

ARTICLES

TOLERANCE IN AN AGE OF TERROR[†]

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Should the government forbid school girls in France or female college students in Turkey from coming to school with their hair covered according to an Islamic tradition? Were one hundred members of Congress right to call for the resignation of Columbia University assistant professor Nicholas de Genova, who, during a teach-in on the Iraq war, publicly wished for “a million Mogadishus,” a reference to the violent assault of U.S. troops in Somalia, depicted in the film *Black Hawk Down*?¹ Should the U.S. government refrain from law enforcement and surveillance tactics targeting people because they share the race, ethnicity, or religion of others identified as terrorists? Should the media be forbidden from revealing how the food supply, electricity, chemical production, transportation, and border security could be vulnerable to terrorist attack?² Should the government screen curricula of private religious schools to guard against political extremism and terrorism?³ Should a democracy forbid the participation in electoral politics of parties dedicated to dismantling secular democracy?⁴

Questions such as these have circulated in legal and political circles for decades but 9/11 pushed them to the forefront. Although terrorism has a

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¹ See Robert M. O’Neil, Academic Freedom in the Post-September 11 Era: An Old Game with New rules, in *Academic Freedom at the Dawn of a New Century: How Terrorism, Governments, and Culture Wars Impact Free Speech* at 43, 45 (Evan Gertsmann & Matthew J. Streb eds., 2006).

² See Dennis Pluchinsky, *They Heard It All Here, and That’s the Trouble*, WASH. POST, June 16, 2002, at B03.

³ See Avigael N. Cymrot, *Reading, Writing, and Radicalism: the Limits on Government Control Over Private Schooling in an Age of Terrorism*, 37 ST. MARY’S L.J. 607 (2006). “Terrorism” should be understood as a means, not an ends, and as a complex collection of many types of threats, perpetrated by many different kinds of actors. See Arthur Paecht, *Opening Speech: Europe Faces Terrorism*, INSTITUTE DE RELATIONS INTERNATIONALES ET STRATEGIQUES, EUROPE FACE TO FACE WITH TERRORISM (Mar. 8, 2005) (speeches from conference in Paris sponsored by IRIS, European Commission and NATO). The head of the French National Antiterrorist Division commented in 2005 that Europe faces four different forms of terrorism: “Islamic terrorism, separatist-inspired terrorism, politically extremist terrorism, and others—including extortion threats.” Frederic Veaux, *Fighting Terrorism Efficiently* 95, 95–96, in INSTITUTE DE RELATIONS INTERNATIONALES ET STRATEGIQUES, EUROPE FACE TO FACE WITH TERRORISM (Mar. 8, 2005) (speeches from conference in Paris sponsored by IRIS, European Commission and NATO).

⁴ For a recent thoughtful treatment of this topic, see Samuel Issacharoff, *Fragile Democracies*, HARV. L. REV. (forthcoming 2007).

long history, and despite the fact that dilemmas of tolerance may be traced to the first human societies, new urgency and new levels of difficulty seem apparent now as governments and private individuals navigate between perceptions of increasing threats of terrorism and commitments to free speech, free exercise of religion, and equal treatment and respect for all.⁵ “Tolerance” has surfaced often in public discourse since 9/11. For example, on September 30, 2001, the Anti-defamation League took out a large ad in the *New York Times* with the headline: *Empowering Children in the Aftermath of Hate: A Guide for Educators and Parents*.⁶ Discussing the damage done by stereotypes, prejudice and discrimination, the ad continued, “intolerance of difference is at the root of most violence,” and explained that adults therefore should give children tools to confront hate effectively.” Yet, policies confronting terrorism can also express intolerance: intolerance of terrorism, but also at times intolerance toward people who look like terrorists, people who criticize counter-terrorism tactics or the leaders who pursue them.

Indeed, a review of contemporary scholarship and of news coverage reveals two narratives linking tolerance and terrorism. The first sees overreaction and intolerance as responses to terror; and the second sees under-reaction and too much tolerance. Law review articles and public interest advocates charge the United States since 9/11 with overreaction that jeopardizes legal and cultural commitments to tolerance. Recent books and articles allege under-reaction on the part of several European nations, citing an ideal of multicultural tolerance that offers space for intolerant and even murderous individuals and groups to plan and carry out violent acts.⁷ I will suggest, however, that a single nation may seem to or actually produce both intolerance and too much tolerance, generating both overreactions and under-reactions to terrorism. Because the United States and European nations each have pursued policies that threaten civil liberties and indicate intolerance of immigrants and dissenters, a detailed assessment is necessary—and so is analysis of the rhetorical arguments about overreaction and under-reaction. Moreover, tolerance can be a feature of personal ethics, or national character, or public policy, and the connections between tolerance and anti-terrorism can take complex forms at each of these levels.

⁵ Many people in other parts of the world suggest that 9/11 simply taught Americans about the threats of terrorism that other nations have already seen and experienced. Yet the scale of the 9/11 assault and the attack on the U.S. superpower stands out even to people in countries with deeper experiences with terrorism. See ELISABETH YOUNG-BRUEHL, *WHY ARENDT MATTERS*, 64 (2006) (describing world reactions to 9/11).

⁶ *Educational Programs to Teach Tolerance Grew After 9/11*, N.Y. TIMES, Sept. 30, 2001, . See, e.g., Mike Rose, *Teaching Tolerance After Terrorism*, EDUC. DIG., Feb. 2002, at 2–4. But some objected and called instead for more instruction in patriotism. See Chester E. Finn, Jr., *Teachers, Terrorist and Tolerance*, COMMENTARY, Dec. 2001, at 54.

⁷ Talking of “Europe” risks neglecting the significant national and cultural differences within particular European nations, and yet the commonalities—and the shared practices of an increasingly unified Europe—help to explain the frequent invocation of “Europe” as the comparison with the United States. The greater American propensity to use military force in international contexts, in comparison with European nations, may reflect similar tendencies toward coercive action in response to terrorism. See Robert Kagan, *OF PARADISE AND POWER: AMERICAN AND EUROPE IN THE NEW WORLD* 23, 31 (2003). Or this foreign affairs contrast may instead affect public perceptions of American overreaction to threat.

“Overreaction” and “under-reaction” each presuppose that there is a proper reaction in relation to two dimensions: the scope of the harm triggering the response and the departure from a baseline set of values or commitments. Assuming the baseline commitments to civil rights and civil liberties, overreaction could involve policies that depart from commitments to racial and religious equality by pursuing a discriminatory purpose, through a means such as racial profiling, without clearly advancing security, while underreaction would mark a failure to adopt policies that address specific known threats from a specific group, such as adherents to radical Islam. Similarly, surveillance, intelligence, and detention policies that significantly and disproportionately affect members of racial and religious minorities could be an overreaction in the absence of a demonstration that security requires that degree of unfairness. Further, policies fomenting increased prejudices toward or unfounded fears of members of religious and ethnic minorities signal overreaction, while as failures to restrict recruitment by violent terrorist groups mark underreaction.

It is common to describe these dangers as an inevitable trade-off between liberty and security, with the reminder that our constitution is not a suicide pact.⁸ But I have joined others in arguing that the security we seek includes the liberty we cherish.⁹ In a liberal democracy, our security encompasses the guarantees of our freedom as well as our physical safety, and in a global struggle that includes ideological as well as military conflict, we lose a key advantage if we sacrifice the ideals that we hope attract hearts and minds around the world. Fear and hatred are the

⁸ The classic statement is Justice Robert Jackson’s in *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (judges should not “convert the constitutional Bill of Rights into a suicide pact”). See e.g., Fareed Zakaria, *Freedom vs. Security*, NEWSWEEK, July 8, 2002, at 26; Robert M. Chensey, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilty by Association Critique*, 101 MICH. L. REV. 1408, 1413 (2003); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011 (2003). For a contemporary elaboration of the argument, see ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007); RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006). See also William H. Rehnquist, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998) (arguing that civil liberty should not occupy the same favored position in wartime as it does in peacetime); Zakaria, *supra*, at 26; Chensey, *supra*, at 1413; *Civil Liberties and the Terrorism Prevention Paradigm: The Guilty by Association Critique*, 101 MICH. L. REV. 1408, 1413 (2003); Oren Gross, *supra*, at 1011. Many of these authors argue that the trade-off of liberty to achieve security is inevitable. Some also argue that the executive branch is likely to make accurate judgments about the trade-off. See e.g., POSNER & VERMEULE, *supra*.

⁹ Emanuel Gross, *THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM* 9, 157–93 (2006); Anthony Lester, *Counter-Terrorist Measures, Human Rights and Multiculturalism in the United Kingdom*, Madrid Conference Paper, Sep. 2006 (unpublished paper); Ally Hack, Note, *Forfeiting Liberty: A Collective Sense of Vulnerability and the Need for Proactive Protection After 9/11*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 469, 471–72 (2004); Martha Minow, *The Constitution as Black Box During Times of National Emergencies: Comment on Bruce Ackerman’s Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, 75 FORDHAM L. REV. 693 (2006); David Pannick, *Human Rights in an Age of Terrorism*, 36 ISR. L. REV. 1, 3–4, 6 (2002); Paul Rosenzweig, *On Liberty and Terror in the Post 9/11 World: A Response to Professor Chemerinsky*, 45 WASHBURN L.J. 29, 45 (2005); Jeremy Waldron, *Security and Liberty, and the Image of Balance*, 11 J. POL. PHIL. 191 (2003). See also Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 694 (2005–06) (arguing against extremes of national security fundamentalism and liberty perfectionists and in favor of judicial minimalism to advance both goals). There remain potential tradeoffs between immediate security and long-run security, but it is helpful to locate the policy choices within the security framework rather than between security and liberty. For then it would be clear that there is not a zero-sum game between liberty and security.

underlying issues: understandable fear of terrorism and the sadly familiar hatred of people identified as threatening circulate among longstanding residents while fear of government abuse and hatred of those associated with it can grow among immigrants and people outside the country. Overreaction in the form of systematic mistreatment of minorities can stoke fires of alienation, jeopardizing support for the nation and potentially increasing the numbers of people who support terrorists. Overreaction can undermine tolerance and the freedoms it advances. Underreaction tolerates behavior by enemies and haters and jeopardizes our existence and our ways of life.

The two dangers represent in fact a genuine dilemma, with trade-offs and catch-22s, whether measured in terms of effects on rights (of speech, assembly, due process, privacy, and equal protection) or sheer social welfare. I first consider the dilemmas of tolerance emerging now, and then turn to the narratives of overreaction and underreaction and what they further reveal. Because some of the issues along the way can be traced to the project of liberal tolerance and role ideas can play in this difficult time, these dimensions figure in the analysis.

I. THE DILEMMA OF TOLERANCE

Tolerance, at minimum, means forbearance: the restraint against expressing or enacting disapproval of another.¹⁰ It is not tolerance if you do not disapprove of the other person or view.¹¹ Philosopher Thomas Scanlon explains that tolerance “involves an attitude that is intermediate between wholehearted acceptance and unrestrained opposition.”¹² Tolerance demands a kind of humility and self-critique to guard against acting on absolute judgments; it also requires a commitment to create and preserve the conditions of peaceful co-existence among people with clashing religious, culture, or political beliefs.¹³ One established political structure solution to such clashes granted relative autonomy to groups with practices that diverged from those in control. The millet system devised in the

¹⁰ See WEBSTER 7TH COLLEGIATE DICTIONARY 930 (1977) (“... sympathy or indulgence for beliefs or practices differing from or conflicting with one’s own b: the act of allowing something;” toleration is defined as: “a: the act or practice of tolerating something . . .” Tolerance as a concept is associated with overlapping notions; I take here a pragmatic approach and look to the debates and positions in which the concept is often invoked. See ANNA ELISABETTA GALEOTTI, TOLERATION AS RECOGNITION 225 (2002) (explaining pragmatic approach).

¹¹ See Joshua Halberstam, *The Paradox of Tolerance*, 14 PHIL’ICAL FORUM. 190–206 (1982–83); Geoffrey Harrison, *Relativism and Tolerance*, 86 ETHICS 122–35 (1976).

¹² T.M. SCANLON, *The Difficulty of Tolerance*, THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 187 (2003); See AVIAM SOIFER, LAW AND THE COMPANY WE KEEP (1998).

¹³ See, e.g., Marc Gopin, *Counter Religious Extremism with Religious Compassion*, CHRISTIAN SCI. MONITOR, Sept. 7, 2006, available at <http://www.csmonitor.com/2006/0907/p09s02-coop.html>; David Little, Senior Scholar, Special Initiative on Religion, Ethics, and Human Rights, United States Institute of Peace, Remarks at a Presentation at the University of Texas entitled Moral Values in a Free Society, *Tolerance, Equal Freedom, and Peace: A Human Rights Approach*, (Nov. 11, 1996) (transcript available at <http://www.usip.org/religionpeace/rehr/equalsfree.html>); W. Paul Voigt, TOLERANCE & EDUCATION: LEARNING TO LIVE WITH DIVERSITY AND DIFFERENCE (1997); RECONCILIATION, JUSTICE, AND COEXISTENCE: THEORY AND PRACTICE (Mohammed Abu-Nimer ed., 2001); IMAGINE COEXISTENCE: RESTORING HUMANITY AFTER VIOLENT ETHNIC CONFLICT (Antonia Chayes & Martha Minow eds., 2003).

Ottoman Empire grouped people by religious communities and granted them some degree of self-governance, permitting peaceful co-existence among Muslims, Christians, and Jews as well as maintaining avenues for minority communities to persist.¹⁴

A different political solution emerged in the form of liberal tolerance when Europeans pursued peaceful co-existence after the Seventeenth Century's Thirty Years War between Protestants and Catholics. The Treaty of Westphalia in 1648 registered agreement of competing states to respect one another, and acknowledged the power of each local ruler to dictate his state's religion. Accordingly, respect for national borders became the mutual condition of peaceful coexistence across different sovereign states. Over time, political leaders drew on Protestant ideas of individual conscience in crafting constitutional democracy norms of free speech and equality, with religious freedom left largely to individuals. In contemporary form, liberal tolerance has come to include practices of multiculturalism, assuring room for the expressive activities of members of different religious and cultural groups. At times, this multiculturalism has been attacked for being a kind of ethical relativism, suspending any collective judgment about the good or the right.¹⁵ It remains difficult to distinguish the suspension of disagreement required for co-existence from the suspension of all judgments about right and wrong.

This ambiguity about values is hardly the only problem with tolerance. Liberal tolerance has always struck me as a second-best, a kind of "putting up with" difference that falls short of genuine respect. Tolerance implies an imbalance of power: some have the power to grant—or withhold—tolerance toward others. As Amalie Taubels wrote in 1839: "Even the word tolerance is intolerable. No one has a right to tolerate another."¹⁶

Yet tolerance seems so much better than its opposite. Intolerance, the dictionary tells us, entails the "unwillingness or refusal to tolerate or respect contrary opinions or beliefs, persons of different races or backgrounds."¹⁷ To be intolerant is to be bigoted, which, in one of those unhelpfully circular dictionary definitions, means being "so obstinately attached to a creed, opinion or practice as to be illiberal or intolerant."¹⁸ Intolerance is scolding and degrading; it plants seeds for harassment and even violence. In this difficult first decade of a new century, intolerance of immigrants, headscarves, and political dissenters is palpable in politics, in the media, and even in classrooms. Abortion clinics are sites of intolerance

¹⁴ See generally, AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001). See also MARIA ROSA MENOCAL, *THE ORNAMENT OF THE WORLD: HOW MUSLIMS, JEWS, AND CHRISTIANS CREATED A CULTURE OF TOLERANCE IN MEDIEVAL SPAIN* (2002).

¹⁵ See JOHN BOWEN, *WHY THE FRENCH DON'T LIKE HEADSCARVES* 83 (2006).

¹⁶ ROSALIE MAGGIO, *THE NEW BEACON BOOK OF QUOTATIONS BY WOMEN* 699 (1996) (quoting a letter dated 1839).

¹⁷ Random House Unabridged Dictionary (2006), available at <http://dictionary.reference.com/browse/intolerance>.

¹⁸ WEBSTER 7TH COLLEGIATE DICTIONARY, *supra* note 10, at 83 (bigotry), 444 (intolerant). See also Random House Unabridged Dictionary, *supra* note 17, (defining bigoted as "utterly intolerant of any creed, belief, or opinion that differs from one's own"), available at <http://dictionary.reference.com/search?r=2&q=bigoted>.

and, at times, violent protest; right-to-life protesters can also name their own ample encounters with intolerance.¹⁹ Growing rights for gays, lesbians, and other sexual minorities meet with overt expressions of hatred and intolerance.

Some theorists place tolerance as the precondition for equality, freedom and justice. Then intolerance deserves the most serious response.²⁰ But we soon hit the dilemma: the most serious response to intolerance is to stop it, to refuse to endure it, to object, scorn, to become intolerant. Tolerance was supposed to endure the objectionable and establish peaceful co-existence with disagreeable others. How can the tolerant be intolerant of intolerance? But how can the tolerant tolerate intolerance?

Discerning precisely what tolerance demands and what its limits are has always been a conundrum.²¹ This question of limits becomes especially vexing when symbols stand in for tolerance or for intolerance—or even for both. Take the dispute over whether the Turkish government could ban the wearing of headscarves in its public university.²² The Supreme Administrative Court upheld the ban because “wearing the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic.”²³

Leyla Sahin enrolled at the medical school at Istanbul University prior to the issuance of a university order excluding students from lectures, courses or tutorials if they wore clothes “symboli[zing] any religion, faith, race or political or ideological persuasion.”²⁴ Denied the ability to pursue her studies, she filed a challenge to the circular, pursued judicial review in Turkey without success, and then she pursued an action in the European Court of Human Rights.

¹⁹ See James Barron, *Abortion Issue Takes a Violent Turn*, N.Y. TIMES, Nov. 25, 1984, at A2; Dudley Clendinen, *U.S. Sends Warning of Potential Threat to Abortion Clinics*, N.Y. TIMES, Jan. 11, 1985, at A1; Dudley Clendinen, *The Abortion Conflict: What it Does to One Doctor*, N.Y. TIMES, Aug. 11, 1985, at F18.

²⁰ See CHANDRAN KUKATHAS, *THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM* 119 (2003); WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* 19 (2006) (discussing the ambiguity surrounding tolerance and the tendency to conflate issues of religion, ethnicity, race, and culture).

²¹ Karl Popper presented the paradox of tolerance this way: “If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them.” KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES*, 1 PLATO 265 n.4 (1971). For recent examinations of these and related difficulties with tolerance, see Milner Ball, *Beyond Tolerance*, 24 CARDOZO L. REV. 1621 (2003); Lasse Thomassen, *The Inclusion of the Other?: Habermas and the Paradox of Tolerance*, 34 POLITICAL THEORY 439–62 (2006); Michel Rosenfeld, *Extremist Speech and the Paradox of Tolerance*, 100 HARV. LAW REV. 1457 (1987) (reviewing LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986)).

²² See Christopher D. Bebeliu, Comment, *The Headscarf as a Symbolic Enemy of the European Court of Human Rights’ Democratic Jurisprudence: Viewing Islam through a European Legal Prism in Light of the Sahin Judgment*, 12 COLUM. J. EUR. L. 573, 584–85 (2006) (recounting 1981 regulations by Turkish Cabinet requiring ordinary modern dress for staff and female students in public institutions, 1982 ban of headscarves in lecture rooms by the Council of Higher Education, 1984 endorsement by Supreme Administrative Court of the headscarf ban, and 1988 judicial rejection of Act permitting headscarf wearing).

²³ *Id.* at 584 (citing Sahin v. Turkey, App. No. 44774/98. Nov. 10, 2005, at ¶ 37.)

²⁴ *Id.* at 606 (citing Sahin v. Turkey, at ¶ 47).

That Court in 2005 agreed that the ban interfered with Sahin's right to manifest her religion but the Court nonetheless affirmed the ban—in the name of pluralism, broadmindedness, and tolerance. The European Court reasoned that to advance those values, the government of Turkey needed to act as an impartial arbiter, protecting democracy, and it could adopt the ban as a proportional means to advance such legitimate aims.²⁵ British, German, French, and Dutch universities would not adopt such a ban, and would instead construe pluralism, broadmindedness and tolerance to require accommodating the religious dress of its students. But, reasoned the European Court of Human Rights, the Turkish government would know better how to advance these goals in its national context.²⁶

That context includes the fact that Turkey, alone with Senegal among all Islamic nations, elevates secularism as part of its constitution.²⁷ But because ninety-nine percent of the population is Muslim, religious tension takes the form of conflicts over degree of orthodoxy. A woman who goes uncovered is at risk of derision or worse by fellow citizens who are more Orthodox, unless the government creates a space where she is not allowed to cover her hair. The state is deeply engaged in the project of secularism but this does not mean that it separates itself from religion; indeed, the Turkish government pays the salaries of 60,000 imams and dictates the contents of their sermons.²⁸ After a military coup in 1980, the political party regained democratic control in 1983 and relaxed restrictions on religious expression²⁹ and subsequent leaders have pressed for greater room for religious expression while trying to contain religious fundamentalism.³⁰ As Turkey struggles to find a path between Islamic fundamentalism and secular fundamentalism,³¹ its prime minister at the time of the Sahin decision had two daughters attending school in the United States in order to avoid the headscarf restrictions in Turkish universities.³²

The headscarf, worn in a university setting, is at once the symbol of intolerance and the symbol of tolerance. To some, it represents patriarchal domination, and the intransigent demands for individual conformity by a group willing to use intimidation. To others it represents space enabling for individual expression and produces the diversity and mutual encounters of multicultural respect.³³ To many in the West, the headscarf ban seems like

²⁵ *Id.* at 607 (citing *Sahin v. Turkey*, at ¶¶ 78, 98–99, 108, 113–14, 117–21).

²⁶ *Id.* at 589–92, 607–09 (citing *Sahin v. Turkey*, at ¶¶ 78, 98–99, 108, 113–14, 117–22, and discussing the Court's reliance on Turkey's case law, and the concept of "the margin of appreciation" used by the Court to allow latitude for member states in their decision-making and adherence to the Convention on Human Rights).

²⁷ *Id.* at 577 (on Turkish history).

²⁸ *Id.* at 581 (quoting NICOLE POPE & HUGH POPE, *TURKEY UNVEILED: A HISTORY OF MODERN TURKEY* 317 (2004)).

²⁹ *Id.*

³⁰ *Id.* at 582.

³¹ MARVINE HOWE, *TURKEY TODAY: A NATION DIVIDED OVER ISLAM'S REVIVAL* 248 (2000).

³² Belevliu, *supra* note 22, at 583.

³³ The debate over the headscarf in public schools in France has a specific inflection due to the traditional French conception of republican citizenship. After several girls in one school were suspended for wearing headscarves, a national debate ensued, and ultimately a nation-wide policy was adopted; the government forbids students from wearing conspicuous religious apparel, including

an act of intolerance. But at least as defended, it instead represents intolerance of the intolerant: it marks an effort to prevent male students and others from disciplining women who prefer not to wear a head covering. Here is the paradox of tolerance: either the tolerant must tolerate intolerance or instead turn to intolerance—of the intolerant.³⁴

Either choice undermines tolerance, but at least showing intolerance to the intolerant preserves a domain of tolerance. It seems absurd to tolerate the intolerant for that undermines tolerance itself. But intolerance of tolerance of course terminates tolerance, too. To mute such a dilemma, we

Muslim headscarves. See *France Bans Head Scarves in School, Senate Adopts Controversial Law Forbidding Religious Apparel*, CBSNews.com, (Mar. 3, 2004), available at

<http://www.cbsnews.com/stories/2004/02/02/world/main597565.shtml>; BOWEN, *supra* note 15. For a comment on an earlier stage of the issue in France, see Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 122 (Winter 1991). From afar, the policy may look intolerant and biased. It allows a Christian student to wear a small cross but does not allow a Muslim girl to cover her hair or a Sikh boy to wear a turban. It could however be defended as a long-term effort to promote integration and unity around a shared, secular, French identity. Certainly the government defends it in terms of the historic vigor with which the country has both pursued a separation between religion and government and also worked to tie education to a shared national identity.

Especially given the timing of its adoption, the ban can be viewed as an expression of anxiety about the growing Muslim presence in France. See BOWEN, *supra* note 15, at 242. And it can also be understood as a political effort by moderates to hold the line against more reactionary regulation of immigrants. See BOWEN, *supra* note 15, at 242; Helen Harden Chenut, *Translator's Introduction to FADELA AMARA, BREAKING THE SILENCE: FRENCH WOMEN'S VOICES FROM THE GHETTO 1*, 20–21 (2006). Some of its supporters claim that it offers special protection for Muslim girls who do not want to wear the scarf and yet are pressured by family members and neighbors to do so. See BOWEN, *supra* note 15, at 209, 231–33, 244. As political scientist Seyla Benhabib comments, “Ironically, it was the very egalitarian norms of the French public education system that brought these girls out of the patriarchal structures of the home and into the French public sphere, and gave them the confidence and the ability to resignify the wearing of the scarf.” SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 191 (2002). The ban may have counterproductive effects if it leads some girls to depart from the state’s school or school altogether. See Chenut, *supra*, at 20 (summarizing Le Foulard et la Republique (1995), reporting on interviews indicating some young women between the ages of 16–25 wore the headscarf to please parents or older brothers, while others chose to wear it to affirm their identities as both French and Muslim); Anthony Giddens, *French Headscarf Ban Against Interests of Women*, 23 NEW PERSP. Q., (Jan. 5, 2004), available at http://www.digitalnpq.org/global_services/global%20viewpoint/01-05-04.html. On the complex arguments among women about these and other human rights issues, see Martha Minow, *About Women, About Culture: About Them, About Us*, 4 Daedalus: J. AM. ACAD. ARTS & SCI. 125, 125–45 (2000).

Informed and engaged participants in the debate over the headscarf in France themselves change their views as events unfold. Fadela Amara is the founder of a movement of human rights for Muslim women in France called Ni Putes Ni Soumises (Neither Whore Nor Submissive). Chenut, *supra*, at 20. Amara launched the movement after a gang set an eighteen-year-old Muslim woman on fire apparently because she had resisted Islamic codes of behavior. Chenut, *supra* at 16. Initially, she believed the ban would be ineffective and stigmatizing; later she saw how girls reappropriated the headscarf and found it empowering, but she grew to favor the ban. AMARA, *supra* at 154, 159.

³⁴ Meanwhile, an elementary school teacher in Germany wanted to cover her hair while teaching contrary to the dictates of the school authorities. Fershta Ludin is a German citizen with roots in Afghanistan. The German Constitutional Court recognized her rights of conscience and access to public office under the Basic Law, but reserved the question to state legislative response. BENHABIB, *supra* note 33, at 198–99. Four German states have legislated laws forbidding teachers from wearing an Islamic headscarf to school. *The Islamic Veil Across Europe*, BBCNews.com, (Nov. 17, 2006), available at <http://news.bbc.co.uk/2/hi/europe/5414098.stm>. British Home Secretary Jack Straw who represents a district that is 25–30% Muslim, controversially urged Muslim women to take off the veil when meeting with him, which some Muslims read as an insult. See Mark Simpson, *Straw Met by Applause—and Boos*, BBCNews.com, (Oct. 13, 2006), available at http://news.bbc.co.uk/2/hi/uk_news/politics/6048896.stm; Jo Coburn, *Straw Gets the Debate He Wanted*, BBCNews.com, (Oct. 6, 2006), available at http://news.bbc.co.uk/2/hi/uk_news/politics/5413012.stm; Nasreen Suleaman, *How Veil Remarks Reinforced Its Support*, BBCNews.com, (Nov. 5, 2006), available at http://news.bbc.co.uk/2/hi/uk_news/6117480.stm.

may try to anticipate how one person's actions could so insult another as to trigger their intolerance and attempt to create conditions of mutual respect to minimize such insults; this is one multiculturalist view. But a fair response is, no, we should not bend ourselves out of shape to accommodate the intolerant.³⁵

This pattern recurs in clashes between efforts those who urge multicultural sensitivity and those who stress instead commitments to individual equality, freedom, and mutual respect. After a Danish journal published cartoons ridiculing intolerance by radical Muslims, the depictions of Mohammed offended many and triggered violent protests around the world. Other media outlets then faced the choice over whether to follow multicultural sensitivities and refrain from republishing the cartoons or instead pursue full coverage of the news and to exercise free speech rights. Similar issues recur in other settings. Should local police punish an assault by an immigrant against a local gay couple or instead excuse it based on recognition of his culture's disapproval of homosexuality?

Sorting out the collisions between tolerance and intolerance is especially arduous when the fights produce physical violence or bloodshed. With massive riots causing several deaths after publication of the Danish cartoons,³⁶ republication raised risks of sheer physical danger, not simply charges of intolerance. In the midst of a multicultural street far in Berlin in 2002, for example, a group of immigrant teens beat up a gay couple. According to journalist Bruce Bawer, "That day, [the couple] lost their belief in the ideal of a multicultural society in which minorities act together in solidarity."³⁷ Political theorist Wendy Brown argues that Israel and the United States have engaged in violence in the name of "tolerance" and "democratic" ideals.³⁸

Thus, tolerance presents the dilemma of its own limits. Even if we rule out the self-contradicting position that the tolerant must refrain from enforcing tolerance itself, tolerance defends the persecuted.³⁹ Tolerance is not a substantive position, not a retreat to neutrality. But if tolerance can authorize a live-and-let-live, simplistic version of multiculturalism, it undermines vigilance against intolerance. It may help us to distinguish tolerance of the *people* who hold intolerant views from tolerance of those *views* themselves.⁴⁰ Also it may help to distinguish a personal attitude of tolerance—as in restraint against getting into a fist-fight over undeniable

³⁵ Yet even as tolerance is not the correct response to the intolerant, something surpassing tolerance—something more like efforts to understand—may be necessary and appropriate as a response to people who commit intolerable acts. See Ball, *supra* note 21, at 1623–24.

³⁶ *Muslim Cartoon Fury Claims Lives*, BBCNews.com, (Feb. 6, 2006), available at http://news.bbc.co.uk/2/hi/south_asia/4684652.stm.

³⁷ BRUCE BAWER, WHILE EUROPE SLEPT: HOW RADICAL ISLAM IS DESTROYING THE WEST FROM WITHIN 39 (2006).

³⁸ See BROWN, *supra* note 20, at 104–05.

³⁹ See SCANLON, *supra* note 12, at 197.

⁴⁰ See SCANLON, *supra* note 12, at 197 (discussing Voltaire's statement, "I disapprove of what you say, but I will defend to the death your right to say it.").

disagreement—from institutional arrangements of law and politics that are designed for those most in disagreement with one another to accept.⁴¹

Yet another version of the dilemma of tolerance resurfaces here. Consider what happened in England when Iranian Ayatollah Khomeini issued a fatwa, calling for a ban of Salman Rushdie's novel, *The Satanic Verses*. The fatwa represented high religious authority not only to ban the novel but also to offer a bounty for Rushdie's death even in England, where Rushdie lived.⁴² Beyond the police protection that Britain then offered as Rushdie went into hiding, what could the British government or anyone do to protect him from the physical danger he faced? One rule that we can identify as unhelpful was Britain's own blasphemy law, which was intolerant of religious heresy but only if the heresy targeted Christianity.⁴³ To be fair—and to have any fighting chance of winning respect by Rushdie's critics—England would either need to extend the blasphemy law to Islam or eliminate it altogether. The choice itself extends the dilemma of tolerance. Once the system of tolerance includes some explicit statements of what cannot be tolerated, there will also be disagreements over what should or should not be on that list. Perhaps it would be better not to use secular law to punish religious blasphemy at all. For those whose religion—or whose secularism—is not on the forbidden list, religious blasphemy laws invite charges of bias, hypocrisy, and disrespect. But how can a tolerant society allow religious authorities to punish what the secular world permits? Using law, politics, and social sanctions to establish the limits of tolerance creates the dilemma of intolerance toward intolerance, or tolerance of intolerance. This dilemma affords a useful window in to assessing contemporary responses to terrorism, and the narratives of over- and under-reaction to which I will now turn.

II. RISKS OF OVERREACTION

Books and articles, as well as lawsuits filed since 9/11, tell a narrative of intolerant overreaction to terror in the United States. Academic and popular writings, watchdog reports, and test case litigation describe and criticize post-9/11 domestic restrictions on speech and assembly targeting protesters;⁴⁴ increased government surveillance;⁴⁵ diminished

⁴¹ See SCANLON, *supra* note 12, at 198.

⁴² GARAN HOLCOMBE, *Salman Rushdie*, CONTEMPORARY WRITERS IN THE UK (2004), available at <http://www.contemporarywriters.com/authors/?p=auth87> ("The publication in 1988 of his fourth novel, *The Satanic Verses*, led to accusations of blasphemy against Islam and demonstrations by Islamist groups in India and Pakistan. The orthodox Iranian leadership issued a *fatwa* against Rushdie on 14 February 1989 - effectively a sentence of death - and he was forced into hiding under the protection of the British government and police. The book itself centers on the adventures of two Indian actors, Gibreel and Saladin, who fall to earth in Britain when their Air India jet explodes. It won the Whitbread Novel Award in 1988.") *Id.*

⁴³ See *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* 3 W.L.R. 986 (1991) (ruling that the blasphemy law did not encompass Islam). See also LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED FROM MOSES TO SALMAN RUSHDIE* (1995); DAVID NASH, *BLASPHEMY IN MODERN BRITAIN 1789-PRESENT* (1999); *Q & A: Blasphemy law*, BBCNews.com (Oct. 18, 2004), available at <http://news.bbc.co.uk/3/753408.stm>.

⁴⁴ See Mary M. Cheh, *The Treatment of Demonstrators: Demonstrations, Security Zones, and the First Amendment Protection of Special Places*, 8 D.C. L. REV. 53 (2004); Nick Suplina, Note, *Crowd*

administrative and judicial oversight;⁴⁶ new registration requirements and ongoing monitoring of non-citizens in the United States that subject individuals to arrest, detention, loss of legal immigrant status, criminal charges, and deportation for failures to register;⁴⁷ attempts to deport or hold indefinitely non-citizens for minor or nonexistent immigration violations;⁴⁸ secrecy about the names of people detained;⁴⁹ and use of asset forfeiture⁵⁰ and other expanded governmental powers to obtain information, arrest, detain, and indict individuals, including citizens, for broadly defined terrorism-related activities.⁵¹

Turning to the international scene, overreaching by the U.S. government is the focus of journalism, scholarship, and lawsuits challenging the detention and interrogation techniques used for people captured in Afghanistan, Pakistan, and Iraq. These detentions by the United States almost always proceed without charges, and only recently has the government started a process of planning for hearings of any sort. Even so, the hearings are sharply confined in subject matter and proceed outside the traditional rules of evidence and the military code. The Administration has sharply fought independent judicial review while also limiting detainee access to counsel and subjecting detainee consultations with counsel to

Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism, 73 GEO. WASH. L. REV. 395 (2005). The central decision upholding the restriction is *United For Peace & Justice v. City of New York*, 243 F.Supp.2d 219 (S.D.N.Y. 2003).

⁴⁵ MARK SIDEL, MORE SECURE, LESS FREE?: ANTITERRORISM POLICY & CIVIL LIBERTIES AFTER SEPTEMBER 11 (2004); Tony Loci, *Report Outlines Rights Violations in Sept. 11 Act*, USA TODAY, July 22, 2003, at 2A (describing thirty-four “credible” allegations of civil rights violations by the Justice Department in executing the Patriot Act). See also USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended by 18 U.S.C. §§ 2510-22, 18 U.S.C. §§ 3121-27, 18 U.S.C. §§ 2701-12, 50 U.S.C. §§ 1801-11, and in eleven other sections (2006)) [hereinafter “USA PATRIOT Act”]. The Patriot Act was renewed on March 9, 2006, with only minor changes. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006).

⁴⁶ The Bush Administration established a system of military tribunals for Guantanamo detainees, bypassing Article III courts; the Supreme Court struck down that system as a violation of the Uniform Code of Military Justice (“UCMJ”). See *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006). Congress quickly overturned that decision, thereby reestablishing the military tribunal system. See *Military Commissions Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

⁴⁷ See 8 U.S.C.A. § 1201(b) (establishing general registration requirements for all entering aliens). Congress also created a “special registration” system for aliens from certain countries, requiring regular reports to the Department of Homeland Security from 2002-03. See *Registration and Monitoring of Certain Nonimmigrants*, 8 C.F.R. § 264 (2002) (suspended 2003). See also Nina Bernstein, *In Search of Asylum After Reprieve Proves Temporary*, N.Y. TIMES, Sept. 21, 2006, at B2 (describing effects of special registration system); U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PUBLIC INFORMATION: SPECIAL REGISTRATION I (2006), available at <http://www.ice.gov/pi/specialregistration/index.htm> (describing special registration requirements).

⁴⁸ See Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407, 431 (2005).

⁴⁹ Stanley Mark et al., *Have We Learned the Lessons of History? World War II Japanese Internment and Today's Secret Detentions*, IMMIG. POL'Y FOCUS, Oct. 2002, available at <http://www.aifl.org/ipc/ipfl1002.pdf>, cited in Twibell, *supra* note 48, n.130; American Immigration Lawyer's Ass'n, *Boiling the Frog Slowly: Executive Branch Actions Since September 11, 2001*, 7 BENDERS IMMIG. BULL. 1237 (2002).

⁵⁰ Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?*, 38 U.C. DAVIS L. REV. 609, 632-640, 694-698 (2005) (citing provisions of the Patriot Act and related regulations).

⁵¹ A court rejected as impermissibly vague the prohibition of providing material support or resources in the form of “expert advice or assistance.” *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2 1185 (C.D. Cal. 2004).

government monitoring.⁵² Most explosive are the exposures of secret detention centers abroad and rendition of detainees to countries known to engage in torture, coupled with revelations of shockingly abusive interrogation and detention techniques in the Abu Ghraib prison in Iraq and in Guantanamo, Cuba, which the government specifically chose as a detention center in an effort to evade both domestic and international legal constraints.

Taken together, recent steps taken by the U.S. government create an extraordinary challenge to traditional civil liberties and civil rights. Particular jeopardy falls on dissenters to U.S. policies and on Muslims, Arabs, and Arab-Americans, as well as people who may be mistaken for them. Alongside the broad story of a power grab by the executive branch,⁵³ three specific narratives of government overreaching recur among the commentaries:

- Intolerance of protests
- Surveillance without checks
- Intimidating treatment of non-citizens and “targeting” of Muslims and Arabs

By calling them “narratives,” I do not suggest that claims of government overreaction to terrorist threats are untrue.⁵⁴ Critical accounts contain many points of undeniable truth, and justify deeper analyses that these narratives only partially suggest. By discussing “narratives,” I do mean to estrange ourselves from the debate, to establish critical distance, and to see the frames used to make sense of often overwhelming experiences.

⁵² Akram & Karmely, *supra* note 50, at 654-657 (citing the Bureau of Prisons’s post 9/11 power to monitor and review communications between detainees or inmates and their lawyers).

⁵³ See, e.g., Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 WASHBURN L. REV. 1 (2005). Observers note that President Bush has announced intentions to ignore more than 750 laws, keep without charges nearly 500 “enemy combatants” in detention in Guantanamo, authorize warrantless wiretapping of domestic telephone calls, and to report only to a handful of leaders rather than full Congressional oversight committees, relying on assertions of the inherent powers of the commander in chief and the unitary executive and elevating the President’s control over the other branches. Elizabeth Drew, *Power Grab*, THE NEW YORK REVIEW OF BOOKS, June 22, 2006, available at <http://www.nybooks.com/articles/19092>. The White House lawyers maintain there is precedent for the administration’s activities. For the administration’s argument in favor of its authority with regard to domestic surveillance, see, e.g., U.S. DEP’T. OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>. But some commentators characterize the administration’s activities as a power grab. E.g., Alan Bock, *Breathtaking Power Grab*, Jan. 29, 2006, <http://www.antiwar.com/bock/?articleid=8452>.

⁵⁴ Decisionmakers reflecting on decisions made in the wake of 9/11 have commented on the context of fear and ignorance while debating about the appropriateness of the response. See, e.g., John J. Farmer, Jr., *The Rule of Law in an Age of Terror*, 57 RUTGERS L. REV. 747, 753, 755 (2005) (reflections of former New Jersey Attorney General current Senior Counsel of the National Commission on Terrorist Attacks upon the United States (9/11 Commission)).

A. ON INTOLERANCE OF PROTESTS

The federal government has denied all permits for large demonstrations in Lafayette Park, the open space directly across from the White House that has historically hosted assemblies and protests.⁵⁵ Police have denied parade permits and confined assembly and protests after 9/11 to “free speech zones” removed from government officials and the broader community. In a leading example in 2003, the New York City police denied a permit for the anti-war parade proposed by protestors of the anticipated U.S. military action in Iraq. The police confined the protesters to a location bounded by metal pens.⁵⁶ A federal district court upheld the restrictions in part because the police had too limited a time frame to plan for the event after advance negotiations with protestors stalled. Critics claim that the government caused the stall, and used the permissible time, place, and manner restrictions on free speech and assembly to alter the expressive content of the demonstration. Affirming the decision, the federal court of appeals warned against talismanic justifications for denying parade permits.⁵⁷ During the same incident, police arrested an estimated 250 people, most of whom had tried without success to reach the permitted protest site.⁵⁸ Law enforcement officials similarly restricted protestors to “free speech zones” during the 2004 Democratic National Convention in Boston and the 2004 Republican National Convention in New York. In other public events, supporters of President Bush have been allowed in public settings to hear him speak, while protesters have been confined to zones where they cannot see or hear or be seen or heard by the President, federal officials, or other members of the public.⁵⁹

B. SURVEILLANCE WITHOUT CHECKS

If we are lucky, we will learn more about the surveillance pursued by the federal government since 9/11. Because the usual checks and limitations increasingly do not apply, we may not. Nevertheless, the media has begun to expose practices that the government hoped to keep secret. Recently, the *New York Times* reported on the new use of security letters by the Central Intelligence Agency to obtain domestic financial records while following leads about terrorist threats—including sudden increases in

⁵⁵ Cheh, *supra* note 44, at 55, n.7. *Mahoney v. Norton*, No. 02-1715 (D.D.C. 2001) (upholding ban imposed after 9/11 on protests in Lafayette Park).

⁵⁶ See Ian Urbina, *Police Face Lawsuits over Tactics at Big Protests*, N.Y. TIMES, Nov 19, 2003, at B 4.

⁵⁷ *United for Peace & Justice v. City of New York*, 323 F.3d 175, 178 (2d Cir. 2003). See also Suplina, *supra* note 44, at 418 n.169.

⁵⁸ Shaila K. Dewan, *War Protesters Say They Were Bound to Rally, but Ended up in a Human Traffic Jam*, N.Y. TIMES, Feb. 17, 2003, at B4.

⁵⁹ See Amended Complaint, *Acrod v. City of Philadelphia* 2004 U.S. Dist. LEXIS 8446 (E.D. 2004) (No 03-412); Jonathan Janiszewski, Comment, *Silence Enforced Through Speech: Philadelphia and the 2000 Republican Convention*, 12 TEMP. POL. & CIV. RTS. L. REV. 121 (2002); Coalition to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61 (D. Mass 2004), *aff'd sub nom.* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004); Diane Cardwell, *Police Offer Protesters a Site Far From Garden*, N.Y. TIMES, July 15, 2004, at B1; Jay Weaver, *Groups to File Lawsuits over Actions by Police*, MIAMI HERALD, Dec. 8, 2003, at B1.

assets held by particular individuals.⁶⁰ Although presented as noncompulsory letters to the financial institutions, the requests nonetheless involve the military in the domestic law enforcement domain without clear authority or specified checks on the scope of power and quite coercion they exercise.⁶¹

⁶⁰ Eric Lichtblau & Mark Mazzetti, *Military Expands Intelligence Role in U.S.*, N.Y. TIMES, Jan. 14, 2007, at A1.

⁶¹ *Id.* See also Bob Bauman, Letter from the Editor, *Overreaction*, SOVEREIGN SOCIETY OFFSHORE A-LETTER, Aug. 4, 2005, available at <http://www.sovereignsociety.com/offshore1368.html>. (“Referring to the London bombings and the death of an innocent man who was mistaken for a terrorist, Rep. Barr noted that while such a tragedy has not occurred in the US, “our government continues to overreact to terrorist incidents, real and perceived, in ways that threaten to erase our liberties if not our lives.”). The report continues:

Barr also touched upon a topic we often address - financial privacy.

Echoing our sentiments, he notes: “It was not so many years ago that Americans could open a bank account and rest assured its contents would be free from prying government eyes unless federal agents could establish to the satisfaction of a federal judge that the bank customer had violated the law. While the Internal Revenue Service was exempted from this prohibition on routine disclosure of a law abiding citizens’ financial records, even that agency was severely limited in how it could use the tax related data and with whom it could share the information. In other words, as a man’s home was his castle, so too his finances were his secret. No more.

Under the USA Patriot Act, versions of which were reauthorized recently by both houses of the US Congress, and the ease with which “sneak and peek” warrants may now be issued to the government, a man’s home is the government’s play ground. And, also thanks to the Patriot Act, a person’s bank accounts are now routinely analyzed and reported to government agencies for little or no reason whatsoever.

Barr also notes the futility of all the unnecessary bureaucratic paperwork: Banks are under increasing pressure to file more and more Suspicious Activity Reports” or “SARs” with the feds; at the current rate of some 800,000 per year (nearly triple the rate of just three years ago). Until recently SARs were limited to instances in which truly unusual banking activity triggered a legitimate suspicion the customer was engaged in money laundering or some other illegal financial activity. Now, thanks to both the Patriot Act, which greatly expanded the category of suspicious activities that would trigger an SAR filing, and as a result of “defensive filings” by banks, the types of transactions that are coming under scrutiny are often routine and not indicative of any unlawful activity.

This kind of mindless reporting is little more than plain snooping by bank officials eager to gain favor with federal regulators, and reflects the federal government’s increasing desire to gather data on all of us for no reason or any reason.

It has gotten so bad that one US banker told Barr his bank has set quotas for increased numbers of SARs to be filed each reporting period.

While you might sympathize with the banks, since the federal government is now prosecuting banks for not filing enough SARs, filing a report with the feds on a customer simply because he or she engages in heavy use of an ATM seems an overreaction but it is happening.

What happens to all this information the government is gathering from banks filing more SARs? Not much, beyond gathering data in its massive computers. Of the nearly 700,000 SARs filed in 2004, fewer than 900 were actually passed on to a law enforcement agency for follow-up. Lost in all this is financial privacy, something that used to be important in America but which now appears to have been discarded as ‘ quaint’ and outdated.

We reiterate what we have said before -- real financial privacy does exist in many offshore havens where banking secrecy is the law; where privacy is not waived on a routine basis, but only after judicial review, notice to account holders and determination of probable cause.

Like the increased surveillance of domestic telephones, mail, and email brought to light by investigative journalists, this investigation of financial records depends on aggressive interpretations of federal authority and government secrecy about its own assertions of authority. It thereby undermines legal and democratic accountability in the course of pursuing what many understand as a campaign to restore executive powers curbed after abuses under the Nixon administration.⁶² For example, President Bush recently announced that he believes that federal law enforcement has authority to read materials sent through the U.S. mail. Some new surveillance techniques are no doubt appropriate in light of terrorist threats, but the pattern of concealing the techniques and forestalling demands for authorization has become a series of disturbingly familiar end-runs around democratic checks. These measures are striking especially given the ongoing willingness of Congress to give broad authorization for new surveillance techniques, including techniques that loosen traditional checks on governmental searches and investigations.

Thus, the USA PATRIOT Act increases government power to wiretap and obtain electronic communications.⁶³ It permits law enforcement to demand libraries, bookstores, and businesses to produce tangible items, such as papers, books, and records,⁶⁴ while also forbidding disclosure to any person of such a demand.⁶⁵ It further authorizes searches conducted without giving contemporaneous notice of the search or a warrant for the search.⁶⁶ Civil libertarians objected but secured only small changes as the

It is still legal to have, use and enjoy offshore bank and investments accounts. We can and will assist you in opening these accounts where you get far better asset protection, increased investment opportunities and the kind of peace of mind no longer available in America. That's the way it looks from here.

BOB BAUMAN, Editor

⁶² See ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* (2005).

⁶³ USA PATRIOT Act, *supra* note 45, at § 204 (2006).

⁶⁴ USA PATRIOT Act, *supra* note 45, at § 215 (2006).

⁶⁵ USA PATRIOT Act, *supra* note 45, at § 215(d) (“No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.”) See STEPHEN J. SCHULHOFER, *THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11 2* (2002).

⁶⁶ USA PATRIOT Act, *supra* note 45, at § 215; USA PATRIOT Improvement and Reauthorization Act of 2005, *supra* note 45. On signing the renewal of the Act into law, President Bush indicated, as he has on other occasions, his intention to construe the law’s obligations according to his own view of what the Constitution permits:

The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch, such as sections 106A and 119, in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.

The executive branch shall construe section 756(e)(2) of H.R. 3199, which calls for an executive branch official to submit to the Congress recommendations for legislative action, in a manner consistent with the President’s constitutional authority to supervise the unitary

Act was reauthorized in 2006. Now libraries can consult a lawyer and try to challenge whether the government acts in bad faith in demanding the records.⁶⁷ The Act gives police and other government agents authority to use “sneak-and-peek warrants,” obtained with no advance notice to the subject, to search homes and possessions, and to conduct surveillance on the Internet or email without notice. Electronic surveillance bypasses prior approval previously required by a secret panel of judges on the Foreign Intelligence Surveillance Act (“FISA”) court; after 9/11, the government claimed this process of seeking warrants was too burdensome.⁶⁸ Actually, since 1978, Congress has given the government authority to proceed for seventy-two hours in an emergency case without a warrant. Nonetheless, the Bush administration argued that this broad authority actually contained too onerous a limit.⁶⁹ With challenges to the administration’s practices pending, the President recently agreed to submit electronic surveillance to review by the secret Foreign Intelligence Surveillance Court (“FISC”). Some observers treated this as a victory for the rule of law and checks on excessive governmental power, yet in 2005, FISC approved all 2072

executive branch and to recommend for the consideration of the Congress such measures as he judges necessary and expedient.

George W. Bush, President’s Statement on H.R. 199, the “USA PATRIOT Improvement and Reauthorization Act of 2005,” *available at* <http://www.whitehouse.gov/news/releases/2006/03/20060309-8.html> (Mar. 9, 2006). Thus, although Congress inserted a provision to guard against executive abuses of the power to search private homes and seize papers, the President responded by announcing he did not feel bound to report to Congress if, in his view, such disclosure would impair national security or the performance of the Executive’s duties. See Charlie Savage, *Bush Shuns Patriot Act Requirement*, BOSTON GLOBE, Mar. 24, 2006, *available at* http://www.boston.com/news/nation/articles/2006/03/24/bush_shuns_patriot_act_requirement/.

⁶⁷ As the Department of Justice summarized:

Amendments to section 215 orders. The reauthorizing legislation’s amendments provide significant additional safeguards of Americans’ civil liberties and privacy while continuing to allow investigators to use so-called “section 215 orders”—court orders requiring production of business records—in all phases of authorized national security investigations. The reauthorizing legislation clarifies that a section 215 order cannot be issued unless the information sought is relevant to an authorized national security investigation (other than a threat assessment).

With respect to certain categories of documents that are viewed as more sensitive—such as library, bookstore, medical, tax return, and gun sale records—the reauthorization legislation still allows the FISA court to issue a section 215 order for those documents but requires that the application be signed by either the Director or Deputy Director of the FBI. As another safeguard, the Attorney General must develop and apply so-called “minimization procedures” limiting the retention and dissemination of information concerning U.S. persons that is obtained through section 215 orders. Recipients may explicitly seek judicial review and disclose receipt of a 215 order to attorneys to obtain legal advice or assistance and to other people necessary to comply with the request.

OFFICE OF PUBLIC AFFAIRS, U.S. DEP’T OF JUSTICE, PUBL’N NO. 06-113, FACT SHEET: USA PATRIOT ACT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005, (2006), *available at* http://www.usdoj.gov/opa/pr/2006/March/06_opa_113.html. See also CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, USA PATRIOT ACT REAUTHORIZATION IN BRIEF (2005), *available at* <http://fpc.state.gov/documents/organization/51133.pdf> (summarizing changes in the Act).

⁶⁸ USA PATRIOT Act, *supra* note 45. See also U.S. Department of Justice Fact Sheet, *supra* note 67; ELAINE CASSELL, THE WAR ON CIVIL LIBERTIES: HOW BUSH AND ASHCROFT HAVE DISMANTLED THE BILL OF RIGHTS 13-14 (2004).

⁶⁹ See Responses from the Dep’t of Justice to Questions from Chairman Sensenbrenner (Mar. 24, 2006), *available at* <http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf>.

requests that it received.⁷⁰ The government has not disclosed whether its new willingness to submit requests for warrants to FISA court review—in a secret, nonadversarial, and unreported session—pertains to specific requests or to the program as a whole.⁷¹

Ashton Carter, a former U.S. Assistant Secretary of Defense who is now a professor of international affairs, argues that a government should have more latitude to conduct surveillance of things—including means and channels—than it has for surveillance of persons.⁷² Yet surveillance since 9/11 in the United States seems—or is—more intensive on Muslims, Arabs, and people thought to be Muslim or Arab than anyone else. Restrictions on Muslims figure prominently in the narratives of government overreaching, including anecdotes of discriminatory treatment in ordinary government activities. One account describes how a Catholic nun “covered from head to toe” passed through an airport security checkpoint without a body search, while Enaas Sansour, a seventeen-year-old Muslim girl wearing a headscarf, was forced to remove her scarf in front of men, contrary to her religious views.⁷³ In another incident, Florida revoked the driver’s license of a Muslim woman who refused to comply with an order issued after 9/11 to retake her driver’s license photo with her veil removed.⁷⁴ Because courts have found the photo requirement unconstitutional as applied to objecting Christian plaintiffs,⁷⁵ one critic charged that revoking the Muslim woman’s driver’s license showed religious bias. This objection is not fully persuasive, as the other decisions occurred before the general tightening of security measures after 9/11 and the development of face recognition technology, which increases the usefulness of digitalized drivers’ licenses in law enforcement.⁷⁶ Even so, discrimination in surveillance is only the tip of the iceberg in the third narrative.

C. THE INTIMIDATING TREATMENT OF NONCITIZENS AND “TARGETING” OF MUSLIMS AND ARABS

These narratives encompass government practices within the United States and in the wars in Afghanistan and Iraq.

⁷⁰ Donna Leinword, *Court to Oversee Wiretap Program*, USA TODAY, Jan. 18, 2007, at 1A.

⁷¹ Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1, A16. See also Editorial, *Bush’s Change of Heart (or Not)*, BOSTON GLOBE, Jan. 21, 2007, at F8.

⁷² Ashton B. Carter, *The Architecture of Government in the Face of Terrorism*, in COUNTERING TERRORISM: DIMENSIONS OF PREPAREDNESS 12 (Arnold M. Howitt & Robyn L. Pangi eds., 2003).

⁷³ Ally Hack, Note, *Forfeiting Liberty: A Collective Sense of Vulnerability and the Need for Proactive Protection After 9/11*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 469 (2004) (citing Katherine Shaver, *Freedom of Expression: BWI Screening Prompts Complaint from Virginia Muslim*, WASH. POST, Jan. 9, 2002, available at <http://loper.org/george/trends/2002/Jan/87.html>).

⁷⁴ *Freeman v. State of Florida*, No. 2002-CA-2828, 2004 WL 21338619 (Fla. Cir. Ct. 2003). For critique, see Patrick T. Currier, Note, *Freeman v. State of Florida: Compelling State Interests and the Free Exercise of Religion in Post-September 11th Courts*, 53 CATH. U. L. REV. 913 (2004) (arguing that the Freeman decision reflected post 9/11 biases and will deteriorate strict scrutiny analysis and constitutionally protected rights).

⁷⁵ *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff’d*, *Jensen v. Quaring*, 72 U.S. 478 (1985); *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225 (Ind. 1978).

⁷⁶ See *Freeman v. State of Florida*, *supra* note 74.

Immigration lawyers have been in the front tier of critics exposing government practices following 9/11, including the immediate round-up and detention of thousands of Arabs and Arab Americans,⁷⁷ detentions of non-citizens even after they posted bond, and detentions of people who came forward with information to assist investigations of terrorist activities.⁷⁸ Due to government assertions of emergency, people have been held without bond for unlimited durations of time. Threatened and actual deportations for technical immigration law violations or criminal offenses are coupled with enforcement of the new National Security Entry-Exit Registration System. It required male visitors to the United States from twenty-four Arab and/or Muslim countries (and North Korea) to register with law enforcement officials. The government defended this approach as based on nationality rather than ethnic or religious profiles. But the resulting surveillance and detentions produce real fear among many Arabs and Muslims in the country.⁷⁹ The government is also working to implement a program to deport all immigrants lacking proper papers—a plan that could expel twelve million people.⁸⁰ Some even warn that the government is laying the ground for internment of Arabs and Muslims, in the mode of the Japanese-American internment during World War II.⁸¹ Others find this implausible.⁸² But the post 9/11 registration system was preceded by a 1986 U.S. contingency plan for interning Arabs.⁸³ Shortly after 9/11, the Department of Justice launched an interviewing program based on the list it compiled of 8,000 men, aged eighteen to thirty-three, who entered the United States on nonimmigrant visas from Muslim or Arab countries. The current administration piloted data-mining law enforcement strategies with this group.⁸⁴ The General Accounting Office review of the interviewing project cast substantial doubt on the value of the project,

⁷⁷ E.g., Dan Eggen, *Delays Cited in Charging Detainees*, WASH. POST, Jan. 15, 2002, at A1.

⁷⁸ Twibell, *supra* note 48; Akram & Karmely, *supra* note 50.

⁷⁹ Citizens of Iran, Iraq, Libya, Sudan and Syria were the first group called to register, followed by a second wave that included citizens of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. United States Immigration and Customs Enforcement, Special Registration, *available at* <http://www.ice.gov/pi/specialregistration/index.htm>. See Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,642 (Dec. 18, 2002). See also Deborah Ramirez & Stephanie Woldenberg, *Balancing Security and Liberty in a Post-September 11th World: The Search for Common Sense in Domestic Counterterrorism Policy*, 14 TEMP. POL. & CIV. RTS. L. REV. 495, 497 (2005).

⁸⁰ Carol Rose & Christopher Ott, *Inhumane Raid Was Just One of Many*, BOSTON GLOBE, Mar. 26, 2007, at A9 (describing the Department of Homeland Security plan named Endgame). See also BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SECURITY, *ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-12*, *available at* www.aclum.org/endgame.pdf.

⁸¹ Twibell, *supra* note 48; Jim Buchanan, *Detention Centers For Who, Exactly?*, ASHEVILLE CITIZEN-TIMES, Feb. 26, 2006, at 13A (questioning the motives behind a \$385 million contingency contract awarded to a Halliburton subsidiary for the construction of detention centers on U.S. soil). See also Simon Romero, *Halliburton Says Unit Will Offer Shares*, N.Y. TIMES, Jan. 28, 2006, at C3 (describing the detention center contract briefly).

⁸² Twibell, *supra* note 48, at 420 (citing David Cole's view that internment would not be practical due to the geographic dispersal of Arabs in the U.S.).

⁸³ Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 94 (1999); DAVID COLE, *ENEMY ALIENS* 102 (2003).

⁸⁴ Nancy Murray, *in* CIVIL RIGHTS IN PERIL: THE TARGETING OF ARABS AND MUSLIMS 39 (Elaine C. Hagopian ed., 2004).

which generated fewer than 20 arrests—all on immigration or criminal charges, with no link to terrorism.⁸⁵

The registration system and visa restrictions also have made it more difficult for academic institutions to bring in foreign students and visiting scholars from abroad to study, teach, or attend conferences—and they deter communication more broadly by generating suspicion about such individuals.⁸⁶ Chiefly affecting people from Muslim and Arab countries, these policies also hamper the ability of colleges and universities to increase understanding about precisely those regions of enormous American ignorance, misunderstanding, and intolerance. Yet when the University of North Carolina tried to address some of this lack of understanding by requiring incoming students to read portions of the Qu’ran, state legislators sought to attach to an appropriations bill the requirement that if any religion is studied at the state university, equal time would have to be given to others.⁸⁷

The narratives of oppressive treatment of Arabs and Muslims reach a crescendo with the unprecedented exercise of executive authority in detaining individuals in Guantanamo Bay, the Iraq prison at Abu Ghraib, and other prison facilities abroad, including secret sites.⁸⁸ As most of those held as terrorists in the United States and taken into custody from Afghanistan and Iraq are Arabs and Muslims, critics charge ethnic and religious discrimination in the treatment of non-citizens in the United States and of detainees in Guantanamo, Afghanistan, and Iraq.⁸⁹ This narrative is summarized in the book, *Civil Rights in Peril: The Targeting of Arabs and Muslims*.⁹⁰ The essays within the book examine negative media portrayals of Arabs and Muslim Americans as well as U.S. immigration and surveillance policies and what it calls “the criminalization of Arab and Muslim communities” in the United States and in the Middle East.⁹¹

⁸⁵ U.S. Gen. Accounting Office, Report to Congressional Committees GAO-03-459, Homeland Security: Justice Department’s Project to Interview Aliens after September 11, 2001, 5 (2003), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-03-459>.

⁸⁶ American Association of University Professors, *Academic Freedom and National Security in a Time of Crisis*, in Gertsmann & Streb, *supra* note 1, at 15. See O’Neil, *supra* note 1, at 43-59; John Akker, in Gertsmann & Streb, *supra* note 1, at 114.

⁸⁷ See Gertsmann & Streb, *supra* note 1, at 10–11. For further discussion of rethinking academic freedom in the wake of 9/11, see Lynn V. Cheney, *Defending Civilization: How Our Universities are Failing America and What can be done About it*, TOTSE.COM, Nov. 2001, http://www.totse.com/en/politics/political_spew/162419.html (last visited Apr. 10, 2007); Gertsmann & Streb, *supra* note 1, at 7. Attracting considerable public attention, Ward Churchill compared victims of Sept. 11 attacks to the victims of Nazi Adolf Eichmann. See *id.* at 11. Overall, observers conclude that after 9/11, in American universities, free speech was successfully defended by administrators or outside advocates. See generally O’Neil, *supra* note 1, at 44–59.

⁸⁸ David Cole, *How to Skip the Constitution*, NEW YORK REVIEW OF BOOKS, Nov. 16, 2006, at 22 (reviewing POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY, (2006)).

⁸⁹ Akram & Karmely, *supra* note 50, at 611, 658–56, 691–699, and n. 428.

⁹⁰ See generally ELAINE C. HAGOPIAN, CIVIL RIGHTS IN PERIL: THE TARGETING OF ARABS AND MUSLIMS (2004) [hereinafter CIVIL RIGHTS IN PERIL].

⁹¹ See Robert Morlino, “Our Enemies Among Us!”: The Portrayal of Arab and Muslim Americans in Post-9/11 American Media, in CIVIL RIGHTS IN PERIL, *supra* note 90, at 71–103.

Many observers link the U.S. treatment of Arab and Muslim countries with policies and attitudes affecting Arab and Muslim Americans, and anyone—a Sikh, a Mexican—who can be mistaken for one. The narratives of government overreaction thus combine critiques of American foreign policies, criminal law enforcement, immigration policy and practice, and private harassment and stereotyping.

Critics argue that general law enforcement and anti-terrorism policies can be deployed disproportionately against Muslims and Arabs, and this very risk especially frightens members of those communities. Under the International Emergency Economic Powers Act of 1977,⁹² and other legislation, the U.S. Department of Treasury investigates and blocks contributions to charities for activities suspected of jeopardizing national security. Furthermore, Executive orders signed by President Clinton before 9/11 and President Bush afterwards allow the government to identify an organization or an individual as a terrorist organization and subsequently prevent them from receiving funds, goods, or services.⁹³ After 9/11, the government rigorously reviewed Muslim charities, listing at least twenty-seven Islamic charities as terrorist and chilling donations to many others.⁹⁴ The Treasury Department offered guidelines to assist charities in avoiding suspicion of terrorist ties but has not produced a list of charities that comply with the guidelines.⁹⁵

These government activities and perceptions of their unfairness occur against a backdrop of harassment and degradation reported or unreported by Muslim citizens and residents.⁹⁶ Intense negative responses to Muslims and Arabs appeared in the United States shortly after 9/11,⁹⁷ and negative stereotypes of Muslims persist in the broader American population five years later. Some argue that expert commentators contribute to faulty images of fanatical Muslim fundamentalists.⁹⁸ Surveys of American Muslims—and people perceived to be Muslims—indicate persistent feelings of stigma and experiences of discrimination.⁹⁹ After 9/11, public

⁹² International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1701–07 (2000).

⁹³ See Exec. Order No. 12,947, 60 Fed. Reg. 5,079 (Jan. 23, 1995); Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

⁹⁴ Kathryn A. Ruff, Note, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 NYU. J. LEGIS. & PUB. POL'Y 447, 472–77 (2005/2006).

⁹⁵ *Id.* at 499.

⁹⁶ Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 75 (2004); Kathryn A. Ruff, *supra* note 94, at 448–49 (describing graffiti and street harassment).

⁹⁷ See James Curry Woods, Commentary, *The Third Tower: The Effect of the September 11th Terrorist Attacks on the American Jury System*, 55 ALA. L. REV. 209, 210 (2003) (citing a survey showing 44% of Americans surveyed believed that the terrorist attacks represented the feelings of Muslim Americans toward the United States and 84% favored tighter restrictions on immigrants from Muslim or Arab countries; 55% of those surveyed between the ages of eighteen and twenty-nine had heard negative comments about Arabs in America); Mohamed Nimer, *Muslims in America After 9-11*, 7 J. ISLAMIC L. & CULTURE 1, 15–22 (2002/2003) (citing examples of anti-Muslim rhetoric and increased reports of hate crimes against Muslims after 9/11).

⁹⁸ Liaquat Ali Khan, *The Essentialist Terrorist*, 45 WASHBURN L.J. 47, 47 (2005).

⁹⁹ See Stephen J. Ellmann, *Racial Profiling and Terrorism*, 19 N.Y.L.SCH. J. HUM. RTS. 305, n. 43 (2003) (reporting tabulated complaints of discrimination against Arab-American and Sikhs); *id.* at n. 85

opinion shifted from opposition to the use of racial profiles for law enforcement investigations to majority support of more intensive security checks of Arabs before they could board airplanes in the United States.¹⁰⁰ Such profiling is conceivable only with prior social construction of the racial, religious, or national identities as salient to be mobilized for law enforcement or security measures.¹⁰¹ Extensive academic debate surrounds the use of profiling after 9/11, whether based on race, ethnicity, or national origin.¹⁰² Even the metaphor of war rather than criminal justice produces a group stereotype as enemy rather than individualized suspect.¹⁰³

In December 2006, conservative commentator and radio show host Dennis Prager condemned the first Muslim elected to Congress “for planning to use a Koran during the private part of his swearing-in ceremony.”¹⁰⁴ Prager said that Keith Ellison should give up his post if he could not take his oath on a Bible.¹⁰⁵ A spokeswoman for President George W. Bush responded to questions about Prager’s remarks by indicating that the President “respects religious freedom and the right to free speech.” Others, including Prager’s fellow Holocaust Museum board members, explicitly criticized Prager’s comment.¹⁰⁶ It is important not to blow this one extreme remark by a radio personality out of perspective, as his statement was not a public expression of anxiety about the election of a Muslim congressman. By way of contrast, Representative Virgil H. Goode, Jr. announced that Ellison’s election posed a threat to traditional American values.¹⁰⁷ Perhaps showing that his comment really was a pretext for anti-immigration views, Congressman Goode said he wanted to restrict legal immigration to avoid a majority of Muslims being elected to the U.S. House of Representatives, although in fact Ellison himself was born a U.S. citizen. These, let us hope, are not widespread views, but the comments support the narrative of suspicion toward Muslims—and the view that they are outsiders. Two commentators point out that societies scapegoat

(reporting polls with 3/5 of Arabs and Muslims polled reporting discrimination or harassment and individual accounts indicating perceived stigma and discrimination).

¹⁰⁰ David A. Harris, *New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, 2004 UTAH L. REV. 913, 913–16 (2004) (citing surveys).

¹⁰¹ On stereotyping and socially constructed identities and their relationship to security and criminal justice, see Bernard Harcourt, Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334, 334–47; SAMUEL L. GAERTNER, FRANCES ABOUD, MARIA PIA AMATO, BIRGIT AUFDERHEIDE & RUPERT BROWN, BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTERGROUP PROCESSES (2002).

¹⁰² See Harcourt, Schneider & Ingram, *supra* note 101; Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002) (would allow it); Stuntz (would allow it sometimes); Ellmann, *supra* note 99, at 305 (costs and benefits of racial profiling); Deborah Ramirez & Stephanie Woldenberg, *Balancing Security and Liberty in a Post-September 11th World: The Search for Common Sense in Domestic Counterterrorism Policy*, 14 TEMP. POL. & CIV. RTS. L. REV. 495 (2005) (would disallow it).

¹⁰³ Thanks to Stephen Holmes for this point.

¹⁰⁴ Rachel L. Swarns, *Holocaust Museum Rebukes Member for Koran Comment*, N.Y. TIMES, Dec. 22, 2006, at A26.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

minorities even when there is no emergency, so the problem is not new during anti-terrorist periods.¹⁰⁸

Thus, governmental restrictions on protests, surveillance without checks, intimidating treatment of non-citizens, and “targeting” of Muslims and Arabs domestically and internationally figure prominently in critiques of the U.S. government’s behavior since 9/11, along with skepticism about the manipulation of public fears to serve electoral ends. An implicit punchline in narratives describing overreaction to terrorism is the actual or hoped-for pushback from the courts. Until the 2006 election, the only official check on the federal government’s anti-terrorism policies and practices has come from courts, even though they are largely populated by Republican appointees. The Supreme Court rejected the Administration’s efforts to avoid judicial review of detentions in Guantanamo and to avoid application of the Geneva conventions to those detentions.¹⁰⁹ The Court expressly reserved to Congress the power to authorize the federal detention practices with minimal judicial review, and Congress did so this past fall, despite objections from legal experts.¹¹⁰ Challenges to that legislation are pending now.¹¹¹ Courts of appeal have also rejected some of the incursions on individual rights, as illustrated by the 11th Circuit’s requirement of more than an asserted amorphous interest in preventing terrorism as a justification for random searches and metal detector screenings.¹¹²

The legal narratives emphasize excessive executive actions, and often call for legislation and judicial checks. Moderately chastened by the

¹⁰⁸ Posner & Vermeule, *supra* note 8, at 110. They also doubt the dominant view—expressed by Congressional reparations and judicial correction of war-time judgments—that Supreme Court improperly deferred to the U.S. government’s internment of Japanese-Americans during World War II. Compare *id.* at 112–14 with Civil Liberties Act of 1988: Restitution for World War II Internment of Japanese-Americans and Aleuts, 50 U.S.C. app. § 1989 (1988) and Richard C. Rueben, *Justices Declare Wrong Court Ruled in Internment Case: No Decision on Merits*, L.A. DAILY J., June 2, 1987, at 1 (discussing *U.S. v. Hohri*). For further discussion of the history of the Japanese-American internment during World War II, see generally PETER IRONS, *JUSTICE AT WAR* (1983); ERIC K. YAMAMOTO, ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001).

¹⁰⁹ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); LOUISE RICHARDSON, *WHAT TERRORISTS WANT* 236 (2006): “Where the U.S. government did violate fundamental principles and behave in a manner wholly unworthy of the country’s traditions was in the decision that the Geneva Conventions do not apply to the war on terror and the indefinite detention and mistreatment of suspects that resulted.” Richardson suggests that the PATRIOT Act, in contrast, included appropriate efforts to promote information sharing between law enforcement and intelligence agencies, and ineffective provisions, such as requiring libraries to disclose information on their patrons. *Id.*

¹¹⁰ See United States Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) (codified 10 U.S.C. § 47(A)).

¹¹¹ Salim Ahmed Hamdan included a challenge to the MCA’s declination of habeas corpus to “alien unlawful enemy combatants” but Judge James Robertson refused to rule in favor of Hamdan in this case regarding habeas corpus because:

The Constitution does not provide alien enemy combatants detained at Guantanamo Bay with the constitutional right to file a petition for habeas corpus in our civilian courts, and thus Congress may regulate those combatants’ access to the courts.

Robert Barnes, *Judge Rejects Detention Challenge of Bin Laden’s Driver*, WASH. POST, Dec. 14, 2006, at A09. Further challenges are underway. Warren Richey, *New Lawsuits Challenge Congress’s Detainee Act*, CHRISTIAN SCIENCE MONITOR, Oct. 6, 2006, available at <http://www.csmonitor.com/2006/1006/p01s03-uspo.html> (last visited Apr. 8, 2007).

¹¹² See *Bourgeois v. Peters*, 387 F.3d 1303, 1311 (11th Cir. 2004).

Supreme Court, officials in the executive branch claim their actions have protected the nation from renewed attacks.¹¹³ After the Supreme Court declared that the executive did not have authority, the Republican-dominated Congress granted the authority that the Executive had already seized without initial permission.¹¹⁴ Nowhere on the new Democratic Congress's one-hundred-hour agenda did there appear any effort to roll back the broad executive authority to restrict speech, association, privacy, and equal treatment that Congress approved after 9/11.¹¹⁵ Public fears, both warranted or manipulated by descriptions of terrorism risks, motivate repeated and increasing sacrifices of liberties and the scapegoating practices of the discriminatory treatment of minority groups.¹¹⁶ Radio talk show commentators and callers, bloggers, and government officials mutually reinforce intolerance toward political critics of Bush administration policies. Narratives of overreaction emphasize the incursion on rights and values in the United States, most often affecting immigrants, Muslims, and political dissenters.¹¹⁷

III. RISKS OF UNDER-REACTION

Dramatically different narratives of under reaction—and too much tolerance—are emerging in Europe. These are narratives of inaction and negligence, warning that European freedoms and decency are exploited by those who would constrict or attack the very systems that support them.¹¹⁸ These narratives also reflect scapegoating or intolerance of minority groups in a different key, but the contrast between these and the stories of U.S. overreaction is striking.

A good example of the narratives of underreaction in Europe is Ian Buruma's book, *Murder in Amsterdam: The Death of Theo van Gogh and*

¹¹³ Dick Cheney implied that this was true in the 2004 election campaign, saying that the Bush team was the "right choice." "If we make the wrong choice, then the danger is that we'll get hit again—that we'll be hit in a way that will be devastating from the standpoint of the United States," Cheney said. Dana Milbank & Spencer S. Hsu, *Cheney: Kerry Victory Is Risky; Democrats Decry Talk as Scare Tactic*, WASH. POST, Sept. 8, 2004, at A1.

¹¹⁴ See Saskia Sassen, *Beyond Flawed Elections: Toward a Privatized Presidency*, 9(4) *Theory & Event* para. 14 (2006) (discussing USA PATRIOT and Military Commission Act).

¹¹⁵ Although some members of Congress have indicated that they plan to revisit the Military Commissions Act and other recent legislation authorizing executive counterterrorism action, other priorities appear more pressing. See Ari Melber, *Blink Tanks Fight to Restore Habeas Corpus*, THE NATION, Jan. 16, 2007, <http://www.thenation.com/doc/20070129/melber>; *MCA to be Revisited*, Dec. 29, 2006, <http://www.thecarpetbaggerreport.com/archives/9476.html>.

¹¹⁶ See Peter Galison & Martha Minow, *Our Privacy, Ourselves in the Age of Technological Intrusions*, in HUMAN RIGHTS IN THE "WAR ON TERROR" 258–89 (Richard Ashby Wilson ed., 2005) (discussing magical thinking); MICHAEL MCCLINTOCK, EVERYDAY FEARS: A SURVEY OF VIOLENT HATE CRIMES IN EUROPE AND NORTH AMERICA 13–21 (2005); R. WISTRICH, DEMONIZING THE OTHER: ANTISEMITISM, RACISM AND XENOPHOBIA (STUDIES IN ANTISEMITISM) (1999).

¹¹⁷ The war in Iraq represents, at least in hind-sight, another disproportionate response. Discerning a proportional response is difficult, but becomes easier in hind-sight; thus, Louise Richardson writes: "three thousand casualties, in a country long accustomed to more than five times that many homicides a year, might have elicited a more focused and more moderate reaction." RICHARDSON, *supra* note 109, at 150.

¹¹⁸ Some narratives approve of European tolerance compared with American intolerance after 9/11. See Michel Rosenfeld, *Derrida's Ethical Turn and America: Looking Back from the Crossroads of Global Terrorism and the Enlightenment*, 27 CARDOZO L. REV. 815, 843 (2005).

the Limits of Tolerance.¹¹⁹ Buruma returned to the Netherlands, the country of his birth, to try to understand the murder of a public intellectual by Mohammed Bouyeri, a twenty-six-year-old Moroccan-Dutchman who wielded a curved machete on the street in Amsterdam in what seemed a religious ritual, and left a long letter in Dutch, calling for a holy war against unbelievers.¹²⁰ The letter also urged death for three others: Ayaan Hirsi Ali, a Somali-born woman who had renounced Islam, become a politician, and made a film with Van Gogh criticizing abuse of women under Islam;¹²¹ Jozua van Aarsten, leader of the conservative party to which Ali belonged; and Job Cohen, Mayor of Amsterdam and a proponent of multicultural harmony.¹²²

Buruma describes how he remembered the Europe he left as awash in cultural relativism, letting immigrants have their own identities and communities. But intervening events changed the mood and the politics. The murder of Van Gogh, the earlier fatwa issued by Islamic clerics against Salman Rushdie after he published a novel deemed blasphemous to Islam, and the terrorist bomb attacks in Madrid and London,¹²³ combined with world-wide Muslim protests against the Danish cartoons of Mohammed, created reasons for Europeans to fight for multiculturalist tolerance. In this narrative, Europeans need to push for enlightenment values of secularism, science, equality between men and women, and free speech—and to push against male domination, tribal honor, and divine laws.¹²⁴

Conservatives had long been arguing that tolerance had gone too far and that multiculturalism was a mistake. Secularism, in this view, had gone too far to bring back authority of churches, so conservatives turned to Enlightenment traditions to reassert order.¹²⁵ Accordingly,

Islamist revolution, like any violent creed, needs to be resisted, and a nation-state, to be viable, must stand for something....But an essential part of Enlightenment thinking is that everything, especially claims to “nonnegotiable” or “fundamental” values, should be open to criticism. The whole point of liberal democracy, its greatest strength, especially in

¹¹⁹ IAN BURUMA, *MURDER IN AMSTERDAM: THE DEATH OF THEO VAN GOGH AND THE LIMITS OF TOLERANCE* (2006).

¹²⁰ *Id.* at 2–3.

¹²¹ *Id.* at 4–5. Ayaan Hirsi Ali, born in Somalia, went with her family as a refugee to Saudi Arabia, the Sudan, Ethiopia, and Kenya. While young, she became a Muslim fundamentalist, wore the hijab, and went along with the planned marriage arranged by her parents to a cousin, but on her journey to the cousin in Canada, she escaped to Germany, then sought asylum in Holland. She was advised to seek political asylum from the civil war in Somalia rather than asylum from the forced marriage, so she lied on her application. Ultimately this came to haunt her when an immigration official decided to make an issue of it precisely when Ali was evicted from her home for drawing too much controversy and making her neighbors feel unsafe. So she moved to the United States and currently lives in New York. *Id.* at 151–58. She tells her story and offers her critiques of Islam in *AYAAN HIRSI ALI, INFIDEL* (2007) and *THE CAGED VICTIM: AN EMANCIPATION PROCLAMATION FOR WOMEN AND ISLAM* (2006).

¹²² BURUMA, *supra* note 119, at 5–6.

¹²³ On European views of terrorism by Muslims prior to 9/11, see Antonio Brown, *Academic Freedom in Western Europe: Right or Privilege*, in *ACADEMIC FREEDOM*, *supra* note 1, at 127.

¹²⁴ BURUMA, *supra* note 119, at 34.

¹²⁵ BURUMA, *supra* note 119, at 34–35.

the Netherlands, is that conflicting faiths, interest, and views can be resolved only through negotiation. The only thing that cannot be negotiated is the use of violence.¹²⁶

Due to immigration patterns and birthrates, Buruma argues that “Islam may soon become the majority religion in countries whose churches have been turned more and more into tourist sites, apartment houses, theaters, and places of entertainment.”¹²⁷ This very recognition fuels the claim that multicultural accommodation has gone too far.

Accommodation has not halted segregation. Muslim immigrants still live in enclaves in European cities or in dreary suburbs remote from central city jobs and activities. Tuned in to al-Jezerra and other Arab-language satellite television, immigrants can and do live as much in a transnational world as in the host country. Satellite dishes give these communities the nickname “dish cities.”¹²⁸ Through global media, it is the children of immigrants who often develop a sense of diasporic identity, tied less to the territory where they live than the imagined territories of Muslim countries that they have not even visited. Buruma quotes Pim Fortuyn, a successful, conservative, gay populist who said, “successive Dutch governments had been far too tolerant of intolerance. They should never have allowed those dish cities to grow into hotbeds of religious bigotry.”¹²⁹

The cosmopolitan, multicultural cities of Europe afford the freedom for Muslim immigrants and their children and grandchildren to make new lives, replete with their own preferred cultural practices. That same freedom has enabled women, gays, lesbians, prostitutes, and other immigrants from around the world to circulate with the Muslim immigrants on city streets, in internet cafes, cinemas, and within commercial life. The collisions are not all happy ones. Buruma interviewed Jolande Withuis, a leftwing feminist historian, who said, “I find it terrible that we should be offering social welfare or subsidies to people who refuse to shake hands with a woman.”¹³⁰ Hence, the critique emerging from Buruma’s informants

¹²⁶ BURUMA, *supra* note 119, at 35.

¹²⁷ BURUMA, *supra* note 119, at 35.

¹²⁸ BURUMA, *supra* note 119, at 35.

¹²⁹ BURUMA, *supra* note 119, at 54–55. Fortuyn was himself murdered. Buruma comments, “To almost universal relief, Fortuyn was not killed by a Muslim jihadi of foreign descent but by an earnest Dutch animal rights activist on a bicycle.” BURUMA, *supra* note 119, at 40.

¹³⁰ BURUMA, *supra* note 119, at 128. Buruma elaborates:

Tolerance, then, has its limits even for Dutch progressives. It is easy to be tolerant of those who are much like ourselves, whom we feel we can trust instinctively, whose jokes we understand, who share our sense of irony and might even have heard of Michael Ignatieff. It is much harder to extend the same principle to strangers in our midst, who find our ways as disturbing as we do theirs, who watch fearfully as their own children, caught in between, slip from the paternal grasp into a new and bewildering world. Jolande Withuis and Paul Scheffer, like Theo van Gogh, are quite ready to extend their hands to those children, so long as they renounce the same things that the Dutch progressives renounced not so very long ago. But this will not help those who go the other way and seek salvation, or at least a degree of comfort, in the reinvention of tradition.

BURUMA, *supra* note 119, at 128–29.

is that the Netherlands—and other parts of Europe—failed to set sufficient limits on tolerance in order to protect tolerance.

The central jeopardy, in this account, targets the social ethos within European nations rather than the physical safety of its inhabitants. But physical jeopardy to residents would come from networks that recruit people to join terrorist causes from communities of immigrants and their children living in Europe. Individuals could be recruited to join local groups or to travel to training camps in Afghanistan. Narratives of these risks link European tolerance to its vulnerability to global terrorism.¹³¹ In a speech at a North Atlantic Treaty Organization conference, one consultant engaged in antiterrorism work explained that Muslim communities in Europe provide camouflage for terrorist combatants.¹³² He cites a survey conducted by *The Guardian* in May 2004, which found that thirteen percent of British Muslims responded that “further attacks on the United States by Al Qaeda would be justified.”¹³³

Melanie Phillips’ book, *Londonistan*¹³⁴ and Bruce Bawer’s book, *While Europe Slept: How Radical Islam is Destroying the West from Within*¹³⁵ make the case even more strongly. Phillips argues that due to neglect by police and intelligence agencies, London has become the European hub for promoting, recruiting, and financing Islamic terror and extremism.¹³⁶ She attributes this development to a loss of confidence in the traditional British identity and to accommodation of a particularly virulent form of multiculturalism.¹³⁷ The politically correct policies allow manipulation by those who plan terrorist activities.

Phillips argues that public accommodation of immigrants who do not want to assimilate is mirrored by the government’s benign neglect of terrorist cells, extremist groups, fundraising that supports recruitment efforts by Islamic jihad organizations, and other networks drawing people to radical Islam.¹³⁸

Bawer similarly criticizes the Dutch and others in Western Europe for treating Islam as a kind of ethnic identity, and failing to condemn Islamic fundamentalism.¹³⁹ He recounts multiple instances like the case of Pela Atroshi, whose family emigrated from Iraq to Sweden. One night when she was 19, she stayed out all night and returned home where she met her parents’ fury; several male family members insisted that she be murdered. Her parents forgave her and she agreed to an arranged marriage. Bawer

¹³¹ See Piero Luigi Gigna, *Islamic Terrorism in Italy* (Paris, March 8, 2005), in INSTITUTE DE RELATIONS INTERNATIONALES ET STRATEGIQUES, EUROPE FACE TO FACE WITH TERRORISM 23, 24–25 (speeches from conference sponsored by IRIS, European Commission, and NATO); Mladen Vulinec, *Fighting Terrorism World-Wide* (Paris, March 8, 2005), in *id.* at 29, 30–31.

¹³² Mark Baillie, *Terrorism: A Social Phenomenon* (Paris, March 8, 2005), in *id.* at 51–52.

¹³³ *Id.* at 53.

¹³⁴ MELANIE PHILLIPS, *LONDONISTAN: HOW BRITAIN IS CREATING A TERROR STATE WITHIN* (2006).

¹³⁵ BRUCE BAWER, *WHILE EUROPE SLEPT: HOW RADICAL ISLAM IS DESTROYING THE WEST FROM WITHIN* (2006).

¹³⁶ See PHILLIPS, *supra* note 134, at xi.

¹³⁷ PHILLIPS, *supra* note 134, at xi.

¹³⁸ PHILLIPS, *supra* note 134, at xi.

¹³⁹ BAWER, *supra* note 135, at 34.

explained, “When she traveled with her father to Iraq for the ceremony, however, it turned out that her family had arranged not for a marriage but a murder. An Iraqi court sentenced Atroshi’s father and uncle to five months’ probation for the crime. The reason for the lenient sentence was that their motive was honorable.”¹⁴⁰

Relying on a European Union report, Bawer also summarizes a series of anti-Semitic incidents between 2002 and 2003, some moving beyond vandalism to violence, and points to the pattern of tepid responses in Britain, France, and Scandinavia, which he attributes to efforts “not to upset the Muslim community.”¹⁴¹ He also emphasizes that many of the incidents occur in schools where young people enact what they have heard at home, in the mosque, and through Arab-language media.¹⁴²

Bawer turns to the March 11, 2004 bombings in the Madrid train stations that killed 200 and wounded thousands more, and the subsequent election of a Socialist government that vowed to loosen its ties with the United States and to withdraw troops from Iraq.¹⁴³ Protesters then blamed the Spanish government and its prior support for U.S. policy in Iraq for the terrorist attack.¹⁴⁴ Bawer argues that Western Europeans in general have the delusion that they have no enemies, and instead live in a multicultural political community of tolerance and collegiality.¹⁴⁵ He concludes that even after the Madrid bombings, “most of the Western European establishment continued to embrace the pretense of Islamist terrorism as too complex, too ambiguous, and too nuanced a problem to make possible a direct, forceful response.”¹⁴⁶ He warns that Western Europe may succumb to radical Islam through appeasement of Islamic militants and deference to new immigrants.¹⁴⁷ His evidence includes reports of an Italian trial of writer Oriana Fallaci for “vilification of Islam,” another trial of Ayann Hirsi Ali for making derogatory comments about Islam, and a new Norwegian law passed in 2005 that prohibits discriminatory comments on the basis of skin color, ethnicity, religion, or sexual orientation and presuming guilt until the accused can disprove it.¹⁴⁸ Bawer concludes that Europe’s enemy is not radical Islam but Europe’s own passivity and appeasement.¹⁴⁹

These are obviously polemical views, affected by Bawer’s own shock to encounter anti-gay insults and harassment in Europe at the hands of Moslem residents, though his account is echoed by other authors without

¹⁴⁰ BAWER, *supra* note 135, at 24.

¹⁴¹ BAWER, *supra* note 35, at 145. He describes an initial report, *Manifestations of an Anti-Semitism in the European Union*, commissioned by the European Monitoring Center on Racism and Xenophobia, and prepared by the Center for Research on Anti-Semitism, that was not released apparently due to desires to avoid naming Muslims as the offenders, and a later report making clear that most of the perpetrators were young Muslim males—and a press release suppressing that conclusion. BAWER, *supra* note 135, at 143–44.

¹⁴² BAWER, *supra* note 135, at 143–44.

¹⁴³ BAWER, *supra* note 135, at 153–57.

¹⁴⁴ BAWER, *supra* note 135, at 158.

¹⁴⁵ BAWER, *supra* note 135, at 158–82.

¹⁴⁶ BAWER, *supra* note 135, at 158.

¹⁴⁷ BAWER, *supra* note 135, at 158–72.

¹⁴⁸ BAWER, *supra* note 135, at 216–17.

¹⁴⁹ BAWER, *supra* note 135, at 233.

that experience who write similar warnings about the new Europe.¹⁵⁰ These narratives each portray neighborhoods in and outside of European cities in which young men of Arab backgrounds become targets for recruitment to radical Islam, as both local and distant religious leaders convey their messages through schools, mosques, private gatherings, satellite dishes, and the internet.

The narratives charging “too much tolerance” propose or imply concrete policy measures in response. To guard against the specters of illiberalism within liberal societies—and to end hospitality for hatred and terrorism, Europe must root out recruitment to radical Islam, and lift the handcuffs from governments so that they can protect the citizens of democracies from dangers in their midst.

Legal authors in particular often propose steps Europeans have failed to take that could guard against too much tolerance and might check forces of illiberal recruitment:

- Permit punishment for any who preach hatred Against Israel and Jews, coalition forces in Iraq, or against Americans?¹⁵¹ Speeches and sermons encouraging young people to join the “global jihad” may be protected by laws protecting speech and religious expression. Britain’s Terrorism Act of 2000 does permit charges against individuals for incitement of terrorist acts abroad,¹⁵² and Scotland Yard investigated a Muslim cleric Sheikh Omar Bakri Muhammad for allegedly inciting terrorism and hatred.¹⁵³ Great Britain banned him from the country,¹⁵⁴ but some critics charge that the government has been slow and insufficient in pursuing incitement to hatred and terrorism. Prosecutors took three years to indict the former lead preacher in Finsbury Park Mosque of London for urging people to kill non-Muslims, especially

¹⁵⁰ MARK STEYN, *AMERICA ALONE: THE END OF THE WORLD AS WE KNOW IT* (2006); BAT YE’OR, *EURABIA: THE EURO-ARAB AXIS* (2002).

¹⁵¹ In the United States, a Muslim preacher named Ali Al-timimi was prosecuted and convicted in federal district court for urging eight followers to join the fight against Americans before the expected invasion of in Afghanistan. Jerry Markon, *Jurors Convict Muslim Leader in Terrorism Case*, WASH. POST, Apr. 27, 2005, at A1. For a complex view of the case, see Milton Viorst, *The Education of Ali Al-timimi*, THE ATLANTIC MONTHLY, June 2006, at 68.

¹⁵² Terrorism Act of 2000, Part IV, §59: (1) A person commits an offence if-

- (a) he incites another person to commit an act of terrorism wholly or partly outside the United Kingdom, and
- (b) the act would, if committed in England and Wales, constitute one of the offences listed in subsection (2).

available at <http://www.opsi.gov.uk/Acts/acts2000/00011--g.htm#56>.

¹⁵³ *Islamic Cleric ‘Incitement’ Probe*, BBC News, Jan. 18, 2005, available at <http://news.bbc.co.uk/1/hi/uk/4185085.stm>; Don van Natta Jr. & Lowell Berman, *Militant Imams Under Scrutiny Across Europe*, N.Y. TIMES, Jan. 25, 2005, at A1.

¹⁵⁴ Andrew Alderson, *Ex-UK Cleric ‘Inspired Plot to Kidnap Soldier,’* TELEGRAPH, May 2, 2007, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/02/04/nterr104.xml>.

Jews.¹⁵⁵ The bombing of the London subway in July 2005 galvanized Parliament to adopt the Terrorism Act of 2006, which criminalizes publication of statements that directly or indirectly encourage or induce others to commit or prepare acts of terrorism.¹⁵⁶ It also allows prosecutions of such acts even when they are committed outside of Britain.

- Shut or tightly regulate religious schools—and notably, Muslim schools—to prevent instruction in hatred and recruitment to terrorism.¹⁵⁷ Critics warn that there may be special perils when the schools are funded by groups outside the country, if the curriculum is supplied by another country, or if the teachers' training and loyalty tie them to another country, and if the schools teach hatred or incite people to join Islamic jihad militant groups. Muted but still genuine warnings persist about the religious schools that manifest and pass on views about women and homosexuals that conflict with the equality, liberty, and privacy commitments of the liberal democracy that permits the schools to exist. The English Chief Inspector of Schools urged Muslim schools to make sure that their students “acquire an appreciation of and respect for other cultures in a way that promotes tolerance and harmony,” ensure encouragement of higher education for girls and guard against demeaning people in same-sex relationships, and recommended government monitoring of faith schools to ensure instruction in the common heritage of Britain.¹⁵⁸ Muslim leaders reacted with hurt and anger over what they perceived to be biased and unfair concerns about Muslim schools.¹⁵⁹ Similarly, in pursuit of the greater social integration of Muslims, the British government proposed and

¹⁵⁵ Kenneth Lasson, *Incitement in the Mosques: Testing the Limits of Free Speech and Religious Liberty*, 27 WHITTIER L. REV. 3, 15–16 (2005).

¹⁵⁶ The Act places criminal sanctions on one who publishes “a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.” Indirect encouragement statements include every statement which “glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.” Terrorism Act of 2006, available at http://www.opsi.gov.uk/acts/acts2006/ukpga_20060011_en.pdf (last visited Apr. 20, 2007).

¹⁵⁷ See Cymrot, *supra* note 3. See also Kumquat Ali Kahn, *The Essentialist Terrorist*, 45 WASHBURN L.J. 47, 84 (2005). Short of closing or tightly regulating Muslim schools, a government could create a rival Muslim school that teaches the Qu'ran and Arabic but compatibly with secular Western norms; similarly, government or other actors could try to compete with Al-jazeera by producing compelling Arabic-language mass media that does not espouse hatred of the West, Jews, or secularism. Competing for attention in these ways, however, would be viewed by some as giving up on the ideal of assimilation. Yet assimilation to the secular world may be too unattractive—and private choice may be too hands-off—if the shape of the entire polity is shifting through the practices of newcomers.

¹⁵⁸ Polly Curtis, *Faith Schools 'Failing to Teach Obligation to Society'*, GUARDIAN UNLIMITED, Jan. 17, 2005, available at <http://education.guardian.co.uk/ofsted/story/0,,1392274,00.html>.

¹⁵⁹ Sean Coughlan, *Muslim Schools 'Deeply Upset'*, BBC, Jan. 18, 2005, available at http://news.bbc.co.uk/2/hi/uk_news/education/4184319.stm.

then, in the face of opposition, withdrew a requirement that state-sponsored, faith-based schools admit twenty-five percent of students from another religion.¹⁶⁰

- Prohibit political parties that seek to undermine liberal democracy. Precautionary steps to prevent the subversion of democracy through its own liberal processes represent another set of policies to remedy what some charge as Europe's insufficient response to the terrorist threat. Memories of the Nazi rise to power initially through elections during the Weimar Republic make this a concrete concern for many in Europe. Germany specifically forbids political parties that threaten the free basic democratic order,¹⁶¹ and has banned both the neo-Nazi party and the Communist party on that basis.

To prevent threats to democracy and individual rights, the Turkish Constitutional Court banned the Refah party in 1998. That political party planned to introduce Islamic law into the country's governance scheme—proposing to divide the society into religious orders which in turn would govern each individual, contrary to the separation of religion and government in Turkey's constitution.¹⁶² The Refah party defended its proposal as a kind of voluntary private law, but others viewed it as the end of the secular state. When the country's high court dissolved the party, the party had already gained twenty-two percent of the popular vote and Turkey's own prime minister was a member of the party.¹⁶³ The European Court of Human Rights affirmed the dissolution of the party, despite alleged violations of the freedom of association protected by Article 11 of the European Convention on Human Rights. The court found the dissolution of the party a fair means to protect state institutions from an association that itself jeopardizes democracy by threatening to impose religious law and undermines the state's ability to ensure individual rights and liberties. The Court also specifically found Islamic law incompatible with fundamental democratic principles.¹⁶⁴

Other democratic nations, committed to free speech and elections, may face potential electoral victory of parties that would dismantle national liberal commitments.¹⁶⁵ If so, these countries would need, in advance of

¹⁶⁰ Mike Baker, *Why the U-Turn on Faith Schools?*, BBC, Nov. 4, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/education/6114938.stm. For debates over Saudi funding for Muslim schools in Germany, and over whether German Muslims as well as children of diplomats can attend religious schools that are not subject to a state-approved curriculum, see Cymrot, *supra* note 153, at 612–13.

¹⁶¹ Art. 21, German Basic Law. For similar bans, see Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, at 8–9, (U. Toronto, Legal Studies Research Paper No. 05-03, April 2005), available at <http://ssrn.com/abstract=702465>.

¹⁶² *Rafah Partisi (the Welfare Party), and Others v. Turkey*, application nos. 413040.87, 41342/98, 41343/98 and 41344/98 (2001). See also Macklem, *supra* note 157.

¹⁶³ Macklem, *supra* note 157, at 28.

¹⁶⁴ See *Rafah Partisi*, *supra* note 162, at para. 123.

¹⁶⁵ See Issacharoff, *supra* note 4.

any crisis, to establish a constitutional basis for banning such a party that would itself undo liberal democratic norms—a formal intolerance for intolerance.¹⁶⁶

Stand back and consider the two narratives of reactions to terrorism—both under-response and over-response, too much tolerance and not enough. The overreaction threatens freedom, privacy, and equality. But the under-reaction could do so as well. To fix the under-reaction, to awaken to the dangers, Europe could regulate preaching, teaching, and religious and political associations,¹⁶⁷ it could extend detentions without charges—and then government methods would contradict the ends of a liberal democracy.¹⁶⁸ Once again, the dilemma of tolerance returns, but now with stark programmatic choices. Should a liberal democracy try to prevent terrorism through measures that themselves vitiate liberal democratic values?

IV. RECONSIDERING THE PROBLEM

The narratives of U.S. overreaction to terrorism and European under-reaction reflect not only differences in the policies taken but also in the constellation of internal political pressures affecting each. Certainly, important differences in history, demography, economics, and politics can explain diverging patterns in responses to terror by the United States and European nations. With the first major external terrorist attack within the United States in decades—and the largest in the world—post-9/11 responses reflect both the shock of vulnerability and the scale that may distinguish recent U.S. experience from the experiences of European nations.¹⁶⁹ Responses to Muslims reflect the different national histories and ideologies in the United States and in European countries such as Germany, France, and the Netherlands. The self-conception as a nation of immigrants, the route to becoming American by being an outsider,¹⁷⁰ the patterns of economic and social mobility, and the availability of jobs and entrepreneurial opportunities affect the reception of Muslims in America—as does the persistence of a racialized underclass, filling the social position of the societal bottom. The contrasting conceptions of nationality linked to ethnicity and blood, the unemployment rates, and new encounters with racialized differences precisely when the European Union destabilizes what it means to be “Dutch” or “French” or “German” contribute to uneasy attitudes by old-time residents toward Muslims in Amsterdam, Paris, and

¹⁶⁶ Careful analysis should also attend to the success of Islamic groups in mobilizing youth in the context of apparently secular authoritarian states. See CARRIE ROSEFY WICKHAM, *MOBILIZING ISLAM: RELIGION, ACTIVISM, AND POLITICAL CHANGE IN EGYPT* (2002).

¹⁶⁷ Should governments have authority, as in the United States, to use law enforcement against individuals who raise funds for groups with terrorist ties even without evidence of specific intention to pursue the illegal goals? See Laura K. Donahue, *Terrorist Speech and the Future of Free Expression*, 27 *CARDOZO L. REV.* 233, 318–19 (2005).

¹⁶⁸ See Andrew Tully, *Can West Fight Terror and Still Maintain Civil Liberties* (part 3), RADIO FREE EUROPE RADIO LIBERTY, Oct. 7, 2005, available at <http://www.rferl.org/featuresarticle/2005/10/a6fbd4c9-808d-4fe6-81d9-f79b908f08b5.html>.

¹⁶⁹ RICHARDSON, *supra* note 109.

¹⁷⁰ See R. LAURENCE MOORE, *THE RELIGIOUS OUTSIDER AND THE MAKING OF AMERICANS* (1987).

Frankfurt. The relatively small percentage of Muslim immigrants hovering at one percent in the United States contrasts with five percent across Western Europe,¹⁷¹ heavier concentrations rising to ten percent in France,¹⁷² and far greater percentages in specific regions of Paris, Amsterdam, and London.¹⁷³ When connected with the low birthrate among longstanding European residents and the high birthrate among immigrants, some predict that 1 in 5 Europeans will be Muslim in the next decades,¹⁷⁴ and some Western observers predict that Europe will become Islamic over time.¹⁷⁵ And the secularization of Europe—perhaps abetted by a lack of formal state support of religion—contrasts sharply with the religiosity of new immigrants, while immigrants can match many Americans with their religiosity.¹⁷⁶

But in fact the stories of under-reaction resonate within the United States and the narrative of overreaction may have its echo in Europe. Thus, Thomas Carothers of the Democracy and Rule of Law Program at the Carnegie Endowment for International Peace argues that Europe has overreacted to terrorism by curbing civil liberties, while the United States, with its traditional suspicion of government, has remained measured, except—and it's a big exception—in its victimization of immigrants.¹⁷⁷

Others warn of American under-reaction when it comes to speech and expression.¹⁷⁸ Dennis Pluchinsky, Senior Intelligence Analyst in the U.S. Department of State, has called for censorship in the United States because media accounts could reveal vulnerabilities in food supply, electricity, chemical production, transportation, and border security.¹⁷⁹

¹⁷¹ RICHARDSON, *supra* note 109, at 237.

¹⁷² Muslim Population Worldwide, http://www.islamicpopulation.com/europe_islam.html.

¹⁷³ "Muslims made up 8 per cent [*sic*] of London's population overall but 36 per cent [*sic*] of the Tower Hamlets and 24 per cent [*sic*] of the Newham populations." National Statistics Online, <http://www.statistics.gov.uk/cci/nugget.asp?id=956> (last visited Apr. 20, 1007).

¹⁷⁴ Evan Osnos, *Islam Shaping a New Europe: Staking Out Their Place in Europe*, CHI. TRIB., Dec. 19, 2004, at C01.

¹⁷⁵ See Daniel Pipes, *Muslim Europe*, N.Y. SUN, May 11, 2004, at 9; *Muslims in Europe: Country Guide*, <http://news.bbc.co.uk/2/hi/europe/4385768.stm>. For commentary perspectives, see ORIANA FALLACI, THE FORCE OF REASON; Omer Taspinar, *Europe's Muslim Street*, FOREIGN POLICY, March 2003, available at <http://www.brook.edu/views/op-ed/fellows/taspinar20030301.htm>; Osnos, *supra* note 174; Robert S. Leiken, *Europe's Angry Muslims*, FOREIGN AFFAIRS, July/Aug. 2005, at 120.

¹⁷⁶ Hume advised governments to create secular society by establishing a state church and undermining the entrepreneurship of religious groups. DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING; DIALOGUES AND NATURAL HISTORY OF RELIGION (1748). See also CHARLES GLENN, THE AMBIGUOUS EMBRACE (2000) (documenting decline in religiosity in Europe alongside state support for religious institutions). In contrast, work on religious entrepreneurship in the United States, past and present—with mega churches; R. LAWRENCE MOORE, RELIGIOUS OUTSIDERS AND THE MAKING (1987).

¹⁷⁷ Quoted in Tully, *supra* note 168, at Part 3. See also Thomas Carothers, *Promoting Democracy and Fighting Terror*, FOREIGN AFFAIRS, Jan.–Feb. 2003, at 84; Paula J. Dobriansky & Thomas Carothers, *Democracy Promotion*, FOREIGN AFFAIRS, May/June 2003, at 141.

¹⁷⁸ The closest discussion comes with historical arguments. For example, Yale Professor Paul Kennedy compares the situation currently faced by the United States with Britain's in the nineteenth century, and concludes that the United States is in a more difficult predicament mainly because of the openness of today's world. STROBE TALBOTT, THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11 (2002).

¹⁷⁹ Dennis Pluchinsky, *They Heard It all Here, and That's the Trouble*, WASH. POST, June 15, 2002, at B03.

It is possible to view the United States as under-regulating hate speech and political activity that aims to overthrow democracy, when compared with the French and Germany hate speech bans and the German prohibition of political parties that would challenge liberal democracy. That such steps might well violate the U.S. Constitution is taken simply to be further evidence of U.S. failures to address terrorist risks seriously.¹⁸⁰ Note how this set of constitutional restraints is not up for debate, even though the executive branch strains other constitutional limits. If the constitution is not a suicide pact, and the danger is severe enough, some argue that this country should regulate hate speech,¹⁸¹ religious school messages,¹⁸² political parties opposed to liberal democracy,¹⁸³ and some forms of privacy. Moreover, the United States looks like it is under-responding when compared with Britain's extensive use of face recognition cameras and national I.D. cards with biometrics. Failures to devise increased security for chemical plants, water works, cargo shipments, and nuclear material that could end up in terrorist hands also look like underreaction, given security analyses and expert recommendations.¹⁸⁴ And, undoing even the categories of over- and under-reaction are the critics of the war in Iraq for its effect in escalating international recruitment of young disaffected Muslims by jihadists opposed to the United States, globalization, and secularism.¹⁸⁵

Great Britain in fact is criticized for both over- and underreacting. When Prime Minister Tony Blair proposed extending government power to detain people without charges for 90 days, he and his party suffered defeat not only of the proposal but general diminution of his authority.¹⁸⁶ Critics claimed that the detention proposal was an overreaction, but Blair's

¹⁸⁰ See Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in EUROPEAN AND U.S. CONSTITUTIONALISM 47-74 (Georg Nolte ed., 2005).

¹⁸¹ See John C. Knechtle, *When to Regulate Hate Speech*, 100 PENN. ST. L.R. 539 (2006) (describing the differences between hate speech restrictions in Europe and the United States). See also Keith B. Richburg & Alan Cooperman, *Swede's Sermon on Gays: Bigotry or Free Speech?; Pastor Challenges Hate-Law Restrictions*, WASH. POST, Jan. 29, 2005, at A01.

¹⁸² There could even be problems with requiring public or private schools to teach tolerance if private schools framed challenges to such a requirement as content-based compelled speech, burdens on religious freedom, or unconstitutional conditions on public funding. See Cymrot, *supra* note 3.

¹⁸³ See Shawn Boyne, *The Future of Liberal Democracies in a Time of Terror: A Comparison of the Impact on Civil Liberties in the Federal Republic of Germany and the United States*, 11 TULSA J. COMP. & INT'L L. 111 (2003); Yigal Mersel, *The Dissolution of Political Parties: The Problem of Internal Democracy*, 4 INT'L J. CONST. L. 84 (2006).

¹⁸⁴ See GRAHAM ALLISON, NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE 104 (2004) (explaining the weaknesses in port, cargo, and facility security); Dan Eggen & Spence S. Hsu, *Democrats Still Face Hurdles in Enacting 9/11 Panel's Ideas*, WASH. POST, Nov. 11, 2006, at A03 (describing the proposals of the 9/11 Commission and the difficulties of enacting them); Sally Goldenberg, *Mayor Faults Way Anti-Terror Funds are Allocated*, STATEN ISLAND ADVANCE, Jan. 10, 2007, at A08 (detailing Mayor Bloomberg's assessment that the federal government should provide more funding for port and cargo security).

¹⁸⁵ See Jessica Stern, *How America Created a Terrorist Haven*, THINKING PEACE, Aug. 20, 2003, <http://www.thinkingpeace.com/pages/Articles/Archive1/arts021.html>.

¹⁸⁶ *Blair Defeated Over Terror Laws*, BBC NEWS, Nov. 9, 2005, available at http://news.bbc.co.uk/1/hi/uk_politics/4422086.stm; *A Failure of Political Judgment*, GUARDIAN, Nov. 11, 2005, available at

<http://www.guardian.co.uk/leaders/story/0,3604,1639795,00.html>. See also, Souad Mekhennet & Dexter Filkins, *British Law Against Glorifying Terrorism Has Not Silenced Calls to Kill for Islam*, N.Y. TIMES, Aug. 21, 2006, at A8 (Parliament did approve detentions for twenty eight days).

proposal and related initiatives grew from concerns that Britain generally has failed to take sufficient actions to anticipate and quell terrorist risks.¹⁸⁷ Others charge Great Britain with underreacting to terrorist threats by indulging Muslim fundamentalists' hate speech and failing to cooperate with other nations seeking to extradite a terrorist suspect.¹⁸⁸ With heightened scrutiny of immigrants since the London and Madrid bombings, anti-immigrant politics also increased in Europe. Moderate Muslims argue that British foreign policy is radicalizing residents with immigrant roots, just as photographs of abusive treatment at the Abu Ghraib prison probably promoted recruitment by racial Islamic terrorist networks.¹⁸⁹

What might we learn by reading the narratives of over- and under-reaction together? We could learn that any liberal democracy can be criticized both for over- and under-reacting to terror. Perhaps this simply reflects diverging views about the right balance. But alternatively it could reveal how misdirected policies can constrain liberties and target minorities without increasing safety for resident populations. The reversibility and simultaneity of narratives of over- and under-reaction might well be a clue to a defect in the analysis that links security and tolerance. Policies invading civil rights and civil liberties can in fact distract from security measures that would not impair rights. Looking at the narratives of under- and over-reaction together, we could come to the following: (1) to focus on measures to increase security without increasing intolerance, and (2) to address unsatisfactory reception of minorities and treatment of immigrants without confusing these with security issues.

A. IMPROVING SECURITY

A crucial difficulty comes in measuring government responses to terrorism. Terrorism, well defined by Louise Richardson as "deliberately and violently targeting civilians for political purposes," is a means, advocated and used by a variety of individuals and groups, with quite a range of techniques. Assessing growth or reduction in the threats of terrorism is not only complex but elusive as a target.¹⁹⁰ Confining the focus

¹⁸⁷ See also Virginia Mantouvalou, *Council of Europe: UK Anti-Terrorism Measures Fall Short of European Standards*, EUROPEAN CIVIL LIBERTIES NETWORK, Apr. 10, 2007,

<http://www.ecln.org/essays/essay-5.pdf> (summarizing criticisms of the European Committee for the Prevention of Torture about conditions of detention under Anti-Terrorism, Crime and Security Act of 2001 and criticism of Prevention of Terrorism Act of 2005).

¹⁸⁸ See John Kampfner, *It is Easier to Diminish Our Freedoms Than to Root Out The Terrorist*, THE INDEPENDENT, Aug. 7, 2005, www.findarticles.com/p/articles/mi_qn4159/is_20050807/ai_n14862538 (discussing criticisms of Britain for harboring terrorists and giving them freedom to act, for blocking extradition of Rashid Rama, a person accused of bombing the Paris Metro, and allowing fundamentalists to incite violence). See also RANDALL L. SCHWELLER, UNANSWERED THREATS: POLITICAL CONSTRAINTS ON THE BALANCE OF POWER (2006); Randall L. Schweller, *Unanswered Threats: A Neoclassical Realist Theory of Underbalancing*, 29 INT'L SECURITY 159 (2004) (devising a theory to explain why nations fail to respond to threats).

¹⁸⁹ RICHARDSON, *supra* note 109.

¹⁹⁰ See RICHARDSON, *supra* note 109, at 4. "To declare war on what is, after all, a tactic does not appear to make a great deal of sense. . . . There were, of course, alternatives available to declaring war on terrorism, terror, and evil. The administration might, for example, have declared war on al-Qaeda or on Afghanistan, the state that harbored it. Had it done so, there would have been some clear matrices of success or failure by which progress could have been measured." RICHARDSON, *supra* note 109, at 175.

to al-Qaeda, given its role in 9/11 in 2001, the 2005 bombings of the London underground, the 2004 Madrid commuter train bombings, and the 1998 and 2000 bombings of U.S. embassies in Kenya and Tanzania helps little. What are the measures to tell if terror risks are reduced when the risks come from a set of secret self-replenishing global networks of potential terrorists? A repressive government can defend its repression by pointing to the absence of new attacks without beginning to demonstrate that the repression itself was responsible. A government can announce that it has “foiled” terrorist plots when in fact the suspects had no serious plan or only plans developed with government enticement.¹⁹¹ But “sleeper cells” of terrorists can in fact persist anywhere in the world, and plans can be decades in the making. Geopolitical changes and economic opportunities affect the prospects of al-Qaeda. The “war on terror” waged in Afghanistan and Iraq and economic stagnation in parts of Europe seem to have increased the recruitment activities and yield for al-Qaeda.¹⁹²

The quandary compounds as the risk of home-grown terrorists grows. Terrorists can hide out within a free society and that very freedom constrains efforts to locate them. Those nations that have defeated terrorism, like Argentina and Brazil, did so through domestic deployment of military death squads, torture, surveillance, and internal repression—all forbidden within and contrary to the norms of a democratic society.¹⁹³ With the mounting concern of homegrown terrorists, any disaffected teen or any disillusioned twenty-something could answer the call of the satellite dish. Thus large swathes of that generation and those that follow become suspect. If you are skeptical of such speculations, then steps such as national ID cards, street-corner face recognition technology, and airport screenings are overreactions. Indeed, absent evidence that diminishing civil liberties and targeting Muslims and immigrants actually reduce risks of terrorism, there seems to be a kind of magical thinking in policies that link the two. It is as if we imagine that by sacrificing our values, we will make ourselves safer.¹⁹⁴ If it hurts us (or hurts others), we ward off danger. Perhaps it would improve analyses to de-link security policies from the preoccupations with tolerance; policies in each area are difficult enough to design and assess, and the link between them difficult to diffuse.

¹⁹¹ Rudolph Bush & Jeff Coen, *Man Held in Terror Plot Near Rockford*, CHI. TRI., Dec. 10, 2006, at C3 (describing the arrest of Derrick Shareef for discussing an attack and acquiring grenades from undercover FBI agents); *7 Suspects Allegedly Plotting to Attack Sears Tower Arrested in Miami*, CHIC. TRI., June 23, 2006, at 8 (describing the arrest of seven Miami men after they held “criminal discussions”); Jerry Seper, *FBI Foils New York Terror Plot; Lebanese Arrest One in Tunnels-Attack Plan*, WASH. TIMES, July 8, 2006, at A01 (describing a thwarted terrorist attack as “aspirational, rather than operational”).

¹⁹² National Intelligence Estimate, *Trends in Global Terrorism: Implications for the United States* (2006), available at http://www/dni.gov/press_releases/Declassified_NIE_Key_Judgments.pdf (last visited Apr. 20, 2007); *Stating the Obvious: Terrorism and Iraq*, THE ECONOMIST, Sept. 30, 2006 (describing al-Qaeda’s increasing strength since the Iraq invasion). Richardson suggests that, “To be elevated to the status of public enemy number one is just what a terrorist group wants. It gives the group stature among its potential recruits, which in turn wins it more followers. Declaring war on terrorists, in effect, hands it the renown it seeks.” RICHARDSON, *supra* note 109, at 177.

¹⁹³ RICHARDSON, *supra* note 109, at 183–84.

¹⁹⁴ See Galison & Minow, *supra* note 116, at 258–94.

There remain many policies to promote security that have nothing to do with immigration or civil liberties. These include safeguarding nuclear materials and materials that could be turned into biological weapons, protecting vulnerable targets like water supplies and chemical plants, monitoring all cargo through shipping ports, creating surveillance cameras with face recognition software read only by computers until there is a sufficient match with terror suspects to satisfy legal search requirements, and building and improving intelligence services including the language capacity of agents. Each of these steps not yet taken in the United States would make us more secure without jeopardizing freedoms or tolerance.¹⁹⁵ Specifying goals keyed to enhancing security would have the benefits of measurable targets and also would put to the side confused and easily manipulable ideas about how treatment of immigrants, Muslims, and other minority members affects national security.

One vital connection with immigrant communities and terrorism worth further exploration involves the resources those communities offer to assist law enforcement and intelligence activities. Louise Richardson, an expert on terrorism, reports that “[e]very government that has faced a threat from terrorism has found that good intelligence has been the most crucial weapon in its armory.” She reviewed evidence from Venezuela, France, Peru, Israel, and Great Britain that underscored her point.¹⁹⁶ One approach would be to replace ethnic and religious profiling with behavioral profiling.¹⁹⁷ Another would be to develop deep partnerships between government officials and members of American Muslim, Arab, and Sikh communities to develop domestic intelligence.¹⁹⁸ Experts in terrorism emphasize the central role of intelligence resources and criticize the failures in coordinating intelligence and law enforcement activities in the United States.¹⁹⁹ Besides generating potentially critical information about the presence—and absence—of risks, such efforts could communicate as little else could that individuals in these groups are trusted and valued members of the larger society.

If risks of homegrown terrorism are massive, the only precedents for success in defeating it require degrees of repression and authoritarian rule that no liberal democracy has taken or could pursue while remaining a liberal democracy.²⁰⁰ This very prospect raises a new dilemma of tolerance:

¹⁹⁵ See Minow, *The Constitution as Black Box During National Emergencies: Comment on Bruce Ackerman's Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, 75 *FORDHAM L. REV.* 593, 601–02 (2006); DANIEL BENJAMIN & STEVEN SIMON, *THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT* (2005).

¹⁹⁶ RICHARDSON, *supra* note 109, at 210.

¹⁹⁷ See Harris, *supra* note 100.

¹⁹⁸ Ramirez & Woldenberg, *supra* note 79, at 501–11.

¹⁹⁹ RICHARDSON, *supra* note 109; Eben Kaplan, *Examining Counterterrorism Culture*, COUNCIL ON FOREIGN RELATIONS, Apr. 10, 2007, <http://www.cfr.org/publication/11922/#2>; DoD USS COLE COMMISSION REPORT (2001), <http://www.defenselink.mil/pubs/cole20010109.html>; PHILIP B. HEYMANN & JULIETTE KAYYEM, *PROTECTING LIBERTY IN AN AGE OF TERROR* (2005) (based upon the published report “Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terror”); PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* (2003).

²⁰⁰ *Id.*

how can the society communicate tolerance when it also summons suspicion of everyone, and especially of those who already feel marginal?

B. IMPROVING TREATMENT OF MINORITY GROUPS
AND THEIR MEMBERS

Improving the treatment of minority groups and their members should be a priority for the United States and Europe quite separate from security concerns. Thinking about this topic distinctly clarifies what the dimensions are that are relevant to enhancing security. Adhering to national values of equal and fair treatment and restricting government intrusions strengthen the nation's legitimacy among its residents and outside observers. Fair and equal treatment has, of course, intrinsic value. Moreover, reducing reasons for alienation is a practical, indeed a vital, step in preventing recruitment by radical terrorists or the ranks of those who sympathize with them.²⁰¹

By contrast, a government that tries to justify intolerant measures in the name of tolerance risks alienating both the targets and the observers of such measures. British journalist Mick Hume commented, "Some of us are finding it increasingly hard to tolerate the way that appeals to British tolerance are being used to justify intolerant censorship and repression."²⁰² He then contrasted calls for freedom, tolerance, and respect for others by Prime Minister Tony Blair with plans to criminalize direct and indirect incitement to religious hatred following the bombing of the London subway in July 2005.²⁰³ Hume suggests that new laws punishing incitement are unnecessary, given existing criminal laws and the minute threat posed by "a few crank preachers."²⁰⁴

If used, would such new laws be counterproductive? Yes, Hume argues, because such prosecutions would create martyrs to inspire disaffected Muslim youth.²⁰⁵ Further, a law punishing people for ridiculing Islam in the name of cultural sensitivity is, according to Hume, "far more likely to intensify a sense of grievance on all sides: among Muslims who might feel that the continual calls for tolerance and condemnations of 'Islamophobia' confirm their special victim status in society; and among white people who might feel aggrieved at being lectured and policed as if they were a mob of bigots straining at the leash to burn down a mosque or beat up a Muslim."²⁰⁶ Hume makes just a guess, however, just as it is a guess that those who cited free speech commitments when printing and reprinting cartoons that most Muslims found offensive also enjoyed offending the newcomers in their midst. Even principles of freedom can be pushed in

²⁰¹ RICHARDSON, *supra* note 109, at 215–17.

²⁰² Mick Hume, *The Age of Intolerant Tolerance*, SPIKED, Aug. 19, 2005, <http://www.spiked-online.com/index.php?site/article/815/>. (Hume identifies himself as an "[a]ngry middle-aged libertarian Marxist;" he is also a journalist for *The Times*).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

ways that betray nationalist or intolerant motives or become instruments for resentment.

The empirical record is simply too confusing for us to know whether any of these predictions is right—and whether suppressing speech to enhance tolerance in any particular context is elusive. Does tolerance advance by publishing the Danish cartoons of Mohammed or by refraining from doing so because of the insult many Muslims read into them? Is tolerance aided by authorizing and subsidizing Muslim schools, or by directing Muslims to secular public schools, or by regulating all public and private schools to ensure that they teach tolerance and respect across different religious, ethnic, and racial groups?

A commitment to curb speech and equality protections—to increase intolerance—only when there is strong evidence that security requires such measures would provide a useful guide. Another useful rule would universalize security restrictions—to minimize real and perceived targeting of minority groups. For security purposes, the Muslim woman might well have to remove her veil for an identification photo—if all others must also show their faces for such photos. The curriculum and hiring practices of Islamic private schools should be regulated in the same degree that other private schools face government review. Profiling by race and nationality for criminal and terrorist suspects could be avoided both by more specific details in the profiles or via more general searches.²⁰⁷ If universalizing security measures prompts the objection that civil liberties would be too much invaded, then the issue would be properly presented as one affecting everyone. There is a risk that some would use even this development as a pretext for curbing civil liberties and expanding law enforcement power, but broad coalitions would more likely respond to universal restrictions than to ones that fall largely on minority groups.

It would help to unwind the paradox of tolerance—and to identify good policies—if we acknowledge that “tolerance” signals a particular, substantive vision, not a neutral or nonjudgmental stance. Tolerance strives to be inclusive in terms of respecting all persons, yet tolerance also means to differ with and even rebuke intolerant views. Those who pursue tolerance should not be embarrassed about the substance of their commitments: to open-mindedness, criticisms, and self-criticisms. If this is not what tolerance means, then we probably should forget “tolerance” and embrace these values of open inquiry alongside cultural literacy, inclusion, and respect for all members of society.

Switching the framework from tolerance to equality offers more promise for improving Western treatment of minority groups and viewpoints—and of recent immigrants and their families. It is preferable to focus on anti-subordination, rather than tolerance, a concept that embeds its

²⁰⁷ See Ramirez & Woldenberg, *supra* note 79. Technology and intelligence information can work together to produce refined techniques, avoiding crude profiling by race or nationality. See *New Israeli System IDs Terrorists Without Profiling*, <http://www.worldtribune.com/worldtribune/05/front2453545.904861111.html> (last visited Apr. 10, 2007).

own advice in hierarchical power relationships. Political theorist Herbert Marcuse launched this kind of analysis in his *Critique of Pure Tolerance* in 1970,²⁰⁸ and Wendy Brown's 2006 book, *Regulating Aversion: Tolerance in the Age of Identity and Empire*, brings such an approach up to date by encompassing not only political dissenters but identity politics.²⁰⁹ Brown criticizes invocations of tolerance for presuming and maintaining a hierarchical power structure;²¹⁰ she argues that tolerance poses as universal and neutral when it is instead particular and culturally tied to Western Europe and the United States.²¹¹ Brown claims that people may invoke "tolerance" to try to legitimate violent war and imperialist aspirations.²¹² Tolerance discussion these days reduces people to their groups' memberships or identities rather than engaging with their beliefs.²¹³ In addition, Brown states that talk of tolerance obscures politics by treating issues in terms of interpersonal ethics rather than power struggles.²¹⁴

To Brown, tolerance as a concept may simply cover the arrogance of personal and national power, disguising such power from those smug enough to offer it but not from those insulted enough to know it is less than real respect. Brown may well be right, although her account neglects the multiple power relationships in contemporary societies. Occupants of different economic and social statuses—rich and poor, longtime residents and new immigrants—can offer or withhold forbearance, or direct scorn toward one another. A Muslim resident of Norway who spits on a gay couple may occupy a lower economic class and more tenuous political status, but he still has the power to wound a member of a different minority group by disapproval . . . or by fists.

Addressing mutual respect and civility in a multi-ethnic society is hard enough without imagining that this is a key beachhead in the war against terrorism. Concerns about security permeate the mutual distrust between longstanding residents and Muslim immigrants in Europe, even in nations that extend money and rights to newcomers. The newcomers—and their children and grandchildren—may perceive continual slights and exclusions.²¹⁵ Mutual distrust is likely to be exacerbated by public

²⁰⁸ See ROBERT PAUL, BARRINGTON MOORE & HERBERT MARCUSE, *CRITIQUE OF PURE TOLERANCE* (1970); HERBERT MARCUSE, *ONE DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY* (1964).

²⁰⁹ BROWN, *supra* note 20.

²¹⁰ By invoking tolerance the powerful are able to grant or withhold tolerance, and offer not equality, but at best protection for the less powerful. See BROWN, *supra* note 20, at 12, 36, 39, 87, 178. Hence, the language of tolerance displaces "articulations of inequality, abjection, subordination, and colonial and postcolonial violence." BROWN, *supra* note 20, at 205. This implies that equality rhetoric would work better—but others stress failures of equality rhetoric to acknowledge or remedy social hierarchies. See, e.g., GALEOTTI, *supra* note 10, at 226–28; MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990).

²¹¹ BROWN, *supra* note 20, at 7, 21, 31–33, 78, 86.

²¹² BROWN, *supra* note at 37, 99, 103.

²¹³ BROWN, *supra* note 20, at 19, 45, 70, 78 (arguing that contemporary tolerance rhetoric, in educational and political settings, equates religion with race, culture, and gender and assumes the tribalism it supposedly rejects).

²¹⁴ BROWN, *supra* note 20, at 13–16, 129.

²¹⁵ The ex-Moslem politician, Ayann Hirsi Ali, and an Eastern European immigrant writer, Dubravka Ugresic, described the public generosity and private conformity of the Dutch. Buruma summarized:

discussions linking policies toward immigrants—whether coercive or supportive—to anti-terrorism.

Finding ways to truly integrate more recent immigrants seems to elude much of Europe. Economic and physical segregation produce parallel lives, but not a common society joining long-standing residents and immigrants—even when the immigrants (and their children and grandchildren) —have spent decades in France, or Germany, or the Netherlands. Ian Buruma urged contemporary Dutch people to discern “how to stop future Mohammed Bouyeris [the murderer of Theo van Gogh] from becoming violent enemies of the country in which they grew up—how to make those boys pissing on the seventeenth-century door feel that this is their home too”²¹⁶—rather than finding ritualized murders or dreams of death as their only way home.

“Home” in this sense need not be a sentimentalized or fictive identification with an alien past, nor need it require the suspension or repression of affinities that draw an individual to identify with traditions, nations, or hopes lying outside the territory in which he or she resides. Feeling entirely “at home” may be elusive to everyone in periods of mass migration and globalization. The very unease that long-time residents have due to the shifting composition of their neighborhoods demonstrates how evanescent the sense of being “at home” can become. But the disproportionate sense of displacement experienced by so many immigrants and their children often gives rise to alienation.²¹⁷ And alienation is a crucial element of the toxic cocktail that inspires terrorism.²¹⁸

Offering a way for newcomers and their children to feel at home is especially challenging when modern technologies of communication and travel allow them to maintain stronger ties outside the new country than they have inside it. Such a challenge, even if grasped and accepted, will require perceptive readings of subtle daily exchanges to unearth and alter the cues of exclusion woven into everyday interactions. Prevailing

The generosity of the state toward refugees and other newcomers can lead to a peculiar resentment. The Dutch feel, in Ayaan’s words, that since they ‘have been so kind’ to the foreigners, the foreigners should behave as the Dutch do. Then there is the other kind of resentment, of the recipients of Dutch government largesse, who feel that it is never enough.

Dubravka went on to explain that people from Balkans “develop a criminal mentality in Holland. . . . They think this country is a soft touch.” BURUMA, *supra* note 119, at 203. *See also* Sabine Mannitz & Werner Schiffauer, *Taxonomies of Cultural Difference: Constructions of Otherness*, in CIVIL ENCULTURATION: NATION-STATE, SCHOOLS AND ETHNIC DIFFERENCE IN FOUR EUROPEAN COUNTRIES 60, at Epilogue (2004).

²¹⁶ BURUMA, *supra* note 119, at 240 (Buruma criticized the Dutch for using World War II as their template, and returning to guilt over their behavior during the Holocaust, when the Dutch failed to resist the Germans and turned over their Jewish neighbors).

²¹⁷ *See* Rose-Anne Clermont, *Integration in Theory, Alienation in Practice*, SPIEGEL ONLINE INTERNATIONAL, Aug. 23, 2006, <http://www.spiegel.de/international/0,1518,433006,00.html>; CHERIF RIFAAT, IMMIGRANTS ADAPT, COUNTRIES ADOPT . . . OR NOT: FITTING INTO THE CULTURAL MOSAIC (Inc. 2004) (an account based in Canada); ZEEV BEN-SIRA, IMMIGRATION, STRESS, AND READJUSTMENT (1997) (an account based in Israel).

²¹⁸ *See* RICHARDSON, *supra* note 109; JESSICA STERN, TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL (2003); JESSICA STERN, THE ULTIMATE TERRORISTS (1999).

approaches have not worked, and proceeding with business as usual is not likely to meet either the challenges of terrorist threats or a key test: do the heirs of the immigrants feel at home?

Consider this example. Social scientists observing a German school described a history class addressing Kristallnacht and the attacks on Jewish shops and synagogues during the night of November 9, 1938.²¹⁹ A Turkish student asked why the Jews had not fled Germany. The teacher replied by asking why Turks do not flee Germany today, following murders, assaults, and arson attacks against them. The student answered, “Things won’t get that bad.” The teacher replied, that is what many Jews believed as well and thereby found it difficult to leave, just as a Turk who owns a shop or an apartment in Germany today would find it difficult to leave without his or her possessions.²²⁰ This effort to build on the student’s own experience and position in this context may make empathy an ingredient of education—but it also communicates: you, like the Jews, are vulnerable here, there is no long-term future for you here.²²¹ French schools direct students to put aside their differences and absorb the abstract model of French civilization, including the ideal of equality, but the schools convey hidden codes of exclusion in individual classrooms and in sorting students at young ages between academic tracks with promising jobs and technical schools with much lower economic prospects.²²²

If virtually every day includes episodes such as this exchange between the German teacher and the Turkish student, the sources of alienation for immigrants and their children are not hard to find. To understand what it would mean for non-natives to feel more at home requires subtle readings of cultural, psychological, generational, and sexual symbolism, shifting through time and differing across national contexts.²²³ The motivation to revise interactions with newcomers is tested or depleted for many natives who themselves feel threatened and less at home as their communities change. When newcomers appear to reject the Western norms of gender and sexual equality, secularism, and individual rights, they may be tempted to

²¹⁹ Mannitz & Schiffauer, *supra* note 215, at 80–81.

²²⁰ Mannitz & Schiffauer, *supra* note 215, at 80.

²²¹ The same observer comments that the Germans use the term *Mittbürger*, “fellow citizen,” for foreign residents rather than simply the word for citizen, and perpetuate a boundary between Germans and foreigners, based on ethnic identity. Mannitz & Schiffauer, *supra* note 215, at 81.

²²² Mannitz & Schiffauer, *supra* note 215; BOWEN, *supra* note 15.

²²³ Fershta Ludin, a German citizen with roots in Afghanistan who taught elementary school in Germany, wanted to cover her hair while teaching contrary to the dictates of the school authorities. . The German Constitutional Court recognized her rights of conscience and access to public office under the Basic Law, but reserved the question to state legislative response. BENHABIB, *supra* note 33, at 198–99. Four German states have legislated laws forbidding teachers from wearing an Islamic headscarf to school. *The Islamic Veil Across Europe*, BBC NEWS, Nov. 17, 2006, available at <http://news.bbc.co.uk/2/hi/europe/5414098.stm>. British Home Secretary Jack Straw who represents a district that is twenty-five to thirty percent Muslim, controversially urged Muslim women to take off the veil when meeting with him, which some Muslims read as an insult. Mark Simpson, *Straw Met by Applause—and Boos*, BBC NEWS, Oct. 13, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/politics/6048896.stm; Jo Coburn, *Straw Gets the Debate He Wanted*, BBC NEWS, Oct. 6, 2006, http://news.bbc.co.uk/2/hi/uk_news/politics/5413012.stm; Nasreen Suleaman, *How Veil Remarks Reinforced its Support*, BBC NEWS, Nov. 5, 2006, http://news.bbc.co.uk/2/hi/uk_news/6117480.stm.

announce, “Why should we tolerate those who do not tolerate us?” Religious fundamentalists living in the West may be disturbed or disoriented by commercial, secular, or hedonistic values. Politicians and public figures in the West struggle over how to express respect for viewpoints quite critical of their countries and cultures. Longtime residents, even without realizing it, are degraded by living next to people who are not accepted as or invited to be equal citizens in their own society. Competitive intolerance could be the new motor for dehumanization, accelerated by the larger fears of terrorism and uncontrollable change.

Perhaps, instead, people from each of these walks of life will come increasingly to live in more than one discourse, taking each other’s perspectives, and even developing multiple identities.²²⁴ Even such a hopeful vision must foresee that instability will emerge and some tragic choices will be inevitable components of global change.²²⁵ More than bland tolerance is required for encounters with hatred, and at times, understanding is crucial. This calls for the extraordinary dexterity to avoid demonizing those who demonize you—without, however, relenting on the insistence against demonization by anyone.²²⁶ Perhaps only an idea of “home” as a destiny rather than the target of nostalgia can be large enough to house the competing hopes of newcomers and longtime residents as each struggle with the shock of the new—amid the intensified insecurities of an age of terrorism.

The clashes between old and new, natives and newcomers, East and West, are frightening when intolerance seems to be a tool of anti-terrorism. Instead of assuming this to be the case, let us pay attention to the competing narratives of European and American responses to terrorism, and actually debate anti-terrorism policies without assuming a core trade-off between tolerance and security. We might less ambivalently address how to navigate these challenging times by both whole-heartedly pursuing security and emphatically resisting the subordination of “others.” Ideas about tolerance, security, equality, and terror matter here. So does thinking hard about what is done in our name.

²²⁴ RICHARD NED LEBOW, *THE TRAGIC VISION OF POLITICS: ETHICS, INTERESTS AND ORDERS* (2003).

²²⁵ *Id.* at 378 (Lebow discusses the sense of flux and instability produced by the combination of economic globalization and the world-wide international political system, bringing different political cultures into closer contact).

²²⁶ “Tolerance, practiced as ‘you believe what you like and so will I,’ makes no effort and has no reason to make an effort at understanding—it is self-absorbed and oddly lacking in curiosity.” Ball, *supra* note 21, at 1625.