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


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 see
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 dissidents, 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.

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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
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
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. But I have joined others in arguing that the security we seek includes the liberty we cherish. 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


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. It is not tolerance if you do not disapprove of the other person or view. Philosopher Thomas Scanlon explains that tolerance “involves an attitude that is intermediate between wholehearted acceptance and unrestrained opposition.” 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. 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

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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;” tolerance 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).
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

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?q=2&q=bigoted.
and, at times, violent protest; right-to-life protesters can also name their
own ample encounters with intolerance. Some theorists place tolerance as the precondition for equality, freedom and justice. Then intolerance deserves the most serious response. 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. 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. 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.”

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 “symbolizing any religion, faith, race or political or ideological persuasion.” 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.

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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)).


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. 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.

That context includes the fact that Turkey, alone with Senegal among all Islamic nations, elevates secularism as part of its constitution. 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. After a military coup in 1980, the political party regained democratic control in 1983 and relaxed restrictions on religious expression and subsequent leaders have pressed for greater room for religious expression while trying to contain religious fundamentalism. As Turkey struggles to find a path between Islamic fundamentalism and secular fundamentalism, 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.

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. To many in the West, the headscarf ban seems like...
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.


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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.
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 into 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

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41 See SCANLON, supra note 12, at 198.
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; new registration requirements and ongoing monitoring of non-citizens in the United States that subject individuals to arrest, detainment, loss of legal immigrant status, criminal charges, and deportation for failures to register; attempts to deport or hold indefinitely non-citizens for minor or nonexistent immigration violations; secrecy about the names of people detained; and use of asset forfeiture and other expanded governmental powers to obtain information, arrest, detain, and indict individuals, including citizens, for broadly defined terrorism-related activities.

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


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.

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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).


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. 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. 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. During the same incident, police arrested an estimated 250 people, most of whom had tried without success to reach the permitted protest site. 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.

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

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.
assets held by particular individuals. 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 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 playground. 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. 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. It permits law enforcement to demand libraries, bookstores, and businesses to produce tangible items, such as papers, books, and records, while also forbidding disclosure to any person of such a demand. It further authorizes searches conducted without giving contemporaneous notice of the search or a warrant for the search. Civil libertarians objected but secured only small changes as the

BOB BAUMAN, Editor

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(c)(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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

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.


requests that it received. 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.

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. 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. 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. Because courts have found the photo requirement unconstitutional as applied to objecting Christian plaintiffs, 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. 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.

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70 Donna Leinword, Court to Oversee Wiretap Program, USA TODAY, Jan. 18, 2007, at 1A.
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, detentions of non-citizens even after they posted bond, and detentions of people who came forward with information to assist investigations of terrorist activities. 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. The government is also working to implement a program to deport all immigrants lacking proper papers—a plan that could expel twelve million people. 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. Others find this implausible. But the post 9/11 registration system was preceded by a 1986 U.S. contingency plan for internment Arabs. 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. The General Accounting Office review of the interviewing project cast substantial doubt on the value of the project.

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

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. 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.

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. 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. This narrative is summarized in the book, Civil Rights in Peril: The Targeting of Arabs and Muslims. 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.

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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)).
90 See generally ELAINE C. HAGOPIAN, CIVIL RIGHTS IN PERIL: THE TARGETING OF ARABS AND MUSLIMS (2004) [hereinafter CIVIL RIGHTS IN PERIL].
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 Economic Emergency Powers Act of 1977, 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
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. 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. Extensive academic debate surrounds the use of profiling after 9/11, whether based on race, ethnicity, or national origin. Even the metaphor of war rather than criminal justice produces a group stereotype as enemy rather than individualized suspect.

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.” Prager said that Keith Ellison should give up his post if he could not take his oath on a Bible. 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. 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. 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

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 Aupperheide & Rupert Brown, BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTERGROUP PROCESSES (2002).
102 See Harcourt, Schneider & Ingram, supra note 101; Samuel R Gross & Debra Livingston, supra note 104.
103 Thanks to Stephen Holmes for this point.
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 Guantánamo 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

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\(^{109}\) 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.


\(^{111}\) 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 Guantánamo 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.

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\(^{112}\) 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. 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. 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. 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. 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.

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. 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

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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.


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.

the Limits of Tolerance. 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. The letter also urged death for three others: Ayaan Hirsi Ali, a Somalian-born woman who had renounced Islam, become a politician and made a film with Van Gogh criticizing abuse of women under Islam; Jozua van Aarsten, leader of the conservative party to which Ali belonged; and Job Cohen, Mayor of Amsterdam and a proponent of multicultural harmony.

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, 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.

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. 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

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120 Id. at 2–3.
121 Id. at 4–5. Ayann 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 AYAN 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.\footnote{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.”\footnote{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.”\footnote{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.”\footnote{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.”\footnote{130} Hence, the critique emerging from Buruma’s informants

\footnote{126}{} BURUMA, supra note 119, at 35.
\footnote{127}{} BURUMA, supra note 119, at 35.
\footnote{128}{} BURUMA, supra note 119, at 35.
\footnote{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.
\footnote{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.

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. 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. 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.'"

Melanie Phillips’ book, Londonistan, and Bruce Bawer’s book, While Europe Slept: How Radical Islam is Destroying the West from Within, 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. She attributes this development to a loss of confidence in the traditional British identity and to accommodation of a particularly virulent form of multiculturalism. 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.

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. 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

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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.
133 Id. at 53.
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.”’

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.’” 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.

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. Protesters then blamed the Spanish government and its prior support for U.S. policy in Iraq for the terrorist attack. 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. 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.”

He warns that Western Europe may succumb to radical Islam through appeasement of Islamic militants and deference to new immigrants. 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.

Bawer concludes that Europe’s enemy is not radical Islam but Europe’s own passivity and appeasement.

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
that experience who write similar warnings about the new Europe. 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? 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, and Scotland Yard investigated a Muslim cleric Sheikh Omar Bakri Muhammad for allegedly inciting terrorism and hatred. Great Britain banned him from the country, 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

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).
Tolerance in an Age of Terror

Jews. 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. 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. 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 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. Muslim leaders reacted with hurt and anger over what they perceived to be biased and unfair concerns about Muslim schools. Similarly, in pursuit of the greater social integration of Muslims, the British government proposed and


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 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-jezera 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.


then, in the face of opposition, withdrew a requirement that state-sponsored, faith-based schools admit twenty-five percent of students from another religion.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{164}

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

\textsuperscript{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.


\textsuperscript{162} Rafeh 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.

\textsuperscript{163} Macklem, supra note 157, at 28.

\textsuperscript{164} See Rafeh Partisi, supra note 162, at para. 123.

\textsuperscript{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 underreaction 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).


169 Richardson, supra note 109.

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, and far greater percentages in specific regions of Paris, Amsterdam, and London.172 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,173 and some Western observers predict that Europe will become Islamic over time.174 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.175

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. 176

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.
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. 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, religious school messages, political parties opposed to liberal democracy, 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. 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.

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. Critics claimed that the detention proposal was an overreaction, but Blair’s

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.
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).
proposal and related initiatives grew from concerns that Britain generally has failed to take sufficient actions to anticipate and quell terrorist risks. 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. 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.

What might we learn by reading the narratives or over- and underreaction 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. Confining the focus

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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. 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.

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. 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. 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. TRIB., 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. TRIB., June 23, 2006, at 8 (describing the arrest of seven Miami men after they held “criminal discussions”); Jerry Seper, FBI Fools 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”).
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 plans, 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:

196 RICHARDSON, supra note 109, at 210.
197 See Harris, supra note 100.
198 Ramirez & Woldenberg, supra note 79, at 501–11.
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.”

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.
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.\textsuperscript{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

\textsuperscript{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, 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. Brown criticizes invocations of tolerance for presuming and maintaining a hierarchical power structure; she argues that tolerance poses as universal and neutral when it is instead particular and culturally tied to Western Europe and the United States. Brown claims that people may invoke “tolerance” to try to legitimate violent war and imperialist aspirations. Tolerance discussion these days reduces people to their groups’ memberships or identities rather than engaging with their beliefs. In addition, Brown states that talk of tolerance obscures politics by treating issues in terms of interpersonal ethics rather than power struggles.

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. Mutual distrust is likely to be exacerbated by public...
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).


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. 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. 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. 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.

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. 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 Mitbürger, “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.
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. Even such a hopeful vision must foresee that instability will emerge and some tragic choices will be inevitable components of global change. 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. 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 ambiguously 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.

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.