic amplification from passive hosting holds platforms accountable for their own design choices, not for the expressive content generated by their users. Interagency coordination mechanisms ensure that threat assessment, investigation, and prosecution operate as a unified response rather than sequential and disconnected functions. Algorithmic transparency obligations give that entire system the visibility it currently lacks.

The law has confronted technological disruption before and adapted. After September 11, Congress reshaped the entire architecture of federal counterterrorism law within months. The threat today is different — more diffuse, more digitally mediated, and in some ways harder to see — but it is no less real. Every year that federal law remains calibrated to the terrorism of 2001 is another year in which the mechanisms that produced January 6 and Buffalo operate without meaningful legal constraint. The cost of that delay will not be theoretical. It will be measured in the next attack that federal law sees clearly only in hindsight.

DECIDING IN THE DARK: NOEM V. PERDOMO AND THE FOURTH AMENDMENT'S DRIFT ON THE SHADOW DOCKET

Diana Lachell Copeland*

I. INTRODUCTION

On November 21, 2018, Jilmar Ramos-Gomez, a United States citizen and Marine Corps veteran living in Michigan, experienced a post-traumatic stress mental health episode and was arrested by local police on the roof of a hospital.[1] An off-duty police officer contacted Immigration and Customs Enforcement (ICE) to verify his immigration status, despite no apparent basis to suspect he was undocumented other than his name and perceived ethnicity.[2] Although federal authorities possessed documentation confirming his citizenship, Ramos-Gomez was transferred to ICE custody and detained for three days before being released. Encounters like this are becoming all too frequent

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1. Ramos-Gomez v. Adducci, No. 2:19-cv-13475-LJM-MJH, 2020 U.S. Dist. LEXIS 186519 (E.D. Mich. Oct. 8, 2020).

2. ACLU of Mich., *ACLU Sues ICE Over U.S. Marine Corps Veteran Jilmar Ramos-Gomez's Case*, https://www.aclumich.org/press-releases/aclu-sues-ice-us-marine-corps-veteran-jilmar-ramos-gomezs-case/ (last visited February 22, 2026)

post *Noem* and illustrate the constitutional risk that arises when suspicion is based on identity rather than behavior.[3]

The Fourth Amendment safeguards against unreasonable seizures, but this protection weakens when demographic assumptions replace individual justification. Immigration enforcement frequently tests this constitutional limit, where broad stereotypes about an individuals' status threaten to replace individual suspicion as the constitutional standard.[4]

In 1968, the Supreme Court decided *Terry v. Ohio*, creating a narrow exception to the Fourth Amendment's probable cause requirement that permitted brief investigative stops based on reasonable suspicion.[5] The Court emphasized that such authority was carefully limited. Officers were required to identify "specific and articulable facts" tied to a particular individual, and courts were instructed to scrutinize police conduct closely to prevent erosion of Fourth Amendment protections.[6] From its inception, *Terry* was controversial. Despite its narrow scope, *Terry* has long occupied an uneasy position in Fourth Amendment jurisprudence. Critics cautioned that adopting a standard below probable cause risked expanding police discretion, particularly against marginalized communities. Justice Douglas warned that permitting seizures on less than probable cause threatened to dilute the Fourth Amendment's core protections. Subsequent jurisprudence would reveal the force of that concern. [7]

More than half a century later, the Supreme Court's emergency order in *Noem v. Perdomo* signals a marked departure from *Terry's* original framework.[8] Issued without a full briefing or oral argument, the Court stayed a lower court injunction that barred roving immigration patrols based on contextual indicators

3. Noem v. Perdomo, 146 U.S. (2025).

4. *See* United States v. Sokolow, 490 U.S. 1, 12 (1989). ("By requiring reasonable suspicion as a prerequisite to such seizures, the Fourth Amendment protects innocent persons from being subjected to 'overbearing or harassing' police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race." (citing Terry v. Ohio, 392 U.S. 1, 14-15 & n.11 (1968)).

5. Terry v. Ohio, 392 U.S. 1 (1968).

6. *Id.* at 21–22.

7. *Id.*

8. Noem v. Perdomo, 146 U.S. (2025).

such as language, appearance, and location.[9] Although framed as a routine application of reasonable suspicion principles, the order extended *Terry*'s logic far beyond individualized conduct and recasts suspicion as a function of demographic probability.[10]

Noem v. Perdomo represents a pivotal moment in Fourth Amendment jurisprudence.[11] It reflects the emergence of a probabilistic model of constitutional policing in which reasonableness is measured by statistical likelihood rather than individualized behavior. The decision thus exemplifies constitutional drift, the gradual redefinition of constitutional meaning through procedural shortcuts and unreasoned judicial action on the shadow docket.[12]

Section II traces the evolution of the stop-and-frisk doctrine from *Terry* through its extension into immigration contexts. Section III situates *Noem* within that trajectory and demonstrates how the decision constitutes probabilistic suspicion. Section IV examines the constitutional and policy implications of this doctrinal shift. This Note concludes by addressing the dangers posed by constitutional drift on the shadow docket and the need to reaffirm individualized suspicion as the Fourth Amendment baseline.

This author affirms that individualized suspicion is not merely a doctrinal preference but a constitutional requirement and proposes that courts must reject efforts to redefine reasonableness through demographic probability. This Note argues that *Noem v. Perdomo* represents a dangerous form of constitutional drift, one that risks converting the Fourth Amendment from a shield protecting individuals into a mechanism for managing populations. Doctrinal recalibration is necessary to restore the Fourth Amendment's commitment to individualized liberty.

9. *Id.*

10. Terry v. Ohio, 392 U.S. 1 (1968).

11. Noem v. Perdomo, 146 U.S. (2025).

12. See Rory Little, *"Roving Patrols," Reasonable Suspicion, and Perdomo*, SCOTUSblog (Sept. 18, 2025); Siegal, supra note 2.

II. THE STOP AND FRISK DOCTRINE: FROM *TERRY* TO IMMIGRATION ENFORCEMENT

A. The Genesis of the Doctrine: Terry v. Ohio (1968) and Its Companions

The legal doctrine of "stop and frisk"[13] as articulated in *Terry v. Ohio* comprises two analytically distinct components: the investigative "stop" and the protective "frisk." A "stop" pertains to a temporary investigative detention of an individual conducted by law enforcement, which must be justified by reasonable suspicion. This suspicion involves specific and articulable facts, along with rational inferences derived from those facts, indicating that criminal activity may be afoot.[14] This threshold is less stringent than probable cause, yet it necessitates a factual foundation beyond mere intuition or unparticularized suspicion.[15]

A "frisk" constitutes a limited pat-down of an individual's outer clothing, conducted following a stop. Such a search is constitutionally permissible solely when the officer has a reasonable belief, grounded in specific facts, that the individual is armed and poses an immediate danger. The principal objective of the frisk is not evidentiary in nature, but rather to ensure the safety of law enforcement personnel and the public by identifying and neutralizing potential weapons.[16]

The U.S. Supreme Court in *Terry* emphasized that both the stop and the frisk must each independently satisfy the Fourth Amendment's reasonableness standard. [17] The legality of the stop hinges on its justification at its inception, whereas the permissibility of the frisk relies on the reasonable belief that the individual is armed and dangerous[18]

13. Terry v. Ohio, 392 U.S. 1, 21-24 (1968).

14. *Id.* See. State v. Andrade-Reyes, 309 Kan. 1048, Arizona v. Johnson, 555 U.S. 323, Commonwealth v. Hicks, 652 Pa. 353.

15. Terry v. Ohio, 392 U.S. 1, 21-24 (1968).

16. Id.

17. Terry v. Ohio, 392 U.S. 1 (1968).

18. State v. Andrade-Reyes, 309 Kan. 1048, Arizona v. Johnson, 555 U.S. 323, Commonwealth v. Hicks, 652 Pa. 353.

In *Terry,* the Supreme Court created a new category of "reasonable" searches, grounded in reasonable suspicion rather than probable cause.[19] In *Terry*, a police officer observed three men repeatedly peering into a store window and suspected a robbery in progress. The officer stopped them, conducted a limited pat-down, and discovered a weapon. The Court upheld the search, concluding that an officer may conduct a brief investigatory stop when the officer can point to "specific and articulable facts" giving rise to reasonable suspicion that criminal activity is afoot.[20] The Court reasoned that it would be unreasonable to require that a police officer await the glint of steel before acting to preserve his own safety.[21]

Crucially, the *Terry* Court emphasized that this authority was narrowly confined and that the purpose of the stop was investigative, while the purpose of the frisk was strictly protective, to allow officers to pursue their investigation without fear of violence.[22] Chief Justice Warren cautioned that courts must carefully scrutinize such encounters to prevent the erosion of the Fourth Amendment's protections through uncritical deference to law enforcement judgment.[23] Justice Douglas, dissenting, cautioned that expanding police discretion beyond probable cause risked fraying the Fourth Amendment to tatters.[24]

The Court reaffirmed these limitations in companion cases. In *Sibron v. New York*, the Court invalidated a frisk where the officer could not articulate any reason to believe the suspect was armed and emphasized that a protective search requires more than generalized suspicion or association.[25] By contrast, in *Peters v. New York*, the Court upheld a stop, emphasizing the officer's specific observations of the suspect's conduct and reaffirming the requirement that suspicion be grounded in individualized facts. Together, these cases established that reasonable suspicion must be particularized and grounded in observable behavior.

19. Terry v. Ohio, 392 U.S. 1, 21-24 (1968).
20. *Id.* at 21–22.
21. *Id.*
22. *Id.* at 24.
23. *Id.* at 15.
24. *Id.* at 38 (Douglas, J., dissenting).
25. Sibron v. New York, 392 U.S. 40, 62–63 (1968).

Subsequent decisions elaborated on *Terry* without abandoning its core constraints.

As the doctrine matured, the Court confronted efforts to justify stops based on generalized profiles rather than individualized conduct. In *Brown v. Texas*, the Court invalidated a stop based solely on the defendant's presence in a high crime area, holding that such reasoning failed to provide the individualized suspicion required by the Fourth Amendment.[26] Similarly, in *Reid v. Georgia*, the Court rejected an airport stop premised on a broad drug-courier profile, warning that such profiles "describe a very large category of presumably innocent travelers."[27] These cases underscore that reasonable suspicion cannot rely on characteristics common among lawful populations.

Subsequent cases refined the reasonable suspicion inquiry while preserving the requirement of individualization. In *United States v. Arvizu*, the Court directed lower courts to assess reasonable suspicion based on the "totality of the circumstances" rather than isolating individual factors.[28] However, *Arvizu* did not dispense with the requirement that suspicion be grounded in particularized observations; rather, it cautioned courts against second-guessing reasonable inferences drawn from observed conduct.[29]

Following *Terry*, the Court gradually expanded the range of contextual factors officers could consider when forming reasonable suspicion. In *Illinois v. Wardlow*, the Court held that an individual's unprovoked flight in a high-crime area could contribute to reasonable suspicion. Although the Court reiterated that presence in a high crime area alone is insufficient, the decision nonetheless sanctioned reliance on environmental context as constitutionally relevant.[30] *Wardlow* marked a subtle but important shift. Whereas *Terry* emphasized conduct suggesting imminent criminal activity, *Wardlow* permitted suspicion to arise from a combination of location and reaction to police presence. Dissenting opinions warned that this framework risked converting geography into a proxy for criminality, effectively subjecting

26. Brown v. Texas, 443 U.S. 47, 52 (1979).
27. Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam).
28. United States v. Arvizu, 534 U.S. 266, 273–75 (2002).
29. *Id.* at 277.
30. Illinois v. Wardlow, 528 U.S. 119 (2000).

residents of heavily policed neighborhoods to diminished Fourth Amendment protections.

The implications of *Wardlow* would reverberate through subsequent jurisprudence, normalizing the use of contextual cues that describe environments rather than individuals. This doctrinal shift laid the groundwork for later reliance on demographic and situational indicators, an evolution that is vital for assessing *Noem*.

B. Terry in Transit: From Traffic Stops to Routine Encounters

The Court extended *Terry's* reach beyond traditional street encounters in *Arizona v. Johnson*, holding that law enforcement officers may frisk a vehicle passenger during a lawful traffic stop when they possess reasonable suspicion that the passenger is armed and dangerous.[31] Justice Ginsburg's unanimous opinion clarified that such a frisk must satisfy two conditions: (1) the stop must be lawful, and (2) the officer must reasonably suspect the person poses a threat. This articulation cemented *Terry's* two-prong test as the default standard for virtually all law enforcement encounters short of arrest.

However, the very elasticity that made *Terry* so enduring also made it perilous. By defining reasonableness through context and experience, the Court allowed law enforcement culture to shape constitutional boundaries. Over time, what began as a narrow safety exception metastasized into a broad license for preventive detentions and frisks predicated on subjective intuition. Empirical studies of New York City's stop and frisk programs demonstrated that this doctrine, when translated into policy, disproportionately burdened minority communities without producing equivalent public safety benefits.[32] This decision sanctioned the extension of *Terry* frisks into routine, noncriminal encounters.

Taken together, these stops reflect a gradual doctrinal shift from reactive policing toward preventive risk management.[33] Stops increasingly became tools for anticipating danger rather

31. Arizona v. Johnson, 555 U.S. 323 (2009).

32. Noem v. Perdomo, 146 U.S. (2025).

33. Illinois v. Wardlow, 528 U.S. 119 (2000); Arizona v. Johnson, 555 U.S. 323 (2009).

than responding to observed wrongdoing. While these cases stopped short of abandoning particularity, they expanded the universe of permissible inference in ways that would later facilitate probabilistic reasoning.

C. From Urban Streets to the Border

The Supreme Court's 1975 decision in *United States v. Brignoni-Ponce* marked a watershed moment in the migration of *Terry's* logic to immigration enforcement.[34] In that case, Border Patrol agents in southern California stopped a vehicle near the Mexican border based solely on the occupants' apparent Mexican ancestry.[35] The Court held that while agents may stop vehicles near the border based on specific articulable facts that suggest illegal presence, ethnicity alone cannot justify a stop.[36] *Brignoni-Ponce* imported *Terry's* two-pronged framework into the border context, while explicitly condemning racial profiling as constitutionally impermissible. Despite this limiting language, *Brignoni-Ponce* broadened the scope of the government's authority to execute brief immigration detentions based on a combination of factors, including location, proximity to the border, and ethnic characteristics. The Supreme Court held that officers on roving patrol may stop vehicles if they are aware of specific, articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain individuals who may be illegally in the country. Effectively, the Court opened a new front for *Terry* analysis: a space where the Fourth Amendment's individualized suspicion requirements yielded to the imperatives of border security and national sovereignty.[37]

D. From Individual Suspicion to Demographic Probability: The Path to Noem v. Perdomo

The Supreme Court's recent shadow docket jurisprudence in *Noem v. Perdomo* extended *Terry's* rationale from contextual suspicion to categorical assumption.[38] Under the directive

34. United States v. Brignoni-Ponce, 422 U.S. 873, 885-87 (1975).
35. *Id.* at 875-876.
36. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).
37. *Id.*
38. Noem v. Perdomo 602 U.S. (2025).

challenged in *Noem*, officers may detain individuals for "observable indicators of unlawful presence,"[39] including accent and demeanor. In effect, the program resurrects the very reasoning that *Brignoni-Ponce* repudiated: that ethnicity and language can serve as probabilistic proxies for criminality. [40]

The connection between *Terry* and *Noem* primarily lies in their methodology rather than their substance. Both doctrines emerged from judicial efforts to balance constitutional rights against perceived public needs. Each have replaced pragmatic compromise with reasoned principles. Moreover, both have redefined "reasonableness" as contingent upon context and authority, rather than solely based on textual interpretation and constraints. *Terry's* approach to urban policing mirrors *Noem's* stance on immigration enforcement: both establish a constitutional framework based on suspicion that is limited in theory, but limitless in practice.

Overall, these decisions establish a consistent doctrinal throughline: the Fourth Amendment tolerates brief investigatory stops only when the government can articulate individualized reasons for suspecting a particular person of wrongdoing or danger. This framework, grounded in particularity, restraint, and judicial oversight, sets the baseline against which *Noem v. Perdomo* must be evaluated. As the next section demonstrates, *Noem* departs from these principles by substituting probabilistic inference for individualized suspicion.

III: CONSTITUTIONALIZING SUSPICION: *NOEM V. PERDOMO*

A. From Particularized Suspicion to Probabilistic Policing

At its core, *Terry* required government intrusion to be justified by facts particular to the individual seized.[41] The doctrine's legitimacy depended on that requirement.

In *Noem v. Perdomo*, the Court's emergency stay order quietly untethered reasonable suspicion from individualized conduct by authorizing investigative stops premised on contextual

39. *Id.*

40. Avi Siegal, *Balancing in the Shadows of Noem v. Vasques Perdomo,* Yale J. on Reg.: Notice & Comment (Sept. 24, 2025).

41. Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

indicators such as language, appearance, location, and occupation.[42]

Justice Kavanaugh's concurrence reasoned that "common sense" and officer experience provide contextual cues for reasonable suspicion.[43] This common sense reconceptualization transforms reasonable suspicion into a predictive tool. As Professor Rory Little explains, the logic endorsed in *Noem* "embraces a probabilistic theory of reasonable suspicion and abandons the requirement of individualized suspicion."[44] The Fourth Amendment then shifts from protecting persons to managing populations.

B. Erosion of Individualized Suspicion

The Court has long rejected suspicion based on generalized traits. *Brignoni-Ponce* warned against casting suspicion on large segments of the public, and *Brown* reinforced the requirement of individualized facts.[45]

Noem undermines those constraints by permitting reliance on aggregated contextual cues. Justice Kavanaugh's concurrence further revives the very logic *Brignoni-Ponce* condemned[46] proclaiming that "high number and percentage of illegal immigrants in the Los Angeles area [who] tend to gather in certain locations [and] often work in certain kinds of jobs". By collapsing ethnicity and geography into "circumstances", the concurrence invites a standard of generalized suspicion indistinguishable from profiling. This is a "significant change in the reasonable suspicion

42. *Rory Little, "Roving Patrols," Reasonable Suspicion, and Perdomo, SCOTUSblog (Sept. 18, 2025).*

43. Noem v. Perdomo 146 U.S. 1 (2025). (Kavanaugh, J., concurring). Justice Kavanaugh's concurrence underscored the significance of "common sense," yet neglected to articulate a precise definition of the term. The enduring observation that common sense is, paradoxically, not universally shared remains applicable. Within this legal context, it is imperative to delineate what constitutes "common sense" when law enforcement officers determine whether to initiate a stop.

44. *Rory Little, "Roving Patrols," Reasonable Suspicion, and Perdomo, SCOTUSblog (Sept. 18, 2025).*

45. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

46. Michelle M. Mello, *Whose Common Sense? Some Reflections on Noem v. Vazquez Perdomo*, Stan L. Sch. Legal Aggregate (Sept. 24, 2025).

standard," one that abandons *Terry's* demand for particularity in favor of group-based inference.[47]

This transformation alters the constitutional subject itself. Under *Terry*, suspicion attached to a person based on observed conduct. Under *Noem*, suspicion attaches based on perceived group membership. The unit of constitutional analysis shifts from the individual to the demographic proxy.

C. Judicial Rationalization and the Turn to "Common Sense"

The concurrence's reliance on common sense plays a critical role in this doctrinal shift. Rather than citing empirical data or articulable facts, the opinion appeals to intuition, an innovation of what Stanford Professor Michell M. Mello calls "majoritarian common sense masquerading as constitutional reasoning."[48] By elevating "common sense" to the level of constitutional justification, *Noem* revives the same rhetorical device that once rationalized *Terry's* furtive movement in high crime areas. In both instances, subjectivity is rebranded as objectivity. Elevating intuition over articulation reduces the Fourth Amendment inquiry to plausibility rather than fact. Judicial authority shifts toward officers, and constitutional constraints weaken.

D. The Displacement of Judicial Restraint

Terry envisioned judicial review as a safeguard against arbitrary policing. Chief Justice Warren emphasized that courts must independently assess the reasonableness of police conduct.[49] Chief Justice Warren's opinion in *Terry* conceived of judicial review as the essential check on discretion, warning that courts must not "approve the conduct of the police simply because the officer acted in good faith."[50] In *Noem*, the Court defers almost entirely to executive judgment.[51] Its silence, both procedural and doctrinal, signals a willingness to let enforcement exigency define

47. Rory Little, "*Roving Patrols", Reasonable Suspicion, and Perdomo*, SCOTUSblog (Sept. 18, 2025).

48. Michelle M. Mello, *Whose Common Sense? Some Reflections on Noem v. Vázquez Perdomo*, Stan. L. Sch. Legal Aggregate (Sept. 24, 2025).

49. Terry v. Ohio, 392 U.S. 1, 15 (1968).

50. *Id.* at 21–22.

51. Noem v. Perdomo 146 U.S. 1 (2025). (Kavanaugh, J., concurring).

constitutional scope. By deferring almost entirely to executive judgment, the Court diminishes its own role as a constitutional check.

E. The Probabilistic State and Constitutional Drift

Noem exemplifies what this Note terms the probabilistic state, a governance model in which constitutional reasonableness is measured by statistical likelihood rather than individualized wrongdoing. Liberty becomes contingent on demographic inference.

Justice Kavanaugh's concurrence exemplifies this transformation. He reasoned that because undocumented immigrants "tend to gather" in certain areas and "often work in certain kinds of jobs," officers could reasonably infer unlawful presence from these contextual facts.[52] The argument replaces *Terry*'s insistence on "specific and articulable facts" with an actuarial logic: if a person's demographic characteristics correlate with illegality, then the correlation itself provides the constitutionally sufficient cause for intrusion.[53]

Noem accelerates this evolution through both substance and procedure. Substantively, it replaces *Terry*'s factual inquiry with a probabilistic heuristic. Procedurally, it achieves that transformation through the shadow docket, bypassing the deliberation and public reasoning that normally legitimate doctrinal change. As Avi Siegal explains, this is the essence of constitutional drift, the redefinition of rights not by explicit overruling but by silent accretion.[54] Each emergency order that treats demographic probability as reasonable suspicion nudges constitutional meaning further from its text, until the exception swallows the rule.

The probabilistic state operates as both the instrument and the outcome of constitutional drift. It transforms *Terry*'s narrow compromise, crafted to balance safety with liberty, into a general permission slip for preventive policing. And because this transformation occurs under the procedural veil of the shadow

52. *Id.* (Kavanaugh, J., concurring).

53. Terry v. Ohio, 392 U.S. 1, 15 (1968).

54. *See* Avi Siegal, *Balancing in the Shadows of Noem v. Vásquez Perdomo*, Yale J. on Regul.: Notice & Comment (Sept. 24, 2025).

docket, it lacks the transparency, contestation, and reason-giving that sustain constitutional legitimacy. In this new paradigm, the Constitution evolves not through argument or amendment but through inertia, its text unchanged, its meaning quietly altered.

As the next section demonstrates, these doctrinal changes carry profound policy consequences, reshaping immigration enforcement, federalism, and equal protection in ways that extend far beyond the facts of the case.

III. POLICY IMPLICATIONS: FROM STOP AND FRISK TO STATUS AND FRISK

The doctrinal shift reflected in *Noem v. Perdomo* carries consequences that extend far beyond the immediate context of immigration enforcement.[55] By transforming reasonable suspicion into a probabilistic inquiry grounded in demographic inference, the decision reshapes how police power may be exercised and alters the lived experience of constitutional rights. The result is a model of enforcement that increasingly treats status, rather than conduct, as the trigger for investigative intrusion.

A. The Migration of Stop-and-Frisk Logic into Immigration Enforcement

Noem accelerates the migration of the stop-and-frisk doctrine from traditional criminal policing into civil immigration enforcement. Historically, *Terry* was justified by the exigencies of officer safety during street encounters involving suspected criminal activity.[56] *Noem* repurposes that logic to authorize roving immigration patrols, blurring the line between criminal investigation and administrative enforcement.[57]

The policy consequences of this doctrinal shift are not merely theoretical. The immediate policy consequences of *Noem* are the transportation of urban policing logic into immigration enforcement.[58] What began in *Terry* as a rule for street-level encounters has now crossed into the realm of border and

55. Noem v. Perdomo, 146 U.S. (2025).

56. Terry v. Ohio, 392 U.S. 1, 23–24 (1968).

57. Rory Little, *"Roving Patrols," Reasonable Suspicion, and Perdomo*, SCOTUSblog (Sept. 18, 2025).

58. Noem v. Perdomo, 146 U.S. (2025).

demographic regulation. In this new context, the justifications once tied to officer safety, furtive gestures, concealed weapons, and imminent danger are replaced by contextual indicators of unlawful presence, such as accent, clothing, or community association.[59]

Noem accelerates the migration of stop-and-frisk logic into civil immigration enforcement. Immigration violations are civil in nature, yet *Noem* permits investigative stops that mirror criminal seizures. The line between criminal investigation and administrative enforcement blurs. The effect is to normalize intrusive encounters not based on suspected wrongdoing, but on perceived immigration status. As scholars have observed, this expansion risks converting presence itself into a basis for suspicion.[60]

B. The Normalization of Demographic Suspicion

By treating language, appearance, location, and occupation as constitutionally relevant indicators, *Noem* legitimizes demographic suspicion as reasonable.

By validating detentions based on "common sense" contextual cues, the Court implicitly affirms that outward signs of difference can constitute articulable facts. This logic transforms appearance and language into legally cognizable evidence. The danger is not confined to immigration enforcement. Once the Court treats cultural and linguistic traits as legitimate grounds for suspicion, those markers can migrate into other policing contexts such as counterterrorism surveillance, welfare fraud investigations, or even public benefits verification. In each domain, difference becomes a variable in the state's probabilistic model of risk. Empirically, this pattern mirrors what scholars of criminal justice describe as the feedback loop of suspicion: the more a community is policed, the more evidence accumulates to justify further policing.[61] *Noem* hardwires that loop into doctrine by constitutionalizing demographic probability. This dynamic

59. See Michelle M. Mello, *Whose Common Sense? Some Reflections on Noem v. Vázquez Perdomo*, Stan. L. Sch. Legal Aggregate (Sept. 24, 2025).

60. *Id.*

61. See Michelle M. Mello, *Whose Common Sense? Some Reflections on Noem v. Vázquez Perdomo*, Stan. L. Sch. Legal Aggregate (Sept. 24, 2025); Rory Little, *"Roving Patrols," Reasonable Suspicion, and Perdomo*, SCOTUSblog (Sept. 18, 2025).

mirrors earlier stop-and-frisk regimes that disproportionately burdened racial and ethnic minorities. In *Floyd v. City of New York*, for example, a federal court documented how reliance on generalized profiles resulted in widespread unconstitutional stops.[62] *Noem* risks entrenching similar disparities under the guise of neutral, probability-based enforcement.

C. Chilling Effects on Communities

The normalization of demographic suspicion has predictable chilling effects on mixed-status communities. When identity markers trigger investigative stops, individuals may avoid public spaces, decline to report crimes, or disengage from civic life. These effects undermine both constitutional values and public safety.

D. Equal Protection Concerns

Although framed in neutral terms, probabilistic suspicion disproportionately burdens racial and ethnic minorities. Treating demographic traits as proxies for illegality risks reproducing the effects of profiling while avoiding explicit scrutiny. *Noem* sidesteps this concern by treating demographic inference as reasonable, even when its consequences are foreseeably unequal.

E. Efficiency and Constitutional Risk

At the broader level, *Noem* reflects an efficiency driven approach to constitutional interpretation. Risk management and administrative convenience begin to outweigh individualized rights. This risk management paradigm recasts constitutional protections as obstacles to be managed rather than guarantees to be preserved. Over time, such priorities erode public trust and weaken judicial oversight.

F. Restoring the Balance: Toward Doctrinal and Policy Recalibration

Restoring constitutional balance requires reaffirming individualized suspicion as the Fourth Amendment baseline. Courts must resist the temptation to substitute probability for

62. Floyd v. City of New York, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013).

particularity, and policymakers should impose clear limits on the use of demographic inference in enforcement decisions.

Absent such recalibration, the transformation inaugurated by *Noem* risks entrenching a regime of status-based policing inconsistent with the Fourth Amendment's core commitments. The consequences of this shift are not confined to immigration law; they threaten to redefine constitutional reasonableness across contexts wherever risk and efficiency are invoked.

IV. CONCLUSION: CONSTITUTIONAL DRIFT IN THE SHADOWS

The evolution of the stop-and-frisk doctrine from *Terry v. Ohio* to *Noem v. Perdomo* reflects a profound shift in the constitutional regulation of police power. What began as a narrow accommodation designed to protect officer safety while preserving individual liberty has expanded into a framework that tolerates suspicion based on probability, inference, and perceived status rather than individualized conduct.

Noem exemplifies this transformation. Issued on the Supreme Court's shadow docket and devoid of full briefing or reasoned explanation, the decision authorizes immigration enforcement practices that rely on demographic and contextual indicators rather than particularized behavior.[63] In doing so, it redefines reasonable suspicion as a predictive inquiry and untethers the Fourth Amendment from its historical commitment to individualized justification.

Noem represents a form of constitutional drift, the gradual reworking of constitutional meaning through procedural shortcuts and unexamined assumptions. The shadow docket enables doctrinal change without the transparency, deliberation, or accountability traditionally associated with Supreme Court adjudication. Temporary emergency orders thus exert lasting influence on constitutional law while evading meaningful scrutiny.[64]

The consequences of this drift are not abstract. When suspicion is untethered from individual conduct, entire communities become subject to heightened surveillance and

63. Noem v. Perdomo, 146 U.S. (2025).

64. *See* Avi Siegal, *Balancing in the Shadows of Noem v. Vásquez Perdomo*, Yale J. on Regul.: Notice & Comment (Sept. 24, 2025).

intrusion. The normalization of demographic suspicion undermines the Fourth Amendment's promise that individuals will be secure against unreasonable seizures regardless of identity or status.[65] As Justice Sotomayor has warned across multiple Fourth Amendment dissents, constitutional liberties cannot be displaced simply because individualized enforcement is more burdensome or administratively inconvenient.[66]

Restoring constitutional balance requires a renewed commitment to both procedural and substantive restraint. Procedurally, courts should provide reasoned explanations when emergency orders implicate fundamental rights, particularly where those orders alter settled doctrine. Substantively, courts must reaffirm individualized suspicion as the constitutional baseline, resisting the substitution of probability for proof.

Absent such reforms, the trajectory inaugurated by *Noem* risks entrenching a regime of status-based policing that erodes public trust and diminishes the judiciary's role as a meaningful check on executive power. The enduring lesson *Terry* is that liberty demands justification.[67] Conversely, the lesson of *Noem*, if left unchecked, suggests that liberty may yield to prediction.[68] Whether the Fourth Amendment remains a shield for individuals or becomes a tool of risk management will depend on whether constitutional reasoning remains in the light or continues to drift in the shadows.

65. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 885–87 (1975).

66. *See* Noem, 146 U.S. (2025) at 6 (Sotomayor, J., dissenting); Utah v. Strieff, 579 U.S. 232, 255–56 (2016) (Sotomayor, J., dissenting).

67. Terry v. Ohio, 392 U.S. 1 (1968).

68. Noem v. Perdomo, 146 U.S. (2025).

LIGHTS, CAMERA, IMMUNITY: HOW TECH IS REWRITING THE RULES

Michael Gibson*

"The development of full artificial intelligence could spell the end of the human race." – Stephen Hawking

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INTRODUCTION

In an era where police can scan a crowd with drones and identify suspects in seconds using facial recognition, the law still clings to doctrines written for a world of rotary phones and paper reports.

Qualified immunity is a legal doctrine that shields government officials, including police officers, from personal liability for violating constitutional rights unless their conduct breaches a law that was "clearly established" at that time. This effectively protects officials and by extension, their agencies from financial damages.[1]

Qualified immunity, as currently applied, is dangerously out of sync with the digital tools shaping modern policing. The integration of body-worn cameras, license plate readers, and facial recognition technologies captures police interactions in real time, producing evidence that challenges qualified immunity by undermining subjective claims of good faith.[2] As law enforcement increasingly relies on black-box tools like facial recognition, predictive algorithms, and drone surveillance, the logic behind accountability falters.[3] This error is most prevalent when arrests stem from flawed systems rather than human judgment.[4] To restore accountability, the doctrine must evolve alongside the tools it governs. If the law can't recognize a digital violation, can it still deliver justice in a digital age?

I. BACKGROUND: HOW QUALIFIED IMMUNITY AFFECTS POLICING POLICY?

In 1975, the Supreme Court in *Wood v. Strickland* recognized that government officials could face liability for constitutional violations if they acted with "malicious intent" or in

1. Qualified Immunity, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/civil-and-criminal-justice/qualified-immunity (last visited December 13, 2025).

2. *Atlas of Surveillance Glossary*, Electronic Frontier Foundation, https://www.atlasofsurveillance.org/glossary (last visited December 13, 2025).

3. Williams v. City of Detroit*: Face Recognition False Arrest,* ACLU, https://www.aclu.org/cases/williams-v-city-of-detroit-face-recognition-false-arrest (last visited October 23, 2025).

4. *Id.*

"reckless disregard" of clearly established rights.[5] Seven years later, in 1982, *Harlow v. Fitzgerald,* the Court abandoned the subjective standard and replaced it with the objective standard, asking whether a reasonable official would have known that the conduct violated clearly established law.[6]

The doctrinal shift in *Harlow* reshaped the landscape of qualified immunity. In *Anderson v. Creighton*, the Court required that the "clearly established" right be defined in light of the specific facts confronting the officer.[7] Subsequent cases such as *District of Columbia v. Wesby* and *City of Escondido v. Emmons* deepened this requirement by demanding a close factual match between prior precedent and the case at hand.[8] As a result, courts now routinely grant immunity not because the conduct was lawful, but because no prior case addressed the same facts with sufficient specificity.[9] In effect, the more novel or egregious the violation, the more likely it is to be shielded from review.

The increasingly rigid framework has not gone unnoticed. The Court's insistence on near-identical precedent has drawn sustained criticism from scholars, jurists, and even members of the court itself.[10] Justice Ginsburg, for example, cautioned that such a narrow approach to qualified immunity tilts "too heavily in favor" of law enforcement.[11]

II. IS IT TIME THE LAW CAUGHT UP WITH THE LENS?

Policing today looks nothing like it did a generation ago. Body-worn cameras, facial recognition, fusion centers, predictive policing, and other AI-powered surveillance tools now capture police conduct in real time, offering objective evidence that was once unavailable.[12] Nevertheless, courts continue to apply

5. Wood v. Strickland, 420 U.S. 308, 322 (1975).

6. *Harlow*, 457 U.S. at 818.

7. Anderson v. Creighton, 483 U.S. 635 (1987).

8. *See* District of Columbia v. Wesby, 583 U.S. 48, 63 (2018); City of Escondido v. Emmons, 586 U.S. 505, 508 (2019) (per curiam).

9. *See Wesby*, 583 U.S. at 63; *Emmons*, 586 U.S. at 508.

10. Alexander A. Reinert, The Rise of Qualified Immunity, 106 Geo. L.J. 1, 25—30 (2017).

11. District of Columbia v. Wesby, 583 U.S. 48, 68 (2018) (Ginsburg, J., concurring in the judgment).

12. NAT'L CONF. OF STATE LEGISLATURES, *supra* note 2.

qualified immunity using precedent-driven standards that often stem from flawed surveillance tech.[13] The gap between what technology reveals and what doctrine permits is growing, and with it, concerns about justice, accountability, and constitutional integrity.[14]

This isn't just a theoretical flaw; it's a silent fracture in the law. Even when body camera footage exposes the facts in stark detail, victims of police violence are often left without remedy.[15] Courts demand precedent that mirrors the present moment almost identically, dismissing new forms of evidence as legally irrelevant.[16] In doing so, the courts shield misconduct from scrutiny and allow outdated doctrine to override technological clarity. The faster technological innovation moves, the more glaring the law's resistance becomes, jeopardizing both accountability and the Constitution's promise.[17]

The phrase "Constitution's promise" refers to the core guarantees of due process, equal protection, and the right to seek redress for official misconduct.[18] Yet when courts prioritize outdated precedent over unmistakable, modern evidence, the vitality of constitutional rights is placed in jeopardy. These fundamental protections risk becoming hollow guarantees, as

13. *Williams*, *supra* note 6.

14. *See* Ken Wallentine, *Body-Worn Camera Video Supports Award of Qualified Immunity*, Lexipol, https://www.lexipol.com/resources/blog/body-worn-camera-video-supports-award-of-qualified-immunity/ (last visited October 13, 2025); *see also* Bryan Lammon, *A Video-Evidence Exception for Qualified Immunity Appeals*, Final Decisions PLLC, https://finaldecisions.org/a-video-evidence-exception-for-qualified-immunity-appeals/(last visited December 17, 2025).

15. Olivias v. Guadarrama, No. 20-10055, 2021 WL 393191 (5th Cir. Feb. 8, 2021) (per curiam).

16. *See Wallentine*, *supra* note 22.

17. Hon. Maritza Dominguez Braswell, *Law at the Speed of Innovation: Thinking Beyond Our Systems and Structures*, Thomson Reuters Inst., https://www.thomsonreuters.com/en-us/posts/ai-in-courts/law-at-the-speed-of-innovation/ (last visited December 17, 2025).

18. *See Due Process vs. Equal Protection: Your Constitutional Rights Explained*, Govfacts, https://govfacts.org/explainer/due-process-vs-equal-protection-your-constitutional-rights-explained/ (last visited December 17, 2025).

qualified immunity expands beyond policing into other domains, including classrooms, hiring decisions, and correctional facilities.[19]

III. THE ROLE OF TECHNOLOGY IN MODERN POLICING

Technological interventions have emerged as alternative mechanisms for oversight.[20] Leading these innovations are body-worn cameras and artificial intelligence tools, which promise to enhance transparency by documenting real-time encounters between "officers and community members," thereby providing a clearer record for oversight and accountability.[21]

Modern law enforcement agencies are increasingly integrating artificial intelligence technologies to enhance operational efficiency, improve public safety, and ensure accountability.[22] These tools enable real-time data analysis, predictive policing, and streamlined workflows.[23]

As of 2025, facial recognition is one of the most well-established applications of biometric technology, routinely used to identify suspect or victims by comparing facial features captured in images or videos with databases of known individuals.[24] Law Enforcement use of related technologies also support fingerprint matching, DNA analysis, and even ear biometrics, reflecting a broader trend toward algorithmic identification.[25]

This broader reliance on technology in policing coincided with a distinct accountability movement. The 2014 death of Michael Brown catalyzed a national reckoning over police practices, prompting the widespread adoption of body-worn cameras as a technological remedy to perceived institutional

19. *See also Qualified Immunity | Beyond Policing*, Constitutional Accountability Center, https://www.theusconstitution.org/think_tank/qualified-immunity-beyond-policing/ (last visited December 17, 2025).

20. Brett Chapman, *Body-Worn Cameras: What the Evidence Tells Us*, Nij j. No. 280 (January 2019), https://www.ojp.gov/pdffiles1/njj/252035.pdf.

21. Chapman, *supra* note 28, at 2.

22. Nicole Ezeh, Amber Widgery & Chelsea Canada, *Artificial Intelligence and Law Enforcement: The Federal and State Landscape*, Nat'l conf. of state legislatures (February 3, 2025), https://www.ncsl.org/civil-and-criminal-justice/artifical-intelligence-and-law-enforcement-the-federal-and-state-landscape.

23. *Id.*

24. *Id.*

25. *Id.*

failures.[26] Backed by federal funding and executive support, agencies across the country embraced body-worn cameras with the expectation that they would provide an objective record of police-community interactions, deter misconduct, and restore public trust.[27] This reflects the paradox of deploying technology for accountability, only to have it in the wrong hands, function as a shield that protects officers instead of exposing misconduct.

While some studies report modest reductions in use of force incidents and citizen complaints, others find no statistically significant improvements.[28] One reason for this mixed record lies in the infrastructure itself. Axon, whose body-worn cameras represent the most widely adopted platform among major law enforcement agencies worldwide.[29] Trusted by officers for capturing accurate accounts of daily encounters, Axon devices also provide high-quality evidence and efficient workflows relied upon across the justice system.[30] Yet despite its operational value, Axon stores over 100 petabytes of footage, totaling over 5,000 years' worth of data, most of which goes unreviewed.[31]

To address the overwhelming volume of unreviewed body-worn camera footage, law enforcement agencies have begun implementing artificial intelligence tools capable of analyzing video and audio recordings from body-worn cameras, surveillance systems, and other sources.[32] These tools use "natural language processing" to transcribe audio and to identify and flag officer verbal conduct that is inappropriate or inconsistent with departmental policy.[33] In parallel, computer vision algorithms detect gestures, facial expressions, and physical movements.[34]

26. *Rethinking Response Part Two: AI to Analyze Body-Worn Camera Footage*, Policing Project (May 8, 2025), https://www.policingproject.org/rethinking-response-articles/2025/5/8/part-two-body-worn-camera-analytics.

27. *Id*.

28. *Id*.

29. Axon Flex 2, Axon, https://www.axon.com/products/axon-flex-2 (last visited December 17, 2025).

30. *Id*.

31. *Policing Project*, *supra* note 39.

32. *Id*.

33. *See Policing Project*, *supra* note 39.

34. *Id*.

Together, these technologies aim to transform raw footage into actionable insights for oversight and accountability.

IV. JUDICIAL TREATMENT OF BODY CAM AND AI EVIDENCE

A. Body-Worn Cameras

Despite the widespread adoption of body-worn cameras, courts continue to treat video evidence inconsistently; a pattern the Illinois Supreme Court acknowledged in *People v. Collins*, where judges often minimize the evidentiary weight of footage that appears, at first glance, to offer objective proof.[35] Courts have been slow to embrace video and audio evidence, reflecting a deeper judicial discomfort with technologies that unsettle long-standing frameworks for assessing credibility and determining facts.

In *Scott v. Harris*, the U.S. Supreme Court treated dashboard footage as dispositive, stating that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[36]

The situation highlights the challenges of applying modern surveillance capabilities with evidentiary standards designed for a pre-digital courtroom. The problem is especially pronounced when courts issue conflicting rulings on cases involving nearly identical video evidence or uphold immunity even in the face of footage that seems to document clear misconduct.[37]

Courts' inconsistent treatment of video evidence is not merely theoretical; it produces divergent outcomes in strikingly similar fact patterns.[38] In one jurisdiction, body-worn camera footage is credited as dispositive proof,[39] while an adjacent court

35. People v. Collins, 2022 IL 127584, ¶ 47 ("The nature of the video became more prejudicial than probative."(quoting id. ¶ 37)).

36. Scott v. Harris, 550 U.S. 372, 380 (2007).

37. *See*, e.g., Scott v. Harris 550 U.S. 372, 378 n.5 (2007) (asserting that the dashcam footage "depict[ed] the events in question," and allowing the video to "speak for itself" but resulting in a dissenting opinion that reached the opposite factual conclusion based on the same evidence).

38. Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 1043 (2021).

39. *See*, e.g., *Scott*, 550 U.S. at 380 (holding that evidence "blatantly contradicted" the plaintiff's account and justified summary judgment).

may discount or even exclude nearly identical visual evidence.[40] These contradictions expose a fundamental doctrinal instability in how courts weigh visual evidence against testimonial norms, particularly in cases involving police conduct, use of force, or evidentiary disputes.[41]

These doctrinal inconsistencies are compounded by another troubling trend. Despite the proliferation of body-worn cameras and dashboard footage, courts frequently grant qualified immunity to law enforcement officers even when video evidence appears to show constitutional violations.[42] This doctrinal pattern reflects a deeper tension between the promise of visual objectivity and the legal threshold for overcoming immunity. Courts have often regarded video evidence as insufficient to portray "clearly established law,"[43] thereby shielding officers from liability regardless of what the footage depicts.

Building on *Scott v. Harris*, the Supreme Court signaled a willingness to privilege objective video evidence over conflicting testimony, holding that courts need not credit a version of events that the video disputes.[44] Alarmingly, despite the visual clarity, numerous lower court rulings confirm that similar footage often fails to surmount the qualified immunity barrier. For example, in *City of Tahlequah v. Bond*, the Supreme Court reinstated qualified

40. *See* Baez v. Commonwealth, 79 Va. App. 90, 893 S.E.2d 604, 617—18 (2023) (declining to treat body-worn camera footage as dispositive and requiring testimonial authentication).

41. Mitch Zamoff, *Assessing the Impact of Police Body Camera Evidence on the Litigation of Excessive Force Cases*, 54 Ga. L. Rev. 1, 35—42 (2020) (arguing that courts inconsistently interpret body camera footage and sometimes privilege officer testimony over visual evidence).

42. See, e.g., Kisela v. Hughes, 584 U.S. _ _ _, 138 S. Ct. 1148, 1154 (2018) (per curiam) (granting immunity where officer shot a woman holding a knife, despite video evidence, because no prior case clearly established the unlawfulness of the conduct).

43. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) ("A Government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right."); *City of Tahlequah*, 595 U.S. at 12 ("We have repeatedly told courts not to define clearly established law at too high a level of generality.").

44. Scott v. Harris, 550 U.S. 372, 389 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record… a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

immunity for officers who shot a man holding a hammer, reasoning that no prior case had "clearly established" the law with the requisite factual specificity, thereby treating the video evidence of the shooting as legally insufficient to defeat the defense.[45]

The modern jurisprudence of qualified immunity treats video evidence as persuasive but not transformative.[46] This disjunction between what is seen and what is legally recognized demands a reevaluation of how courts engage with surveillance technology in constitutional litigation.

V. IMPLICATIONS FOR CIVIL RIGHTS AND MINORITY COMMUNITIES

While legislative and procedural reforms offer structural clarity, their real-world impact hinges on how technology reshapes the lived experience of civil rights enforcement. The integration of AI and video evidence into § 1983 litigation carries profound implications for communities historically marginalized by policing practices.[47] As courts and lawmakers revise evidentiary standards, they must also confront the social consequences of these reforms, especially regarding racial justice, democratic accountability, and the balance between efficiency and civil liberties.[48]

A. Potential for Greater Protection

The integration of AI and video evidence into § 1983 litigation offers a powerful tool for exposing racial bias and

45. *City of Tahlequah*, 595 U.S. at 12.

46. *See* City of Tahlequah, *supra* note 62, at 12.

47. *See* Stanford Center for Racial Justice, *Using AI to Drive Public Safety Research*, Stanford Law School (2025), https://law.stanford.edu/stanford-center-for-racial-justice/projects/using-ai-to-drive-public-safety-research/ (discussing how AI analysis of body-worn camera footage can uncover patterns in police-community interactions and improve fairness and procedural justice, particularly in communities disproportionately affected by law enforcement).

48. *See* Rashida Richardson, *Algorithmic Justice and Civil Rights Enforcement*, 59 Harv. C.R.-C.L. L. Rev. 1, 10–15 (2024) (arguing that unregulated algorithmic tools risk exacerbating racial disparities in law enforcement and civil rights adjudication).

enhancing accountability.[49] Algorithmic analysis of body-worn camera footage can detect patterns of disparate treatment, identify excessive force clusters, and reveal inconsistencies between officer narratives and visual records.[50] Rashida Richardson has argued that algorithmic tools, when properly regulated, can illuminate systemic disparities that traditional evidentiary methods obscure.[51] In *McCoy v. Alamu*, the Fifth Circuit upheld qualified immunity for a corrections officer who pepper-sprayed an inmate without provocation, despite video evidence and internal inconsistencies in the officer's account.[52] Had AI-assisted review protocols been in place, they could have reconstructed the incident timeline, identified escalation triggers, and contextualized the officer's conduct within broader patterns of force.

B. Risks of Technological Overreach

Despite their promise, AI tools carry significant risks when deployed without democratic oversight. Rebecca Wexler warns that forensic algorithms often operate as "black boxes," shielded by trade secret protections that prevent defendants from challenging their reliability.[53] In the civil rights context, this "black box" nature makes it difficult to detect errors, biases, or misuse, especially when the technology is used to justify police conduct or deny liability.[54] Without community input and

49. *See* Rashida Richardson, Jason M. Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. Rev. 192, 193–94 (2019) (noting that predictive systems often rely on data generated during periods of racially biased and unlawful policing practices).

50. *See* Farhang Heydari et al., *Putting Police Body-Worn Camera Footage to Work: A Civil Liberties Evaluation of Truleo's AI Analytics Platform*, Policing Project, NYU School of Law (2024), https://truleo.co/hubfs/ssrn-5030758%20%282%29.pdf.

51. *Id*.

52. McCoy v. Alamu, 950 F.3d 226, 230–32 (5th Cir. 2020).

53. Rebecca Wexler, *Code of Silence: How Private Companies Hide Flaws in the Software Used to Analyze Evidence*, 107 Geo. L.J. 1279, 1285–89 (2019) (critiquing the evidentiary risks of unregulated forensic algorithms and the lack of transparency in AI tools used in legal proceedings).

54. *See* Roger Allan Ford & W. Nicholson Price II, *Privacy and Accountability in BlackBox Medicine*, 23 Mich. Telecomm. & Tech. L. Rev. 1, 29–31 (2016).

procedural safeguards, AI may reinforce existing disparities under the guise of objectivity.[55] Legislative reform must therefore mandate transparency, public auditing, and inclusive governance structures to ensure that technological interventions serve justice rather than subvert it.

C. Balancing Efficiency with Justice

Law enforcement agencies increasingly rely on AI to streamline investigations and justify use-of-force decisions.[56] While efficiency is a legitimate institutional interest, it must be balanced against civil liberties and evidentiary fairness.[57] Courts must resist the temptation to treat algorithmic outputs as dispositive, especially when they conflict with visual records or eyewitness testimony.[58] The Fifth Circuit's decision in *Argueta v. Jaradi* illustrates this tension, as the court expanded appellate review without resolving contradictions between footage and officer accounts.[59] Procedural reforms, such as rebuttable presumptions when video contradicts reports can help navigate this balance by preserving judicial discretion while elevating objective evidence.[60]

D. Addressing Counterarguments

Critics may argue that AI tools are too unreliable or that rebuttable presumptions risk undermining officer credibility.[61] As

55. *Wexler*, *supra* note 83, at 1287.

56. *See* Rashida Richardson, *Police Data Bias and Predictive Policing*, AI Now Institute (2018), https://ainowinstitute.org/policing.html (discussing how biased data and AI tools are used to justify enforcement decisions).

57. U.S. Dep't of Justice, *supra* note 70.

58. *See* Maura Grossman & Paul Grimm, *Judicial Approaches to Acknowledged and Unacknowledged AI-Generated Evidence*, 26 Colum. Sci. & Tech. L. Rev. 1, 15–18 (2025), https://journals.library.columbia.edu/index.php/stlr/article/view/13890 (warning against overreliance on AI-generated evidence in the face of conflicting human testimony or visual records).

59. *See* Argueta v. Jaradi, No. 22-20350, 75 F.4th 1010, 1016–18 (5th Cir. 2023) (expanding appellate review in qualified immunity cases involving video evidence without resolving evidentiary contradictions).

60. *Lammon*, *supra* note 22 (arguing for procedural reforms when video contradicts officer accounts).

61. Wexler, *supra* note 83, at 1285–89 (describing how trade secret protections obscure forensic algorithm flaws and raise reliability concerns); *see*

Wexler and Richardson both emphasize, the problem is not the existence of AI but its unregulated deployment.[62] Properly designed protocols can mitigate bias, enhance interpretability, and ensure that AI serves as a supplement, not a substitute for judicial reasoning.[63] Moreover, rebuttable presumptions do not eliminate officer testimony; they simply recalibrate the evidentiary hierarchy when objective contradictions arise.[64]

VI. DOES TECHNOLOGY UNDERMINE THE JUSTIFICATIONS FOR QUALIFIED IMMUNITY?

The recurring failure of video evidence to overcome qualified immunity reveals more than just evidentiary inconsistency; it exposes a deeper structural tension between modern technology and the doctrine's foundational logic.[65] Qualified immunity was originally conceived as a means of protecting officials who act in good faith amid legal uncertainty.[66] However, in an era defined by body-worn cameras, real-time surveillance, and digital

also Will Douglas Heaven, *Predictive Policing Algorithms Are Racist. They Need to Be Dismantled*, MIT Tech. Rev. (July 17, 2020), https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/.

62. See *Wexler*, *supra* note 82, at 1285–89; *Richardson*, *supra* note 76, at 14–15.

63. *See* David Uriel Socol de la Osa & Nydia Remolina, *Artificial Intelligence at the Bench: Legal and Ethical Challenges of Informing—or Misinforming—Judicial Decision-Making Through Generative AI*, 6 Data & Pol'y (2024), https://www.cambridge.org/core/journals/data-and-policy/article/artificial-intelligence-at-the-bench-legal-and-ethical-challenges-of-informingor-misinformingjudicial-decisionmaking-through-generative-ai/D1989AC5C81FB67A5FABB552D3831E46 (arguing that well-designed AI protocols can enhance judicial reasoning when used transparently and supplementally).

64. *See* Fed. R. Evid. 301; *see also* LegalClarity, *What Is a Rebuttable Presumption in Law?* (July 14, 2025), https://legalclarity.org/what-is-a-rebuttable-presumption-in-law/ (explaining that rebuttable presumptions shift evidentiary burdens without excluding contrary testimony).

65. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 45—52 (2017) (documenting how courts often discount video evidence and maintain qualified immunity despite factual clarity).

66. Alexander A. Reinert, *Qualified Immunity at Trial*, 93 Notre Dame L. Rev. 2065, 2069 (2018).

reconstruction, the legal landscape of "uncertainty" that once supported the doctrine is increasingly diminished.[67]

These technologies often provide objective, timestamped, and reviewable accounts of contested encounters, reducing the factual ambiguity that once justified qualified immunity.[68] The Supreme Court acknowledged this evidentiary power in *Scott v. Harris*, treating dashboard video as dispositive in resolving factual disputes.[69] Yet courts continue to demand near-identical precedent to defeat immunity, even when video evidence clearly depicts unconstitutional conduct.[70] Joanna Schwartz's empirical research reveals that qualified immunity is routinely granted despite the availability of such evidence, underscoring a doctrinal disconnect between technological clarity and legal standards.[71] Pattern-based clarity, especially when supported by recurring technological evidence, should inform the clearly established law standard even in the absence of factually identical precedent.

This doctrinal recalibration calls for abandoning rigid precedent matching in favor of a standard that reflects evidentiary clarity and reasonable perception.[72] Courts should ask whether a reasonable officer, viewing the same video or digital reconstruction, would understand the conduct to be unconstitutional.[73] This reframing suggests a video-informed

67. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1806—10 (2018) (arguing that qualified immunity persists even when video and other objective evidence clarify the facts); Andrew D. Selbst, *Negligence and AI's Human Users*, 100 B.U.L. Rev., 1320—25 (discussing how AI-generated outputs can clarify factual disputes and reshape legal standards of reasonableness).

68. *See Scott*, 550 U.S. 372, 378—81 (treating dashcam video as objective, reviewable evidence that can resolve factual disputes by direct observation).

69. *Id*. at 379.

70. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (holding that "existing precedent must have placed the statutory or constitutional question beyond debate")

71. Schwartz, *supra* note 96, at 1820.

72. Schwartz, *supra* note 98, at 1806—10 (documenting cases where courts granted immunity despite clear video evidence and arguing that the doctrine fails to achieve its intended policy goals).

73. *See Scott*, 550 U.S. at 378—81 (treating video footage as objective evidence that can resolve factual disputes); *Selbst*, *supra* note 98, at 1320–25 (arguing that AI-generated outputs can clarify facts and reshape reasonableness standards).

reasonableness test: would a reasonable official, confronted with this footage, recognize the conduct as unconstitutional under existing principles? With the use of modern technology, this evidentiary clarity enables courts to assess constitutional violations with greater precision, though the qualified immunity doctrine has not kept pace with these evidentiary advances.[74] In cases where such evidence depicts misconduct with clarity, the absence of a factually identical precedent should not bar liability.[75]

A. Reasonable Person Standard

Qualified Immunity was originally conceived as a pragmatic shield for government officials navigating ambiguous legal terrain.[76] The Supreme Court has repeatedly emphasized that the doctrine exists to afford "breathing room" for reasonable mistakes made in the course of discretionary duties, particularly in high-pressure or rapidly evolving situations.[77]

The court's justification rests on two interrelated premises: first, that constitutional standards are often vague or evolving; and second, that public officials, especially law enforcement officers, must make split-second decisions without the benefit of legal counsel or judicial hindsight.[78] In such contexts, the Court has reasoned that liability is inappropriate unless the unlawfulness of the conduct is apparent in light of pre-existing law

74. Scott v. Harris, 550 U.S. 372, 378-81 (2007) (treating video footage as objective evidence that can resolve factual disputes); Selbst, *supra* note 98, at 1320—25 (arguing that AI-generated outputs can clarify facts and reshape reasonableness standards).

75. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1806—10 (2018) (arguing that courts grant immunity despite clear video evidence when no identical precedent exists); Tyler Finn, *Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity*, 119 Colum. L. Rev. 439, 445—50 (2019) (criticizing the requirement for factually identical precedent and advocating for a more functional standard).

76. *See* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1890—91 (2018) (explaining the historical development of qualified immunity as a pragmatic doctrine).

77. *Harlow*, 457 U.S. at 818.

78. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989) (emphasizing the need to evaluate police conduct from the perspective of a reasonable officer on the scene, not with 20/20 hindsight).

so clear that "every reasonable official" would understand it violates constitutional rights.[79]

However, the original justification for qualified immunity, protecting officials from liability for reasonable mistakes in unsettled areas of law, no longer applies in a policing environment dominated by technology. Modern surveillance tools, body-worn cameras, and AI-generated outputs increasingly provide objective, reviewable accounts of contested encounters.[80] This evidentiary clarity enables courts to assess constitutional violations with greater precision,[81]—even as the qualified immunity doctrine struggles to keep pace.[82]

As the next section explores, the rise of objective visual evidence, including body-worn cameras, surveillance footage, and AI-generated reconstructions, continues to erode the ambiguity that once justified qualified immunity's protective scope.[83]

B. Proposed Reforms

The uneven judicial handling of visual evidence across jurisdictions reveals a more fundamental breakdown: the law's evidentiary framework has lagged behind the technological realities of modern policing. To preserve the doctrinal integrity and normative legitimacy of qualified immunity, courts and legislatures must rethink how they engage with objective, real-time evidence.

C. Judicial Reform

Courts must develop jurisprudence that gives greater weight to objective visual and AI-generated evidence in excessive force litigation. Current doctrine often treats video footage as

79. *Ashcroft*, 563 U.S. 731, 741 (2011).

80. Wexler, *supra* note 91 (exploring how surveillance and forensic technologies affect evidentiary clarity); Andrew D. Selbst, *Negligence and AI's Human Users*, 100 B.U.L. Rev. 1315, 1320—25 (2020) (arguing that AI-generated outputs can clarify facts and reshape legal standards of reasonableness).

81. *Scott*, 550 U.S. at 378—81 (treating video footage as objective evidence that can resolve factual disputes); Selbst, *supra* note 98, at 1320–25.

82. Schwartz, *supra* note 98, at 1806–10.

83. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 45–52 (2017) (documenting how courts often discount video evidence and maintain qualified immunity despite factual clarity).

supplementary rather than dispositive, even when it clearly contradicts officer testimony or reveals unconstitutional conduct. To address this, courts should do three things:

Recognize video and AI analysis as central to Fourth Amendment adjudication, especially in qualified immunity cases when factual disputes hinge on visual clarity.

Reframe the "clearly established" standard to account for real-time, objective evidence.

Incorporate evidentiary presumptions that favor plaintiffs when visual evidence contradicts official reports, shifting the burden of justification to the state.

D. Legislative Reform

To prevent objective evidence, particularly video and AI analysis from being marginalized by antiquated liability standards;[84] Congress must provide statutory clarity and technological uniformity.[85] The proposals below aim to modernize 42 U.S.C. § 1983 and embed evidentiary precision into the legal framework governing police misconduct.[86]

First, amend 42 U.S.C. § 1983 to clarify standards of liability in cases involving objective tech evidence. The current statute does not distinguish between subjective testimony and objective visual data, leaving courts without guidance on how to weigh body-worn camera footage or algorithmic reconstructions in excessive force cases.[87] Legislative reform should codify the evidentiary weight of such materials and clarify liability thresholds when visual evidence contradicts officer accounts.[88]

84. See Scott v. Harris, 550 U.S. 372, 378–81 (2007); Martin A. Schwartz & Jessica Silbey, *Analysis of Videotape Evidence in Police Misconduct Cases*, BU Sch. of L. Faculty Scholarship Paper 1373, at 118–22 (2009), https://scholarship.law.bu.edu/faculty_scholarship/1373/.

85. *See* Michaela Calhoun, *No Sword*, *No Shield*, *No Problem*: *AI in Pro Se Section 1983 Suits*, 95 Colo. L. Rev. F. 1, 3–5 (2024) (arguing that Section 1983's current framework fails to accommodate emerging technologies and proposing reforms to integrate AI-driven evidence into civil rights litigation).

86. *See Lifting the Legislative Rug: A Proposal for Congressional Abrogation of Qualified Immunity*, 67 B.C. L. Rev. 3194, 3201–03 (2024) (proposing amendments to 42 U.S.C. § 1983 to clarify liability standards and address evidentiary gaps in excessive force cases).

87. *Id.*

88. *Id.* at 3202–03

Secondly, mandate standardized AI analysis of video in misconduct cases. Despite the growing use of AI tools to reconstruct incidents, detect anomalies, and identify excessive force patterns, no federal standards govern their admissibility or interpretive reliability.[89] Congress should establish protocols for AI-assisted video analysis to ensure consistency across jurisdictions and prevent disconnected evidence. This argument fills a critical void in contemporary legal discussion, reflecting an immediate and emerging doctrinal need that current legislative frameworks have yet to satisfy.[90]

E. Procedural Reform

Meaningful reform requires procedural safeguards that ensure courts engage directly with objective evidence before granting qualified immunity. One necessary intervention is a rule requiring courts to review and cite body-worn camera footage when resolving immunity at the summary judgment stage. Although the Supreme Court in *Scott v. Harris* emphasized that video evidence can "speak for itself" when it blatantly contradicts a plaintiff's account,[91] lower courts routinely treat video footage as merely corroborative or by bypass the visual record altogether, relying instead on officer narratives or subjective accounts.[92] Procedural clarity would ensure that visual evidence is not sidelined by narrative testimony.

A second procedural reform involves establishing rebuttable evidentiary presumptions against officers when body-worn camera footage materially conflicts with official reports. In such cases, the burden of justification should shift to the state, discouraging post hoc rationalizations and reinforcing the primacy of objective evidence in excessive force adjudication. Courts have long

89. *See Artificial Intelligence and Civil Rights Litigation: Bridging the Evidentiary Gap*, 58 Stan. Tech. L. Rev. 112, 118–22 (2025).

90. Wexler, *supra* note 83, at 1285–89 (critiquing the evidentiary risks of unregulated forensic algorithms and the lack of transparency in AI tools used in legal proceedings).

91. *Scott*, 550 U.S. at 378.

92. Latits v. Phillips, *supra* note 74, at 552–53 (granting qualified immunity despite dashboard camera footage showing a fatal shooting during a low-speed chase); Arguenta v. Jaradi, *supra* note 88, at 1016–18 (expanding appellate review without resolving contradictions between video and officer testimony).

struggled with how to weigh visual contradictions, often defaulting to officer narratives even when video evidence suggests constitutional violations. Thus, these procedural reforms would operationalize the evidentiary precision made possible by modern technology and reinforce the integrity of qualified immunity adjudication.

VII. CONCLUSION

While critics rightly caution that technology is fallible, pointing to footage gaps, poor resolution, or biased AI,[93] these limitations do not justify judicial disengagement. Similarly, some argue that increased video surveillance has not meaningfully changed police behavior.[94] Indeed, studies on body-worn camera adoption show mixed results; some departments report reductions in use-of-force incidents and citizen complaints, while others see minimal change.[95]

The proper response to these critiques is doctrinal innovation, not judicial stasis.[96] A rebuttable presumption does not nullify the officer's account. It simply shifts the requirement of justification when objective digital evidence contradicts the factual claim.[97] Properly designed protocols can enhance interpretability, mitigate bias, and ensure that AI and video evidence serve as supplements, not substitutes, for judicial reasoning.[98]

93. *Wexler*, *supra* note 83.

94. *See* Cynthia Lum et al., *Body-Worn Cameras: What the Evidence Tells Us*, Nat'l Inst. of Just. (Nov. 2019), https://nij.ojp.gov/topics/articles/body-worn-cameras-what-evidence-tells-us.

95. *See* Police Exec. Research Forum, *Body-Worn Cameras: A Decade Later* 8–12 (2023), https://www.policeforum.org/assets/BWCdecadelater.pdf.

96. *See* Karen Blum, *Qualified Immunity: Achieving a Better Balance*, 69 B. B. J. 1 (2025), https://bostonbar.org/journal/qualified-immunity-achieving-a-better-balance/ (arguing that courts must evolve doctrinal tools to meet modern accountability challenges).

97. *See* Fed. R. Evid. 301, https://www.law.cornell.edu/rules/fre/rule_301 (explaining that rebuttable presumptions shift the burden of production without eliminating contrary testimony); *see also Lammon*, *supra* note 8 (proposing procedural reforms when video contradicts officer accounts).

98. *Socol de la Osa & Remolina*, *supra* note 94.

Qualified immunity, as currently applied, fails to keep pace with the realities of modern policing technology.[99] Courts must integrate technological evidence more meaningfully into constitutional analysis, ensuring that evolving enforcement tools are matched by evolving doctrinal safeguards.[100] In doing so, they reinforce the constitutional imperative of accountability without sacrificing procedural fairness.[101]

99. *Blum*, *supra* note 144.

100. *Lammon*, *supra* note 22.

101. *Socol de la Osa & Remolina*, *supra* note 94.

DEATH BY BRADY: A CASE ANALYSIS OF STATE EX REL. ROBINSON V. VANNOY

William Sadler*

I. ABSTRACT

This article examines *State ex rel. Robinson v. Vannoy* and the application of *Brady v. Maryland* by comparing two divided Louisiana Supreme Court rehearing opinions that reached opposing conclusions without new evidence. It analyzes how identical evidence was interpreted differently under the *Brady* standard focusing on undisclosed serology evidence, witness statements, jailhouse informant deals, and ballistics evidence. The article argues that the Court's second rehearing misapplied the *Brady* doctrine and wrongfully affirmed the denial of the defendant's post-conviction relief, and ultimately contends that the reinstatement of the defendant's death sentence and denial of his post-conviction relief violated the standard established under *Brady v. Maryland*.

II. INTRODUCTION

In 2001, Mr. Darrell Robinson was convicted of four counts of first degree murder and sentenced to death.[1] Subsequently, the Louisiana Supreme Court affirmed his conviction and sentence on direct appeal.[2] In 2005, Robinson initiated post-conviction proceedings. Then, in 2014, the district court held an evidentiary hearing to address his *Brady* violation claims.[3] The district court rejected Robinson's *Brady* claims leading to a denial of his post-conviction relief.[4] However, upon application of a supervisory writ, the Louisiana Supreme Court found the State did violate the *Brady* doctrine, so it reversed Robinson's conviction, vacated his

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1. State v. Robinson, 874 So. 2d 66, 72 (La. 2004).
2. *Id.* at 90.
3. State ex rel. Robinson v. Vannoy, 378 So. 3d 11, 20 (La. 2024).
4. *Id.* at 27.

sentence, and remanded the case for a new trial.[5] Shortly thereafter, on rehearing at the state's request and without any new evidence, the Court reversed itself and reinstated Robinson's conviction and death sentence.[6]

Under *Brady v. Maryland*, the suppression of material, exculpatory evidence violates a defendant's constitutional right to due process.[7] Louisiana courts have struggled with applying this concept in past cases as "[h]alf of all U. S. Supreme Court reversals for Brady violations are from Louisiana."[8] This problem is further confirmed by Ivan Moreno in his article where he interviews Ellen Yaroshefsky "who has written extensively about Louisiana's criminal justice system..." and who confirmed that "Louisiana is an outlier in terms of the number of Brady petitions and Brady errors that have remained unaddressed."[9] Additionally, Moreno reviewed a N.A.C.D.L. study of 620 *Brady* violation cases over five years and in "145 of those cases, prosecutors did not disclose favorable information to the defense, the study said, but judges sided with the government 86% of the time in concluding there was no violation."[10] These materials demonstrate that Louisiana has a persisting problem with the *Brady* doctrine.

This article analyzes Robinson's alleged *Brady* claims by comparing the reasoning behind the conflicting rulings to determine whether his constitutional due process rights were violated. Section III reviews the established facts and procedural history of Robinson's journey. Section IV presents the legal framework of *Brady v. Maryland* and its progeny to establish the standard for assessing a potential violation. Section V compares the two conflicting opinions, analyzes their reasoning, and provides an ultimate determination for each category of undisclosed evidence. Lastly, Section VI delivers closing remarks.

5. *Id.* at 45.

6. State ex rel. Robinson v. Vannoy, 397 So. 3d 333, 383 (La. 2024).

7. Brady v. Maryland, 373 U.S. 83, 87 (1963).

8. Wrongful conviction in Louisiana: Rates, causes & racial disparities: IJLA, Innocence & Justice Louisiana (2025), https://justicelouisiana.org/criminal-justice-issues/wrongful-convictions/ (last visited Dec. 17, 2025).

9. Ivan Moreno, Louisiana has a brady crisis. Can the Supreme Court fix it? Law 360, https://www.law360.com/articles/1561189 (last visited Dec. 17, 2025).

10. *Id.*

III. BACKGROUND

Before determining whether Robinson's constitutional due process rights were violated under *Brady*, the relevant facts and procedural history must be established. Subsection (A) addresses Robinson's direct appeal to the Louisiana Supreme Court, subsection (B) examines the first rehearing that reversed his conviction and sentence, and subsection (C) assesses the second rehearing that ultimately reinstated his conviction and death sentence.

A. State v. Robinson, 874 So.2d 66 (La. 2004)

i. Established Facts

In 1996, four family members were discovered deceased in Poland, Louisiana at Mr. Billy Lambert's household including Billy Lambert, Carol Hooper, Paula Kelly, and 10-month-old Nicholas Kelly.[11] Ms. Doris Foster discovered the bodies around 12:10 p.m. noticing that all of the victims had been shot once in the head, except Lambert who had been shot twice in the head. Upon hearing noises coming from the back of the house, Foster left to notify law enforcement. After notifying law enforcement, she returned to the scene and realized that Lambert's Ford truck was now missing.[12] Then, around 12:15 p.m., two witnesses in the area viewed a Ford truck driving erratically on a nearby road with one witness describing the driver as "a young man with brown hair[.]"[13]

Shortly thereafter, another bystander was side-swiped by the same Ford truck leading him to pursue the driver and call his friend for help. The driver fled the scene prompting the witness to request his friend to follow the truck while he called law enforcement.[14] Eventually, the pursuit ended in Evangeline Parish where the driver rammed through a fence, attempted to hide the truck, and disappeared into the nearby woods. Officers arrived at the scene, found the driver hiding nearby, and apprehended him prompting the suspect to state "I'm not armed.

11. Robinson v. State of Louisiana, 2004 WL 2418922, at 2.
12. State v. Robinson, 874 So. 2d 66, 71 (La. 2004).
13. *Id.*
14. *Id.* at 72.

I don't have a gun." and "I'm on medication for violent tendencies[.]"[15] Upon searching the suspect, the officers recovered a yellow pocketknife belonging to Lambert, seventy-one dollars, and a pack of cigarettes that Lambert regularly smoked yet the officers never found a firearm.[16] Later testing of the suspect's confiscated clothing revealed gunshot residue on the suspect's shirt, waistband, and shorts and two drops of blood on his left shoe that matched the DNA of Nicholas Kelly.[17]

The identity of the suspect was Darrell Robinson who, about a week before the murders, was being treated for alcoholism at the Veteran's Administration Medical Center in Pineville, LA.[18] During treatment, Robinson met Lambert who invited Robinson to live with him in exchange for work. Robinson proceeded to move in with Lambert and was notified that no drinking would be tolerated.[19] However, Robinson's problem began again just days after his release.[20] The night before the murders, Lambert had told a witness that he was going to evict Robinson due to his persisting alcoholism.[21] This problem continued to the day of the murders with a store clerk attesting that Robinson purchased alcohol on the morning of the murders.[22]

ii. Procedural History

In June 1996, Robinson was indicted on four counts of first degree murder.[23] His motion to set bail was denied following a preliminary hearing and he was then incarcerated in the Rapides Parish Detention Center.[24] While incarcerated, Robinson's cellmate was Mr. Leroy Goodspeed who alleged that

15. *Id*. at 72.

16. *Id*. at 72-75.

17. *Id*. at 72.

18. Melissa Gregory, *'Truly warranted': Rapides DA says his office will pursue death penalty in 1996 murders*, The Town Talk (Dec. 20, 2024), https://www.thetowntalk.com/story/news/2024/12/20/truly-warranted-phillip-terrell-rapides-da-says-his-office-will-pursue-death-penalty-in-1996-murders/77070710007/

19. Robinson, *supra* note 11, at 3.

20. State v. Robinson, 874 So. 2d 66, 71 (La. 2004).

21. Robinson, *supra* note 11, at 4.

22. State v. Robinson, 874 So. 2d 66, 71 (La. 2004).

23. *Id*. at 72.

24. *Id*.

Robinson confessed to him "I did those people, a man, two women and a small child, and threw the gun off a bridge."[25] Thereafter, Goodspeed promptly informed an investigator about Robinson's statements.

After granting Robinson's motion to change venue, jury selection took place in St. Landry Parish. Subsequently, Robinson's trial began in March 2001 and the jury returned a verdict of guilty on all four counts within a week. Sentencing began the following day and the jury unanimously returned a recommendation for death. Defense counsel motioned for a new trial; however, the trial court denied the motion and imposed the death sentence.[26] Robinson appealed with 24 assignments of error and, upon review, the Louisiana Supreme Court affirmed the trial court's ruling confirming Robinson's conviction and sentence.[27]

B. State ex rel. Robinson v. Vannoy, 378 So.3d 11 (La. 2024)

i. Additional Facts

In the first rehearing opinion, the Court readdressed the previously established facts and introduced additional facts not discussed in the prior opinion. The Court recognized that a bystander spotted the defendant in a grocery store parking lot on the morning of the murders around 11:30 a.m.[28] Concerning the crime scene, the Court acknowledged the presence of a towel stained with Nicholas Kelly's blood and a blood-stained red jacket which did not match either Robinson's or the victims' D.N.A. implying the existence of an alternate suspect. Defense counsel alleged that the unidentified blood belonged to Mr. Mark Moras, a former resident of Lambert's household who got into a hostile engagement with Lambert over forging checks in his name.[29] Furthermore, only four bullets were found at the crime scene even though the victims together had five bullet wounds.[30] The Court recognized the State's five bullet theory which claimed that Foster

25. *Id*. at 73.
26. *Id*.
27. *Id*. at 90.
28. State ex rel. Robinson v. Vannoy, 378 So.3d 11, 17 (La., 2024).
29. *Id*. at 20.
30. *Id*. at 18-19.

previously possessed Lambert's revolver and she had forgot one of the six bullets upon returning it.[31]

ii. Procedural History

After the Louisiana Supreme Court's affirmance and the United States Supreme Court's denial of certiorari, Robinson initiated post-conviction proceedings. The district court granted an evidentiary hearing to address Robinson's *Brady* claims which uncovered extensive evidence relevant to his contentions.[32]

First, Robinson presented evidence suggesting that Goodspeed was given undisclosed, favorable treatment. This evidence included a redacted note on a statement provided by Goodspeed's wife, correspondence between Goodspeed's probation officer with a Rapides Parish judge requesting leniency, two pardons entered for Goodspeed despite being a habitual offender, and communications between Rapides Parish and Lafayette Parish D.A. offices along with the subsequent dismissal of pending charges in Lafayette Parish.[33]

Second, Robinson presented evidence that portions of 51 pages of serology bench notes and diagrams, which contained blood evidence and DNA testing information, were not disclosed.[34] These notes documented high and medium blood impact splatter on a red jacket found at the crime scene which did not did not match either Robinson's or the victim's DNA.[35] Robinson claimed these findings were inconsistent with trial testimony theorizing the blood on the jacket resulted from routine farm work.[36] Robinson also provided evidence that ballistics bench notes and crime scene diagrams were not disclosed to him.[37]

Third, Robinson presented evidence showing exculpatory eyewitness testimony which contradicted the State's theories was not disclosed. One witness claimed that he saw another vehicle leaving Lambert's household on the morning of the

31. *Id.* at 19.
32. *Id.* at 20-21.
33. *Id.* at 21-24.
34. State ex rel. Robinson v. Vannoy, 378 So.3d 11, 24 (La., 2024).
35. *Id.*
36. *Id.*
37. *Id.* at 24-25.

event.[38] Additionally, defense counsel did not receive notes from an interview with another witness who claimed that Mr. Kirby Brown saw Robinson get dropped off at Lambert's household the morning of the event. Upon interviewing Brown, it was discovered that Robinson was not dropped off until noon opposing the State's timeline.[39]

Upon the hearing's conclusion, the district court denied Robinson's post-conviction relief.[40] The Louisiana Supreme Court then granted Robinson's supervisory writ contesting the district court's determination.[41] On rehearing, the Court focused on the major categories of undisclosed evidence which included Goodspeed's deal, the serology notes, the ballistics evidence, and eyewitness statements.[42] Considering the evidence cumulatively, the Court concluded that Robinson did not receive a fair trial so it reversed his conviction, vacated his sentence, and remanded the case for a new trial.[43]

C. State ex rel. Robinson v. Vannoy, 397 So.3d 333 (La. 2024)

i. Additional Facts & Procedural History

Unsatisfied with the previous determination, the State applied for a rehearing which the Louisiana Supreme Court subsequently granted.[44] The only additional fact considered by the Court was that Robinson was present at Lambert's house around 9 a.m. on the morning of the murders since he had answered an incoming call to the household.[45] The Court readdressed all of Robinson's *Brady* claims and concluded that the trial court did not abuse its discretion in denying Robinson's post-conviction relief thereby affirming its decision, vacating the rehearing decision, and reinstating Robinson's death sentence.[46]

38. *Id*. at 25–26.
39. *Id*. at 26.
40. State ex rel. Robinson v. Vannoy, 378 So.3d 11, 27 (La., 2024).
41. *Id*.
42. *Id*. at 29.
43. *Id*. at 44-45.
44. State ex rel. Robinson v. Vannoy, 397 So.3d 333, 345 (La. 2024).
45. *Id*. at 346.
46. *Id*. at 383.

IV. THE FRAMEWORK OF BRADY V. MARYLAND AND ITS PROGENY

Again, before determining whether Robinson's constitutional due process rights were violated, the legal principles behind the *Brady* doctrine must be established. This section follows *Brady v. Maryland* and its progeny to ascertain a basis for what constitutes a *Brady* violation. The United State Supreme Court has communicated the elements of a valid *Brady* claim include: (1) the evidence must be favorable to the accused, (2) the State must have suppressed the favorable evidence, and (3) the evidence must be material to the accused such that prejudice resulted.[47] To fully understand these elements, a further analysis of *Brady v. Maryland* and its progeny is required.

The United States Supreme Court established the *Brady* doctrine in *Brady v. Maryland*. In that case, the prosecution withheld an extrajudicial statement proving the defendant had not committed murder even after the defense made a specific request for such statements.[48] The Court held that a defendant's due process is violated when the prosecution, upon request, withholds or suppresses favorable evidence that is material to guilt or punishment regardless of whether a prosecutor acted in good or bad faith.[49] Following the ruling in *Brady* establishing the category of exculpatory evidence, the United States Supreme Court affirmed that impeachment evidence is another category which prosecutors must disclose in *Giglio v. United States*. In that case, the Court found that evidence regarding the credibility of the government's essential witness including "evidence of any understanding or agreement as to a future prosecution" could have been used to impeach the essential witness and thus was favorable to the defendant.[50]

The next case to develop the *Brady* doctrine was *United State v. Bagley* which clarified the materiality standard. The Court found that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense,

47. Strickler v. Greene, 527 U.S. 263, 281-82 (1999).
48. Brady v. Maryland, 373 U.S. 83, 84 (1963).
49. *Id.* at 87.
50. Giglio v. United States, 405 U.S. 150, 155 (1972).

the result of the proceeding would have been different."[51] The Court elaborated that a reasonable probability "is a probability sufficient to undermine confidence in the outcome."[52] The *Bagley* Court found this materiality standard sufficient to cover cases involving specific requests, general request, or no requests.[53]

The final case extending the *Brady* doctrine was *Kyle v. Whitley* which refined the materiality standard set forth in *Bagley* by clarifying some misunderstandings of the principle. The Court explained that materiality is not a question of "whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[54] Furthermore, *Kyles* specified that a valid *Brady* violation is shown when the accused demonstrates that the favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[55] Finally, the *Kyles* Court set forth the principle that suppressed evidence must be "considered collectively, not item by item."[56] Essentially, the cumulative effect of the suppressed evidence must be considered when determining materiality, not item by item, to understand whether an accused's constitutional rights have been violated.

V. COMPARISON AND ANALYSIS

Now that a background and framework have been established, an in-depth analysis is required to examine the Court's reasoning in each rehearing to determine whether the undisclosed evidence constituted a *Brady* violation. In the first rehearing, the Court considered four categories of undisclosed evidence including the alleged undisclosed deal between the State and Goodspeed, an undisclosed serology report and notes, undisclosed ballistics evidence, and undisclosed eyewitness information finding all of these categories together constituted a

51. United States v. Bagley, 473 U.S. 667, 682 (1985).
52. *Id.*
53. *Id.*
54. Kyles v. Whitley, 514 U.S. 419, 434 (1995).
55. *Id.* at 435.
56. *Id.* at 436.

Brady violation.[57] In the second rehearing, the Court reconsidered all of the previous categories finding that none of the undisclosed evidence constituted a *Brady* violation.[58] To resolve the discrepancies between the opinions and establish whether a *Brady* violation occurred, all the above mentioned categories must be analyzed.

A. The Alleged Undisclosed Deal Between the State and Goodspeed

The first category of undisclosed evidence concerned the alleged undisclosed deal between the State and Goodspeed. Robinson contended that the following undisclosed pre-trial evidence demonstrated the existence of a deal between Goodspeed and the State: (1) a 1998 Rapides Parish plea deal received by Goodspeed, (2) two pardons Goodspeed received in January 1999 and February 2001, and (3) a letter from Goodspeed's probation officer requesting a Rapides Parish judge to not take any action regarding his probation.[59]

In addition to the alleged undisclosed pre-trial evidence, Robinson also contended the following undisclosed post-trial evidence also demonstrated a deal existed: (1) a redated note on a transcript of a statement provided by Goodspeed's wife, reading "try and reconcile ... said this may help you get out Det[tention]", (2) communications made between the Rapides Parish D.A. and a Lafayette Parish A.D.A. which led the Lafayette Parish A.D.A. to send a five page fax to the Rapides Parish D.A., though only the cover page of the fax was discovered, (3) dismissals of two charges in Lafayette Parish including a charge for being a principal to the a first degree robbery and a charge for issuing worthless checks, (4) a note from a Lafayette Parish A.D.A., who spoke with the Rapides Parish D.A., to another Lafayette Parish A.D.A. which requested the worthless check charge be dismissed, (5) post-trial statements made by Goodspeed informing a post-conviction investigator he received a deal in exchange for his testimony, and

57. State ex rel. Robinson v. Vannoy, 378 So. 3d 11, 45 (La. 2024)
58. State ex rel. Robinson v. Vannoy, 397 So. 3d 333, 365 (La. 2024).
59. *Id*. at 350.

(6) post-trial statements made by Goodspeed to a previous cellmate regarding the existence of a deal.[60]

In the first rehearing, the Court found that the evidence presented sufficiently supported the contention that Goodspeed "both desired to have a deal and received special treatment in exchange for his testimony."[61] The Court rested its reasoning on a ruling from *LaCaze v. Warden Louisiana Correctional Inst. for Women*.[62] *Lacaze* established the principle that *Brady* violation cases have never been limited to those where "the facts demonstrate that the state and the witness have reached a bona fide, enforceable deal."[63] According to *Lacaze*, the "key question is [...] whether the witness 'might have believed that [the state] was in a position to implement ... any promise of consideration.'"[64] The Court proceeded by addressing the evidence produced. The Court took note of the post-trial statements made by Goodspeed to both the post-conviction investigator and his former cellmate which it found supported the existence of a deal.[65] The Court also recognized the two pardons and the letter from Goodspeed's probation officer as clear pre-trial benefits which further supported the existence of a deal.[66] Ultimately, the Court concluded that the circumstantial evidence established "special treatment that could have been used as impeachment evidence... [and thus] [t]he prosecution has a duty to disclose it."[67]

Regarding materiality, the Court in the first rehearing rejected the State's argument, that additional evidence attacking Goodspeed's credibility was worthless since he was already intensely crossed examined, finding that the jury was unable to hear evidence regarding multiple pre-trial and post-trial benefits.[68] Additionally, the Court specified that Goodspeed's misleading testimony of not receiving or expecting any favorable

60. *Id*. at 350-52.

61. State ex rel. Robinson v. Vannoy, 378 So.3d 11, 29 (La. 2024).

62. *Id*. at 30.

63. LaCaze v. Warden Louisiana Correctional Inst. for Women, 645 F.3d 728, 735 (5th Cir. 2011).

64. *Id*. (quoting *Napue v. Illinois,* 360 U.S. 264, 270 (1959).).

65. State ex rel. Robinson v. Vannoy, 378 So.3d 11, 30 (La. 2024).

66. *Id*. at 31.

67. *Id*.

68. *Id*. at 39.

treatment not only went unopposed, but it was reinforced by the State.[69] The Court continued by furthering that the State's case is largely based on circumstantial evidence.[70] The Court rejected the State's argument that Goodspeed's testimony was of little value compared to the other evidence and disclosure of the suppressed evidence would not have changed the jury's determination by again rests its reasoning on *LaCaze v. Warden Louisiana Correctional Inst. for Women*.[71] *Lacaze* propagates the standard that "the [materiality] inquiry is whether an undisclosed source of bias-even if it is not the only source or even the 'main source'-could reasonably be taken to put the whole case in a different light."[72] Using this standard, the Court concluded that the undisclosed evidence and deal was material since "there [was] at least a 'reasonable likelihood'" the disclosure to the jury of Goodspeed's motive for testifying against defendant might have affected the jury's judgment and put the whole case in a different light."[73]

Regarding the second rehearing, the Court found that there was "no direct evidence" which supported the existence of a deal prior to trial.[74] The Court noted that multiple testimonies rejected the existence of a deal before trial.[75] Concerning the two pre-trial pardons, the Court asserted that there was no evidence presented showing that the pardons "were directed to be entered as a benefit to Goodspeed to induce his testimony[.]"[76] Regarding the letter from Goodspeed's probation officer, the Court determined that the letter did not refer to the existence of any deal and did not request any sort of benefit.[77] Concerning the 1998 Rapides Parish plea deal, the Court noticed that evidence of the deal was already presented at trial.[78] Furthermore, the Court also reviewed testimony from Goodspeed's previous attorney who confirmed that

69. *Id*.
70. *Id*. at 41-42.
71. *Id*.
72. LaCaze v. Warden Louisiana Correctional Inst. for Women, 645 F.3d 728, 736 (5th Cir. 2011) (quoting Kyles v. Whitley, 514 U.S. 419, 434-435 (1995).).
73. State ex rel. Robinson v. Vannoy, 378 So.3d 11, 42 (La. 2024).
74. State ex rel. Robinson v. Vannoy, 397 So.3d 333, 352 (La. 2024).
75. *Id*. at 352-353.
76. *Id*. at 353.
77. *Id*. at 354.
78. *Id*. at 352.

his participation in Robinson's trial was not part of the plea deal discussion.[79]

The Court then moved on to address the post-trial evidence which it found did not support the contention that a pre-trial deal was in place.[80] Regarding the redacted note on the transcript of the statement provided by Goodspeed's wife, the Court found it held significantly low evidentiary value and was not material.[81] Concerning the dismissed first degree robbery charge and issuing worthless checks charge, the Court noticed that they were wholly beneficial to Goodspeed; however, it stated that "the fact that a witness who testified at a trial thereafter received benefits, even if they were imparted because of the witness's testimony, is insufficient to demonstrate a *Brady* violation."[82] The Court continued by relaying that nondisclosure of an express agreement may warrant a reversal but it must be shown that the agreement was made before trial and that the witness's subjective belief as to the existence of a deal is not sufficient.[83] The Court rested its reasoning on *State v. Williams* which established that "[t]he fact that an unrelated charge has been dropped against a state witness, standing alone, does not offend defendant's right to due process, and, absent additional showing that her testimony was bargained for, does not violate the proscription set down in Giglio and Brady."[84] Additionally, the Court relied on *Medellin v. Dretke* which provided that "speculation about the suppression of exculpatory evidence is an insufficient basis to support a *Brady* claim."[85] Using this authority, the Court ultimately concluded that the dismissed charges do not evidence a deal existed prior to Robinson's trial.[86]

Regarding the post-trial statements made by Goodspeed, the Court reiterated that Goodspeed's subjective belief that he had a

79. *Id*.

80. State ex rel. Robinson v. Vannoy, 397 So.3d 333, 354 (La. 2024).

81. *Id*. at 354-55.

82. *Id*. at 355.

83. *Id*.

84. State v. Williams, 338 So. 2d 672, 677 (La. 1976).

85. Medellin v. Dretke, 371 F.3d 270, 281 (5th Cir. 2004) (citing Hughes v. Johnson, 191 F. 3d 607, 630 (5th Cir. 1999).).

86. State ex rel. Robinson v. Vannoy, 397 So.3d 333, 357 (La. 2024).

deal in place was not sufficient to support a *Brady* violation.[87] Additionally, the Court relied on *Smith v. Cain* which found that the witness's testimony "was the only evidence linking [the defendant] to the crime ... [and that] evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict."[88] The Court determined that the circumstantial evidence presented in the trial was sufficient to render a verdict of confidence.[89]

It is clear that the opinions diverge when evaluating impeachment value and materiality; however, the Court in the first rehearing correctly determined that the withheld special treatment and undisclosed deal between Goodspeed and the State constituted a violation. Regarding the 1998 plea deal and the letter from Goodspeed's probation officer, the Court presented sound reasoning which explained why these piece of evidence did not support the existence of an undisclosed deal and a violation under the *Brady* doctrine. However, the two pardons should have been designated as valuable circumstantial evidence which supported the contention that an undisclosed deal existed. Though there was no direct evidence, these pardons still comprised valuable circumstantial evidence of special treatment in exchange for Goodspeed's testimony. Not only were these pardons not available to Goodspeed as a habitual offender, but they were also entered around the same time Goodspeed gave his testimony. The coincidentally short timing and unavailability of such pardons are facts which were too great to be ignored. One can reasonably infer that these pardons were not just random acts and were entered by the State to benefit Goodspeed for being a material witness in Robinson's trial.

Regarding the redacted note on the transcribed statement provided by Goodspeed's wife, the Court in the second rehearing again presented sound reasoning as to why it did not hold any evidentiary value. However, the Court incorrectly determined that the two dismissed Lafayette charges did not support this contention. In making this determination, the Court relied on the principle established in *State v. Williams*, however, unlike that

87. *Id.*
88. Smith v. Cain, 565 U.S. 73 (2012).
89. State ex rel. Robinson v. Vannoy, 397 So.3d 333, 358 (La. 2024).

case, this case involved two dropped charges so there was not a dropped charged standing alone. Additionally, the Court failed to consider the two pre-trial pardons and the previous communications between the Rapides Parish and Lafayette Parish D.A. offices. The dismissed charges paired with the pre-trial pardons and D.A. office communications demonstrate valuable circumstantial evidence that a deal existed between Goodspeed and the State. Here, the State was aware of the importance of Goodspeed's testimony, as displayed through the communications between the Rapides Parish and Lafayette Parish D.A. offices, since it was the only direct evidence linking Robinson to committing the murders. These instances of special treatment provided blatant circumstantial evidence of inducement and compensation to Goodspeed for his testimony.

The Court in the second rehearing attempted to undermine the evidentiary value of Goodspeed's special treatment by stating that there was no evidence supporting an express agreement existed prior to trial and that Goodspeed's subjective belief as to the existence of a deal was insufficient to make such a finding.[90] However, the Court in the first rehearing already established that agreements between a witness and the State do not require a "bona fide, enforceable deal."[91] Rather, the central determination is "whether the witness 'might have believed that [the state] was in a position to implement ... any promise of consideration.'"[92] Goodspeed's belief as the existence of a deal was memorialized in the testimony of the post-conviction investigator and his former cellmate. Concerning the testimony of the post-conviction investigator, Goodspeed had told her that he had "received a deal on his Lafayette charges in exchange for his testimony against defendant."[93] Though this only evidenced the fact that Goodspeed received a deal after his testimony, it also showed that he had an understanding that the State was in a position to offer him favorable treatment. The testimony of Goodspeed's former cellmate also furthered this idea purporting that Goodspeed, after testifying, "returned to the cell 'really mad cause they

90. *Id*. at 355-359.

91. LaCaze v. Warden Louisiana Correctional Inst. for Women, 645 F.3d 728, 735 (5th Cir. 2011).

92. *Id*. (quoting *Napue v. Illinois,* 360 U.S. 264, 270 (1959).).

93. State ex rel. Robinson v. Vannoy, 397 So. 3d 333, 351 (La. 2024).

incriminated' him and he worried that 'it messed his deal up[.]'"[94] These testimonies unrefutably portrayed Goodspeed's belief as to the existence of deal between him and the State and his understanding that the State was in a position to offer him favorable treatment.

The Court in the second rehearing tried to undermine this belief by referencing two occasions which it understood contradicted Goodspeed's belief.[95] However, these instances neither confirmed that Goodspeed would not testify against Robinson nor did they ratify Goodspeed's disbelief in the existence of a deal. Additionally, the Court in the second rehearing continuously referenced testimonies which rejected the existence of a deal before trial to undermine evidence and testimonies establishing the existence of a deal.[96] The Court failed to recognize that the majority of the people who testified had an interest in the outcome of the case. The Court was willing to accept these testimonies over the testimonies of the post-conviction investigator and Goodspeed's previous cellmate who both had no interest in the outcome of case. The Court should have given greater consideration to these testimonies since these individuals held no bias or interest in the outcome.

Based on the previous determinations, the Court in the second rehearing should have concluded that the pre-trial and post-trial evidence as well as previous testimony supported the existence of an undisclosed deal between the State and Goodspeed. The Court in the second rehearing found otherwise reasoning that there was a variety of other evidence presented which already rigorously attacked Goodspeed's credibility so the presentation of additional discrediting evidence would hold little value.[97]

In making this determination, the Court in the second rehearing compared Robinson's case to *State v. Henry*, but, unlike that case, Robinson's case involved multiple instances of circumstantial evidence which implicated an undisclosed deal existed which could have been used to attack witness credibility. Though Goodspeed was thoroughly cross-examined, the jury was

94. *Id.*
95. *Id.* at 357.
96. *Id.* at 352-353.
97. *Id.* at 358.

not able to hear about the possibility of Goodspeed receiving favorable treatment in exchange for his testimony. There was certainly a reasonable probability that disclosure of Goodspeed's true motive for testifying would have influenced the jury's determination and outcome of the trial.

Furthermore, the Court tried to undermine the value of Goodspeed's testimony by using *Smith v. Cain* to support its assertion that his testimony was of little value compared the assortment of other evidence reinforcing Robinson's conviction.[98] This conclusion is misplaced as the Court in the second rehearing failed to recognize that Goodspeed's testimony was direct evidence linking Robinson to actually committing the murders. Goodspeed's testimony was of upmost importance because without it Robinson's conviction would be based almost entirely on circumstantial evidence. The only other direct evidence insinuating Robinson was involved in the murders was the gunshot residue found on his clothing and the DNA evidence found on his shoe. Moreover, the Court in the second rehearing failed to acknowledge previously cited authority. As cited by the Court in the first rehearing, "the [materiality] inquiry is whether an undisclosed source of bias-even if it is not the only source or even the 'main source'-could reasonably be taken to put the whole case in a different light."[99] Here, the alleged undisclosed deal could reasonably put the case in a different light as it would have allowed the jury to understand Goodspeed's actual motive thereby making it material.

B. Serology Report and Notes

The second category of alleged undisclosed evidence concerned "at least some portion of ... 51 pages of serology documents [and notes.]"[100] The documents established the existence of high and medium velocity impact blood stains on the front of a red jacket found at the household and other blood stains on the back of the jacket which did not match either the defendant's or the victims' DNA and was later matched to another

98. *Id.*

99. LaCaze v. Warden Louisiana Correctional Inst. for Women, 645 F.3d 728, 736 (5th Cir. 2011) (quoting Kyles v. Whitley, 514 U.S. 419, 434-435 (1995)).

100. State ex rel. Robinson v. Vannoy, 378 So. 3d 11, 31 (La. 2024).

individual, Mark Moras.[101] Additionally, undisclosed photographs of the scene displayed an unidentified blood drip on the wall immediately next to the jacket.[102]

In the first rehearing, the Court found the undisclosed evidence to be exculpatory by relying on the principle established in *Kyles v. Whitley* which provides that "evidence need not be definitive to be exculpatory."[103] The Court determined that even though the blood stain evidence was not definitive it still supported Robinson's position and was therefore exculpatory.[104] Moreover, the Court addressed an undisclosed letter from the Rapides Parish D.A.'s office to a company conducting a test on the red jacket which explained "the 'significance' of the high velocity blood spatter detected on the red jacket[.]"[105] The Court concluded that the State had a duty to disclose the letter regardless of the defense counsel's access to the red jacket since it held exculpatory value.[106] Regarding materiality, the Court found that the undisclosed evidence was material since it could have been used not only to bolster Robinson's case, but it also could have been used to undermine the State's case by impeaching one of the State's witnesses which gave an alternate explanation for the blood stains on the red jacket and furthering Robinson's actual innocence claim.[107]

In the second rehearing, the Court dismissed Robinson's position by reasoning that there was no evidence presented to support when the blood stains were left on the red jacket and declaring that Robinson's reliance on letter's designation as significant is misplaced.[108] The Court also rejected Robinson's argument regarding an undisclosed photograph since the blood drip stain pictured in the photograph was never tested to confirm it was the same blood found on the red jacket or even that it was blood at all.[109] The Court noted that attempting to link the blood

101. *Id*. at 31-32.
102. *Id*. at 32.
103. *Id*. (citing Kyles v. Whitley, 514 U.S. 419, 450–51 (1995).).
104. *Id*.
105. *Id*. at 36.
106. State ex rel. Robinson v. Vannoy, 378 So. 3d 11, 36 (La. 2024).
107. *Id*. at 42–43.
108. State ex rel. Robinson v. Vannoy, 397 So. 3d 333, 360 (La. 2024).
109. *Id*.

stains to the murders required speculation and that the blood stains were not relevant to the murders.[110] The Court also rejected Robinson's argument that the serology report could have been used to impeach a State witness who testified that blood stains potentially resulted from working around the residence since there was no evidence linking the blood stains to the murders and thus could it not be used as impeached evidence.[111]

It is apparent that the opinions differ when evaluating the exculpatory value and materiality; however, the Court in the first rehearing correctly determined that the undisclosed evidence constituted a violation. Though there was no evidence presented to link Robinson's contentions to the undisclosed evidence, it was still exculpatory since "[e]vidence need not be definitive to be exculpatory."[112] The Court in the second rehearing is confusing the undisclosed evidence's weight with its exculpatory value. Though there is not much weight to Robinson's argument, the undisclosed evidence still held exculpatory value in that it allowed for an alternative theory that there was another preparator present during the murders.

Furthermore, the second rehearing's conclusion that the high and medium velocity impact blood splatter was not material and irrelevant to the murders is entirely unfounded. Though there was no direct evidence presented, the existence of the high and medium velocity impact blood splatter on the jacket, which results from violent injuries, can be reasonably linked to the murders. The stains on the jacket could not have resulted from a routine farm work, and it required a more violent injury. The State knowingly produced testimony to undermine the true nature of the blood stains and Robinson could have used the undisclosed evidence to impeach the State's witness.

Regarding materiality, the Court in the first rehearing correctly ruled that the undisclosed evidence was material as it "could have been used to attack the investigation and lessen the credibility of the State's case[.]"[113] Firstly, the undisclosed evidence could have been used to further Robinson's actual

110. *Id*. at 360-361.

111. *Id*.

112. State ex rel. Robinson v. Vannoy, 378 So. 3d 11, 32 (La. 2024) (citing Kyles v. Whitley, 514 U.S. 419, 450–51 (1995).).

113. *Id*. at 43 (citing Kyles v. Whitley, 514 U.S. 419, 445 (1995).).

innocence claim. Secondly, the undisclosed evidence purporting the existence of high and medium blood impact splatter on the red jacket could have been used to impeach the State's witness. Therefore, the undisclosed evidence was material as it could have been used to weaken the credibility of the State's case.

C. Ballistics Evidence

The third category of alleged undisclosed evidence concerned "crime scene photographs, ballistic bench notes, sketches and diagrams of the crime scene[.]"[114] Robinson alleged that this information was important in determining the events of the crime and understanding the interworking of the crime scene.[115]

In the first rehearing, the Court found the ballistic evidence was exculpatory by relying on previous expert testimony explaining that the "undisclosed crime scene photos, ricochet and divot marks support a conclusion that at least six or more shots were fired (undermining the State's 'five bullet theory' of the crime) and that more than one shooter was involved."[116] The State countered this testimony since it did not take into account a previous altercation at the household where shots were fired.[117] However, the Court rejected this proposition by again relying on the principle established in *Kyles v. Whitley* that "evidence need not be definitive to be exculpatory."[118] Regarding materiality, the Court found that the undisclosed evidence was material since it undermined the State's five bullet theory and "could have been used to attack the investigation and lessen the credibility of the State's case[.]"[119]

In the second rehearing, the Court dismissed the expert's testimony since it was speculative reasoning that he provided no explanation for his opinions.[120] Robinson's expert even acknowledged that the different types of bullets found could have been fired from the same gun.[121] Furthermore, the Court took note

114. *Id*. at 35.
115. State ex rel. Robinson v. Vannoy, 397 So. 3d 333, 361 (La. 2024).
116. State ex rel. Robinson v. Vannoy, 378 So. 3d 11, 36 (La. 2024).
117. *Id*.
118. *Id*. (citing Kyles v. Whitley, 514 U.S. 419, 450–51 (1995).).
119. *Id*. at 43. (citing Kyles v. Whitley, 514 U.S. 419, 445 (1995).).
120. State ex rel. Robinson v. Vannoy, 397 So. 3d 333, 362 (La. 2024).
121. *Id*.

that Robinson's expert was not aware of previous incidents in the household resulting gun fire which the expert even conceded such incidents would have impacted his conclusions.[122] The Court found that though expert's opinions' purported the existence of more than one shooter, there was no evidence which showed that Robinson was not one of the preparators.[123] Ultimately, the Court determined that the undisclosed evidence was not material because even if the State provided the evidence to Robinson's expert, there was no reasonable probability the result of the proceeding would have different.[124]

It clear that the opinions conflict when evaluating materiality, however, the Court in the first rehearing correctly identified the evidence to be material. The Court's conclusion in the second rehearing was mainly based on its determination that Robinson's ballistics expert's opinions were speculative and lacked sufficient explanation. Nevertheless, the expert's opinions were validly based theories regarding how the crime was perpetrated. Though the expert was unaware of previous events that transpired in household which may have affected his ultimate opinions, the opinions still provided an alternative explanation on how the crimes were committed opposing the State's position. These opinions could have been used to attack the State's theories and weaken the credibility of the State's case. Thus, the ballistics evidence used to form these opinions were material.

D. Witness Statements

The final category of allegedly undisclosed evidence concerned witness statements. This included: (1) a witness statement transcript which contained a note suggesting another vehicle left the scene, and (2) a redacted note on a witness statement transcript which alleged another witness saw Robinson being dropped off at the household on the morning of the murders.[125]

In the first rehearing, the Court agreed with Robinson finding that the withheld evidence was exculpatory and should

122. *Id.*
123. *Id.* at 363.
124. *Id.*
125. State ex rel. Robinson v. Vannoy, 378 So. 3d 11, 36 (La. 2024).

have been disclosed.[126] Regarding the withheld transcript, the Court found it to be material since it "could have been used to support defendant's argument that another person committed the murders and to impeach law enforcement officers for failing to adequately investigate alternative suspects."[127] Regarding the redacted note, the Court determined it to be material since the referenced witness provided a post-conviction statement which placed Robinson at the crime scene around noon or later, directly contradicting the State's timeline.[128] In making this conclusion, the Court relied on *Juniper v. Zook* which purports the principle that "[c]ourts have found withheld evidence material when the evidence undermined the government's theory as to when a petitioner committed a crime."[129]

In the second rehearing, the Court started by establishing that the redacted note was more incriminating than exculpatory since it placed Robinson at the crime scene on the morning on of the murders.[130] The Court also rejected the post-conviction statement alleging Robinson got dropped off around noon or later as speculative since the statement contradicted the original timeframe.[131] Furthermore, the Court found the post-conviction statement to not be exculpatory since it was still possible for Robinson to commit the murders when the stated timeframe.[132] Since there was no reasonable contention surrounding the redated note, the Court found it not to be material.[133] Regarding the withheld transcript, the Court found it held "no probative value concerning murders" and that it would not have undermined the outcome of the trial. [134]

It is clear that these opinions diverge when evaluating exculpatory value and materiality; however, the Court in the first rehearing correctly identified the withheld evidence to constitute a *Brady* violation. Concerning the transcript purporting the

126. *Id*. at 36-37.
127. *Id*. at 43.
128. *Id*. at 43-44.
129. *Id*. (quoting Juniper v. Zook, 876 F. 3d 551, 570 (4th Cir. 2017).).
130. State ex rel. Robinson v. Vannoy, 397 So. 3d 333, 363–64 (La. 2024).
131. *Id*. at 364.
132. *Id*.
133. *Id*.
134. *Id*. at 364-65.

existence of another vehicle, this information was exculpatory since it implicated the existence of an alternative suspect fleeing from the scene which Robinson could have used to further his actual innocence claim. Not only was this evidence exculpatory, but it also could have been used to impeach state investigators for not fully investigating alternative suspects. Additionally, this information was also material as there is at least a reasonable probability that the existence of another vehicle leaving the scene around the time of the crime would have undermined the original outcome of the trial. Regarding the redacted the note, this information held exculpatory value since it provided information about a potentially favorable witness for Robinson. The witness's information could have been used to attack the State's theory as to when the crime occurred thus making the information favorable to his position. Furthermore, this information was material as it directly contradicted the State's timeline of the murder. Though Robinson could have still committed the murders in the short time span of ten minutes, the witness's statement directly contradicted the State's timeline which theorized that Robinson committed the murders between 11:45 a.m. to 11:50 a.m.

E. Cumulative Effect

As established in *Kyles v. Whitely*, to determine whether a *Brady* violation occurred, one must consider the withheld evidence "collectively, not item by item."[135] In the first rehearing, the Court concluded that even considered separately "each item undermines the strength of the State's case [... and] considered cumulatively they convince [the Court] that [it] can have no confidence that the jury's verdict would not have been affected had the suppressed evidence come to light."[136] In the second rehearing, the Court concluded that the "defendant has not shown the cumulative effect of [the evidence's] nondisclosure 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"[137]

135. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

136. State ex rel. Robinson v. Vannoy, 378 So. 3d 11, 44 (La. 2024).

137. State ex rel. Robinson v. Vannoy, 397 So. 3d 333, 365 (La. 2024) (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995).).

The Court in the first rehearing correctly determined that the cumulative effect of all the categories of undisclosed evidence would have influenced the jury's determination. As determined in all of the previous sections, each category of undisclosed evidence alone constituted a violation under the *Brady* doctrine. Together, all of these categories undermined the confidence of the trial's outcome as the jury was unable to consider multiple pieces of evidence which undercut the State's case. Robinson should have been granted a new trial allowing him to present all of the undisclosed evidence to a jury for a more accurate ruling and fair proceeding.

VI. CONCLUSION

To reiterate, the Court should have found that Robinson's due process rights were violated due to the numerous *Brady* violations in his trial. The undisclosed deal, serology evidence, ballistics evidence, and witness statements individually constituted *Brady* violations and taken together further undermine the confidence in the outcome of Robinson's trial. Though Robinson's due process rights were violated, this was not the Louisiana Supreme Court's conclusion in the second rehearing.

The Louisiana Supreme Court in the second rehearing concluded that "[t]he trial court did not abuse its discretion in denying defendant's *Brady* claims[.]"[138] After reviewing the *Brady* claims, the Court ultimately affirmed the district court's determination and denied Robinson's post-conviction relief.[139] This determination resulted in the reinstatement of Robinson's conviction and death sentence.[140] Though the Court affirmed Robinson's conviction and sentence, this has not halted Robinson from continuing his legal battle. In fact, Robinson recently applied for another rehearing, but this request was subsequently denied by the Louisiana Supreme Court on September 4th, 2025.[141]

As a final note, this article in no way attempts to condone the actions committed, but rather advocates for the maintenance

138. *Id*.
139. *Id*. at 383.
140. *Id*.
141. State ex rel. Robinson v. Vannoy, 415 So. 3d 934 (La. 2025).

of due process especially in cases involving capital punishment. There is no doubt that the crimes committed in this case were some of the most severe crimes man can commit. No family should ever have to suffer through such a travesty without the perpetrator going unpunished, even if that punishment results in a capital sentence. Though these crimes were of utmost egregiousness, there is still a system in place which ensures that all people, even the perpetrator, have a right to due process. By denying Robinson's *Brady* claims, the Louisiana court system has conclusively sentenced an individual to death by violating his due process rights.

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