

Drugs, Bombs, and the Erosion of Rights

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DAVID K. SHIPLER, *THE RIGHTS OF THE PEOPLE: HOW OUR SEARCH FOR SAFETY INVADES OUR LIBERTIES* (New York: Vintage Books 2012)

I. INTRODUCTION

In the days and months after the terrorist attack on the World Trade Center and the Pentagon on September 11, 2001, Americans faced a fundamental quandary: were we willing to give away some of our rights, particularly our privacy rights, for greater security? The struggle with this question continues, as voters and politicians ponder the trade-offs between preventing another attack and our right to be left alone. Less often discussed is a more deeply buried, older, and distinct problem: the erosion of Fourth Amendment rights as collateral damage in the war on drugs.

David K. Shipler plunges self-consciously into this confused realm in *The Rights of the People*. He winningly combines a reporter's straightforward writing and street sense with a lawyer's fascination with process and rights, though his own background is as a journalist, not an attorney. At its best, this book describes the decay of privacy rights at the ground level by laying out the creepy story of a family under surveillance who keeps finding its home violated or describing the work of a D.C. police crew working the streets of Washington looking for guns. Admirably, Shipler avoids extensive legal analysis except where the law has produced an effect on the street.

Rights of the People is the first volume in a two-book set, with the second volume titled *Rights at Risk*. This first volume examines "the element of liberty most severely affected by the spasm of fear following 9/11," which Shipler believes to be rights guaranteed under the Fourth Amendment. The second volume covers rights protected by the First, Fifth, and Sixth Amendments. (P. xiv.)

In truth, though, with this first volume Shipler wrote two books in one. He addresses, without much signposting or substantial analysis differentiating them, two very separate threats to rights. The first is the nation's decades-long war on drugs, which accelerated in the 1980s and has presented a consistent threat to constitutional restrictions on searches and seizures. The second is the federal response to terrorism in the wake of the events of 9/11, often called the war on

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terror. The two “wars” share a similar rhetorical phrase (“war”),¹ but are distinguishable in important ways that should matter as policy is reconsidered.

The truth of this dichotomy is set out by Shipler but not highlighted. He properly reports that the war on terror has been fought with FISA (Foreign Intelligence Surveillance Act) warrants and National Security Letters (Pp. 229–56.), tools that only rarely are available in the war on drugs. The drug war, in contrast, relies (as he compellingly describes) on shady consent searches, dirty informants, and aggressive racial profiling of defendants. (P. 149–99.) These two efforts are fundamentally different and present distinct threats to rights.

Shipler’s mash-up of the two within one book can be a little confusing. For example, the preface reveals that this Pulitzer Prize winner decided to write the book even as the World Trade Center buildings were burning, the very morning of September 11, 2001 and frames the book in terms of those events. (P. xiii.) However, after this tease, the specter of 9/11 fades from view in favor of an extended and worthwhile discussion of body and residence searches for guns and drugs, which are wholly unrelated to terrorism or 9/11. Terrorism pops back up again only once one reaches page 199, and then consumes the remainder of the book.

Fortunately, Shipler addresses both topics—the erosion of rights within the war on drugs and the parallel erosion under the war on terror—with a keen eye, a rootedness in real-life narrative, and accessible prose. What is missing is the recognition of a crucial fact: that the war on drugs and the war on terror are distinct in striking ways. They implicate different types of privacy, pose threats to different parts of the population, began at different times, and are driven by different instincts.

Perhaps the primary factor dividing the privacy sacrifices inherent in the war on drugs and the war on terror is simply that one worked, and one did not. The war on drugs was surprisingly ineffective; despite spending billions on controlling narcotics, they are as plentiful as ever. Meanwhile, there has not been a single incident of mass terror from a foreign source on American soil since that clear autumn day when he was inspired to write this book.

Shipler, importantly, discusses these two strands separately (dividing the book into two equal parts). It would not be fair to charge him with conflating the two, except in the most general way. However, there is a grave importance to recognizing the distinctions between them. Staunching the Fourth Amendment’s leaks requires an accurate assessment of what has caused the holes, and that means a careful attention to both of these sources.

¹ Calling each of these a “war” has the effect of eliciting support for those efforts. As one expert put it, “The homology of literal war rhetoric and metaphorical war rhetoric arises from a potent source. In the modern United States, military images have extraordinary persuasive value . . .” Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War On Drugs*, 36 S. ILL. U. L.J. 1, 3 (2011).

II. THE KEY DISTINCTIONS BETWEEN THE WAR ON TERROR AND THE WAR ON DRUGS RELATING TO PRIVACY RIGHTS

A. *Two Stories of Privacy Lost*

David Shipler is a master storyteller, and his extensive research in writing this book produces a rich lode of narrative. Two stories define this book, and both are compelling, instructive, and shine with the light of reality.

The first of these stories recalls the time Shipler spent with a remarkable and morally ambiguous unit of the Washington, D.C. Police Department that was charged with hunting down illegal guns (Pp. 45–92.), a task intertwined with narcotics operations.² He follows police sergeant G.G. Neill and his crew as they go hunting at night for illegal weapons, and on the way he finds a subculture of citizens and police in which police intrusion into the daily lives of citizens seems to be fairly routine. (Pp. 45–92.)

Sergeant Neill's squad had a tactic they employed repeatedly in poor neighborhoods. They would drive onto a block in four to six cars, and then park at crazy angles in the street. (P. 57.) Once in place, they would approach people on the street and talk them into consenting to a search, or find some pretext to pat them down. (P. 58.)

Time and again, Shipler observes an unusual behavior: when the police approach black men, without being asked, the men lift up their shirts to show that they are not carrying a gun. (Pp. 56–57.) Shipler notes how odd this interaction is:

Nobody had ordered them to lift their shirts. They did so as routinely as airline passengers remove their shoes. The decades of litigation had loosened the legal leash on officers until all the articulate calibrations of personal rights and police powers now vanished in a swirl and a rush. (P. 56.)

In short, police searches were so routine in the neighborhoods G.G. Neill worked regularly that privacy was surrendered by citizens upon the mere approach of the officers.

The second story takes place far from the poor neighborhoods of Washington, both physically and figuratively. In the suburbs of Portland, Oregon, a lawyer named Brandon Mayfield was the subject of an FBI terrorism investigation largely based on a faulty fingerprint identification. (Pp. 199–229.) At first, Mayfield and his family noticed little things amiss at home: unusual footprints, blinking clocks, mysterious computer crashes. (Pp. 199–200.) Mayfield began to notice that he

² Not only are the tactics used by gun-interdiction efforts derived from narcotics operations, the search for guns predictably produces a large number of low-level narcotics cases. NAT'L ASS'N OF SOC. WORKERS, A SOCIAL WORK PERSPECTIVE ON DRUG POLICY REFORM: A PUBLISH HEALTH APPROACH 3 (2013).

was being followed, and eventually someone tried to break into the house while his son was home. (P. 200.) In the end, Mayfield was held for two weeks as a material witness by the FBI until the fingerprint match was cleared up. He was suspected of involvement in terrorism, Shipler asserts, in part because he was a Muslim who had taken flying lessons. (Pp. 219–24.)

Both of these stories involve an almost unimaginable loss of privacy but for very different reasons. G.G. Neill and his crew operated under rules developed as part of the war on drugs. In contrast, Brandon Mayfield was targeted under a different set of techniques and tools developed for the war on terror.

As Shipler accurately describes, street cops,³ like the ones he followed in D.C., use a technique called the “*Terry Stop*” quite liberally to conduct intrusive searches for drugs and guns. (Pp. 46–51.) That technique, and its name, far predate the events of 9/11. In fact, the case which authorized this move—the frisk of a person based on reasonable suspicion that a crime has been committed—was decided by the Supreme Court in 1968.⁴ Shipler’s gift is in describing how the *Terry stop* operates in poor neighborhoods today. G.G. Neil’s crew, for example, uses the *Terry stop* as a matter of course; Shipler describes their training sessions, where they learn that reasonable suspicion can be drawn from the fact that someone walks away, from the way they carry their hands, from the type of clothing worn, from how they hold a girlfriend, or simply by putting a hand on a pocket. (Pp. 46–51.) To this group of police officers, at least, the *Terry stop* is simply a tool to get into people’s pockets rather than a procedure sparingly used to protect officer safety, as the Supreme Court intended.⁵ Shipler cannot help but point out the irony: the dark transition of the *Terry stop* from a protective tool to a sickening routine is taking place five minutes from where the Supreme Court, years ago, issued that opinion. (P. 46.)

In describing the contemporary use of *Terry stops* (and, later in the book, warrants based on often-faulty information from confidential informants) (Pp. 149–75.), Shipler is describing the ground level work of the war on drugs. It is gritty, often brutal work that involves tackling men and breaking down doors. In another stretch of extended and compelling storytelling, the book reveals the work of a D.C. drug unit led by Sergeant J.J. Brennan, including one street-level investigation that ends with a bag of crack being pulled from a target’s underwear. (Pp. 143–46.) The target, naturally, explains that “they’re not my underpants!” (P. 145.) The scene is raw, awful, and unsophisticated.

³ It should be noted that while the war on terror is almost entirely a federal effort, the war on drugs has a different mix. State officers play a much larger role in the war on drugs than they do in the war on terror, both on their own and as part of state-federal task forces. For a good overview of the history and outcomes of the war on drugs in a single state (Florida), see Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315 (2012).

⁴ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁵ *Id.* at 27.

This world is very different than the realm of cell phones, emails, and domestic surveillance described in the second half of the book. The tools used are different, and it is those tools (and the way they are used) that impinge on rights. Instead of flimsy-standard search warrants and fast-action *Terry* stops, the war on terror builds from warrants received from the shadowy Foreign Intelligence Security Court (Pp. 278–87.) and a device called the National Security Letter that is almost devoid of review. (Pp. 236–45.) The war on drugs is out in the open—a rough frisk in front of a crowd—while the war on terror is conducted by humming machines and the storage of data in enormous and unseen vaults.

B. The Type of Privacy and Populations Threatened

The war on drugs intrudes almost exclusively on the poor and takes away any veneer of privacy around their bodies or homes, which can be examined on the thinnest pretext. The war on terror intrudes on nearly everyone, but in a very different way: aside from Muslims wrongfully singled out in sloppy investigations, Shipler sees the harm of this war as occasional, unseen surveillance on our emails and calls.

In describing with intense precision the way that G.G. Neill and J.J. Brennan do their work in Washington, Shipler lays bare one cost of the war on drugs. Put simply, it is this: there are times and places that if you are poor and black, the police can and will easily push you against a wall, rub their hands up and down your body, empty your pockets, and humiliate you with nearly any conceivable justification. If a paid informant offers up your name, they can come to your home, bust down your door, shoot your dog, and ransack the place looking for drugs. The intrusion is physical and often violent, and deeply personal. It is, in a very real way, an armed man groping your crotch as a crowd watches because the Supreme Court has interpreted *Terry v. Ohio* to allow just that.

Law professors, judges, legislators, and opinion leaders are largely insulated from this type of search. That is because few of us live in or visit the neighborhoods where this goes on. As Shipler recalls from his time with G.G. Neill's crew, "[t]he squad, carrying the macho name Power Shift because of the intense, perilous time of night it worked, never entered the affluent, largely white areas of Georgetown or Northwest D.C. It concentrated on Southeast and other sections where most residents were black and poor." (P. 55.) This was true despite the fact that drug use, proportionate to population, is probably higher for whites than blacks, even when the drug of choice is crack.⁶

In contrast to this kind of manhandling and home invasion, Shipler's description of electronic surveillance seems almost dainty. Except in the few cases where an individual like the relatively affluent Brandon Mayfield is investigated

⁶ HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEPT. OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT, available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/nr2006.pdf>.

directly, the war on terror involves wide swaths of the population, black and white alike, and the furtive capture of electronic communications. With war on terror surveillance, we may never know it is happening, and if we did, we might not care very much.⁷

The reason we might not care is in large part because the nature of the intrusion is so different. No one in an alley is frisking us for email or texts. Instead, as Shipler tells it, if the government wants to sweep up and analyze our electronic communications as part of the war on terror, they have a variety of quiet, even undetectable means to do so. Beyond public records, the government collects data directly from service providers such as internet and cell phone companies. All it takes is a request from the government; in some cases not even a subpoena or a National Security Letter is required if the service provider cooperates. (Pp. 317–20.) The service provider has little to lose, because the customer is unlikely to find out the data has been shared, and even if he does, the service provider is immunized from lawsuits in cases where “dangerous activity” is suspected. (P. 320.)

The more one reads Shipler’s book, the clearer it becomes that he is describing the same “Two Americas” dichotomy that emerges from so much contemporary social reporting. One America, comprised of the poor and the brown, are subject to violently invasive government actions, in a realm where the idea of “privacy” is nearly a façade. The other America, white and largely affluent, is left to fret over a government bureaucrat having access to their email, which is likely to be lodged within a gigantic pile of similar and unanalyzed data.

C. The History of Two So-Called Wars

The war on drugs and the war on terror are largely disconnected. They emerged at different times, from different concerns, and have travelled different paths. While in the vaguest of ways they present a similar harm—the invasion of privacy by the government—to conflate the two does a disservice to the understanding of both.

1. The War on Drugs

While drug users have been demonized for centuries, it was not until the 1970s that the United States began what came to be called the “War on Drugs.” Over time, this federal effort came to encompass three primary prongs: increased penalties for drug users and sellers, increased manpower to combat narcotics

⁷ Shipler does briefly mention one broad data collection effort that really can be harmful to a broad number of citizens, primarily black and poor: the “gang member” database known as GangNET. (P. 239.) The hazards of sloppy gang-member data gathering can be pernicious in a real and widespread way, because of the influence gang-member status has on things like suspect targeting and sentencing enhancements.

domestically, and a series of efforts to stem the production of narcotics in other countries. All of these efforts were expensive and shifted resources away from drug treatment and other programs to reduce demand, and the first two played a role in the decay of the privacy rights David Shipler identifies.⁸ These efforts accelerated in the 1980s, when crack cocaine hit the scene, and politicians reacted by pouring resources into the drug war. Perhaps most memorably, in 1989 President George H.W. Bush staged a crack buy across the street from the White House, then held up the crack on national television.⁹

One key tactic in the war on drugs has been the use of *Terry* stops to briefly frisk people; these searches often turn up guns and drugs. The Supreme Court's decision in *Terry v. Ohio*, allowing the police to frisk a citizen where they have a reasonable suspicion that the person might be armed, did not come from a drug case, though. Rather, the opinion was based on an old-fashioned "stick-up" case, where two men were suspected of casing a store with an eye towards robbery. However, once the war on drugs was under way, the *Terry* rule was adapted to apply to drug cases. (Pp. 53–55.)

For example, in 1993, well into the war on drugs, the Court reviewed the case of *Minnesota v. Dickerson*.¹⁰ There, two Minneapolis police officers were patrolling an area near a building known to be a crack house.¹¹ Heading out of that crack house, Dickerson spotted the officers and headed off in the other direction, turning down an alley on the other side. Based on these actions, the police decided to pursue Dickerson, caught him, and conducted a *Terry* stop and frisk, leading to the seizure of crack in the target's jacket.¹² The Court approved the *Terry* stop and the frisk, but not the seizure of the crack because the police officer did not realize it was contraband until he squeezed and manipulated it.¹³ While *Dickerson* reversed the conviction, it represented major slippage in the wall of privacy rights in that it introduced the "plain feel" doctrine. Moreover, it provided a strong

⁸ Another compelling outcry against the drug war's corrosion of Fourth Amendment rights (which preceded and anticipated Shipler's major points) came from U.S. First Circuit Court of Appeals Judge Juan R. Torruella. Juan R. Torruella, *Déjà vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT. L.J. 167, 188–90 (2011).

⁹ Brian Gilmore, *Again and Again We Suffer: The Poor and the Endurance of the "War on Drugs"*, 15 UDC/DSL L. REV. 59, 61–62 (2011).

¹⁰ 508 U.S. 366 (1993).

¹¹ *Id.* at 368.

¹² *Id.* at 369.

¹³ *Id.* at 378–79. Shipler's description of this holding is accurate but incomplete. He described Dickerson's outcome as one that simply "stretched 'plain view' into 'plain feel.'" As long as reasonable suspicion of danger exists to permit a stop and frisk to check for weapons . . . an officer who finds no gun but feels something that he immediately recognizes as drugs can seize them as if they were in plain view." (P. 53).

incentive for police to conduct *Terry* stops, since the drugs they seize will often become admissible evidence.¹⁴

Seven years later, in *Illinois v. Wardlow*,¹⁵ a patrol police spotted a suspect in an area known for drug trafficking. Like Dickerson, he fled once he spotted the police and headed into an alley (though unlike Dickerson, he was not heading out of a crack house). The police pursued him, and seized a gun during a *Terry* stop and frisk.¹⁶ The issue here was using thin reeds to substantiate a *Terry* stop: presence in a high-crime area and fleeing once the police were spotted. The Court again sided with the police,¹⁷ and as Shipler argues, *Wardlow* not only approved but also played a role in *creating* the tactics used by the Washington police officers he followed. Time and again, their focus was on men who walked or ran away as the police approached.

I raise these two important cases—they were important to Shipler, too—because they demonstrate how rooted this type of search has been in the war on drugs. Both *Dickerson* and *Wardlow* involved narcotics investigations and investigations of a certain type that involve a lot of officers, a lot of action, and a lot of intrusiveness. For example, the officers involved in *Wardlow* “were among eight officers in a four-car caravan that was converging on an area known for heavy narcotics trafficking”¹⁸

This observation goes to something that Shipler largely ignores: that the decay of privacy in the face of the war on drugs is driven as much by budgets as it is by legal opinions issued by the Supreme Court. While Shipler is right that it is the Court that gave the D.C. street agents like Brennan and Neill the legal permission to do what they like on the street, it was the larger war on drugs that put people like them out there in the numbers sufficient to make law enforcement intrusions commonplace in so many parts of so many cities. By shifting our spending to the employment of people who perform a succession of *Terry* stops, resulting in a succession of gun and drug seizures, it guarantees that more people, innocent and guilty, will inevitably be affected by these actions.

2. The War on Terror

The drug war emerged in the 1970s and accelerated in the 1980s. The war on terror followed a separate, parallel track, but is largely a more recent development,

¹⁴ Some courts, of course, have made it more difficult than others to rely on “plain feel” to seize admissible drugs. The Virginia Supreme Court, for example, rejected the idea that an officer could tell that what he was feeling was heroin simply because it was a substance in pill form. *Cost v. Comm.*, 657 S.E.2d 505, 509 (Va. 2008).

¹⁵ 528 U.S. 119 (2000).

¹⁶ *Id.* at 121–22.

¹⁷ *Id.* at 124–26.

¹⁸ *Id.* at 124.

and builds not on the war on drugs, but only upon itself. When the Foreign Intelligence Service Act which created the FISA court and FISA warrants was passed in 1978, it was an effort to restrain domestic eavesdropping for purposes of national security, not to expand it, a point that Shipler expertly explains. (Pp. 282–84.) It was only after 9/11 that the Bush administration began much more intensively monitoring domestic conversations—through FISA, and through other programs without even the level of oversight FISA requires. (Pp. 276–88.)

Shipler identifies and describes incidents involving several other Muslims who, like Brandon Mayfield, were the victims of sloppy investigations. He is not wrong to think that Muslims are targeted for investigation in part because of their faith. Former Attorney General Michael Mukasey recently defended such targeting: “We live in a culture, as I said before, in which we hesitate to ask questions about other people’s religion. But when that religion is something they use as a justification for imposing a system on us, we are very well entitled to ask questions about it and draw appropriate conclusions.”¹⁹

Aside from the relatively few (but important) victims of the war on terror²⁰ like Brandon Mayfield,²¹ the harm to privacy that Shipler sees flowing from anti-terror efforts is vaporous. His complaint seems to be with the bare fact that the federal government is accessing a lot of private communications, largely through what he terms the “surveillance-industrial complex.” (P. 315.) Is this offensive? Sure it is. Is it the same as living in a neighborhood where the police arrive at odd hours in large numbers and frisk people for nearly any reason? Not at all.

One reason this less-intrusive form of information-gathering is so compelling is its breadth; the numbers related to this data collection are consistently staggering. The FBI, for example, is said to have acquired 250 million airline passenger name records in 2001. (P. 317.) The CIA pays to have five hundred thousand websites monitored each day, and the NSA reported that some intelligence sources gathered in digital form grow at the rate of one quadrillion bytes per month. (Pp. 324–25.)

¹⁹ Michael B. Mukasey, *The War on Terror: Where We Are and How We Got There*, 56 N.Y.L. SCH. L. REV. 9, 20 (2012).

²⁰ The fact that most of the direct victims of the war on terror—those wrongfully accused, especially—are Muslim should matter. Even though these victims are a fraction of those subjected to street searches in the war on drugs, the fact that there is a religious filter for suspicion of terrorism is both troubling and inconsistent with the facts of modern terrorism. The 1995 attack on the Murrah Federal Building in 1995 was the second worst terrorist incident on American soil in modern times, but involved no Muslims.

²¹ Shipler recounts a few other rare instances where great and mistaken intrusion was visited on individuals in the name of national security. One is a Moroccan immigrant named Karim Koubriti, who had the misfortune of getting entangled in a terribly botched investigation in Detroit. (P. 334–43.) That story was widely reported in a number of sources, including the New York Times. Eric Lichtblau, *Ex-Prosecutor in Terror Inquiry is Indicted*, N.Y. TIMES, Mar. 30, 2006, available at http://www.nytimes.com/2006/03/30/national/30prosecutor.html?_r=0.

The scope of this electronic information sweep is, like the drug and gun sweeps in D.C., both expensive and shocking. However, they are otherwise nothing alike. Being frisked by a narcotics officer is something we would all be intensely aware of, while our data slips away without our even knowing. There is another important distinction, too. Unlike the actions of the street officers, there is a certain self-correcting mechanism that blunts the effects on privacy of the data-miners. Simply put, all that data are far too much to examine, and almost none of the data are read by a human or subjected to analysis, as the agencies “drown” in a tsunami of digital information. (P. 325.) No similar self-correction applies on the street—successful *Terry* stops simply lead to more officers using the same tactics.

D. Success and Failure

There is one final and significant distinction between the war on drugs and the war on terror. Simply put, one worked and one did not.

If the war on drugs is over, it must be said that drugs won. Perhaps most importantly, all the problems that come with addiction, trafficking, and police actions are still with us. A simple review of sentencing commission statistics shows that for most drugs, the number of cases brought in the federal system has remained constant.²² That money was, by any economic measure, poorly invested.

In contrast, the war on terror seems to have worked, at least in terms of preventing further episodes of foreign-based acts of terror on American soil.²³ It is not publicly known how many plots were averted by federal action, or deterred by the increased surveillance and police actions that were part of the war on terror, but it is certain that further attacks did not occur. At the very least, the war on terror has coincided with a remarkable lull in such terrorism, and some correlation is fair to infer. It is hard to argue with the number “0.”

The broad, deep, and physical intrusions into privacy propelled by the war on drugs coincided with a broadening of the narcotics problem. In contrast, the mostly unnoticeable and usually meaningless electronic intrusions on privacy that have been part of the war on terror have at least coincided with a complete cessation of foreign-based terror on American soil. One exacts a heavy price in privacy and does not work; the other, a lesser price and might be working. This is a difference that matters. While giving up our privacy is never good, to give it up for a project that pays no benefits is especially tragic.

²² Extensive records are available at the Sentencing Commission website: www.ussc.gov.

²³ Terrorist acts by disaffected non-Muslim Americans with guns, of course, has not been a focus of the war on terror, and have continued unabated. For example, on December 14, 2012, Adam Lanza forced his way into Sandy Hook Elementary School and killed twenty-six people, including twenty schoolchildren. James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012) http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html?pagewanted=all&_r=0.

III. WE ARE NOT SOVIETS

While I do not claim here that Shipler consciously conflates the war on drugs with the war on terror, I wish that he had made the distinction clearer so that readers would not risk making that error.

Beyond the simple risk of misinterpretation, though, there is some opportunity lost in not discussing the two as more distinct. In my own work, I have begun to see ways in which the harms of the drug war can be mitigated by the tactics developed in the war on terror. A large part of Shipler's critique of the drug war is (properly) its effect on minority communities, and he is far from alone in raising this injustice.²⁴ The price paid (again, for no discernible benefit) for the drug war has been not only tax dollars, but the lives of African-American men who are serving long terms in prison for narcotics crimes,²⁵ a societal cost greater even than the privacy loss that comes with the war on drugs.

Stop for a minute and think about how futile mass incarceration is from a market perspective. In short, we are trying to shut down a business by sweeping up the low-wage labor, in a time and place where there is a glut of low-wage labor. Viewed from an economic perspective, it is easy to see why we failed. Why not, then, focus on what *does* make businesses fail—a disruption of cash flow? If we could grab enough money rather than people (and be sure it is cash flow and not accumulated assets like houses and cars), we might shut down interstate and international drug businesses. The crack dealer would not be locked up, just out of a job.

To do this, we would need to apply some of the skills and techniques of the war on terror to a renewed and fundamentally different approach to drugs. Specifically, the use of terror-war tactics to seize money going to terrorists would be particularly useful. FBI agents who have become experts in interdicting material support for terrorist groups could lead new groups focused on the cash flow returning to narcotics producers and wholesalers. It would involve crossing the streams of the anti-drug and anti-terror efforts, but it would be our best hope to move towards success in drug interdiction.²⁶ The first step, though, is to recognize the many distinctions between narcotics and terror.

At a more fundamental level, Shipler obscures the very different costs paid by different individuals. Based on what he observes as a reporter, it seems that the cost of security varies significantly based on race, religion, and class. If you are

²⁴ Most popular among those critiques, at least among activists, has been that contained in Michelle Alexander's book, *THE NEW JIM CROW: MASS INCARCERATIONS IN THE AGE OF COLORBLINDNESS* (2010).

²⁵ *Id.* at 96.

²⁶ By proposing this sharing of expertise, I am not suggesting that the interdiction of drug money be facilitated by National Security Letters or FISA warrants. Other means, already legal in the criminal realm (such as grand jury subpoenas and traditionally-authorized searches and wiretaps), could be employed to obtain the same information.

poor and black, the war on drugs has resulted too often in a reality on the street where there is essentially no right to privacy—when the police approach, you are wise to show them your belly. The cost to the innocent and guilty alike among this group is too often constant surveillance and oppressive police actions.

The second group is targeted through the war on terror. If you are Muslim or perceived to be sympathetic to Islamic groups, your cost is different—you may be subjected to intense and protracted snooping directed specifically at you rather than your neighborhood, and there is the further threat of arrest and detention on weak or false charges.

Finally, there are the rest of us, who live in areas where the police do not arrive in packs to shake everyone down and who do not fit the profile of terrorist sympathizers. For us, the threat is only that someone, somewhere in the government, might have access to our emails among the billions of others passing through a net drawn to catch terrorists. It is, relative to the other groups, a *de minimus* cost.

And there is the heart of it: the majority, the powerful, the broad middle of the population, who pay very little cost through loss of rights for both the war on drugs and the war on terror. This dynamic, simple as it is, may explain why reform in this area is so difficult; the politically advantaged have little to lose. Perhaps the best and highest use of this book is to describe for us, the advantaged, the damage being done to others.

Shipler closes his book with a brief reflection on his time as a reporter in the Soviet Union and sees parallels to contemporary America. Many of the threads he identifies, though, are very thin. DOJ functionary Monica Goodling, for example, vetting people for positions based on a background in the Federalist Society, is not the same as the Soviet requirement that job-seekers join the Communist Party. (P. 386.) For one thing, once Goodling's process came to light, it stopped. Moreover, the Federalist Society (an often unwieldy group that contains both traditional social conservatives and libertarians) is hardly the same thing as the Communist Party, as Shipler acknowledges. (P. 387.)

The Soviet Union's internal security apparatus was not about suppressing crime but about suppressing dissent. That kind of exercise of state power—the seeking out and destroying of dissidents—is not akin to the genuine harms that Shipler identifies in the preceding chapters. The latter wrongs are uniquely, intimately, and uncomfortably American. If we pretend otherwise, if we accept that the United States in 2013 has the same underlying dilemma faced by the Soviet Union in 1979,²⁷ we ignore the deep roots of the war on drugs in the most

²⁷ Perhaps a more accurate analogy to the war on terror is not the Soviet Union during the Cold War, but the United States during that time. From an American perspective, the Cold War was expensive but politically popular, dealt primarily but not exclusively with an external threat, and created the collateral damage of often baseless attacks on a relatively small number of Americans who may or may not have been sympathetic to Communism, all while some level of quiet domestic spying was going on.

troubling American theme of all: race and racial intolerance. We are not Soviets; we are Americans, with all the tragedy and pain and the remarkable capacity for self-correction and healing through democratic processes that comes with living in this time and in this place.

