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THE SIGNALING FUNCTION OF RELIGIOUS SPEECH IN DOMESTIC COUNTERTERRORISM

Aziz Z. Huq

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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The Signaling Function of Religious Speech in Domestic Counterterrorism

Aziz Z. Huq*

A wave of attempted domestic terrorism attacks in 2009 and 2010 has sharpened attention to the threat of domestic-source terrorism inspired or directed by al Qaeda. Seeking to preempt that terror, governments face an information problem. They must separate signals of terrorism risk from potentially overwhelming background noise and persuade juries or fact finders that those signals warrant coercive action. Selection of accurate signals of terrorism danger in the information-poor circumstances of domestic counterterrorism is arguably a central challenge today for law enforcement tasked with preventing further terrorist attacks. To an underappreciated extent, governments have used religious speech as a proxy for terrorism risk in order to resolve this signaling problem. This Article analyzes the legal and policy significance of state reliance upon religious speech as a predictor of terrorism risk. Constitutional doctrine under the Religion Clauses does recognize interests implicated by the signaling function of religious speech. Yet analysis suggests that such doctrinal protection is fragile. Symptomatic of a wider inflexibility of pre-9/11 constitutional doctrine, this doctrinal protection shows little capacity for responsive change. The absence of constitutional barriers, however, does not mean government should persist in relying on religious speech as a signal. Rather, analysis of counterterrorism policy concerns suggests another path. Institutional considerations and an emerging social science literature on terrorism suggest that religious speech is ill suited to the signaling role it now plays. Instead, empirical social science on terrorism points to the epistemic superiority of a different signal: the close associations of a terrorism suspect. The Article concludes by examining the constitutionality of such a signal and elaborating ways that insight from the new social science of terrorism can be realized without compromising important individual interests.

I. Introduction

Since the September 11, 2001 terrorist attacks, law enforcement agencies in the United States and Europe have strived to anticipate and to intervene early against alleged terrorist conspiracies. Governments focus investigative or regulatory resources on a point substantially before the occurrence of violence, sometimes before clear evidence

* Assistant Professor of Law, The University of Chicago Law School. I am grateful for participants at faculty workshops at the University of Chicago Law School, Cardozo Law School, Columbia Law School, the George Washington University Law School, Harvard Law School, the University of Michigan Law School, and the University of Virginia Law School for helpful comments and incisive criticism, and to the staff of the Texas Law Review for excellent editorial work. I am especially grateful to the Carnegie Scholars Fellowship for provided funding during the research and drafting of this Article, and to the Frank Cicero, Jr. Faculty Fund for support during the completion of this Article. All errors, of course, are mine alone.

1. See, e.g., Memorandum from Att’y Gen. John Ashcroft to Heads of Department Components (Nov. 8, 2001), http://www.justice.gov/opa/pr/2001/November/01_ag_580.htm (announcing that the Justice Department “must shift its primary focus from investigating and prosecuting past crimes to identifying threats of future terrorist acts, preventing them from happening, and punishing would-be perpetrators”).
demonstrates violence to be imminent. This preemptive approach, however, creates an informational problem for governments. They must act without the factual predicates that typically flag criminal violence. Governments, that is, often lack reliable signals of the intention to commit or abet violence and must instead identify new signals of dangerousness to serve as proxies for overt evidence of a terrorist threat. Selection of accurate signals of terrorism danger in the information-poor circumstances of domestic counterterrorism is arguably the central challenge for law enforcement tasked with prevention of further terrorist attacks on American soil. The task has taken on new urgency after a wave of domestic-source terrorism incidents in late 2009 and early 2010. Those attempts prompted the White House in the May 2010 National Security Strategy to “underscore[] the threat to the United States and our interests posed by individuals radicalized at home.”

My aim in this Article is to evaluate one proxy that governments use as a solution to this signaling problem. Religious speech has to an underappreciated extent become for law enforcement in both the United States and the United Kingdom a signal to identify high-risk terrorist threats. Consider the following examples:

- Federal law enforcement officers arrest a Pakistani immigrant recently returned from what might have been training in a foreign terrorist camp. Unable to prove that the suspect in fact received training, the Government charges him with a “material support” offense in relation to a planned future attack. To show the suspect’s intent to commit this future attack, the Government relies on an Arabic note found in his wallet.

2. These include the decision of a Somali-American to travel back to Somalia and become the first American suicide bomber; the July 2009 arrest of seven Muslims in North Carolina; the September 2009 arrest of Afghan-born Najibullah Zazi based on allegations that he intended to complete an attack on the New York subway system; the November 5, 2009 shooting spree by Army psychiatrist Major Nidal Hassan at Fort Hood, TX, which left thirteen dead; the December 2009 arrest of Pakistani-American David Headley and others in connection with the 2008 Mumbai attacks; the Christmas Day 2009 attempt by Nigerian Umar Farouk Abdulmutallab to detonate explosives on board Detroit-bound Northwest Air, flight 253; the May 1, 2010 attempt by Pakistani-born American citizen Faisal Shahzad to explode a car bomb in New York’s Times Square; and the June 5, 2010 arrest of two New Jersey men allegedly on their way to fight in Somalia. See generally Samuel J. Rascoff, The Law of Homegrown (Counter)Terrorism, 88 TEXAS L. REV. 1715, 1716 & n.8 (2010) (recognizing the “ascendancy of homegrown terrorism” and discussing the examples listed above as well as others).


5. See infra Part II.

at the time of arrest that reads, “Oh Allah, we place you at their throats, and we seek refuge in you from their evil.” The jury convict.

- Immigration officials refuse entry to a religious scholar—whose sermons and scholarship, they believe, implicitly condone antidemocratic violence—for fear that he will win converts while a visiting professor at a major university. The scholar is unable to enter the country.

- Days after the September 11 attacks, an imam in a Virginia mosque gives a sermon to a select core group of male congregants, praising resistance to injustice against Muslims. Two of his listeners decide to go to Afghanistan to fight the U.S. forces deployed there. Based on their decision and the contents of his sermon, the imam is charged and convicted on federal conspiracy and incitement charges.

In each of these cases, law enforcement has not had unequivocal evidence of an intention to commit acts of violence. Instead, it has leaned on religious speech or doctrine as a proxy for a suspect’s intention to violate the law in the future or to encourage others to violate the law. In this fashion, religious speech plays a signaling function in the course of domestic counterterrorism focused on minority Muslim communities.

Attention to the religious speech of these communities is a consequence of al Qaeda’s explicitly religious justifications for the September 11 attacks and its subsequent appeals for support grounded in religious solidarity. This attention means immigration officials, prosecutors, and juries are scrutinizing doctrinal intricacies, previously the domain of the devout and scholastic, to discern who among a minority religious or ethnic community poses a terrorist threat.

But is such reliance constitutional? The Religion Clauses of the First Amendment seem, at least on their face, to restrain the government’s reliance on such proxies. And even if constitutional, is reliance on religious speech as a signal in the domestic

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12. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”).
counterterrorism context wise? Under what circumstances does religious speech function as an effective signal of and proxy for the intention to commit terrorist violence? How best is the signaling problem in domestic counterterrorism resolved?

This Article evaluates government reliance on religious speech as a signal in counterterrorism through the lenses of constitutional law and counterterrorism policy. Consider first the constitutional question. The government’s use of religious speech as a signal of terrorism risk indirectly casts a shadow on the exercise of religious liberties. When the government declares in the context of a criminal investigation or trial that a religious phrase or doctrine will be treated as evidence of terrorist intent, it creates a nontrivial incentive on the part of a suspect’s co-religionists not to use that phrase or doctrine. Use of religious speech as a signal thus interposes the government, albeit obliquely, into the ongoing confessional life of a religious community in a way that can change the terms of doctrinal and spiritual practice. The Supreme Court has recognized a religious community’s interest in epistemic autonomy—a communal freedom to hold and to revise religious views. But doctrinal protection of this epistemic autonomy is fragile. It supplies inadequate resources to resist post-9/11 pressures. This is symptomatic of a wider trend: the failure of pre-9/11 constitutional doctrine to respond to new ways in which constitutional rights are compromised as government confronts a new kind of terrorism threat.

But that does not mean the government should persist in relying on religious speech as a signal. Rather, institutional considerations and an emerging social science literature concerning the etiology of terrorism suggest that religious speech is ill suited to the signaling role it now plays. In institutional terms, government is ill equipped to make judgments about the meaning of religious speech. The error rate in state interpretations of religious speech will hence be high. More importantly, recent empirical social science research concerning the origins and predicates of terrorism suggests that variance in religious speech does not correlate with the risk of terrorist violence. This empirical and social science work suggests the superiority of a different signal: the close associations of a suspect. Terrorism’s emergence is regularly associated with the presence of insular groups that break off from the cultural or subcultural mainstream to form their own discrete ethical and normative subcultures. Identification of these insular groups, and not
some search for particular kinds of religiosity, provides some guidance as to the likely incidence of terrorist violence.

I compare religious speech and close associations by applying tools developed in the economics literature to solve signaling problems. Economic analysis of signaling problems shows that a signal is effective when “the cost of the signal is negatively correlated with the unseen characteristic that is [sought].”13 (Consider, for example, the function of education in the job market: Provided the cost of education is inversely related to productivity, education levels can signal a potential employee’s productivity to employers even if education itself does not increase marginal productivity.)14 Applying this framework to the terrorism context suggests that law enforcement should not rely on religious speech as a signal and instead should develop strategies to disaggregate the insular and close-knit groups in which terrorism emerges from a wider religious or ethnic cohort.15

This Article has two supplemental goals. First, it aims to prompt more empirically informed dialogue about the evolution of counterterrorism practice and legal doctrine. It seems likely that the first wave of counterterrorism policies adopted after 9/11, many under tight time and informational constraints, included suboptimal practices as a result of policy makers’ bounded rationality and imperfect information. Possible welfare gains are to be found in updating and improving those policies.16 Yet despite the switch of administrations in the White House, the course of federal counterterrorism policy has been characterized by more continuity than change.17 Second, the September 11 attacks catalyzed new investments in social science and empirical work on the causes and

15. A similar analysis has been applied to the problem of airport screening to suggest that reliance on visible attributes is suboptimal. Atin Basuchoudhary & Laura Razzolini, Hiding in Plain Sight—Using Signals to Detect Terrorists, 128 PUB. CHOICE 245, 254 (2006). The present analysis extends that basic framework to a different context.
17. See Peter Baker, Obama’s War Over Terror, N.Y. TIMES, Jan. 17, 2010 (Magazine), at 33 (observing that during his first year in office President Obama “has adopted the bulk of the counterterrorism strategy he found on his desk when he arrived in the Oval Office, a strategy already moderated from the earliest days after Sept. 11, 2001”).
consequences of terrorism. Yet this empirical literature is rarely invoked in the legal academy’s debates on security policy. This is a needless loss.

Part II of the Article introduces the problem by describing criminal and immigration proceedings in which government has acted preemptively by relying on religious speech. Part III turns to the religious liberty issues under the First Amendment. It contends that the constitutional interests at stake are largely “underenforced.” Part IV examines the policy dimensions of reliance on religious speech as a signal, drawing on recent empirical work to query how religious speech correlates with the incidence of terrorism and then proposes association as an alternative.

II. Religious Speech and Doctrine as a Signal in Counterterrorism

Religious speech and doctrine play an increasingly significant, if underappreciated, role in domestic counterterrorism enforcement in the United States and elsewhere thanks to a post-9/11 shift to preemptive policing strategies. This Part explores the causes of that trend and sets forth examples of religious speech’s use as a signal in criminal law, immigration, and other enforcement actions in the United States and the United Kingdom.

A. Preemptive Domestic Counterterrorism Strategies

Terrorist attacks have potentially catastrophic consequences. Unlike the policing of burglary, murder, or fraud, a counterterrorism policing strategy wholly reliant on interdicting past offenders likely will be suboptimal. And for most governments, “prosecution of completed terrorist acts [alone] is not deemed sufficient.” As a result, numerous governments have adopted a preemptive approach to terrorist interdiction since 9/11 that is aimed at the early stages of terrorist conspiracies. At the same time, they have


19. See generally Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213 (1978) (explaining that “underenforced” constitutional norms occur in “those situations in which the [Supreme Court], because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries”).

invested more resources in domestic counterterrorism policing.\textsuperscript{21} Because terrorism often lacks many of the overt antecedent acts associated with quotidian crime, and because a suspect’s preparatory conduct may be evidence of terrorism only in hindsight,\textsuperscript{22} law enforcement must identify and deploy new signals of terrorist intent to sort threats from the general population.

Governments overtly adopted a preemptive approach soon after 9/11. In November 2001, then-Attorney General John Ashcroft announced that the U.S. Department of Justice “must shift its primary focus from investigating and prosecuting past crimes to identifying threats of future terrorist acts, preventing them from happening, and punishing would-be perpetrators.”\textsuperscript{23} The Justice Department now leans on inchoate or “precursor” offenses such as the material support statutes that allow for prosecution long before an act of terrorism is imminent.\textsuperscript{24} The federal government also supplements criminal prosecution with regulatory complements. Immigration regulation, with its relaxed procedural constraints and more expansive substantive reach, also supplies the government with tools to act in the absence of clear evidence of imminent violence.\textsuperscript{25}

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CRIMINAL TERRORISM ENFORCEMENT IN THE UNITED STATES DURING THE FIVE YEARS SINCE THE 9/11/01 ATTACKS (2006), http://trac.syr.edu/tracreports/terrorism/169/ (“In the twelve months immediately after 9/11, the prosecution of individuals the government classified as international terrorists surged sharply higher than in the previous year.”); Press Release, Dep’t of Justice, Fact Sheet: Department of Justice Anti-Terrorism Efforts Since Sept. 11, 2001 (Sept. 5, 2006), http://www.justice.gov/opa/pr/2006/September/06_opa_590.html (outlining the various measures taken by the Department of Justice to combat domestic terrorism since 9/11, including prosecuting and convicting more terrorists, increasing border security funding, and restructuring the FBI to eliminate more terrorist threats). More recent data suggests that criminal justice resources have been deployed in a more “efficient” manner. CTR. ON LAW & SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD, at i (2010).


\item Memorandum from Att’y Gen. John Ashcroft, supra note 1; see also Paul J. McNulty, Deputy Att’y Gen., Prepared Remarks at the American Enterprise Institute (May 24, 2006), available at http://www.justice.gov/archive/dag/speeches/2006/dag_speech_060524.html (“And, in deciding whether to prosecute, we will not wait to see what can become of risks. The death and destruction of September 11, 2001, mandate a transformed and preventative approach.”).


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The trend toward preemptive strategies has been accelerated by growing concern about terrorism that originates at home rather than abroad. The September 11 attacks originated overseas. But other recent terrorist attacks, first in Europe and then in the United States, have had domestic origins. As a result, governments on both sides of the Atlantic have placed special emphasis on the need to identify and eliminate domestic “sleeper cells.” Since the early 1990s, the British government has monitored al Qaeda efforts to recruit within the United Kingdom and to establish a domestic network. British counterterrorism strategy singles out local Muslim communities as places where radicalization and recruitment to terrorism occur. And even before the July 2005 attacks on London buses and trains, British media sounded regular alarms about the possibility that residents of the United Kingdom might commit acts of terrorism.

In the United States, federal officials also took seriously the risk of “homegrown” terrorism after 9/11, albeit later than in the United Kingdom. In January 2007, for example, a Homeland Security official told a House of Representatives committee that

28. See Intelligence Reform: Hearing Before the S. Select Comm. on Intelligence, 110th Cong. 89 (2007) [hereinafter Intelligence Reform Hearing] (statement of Charles E. Allen, Assistant Secretary for Intelligence and Analysis, Chief Intelligence Officer, Department of Homeland Security) (describing new focus on “domestic terrorists” including “Islamic extremists (Sunni and Shia)”). In 2002, federal authorities identified a suspected sleeper cell in Lakawanna, New York, leading to high-profile arrests and convictions. DINA TEMPLE-RASTON, THE JIHAD NEXT DOOR, at xiii, 198–205 (2007).
30. Id. at 15.
domestic “radicalization challenges” had prompted the creation of a new unit in the Department of Homeland Security “focused exclusively on radicalization in the Homeland.”\(^{32}\) In May 2009, the Senate Homeland Security Committee held a hearing on “Violent Islamist Extremism: al-Shabaab Recruitment in America,” exploring terrorist recruitment among Minneapolis’s Somali-American population. According to FBI testimony, government surveillance and analysis had found Minneapolis to be a site of “an active and deliberate attempt to recruit individuals . . . to travel to Somalia to fight or train on behalf of [the Somali Islamist movement].”\(^{33}\) This prompted law enforcement “concern[]” that a U.S. national recruited in Minnesota might return from fighting overseas “to conduct attacks inside the United States.”\(^{34}\) The concern escalated after a series of domestic-source terrorism incidents in late 2009 and early 2010.\(^{35}\) In May 2010, Deputy National Security Advisor for Homeland Security and Counterterrorism John Brennan warned that “an increasing number of individuals here in the United States [have] become captivated by extremist activities or causes.”\(^{36}\) This caution took official form in the 2010 National Security Strategy, which stated that “recent incidences of violent extremists in the United States” demonstrate “the threat to the United States and our interests posed by individuals radicalized at home.”\(^{37}\)

It is the rising concerns about domestic terrorism and the demand for prophylaxis and prevention of terrorism attacks that in tandem push law enforcement toward novel investigation and prosecution strategies. Prosecutors must establish culpability for serious

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32. Hearing Before the H. Permanent Select Intelligence Comm., 110th Cong. (2007) (written testimony of Charles E. Allen, Assistant Secretary for Intelligence and Analysis, Chief Intelligence Officer, Department of Homeland Security) (on file with author).


34. Id.


37. WHITE HOUSE, supra note 3, at 19.
criminal offenses even though they have fewer overt acts with which to work. In doing so, they face a serious information deficit. Downstream, prosecutors also have fewer reliable indicators of guilt upon which to build a case. Sorting for individuals who present a danger will be consistently more difficult at both the investigative and prosecution stages. And it is to remedy this informational deficit that law enforcement and prosecutors turn to religious speech as a signal of terrorist risk.

B. Criminal Prosecutions and Religious Speech

In April 2006, a jury convicted Hamid Hayat, a Californian of Pakistani descent, of material support for terrorism. Federal prosecutors had charged Hayat with one count of providing material support for a transnational terrorist act and three counts of making willful, false statements related to a journey in 2003 or 2004 to Pakistan, allegedly to “receive jihadist training.” Yet Hayat had committed no act of violence. And scant evidence demonstrated his intent to commit a future act of violence, which was an element of the material support offense. While he had confessed to having visited a training camp in Pakistan, it was unclear whether he had stayed long enough to receive training. His confession was “vague and even contradictory.” On the material support charge, the prosecution’s remaining evidence was equivocal. Unsurprisingly, Hayat’s intention to commit future terrorism emerged as key for a successful prosecution.


39. Hayat Trial Memo, supra note 38, at 2–5. Hayat’s father Umer Hayat was also charged with two counts of making false, material statements. Id. at 5. The charges against him were later dropped. Neil MacFarquhar, Echoes of Terror Case Haunt California Pakistanis, N.Y. TIMES, Apr. 27, 2007, at A1.

40. See Tempest, supra note 38 (noting that the prosecution “had no direct evidence”).

41. See John Diaz, The Phantom Terrorist Camp, SFGATE.COM, Sept. 16, 2007, http://articles.sfgate.com/2007-09-16/opinion/17260704_1_terrorist-camp-fbi-headquarters-hamid-hayat (noting that “the prosecution offered no direct evidence to corroborate Hayat’s admission of attending a terrorist training camp” and that Hayat’s admissions of having attended the camp “were rife with bizarre details and contradictions”).

42. Tempest, supra note 38.

43. Principally, the State relied on an “irresolute” confession with “scant and fuzzy” details of the terrorist acts Hayat was to aid. Waldman, supra note 7, at 82–83; accord Diaz, supra note 41.

44. See Hayat Trial Memo, supra note 38, at 16 (describing the necessary mens rea as whether “the defendant knew or intended that the material support and resources were to be used in preparation for or in carrying out a violation of 18 U.S.C. § 2332b, which prohibits acts of terrorism transcending national boundaries”).
To prove Hayat’s mens rea, the prosecution relied on an Arabic-language prayer found in Hayat’s wallet at the time of his arrest. The prosecution labeled this “the throat note.” Initially, the prosecution translated the Arabic text as, “Lord, let us be at their throats, and we ask you to give us refuge from their evil.” When the defense objected to this translation, negotiations resulted in the note being admitted into evidence translated as “Oh Allah, we place you at their throats, and we seek refuge in you from their evil.”

To demonstrate that the throat note was evidence of Hayat’s mens rea, the U.S. Attorney proffered expert testimony from Professor Khaleel Mohammed, a professor of religious studies at San Diego State University. Mohammed conceded that he did not know Hayat. He also conceded that he did not know how Hayat understood the throat note because Hayat himself had exercised his Fifth Amendment right not to testify. But, Mohammed insisted, the throat note could be read in only one way. It was a prayer “used by Muslim fanatics and extremists that consider themselves to be in a state of war with the rest of the world or their own government.” Mohammed, that is, offered a categorical reading of the note applicable to anyone sharing a particular religious identity. Summarizing its case, the prosecution invoked the throat note to show that Hayat had “a jihadi heart and a jihadi mind” and also as evidence that “Hayat attended a

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45. See Waldman, supra note 7, at 83 (“[T]he prosecution cited [the note] as ‘probative evidence’ that Hayat had ‘the requisite jihadist intent’ . . . .”).
46. Hayat Trial Memo, supra note 38, at 34.
47. Id.
49. Waldman, supra note 7, at 89.
50. Walsh, supra note 48.
52. Walsh, supra note 48. Mohammed also testified that “the supplication would be carried by a holy warrior ready to fight the enemies of Islam. He suggested that the throat is ‘the most vulnerable spot’ for a ‘mortal wound,’ and added, ‘You are asking God to be your champion.’” Demian Bulwa, Trial Focuses on Notation: Warrior’s Creed or Simple Prayer, SFGATE.COM, Mar. 15, 2006, http://articles.sfgate.com/2006-03-15/bay-area/17284650_1_lodi-man-fbi-agents-umer-hayat.
53. Offered for the purposes of one case, Mohammed’s interpretation by definition claims a wider applicability. Defense lawyers found several religious experts who disagreed with Mohammed’s interpretation, but all proved “reluctant” to testify. Waldman, supra note 7, at 89–90. These experts may have been unwilling to irk a potential future employer—the federal government.
54. Id. at 82.
jihadist training camp” with “the requisite jihadist intent.”55 The throat note and other religious speech in Hayat’s possession swung the jury toward conviction.56 Indeed, the jury foreman subsequently explained that the throat note and related expert testimony had been “quite critical.”57

Hayat’s case is not unique. Criminal prosecutions of a New York-based group of thirteen alleged militants led by an Egyptian sheikh, Omar Abdul-Rahman, in the early 1990s also relied on the sheikh’s sermons as evidence of his involvement in a terrorist conspiracy.58 The 2004 material support prosecution of Idaho webmaster Sami al-Hussayen hinged on evidence of religious dogma on the websites the defendant had maintained, which was used in an effort to show his mens rea.59 One journalist observing the trial later evaluated the Government’s case by saying that “it seemed as if the government wanted to put the religion of Islam in the dock.”60 After a jury reached a hung verdict in the 2007 trial of Narseal Baptiste and six others based on their alleged conspiracy to attack the Sears Tower, the Government signaled its renewed commitment to the case by reaching for evidence of the defendants’ religious views to demonstrate their violent intent for a retrial.61 Similarly, in the 2008 retrial of the Holy Land Foundation on terrorist-financing charges, prosecutors thought to introduce expert evidence “that repeated use of traditional Muslim greetings can be a sign of unity with terrorists” to establish the defendant’s intent.62

55. Hayat Trial Memo, supra note 38, at 35.
56. See Waldman, supra note 7, at 92 (explaining that the jury “conclud[ed] that the evidence suggesting that Hayat would act—the scrapbook, the prayer, and so on—was stronger than the evidence that he would not”).
57. Id. at 90.
60. BARRETT, supra note 59, at 244.
In each of these cases, prosecutors sought to use the criminal law preemptively. In each case, lacking the necessary evidence of overt acts, U.S. Attorneys turned to religious speech as a proxy for criminal intent. These prosecutions relied on the assumption that religious speech could supply an accurate signal of an intention to commit acts of terrorism. But these criminal trials, which in any event comprise only a fraction of a criminal justice system dominated by plea bargaining, likely represent only a portion of the total number of cases in which the government relies on religious speech. The incidence of religious speech at the prosecution stage as a signal of criminal intent is suggestive of a greater reliance on the same kind of evidence upstream—in investigations. Even setting aside those investigations that do not end in charges, many terrorism investigations (perhaps a majority) end in “pretextual” charges, from wire fraud to immigration crimes.63 Such charges are unconnected with terrorism but form the possible basis for a less costly type of punitive action.64 In those cases, the state’s upstream reliance on religious speech for singling out a suspect is never revealed. At the very least, therefore, any estimation of the use of religious speech as a signal in counterterrorism that relies on reported trials is likely to yield an undercount, and probably a substantial one.

Religious speech can play a second function in criminal prosecutions. It can also be the *actus reus* for a terrorism offense. One example is a case that arose in Virginia soon after 9/11. On the evening of September 11, 2001, an imam named Ali al-Timimi and his circle of followers met at the storefront Dar al Arqam Center in Falls Church, Virginia:

At the meeting, Al-Timimi stated that the September 11 attacks were justified and that the end of time battle had begun. He said that America was at war with Islam, and that the attendees should leave the United States. The preferred option was to heed the call of Mullah Omar, leader of the Taliban, to participate in the defense of Muslims in Afghanistan and fight against United States troops that were expected to invade in pursuit of Al-Qaeda.65

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Based on that speech al-Timimi was prosecuted on several inchoate offense and solicitation counts.\textsuperscript{66} In addition to the September 11 speech, the prosecution invoked a February 2003 sermon in which al-Timimi spoke of the crash of the U.S. space shuttle \textit{Columbia} as an omen of the imminent end of the West’s domination of the Muslim world.\textsuperscript{67} In an opening statement, the prosecutor focused on the content of the sermons, asserting that “[the] case [was] about what Al-Timimi told the young men who respected him, who revered him . . . who loved him, and most of all, who listened to him.”\textsuperscript{68} Al-Timimi was convicted on ten counts of inducing or soliciting others to commit various crimes related to his disciples’ overseas travel to aid the Taliban.\textsuperscript{69} Evidence of his \textit{actus reus} largely comprised his sermons.\textsuperscript{70} These statements, the jury concluded, had a predictable effect on his codefendants, such that al-Timimi could be held criminally liable.\textsuperscript{71}

Al-Timimi’s case shows how religious speech or dogma can be a basis for solicitation or aiding-and-abetting charges. Moreover, it suggests that such prosecutions can rely on ambiguous religious statements that require interpretation. It is plausible to posit slightly different factual circumstances in which a prosecutor would want to move forward but would have to rely on speech with less substantial overt links to terrorism.

The same trend is visible in other countries. The United Kingdom has enacted laws aimed at “changing the environment in which the extremists and those radicalising others can operate”\textsuperscript{72} by criminalizing speech that often will be framed with religious terminology. Section 1 of the Terrorism Act 2006 criminalizes publications where the publisher “intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism.”\textsuperscript{73}

This “encouragement of terrorism” prohibition reaches “statements that are likely to be

\begin{itemize}
\item \textsuperscript{66} McCormack, \textit{supra} note 20, at 1 & n.1.
\item \textsuperscript{67} Milton Viorst, \textit{The Education of Ali al-Timimi}, ATLANTIC MONTHLY, June 2006, at 69, 78.
\item \textsuperscript{68} Id.
\item \textsuperscript{69} McCormack, \textit{supra} note 20, at 1 & n.1; Jerry Markon, \textit{Muslim Leader Is Found Guilty}, WASH. POST, Apr. 27, 2005, at A1.
\item \textsuperscript{70} See McCormack, \textit{supra} note 20, at 2 (explaining that the acts resulting in al-Timimi’s convictions primarily involved only speaking with and advising others).
\item \textsuperscript{71} See Markon, \textit{supra} note 69 (describing prosecutorial arguments that al-Timimi’s words were intended to cause violence and the subsequent guilty verdict imposed by the jury).
\item \textsuperscript{72} U.K. STRATEGY, \textit{supra} note 29, at 12.
\item \textsuperscript{73} Terrorism Act, 2006, c. 11, § 1(2)(b)(i).
\end{itemize}
understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism” and also “every statement which . . . glorifies the commission or preparation (whether in the past, in the future, or generally) of such acts or offences.”

The offense “implement[s] the requirements of Article 5 of the Council of Europe Convention on the Prevention of Terrorism,” which requires state parties to criminalize “‘public provocation to commit a terrorist offense.’” Another provision in the 2006 Terrorism Act criminalizes “[d]issemination of terrorist publications,” including circulating, selling, lending, or offering for sale or loan, any publication intended to be “direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism.”

Prosecutions under these provisions have been few, far between, and poorly documented. In one high-profile case, an imam named Abu Izzadeen was arrested for glorifying terrorism. While that charge was dropped, he was convicted of inciting terrorism overseas and fundraising for terrorism under the Terrorism Act 2000. In another case, a woman defendant who called herself the “lyrical terrorist” was convicted under a different statutory terrorism offense of possession of “a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism.” While the information at issue included materials with practical implications for planning a terrorist act, her trial was characterized by discussion of quasi-religious poems that she

74. Id. § 1(3) (emphasis added).
76. Terrorism Act 2006, §§ 2(1)(a), 2(2).
77. According to a U.K. government audit of counterterrorism actions, there have been such actions. See LORD CARLILE OF BERRIEW Q.C., REPORT ON THE OPERATION IN 2007 OF THE TERRORISM ACT 2000 AND OF PART I OF THE TERRORISM ACT 2006, at 56 (2008) (“There have been successful prosecutions brought under the section [criminalizing the glorification of terrorism], and others are pending.”); CROWN PROSECUTION SERV., VIOLENT EXTREMISM AND RELATED CRIMINAL OFFENCES ¶ 5, http://www.cps.gov.uk/publications/prosecution/violent_extremism.html (describing some successful antiterrorism prosecutions but none under the antiglorification laws).
78. But there have been some arrests. See, e.g., Sean O’Neill & Stewart Tendler, Islamist Radical who Heckled Reid Is Arrested over ‘Glorifying of Terrorism,’ TIMES (U.K.), Feb. 9, 2007, at 2; Stephen Wright et al., Hate Preacher who Praised Bombers Is Among Six Arrested, DAILY MAIL (U.K.), Apr. 25, 2007, at 20.
81. See Haroon Siddique, ’Lyrical Terrorist’ Convicted over Hate Records, GUARDIAN (U.K.), Nov. 8, 2007, http://www.guardian.co.uk/uk/2007/nov/08/terrorism.world (describing the documents found in
had written seemingly in praise of terrorist actions. It is not implausible to think the quasi-religious poetry introduced at trial played a role in her conviction by demonstrating her mens rea.\textsuperscript{82}

C. Regulatory Actions Based on Religious Speech

Criminal prosecution is not the only way to disrupt or disperse a terrorist conspiracy. Governments also use noncriminal regulatory regimes such as immigration law, financial regulation, and legal proscriptions of certain groups. Like their criminal counterparts, these regulatory actions can turn on religious speech.

American immigration law has long allowed exclusion and deportation on ideological grounds.\textsuperscript{83} As a result, immigration law is an attractive prophylactic tool for government when a terrorism prosecution would otherwise be unavailable. Further, when prosecutors are unable to secure a conviction, the government can use immigration powers to achieve the prosecution’s interdiction goal at a lower cost.\textsuperscript{84} Increasing overlap between the substantive grounds for deportation and the content of the criminal law during the past three decades, moreover, has enlarged the substitutability of deportation for criminal sanctions.\textsuperscript{85}

Amendments to federal immigration law since 1999 expanded terrorism-related removal grounds and facilitated enforcement actions based on religious expression.\textsuperscript{86}

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Malik’s possession).
\textsuperscript{82} The conviction was later overturned. Lee Glendinning, ‘Lyrical Terrorist’ Has Conviction Quashed, GUARDIAN (U.K.), June 17, 2008, http://www.guardian.co.uk/uk/2008/jun/17/uksecurity.ukcrime.

\textsuperscript{83} The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, allowed, inter alia, the exclusion of any alien “affiliated with groups that advocate World Communism or totalitarian dictatorship.” Cf. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 164–67 (2003) (describing litigation in which the Immigration and Nationality Act, also known as the McCarran–Walter Act, was struck down).

\textsuperscript{84} In at least one case, a failed prosecution has been followed seriatim by an immigration action. See, e.g., Elaine Silvestrini, ICE Puts Chill on Megahed Acquittal, TAMPA BAY ONLINE, Apr. 12, 2009, http://www2.tbo.com/content/2009/apr/12/na-ice-puts-chill-on-megahed-acquittal/ (noting the use of immigration law to deport Sami al-Hussayen after the failed prosecution of him).


\textsuperscript{86} For an overview of relevant changes in the immigration statute, see Gerald L. Neuman, Discretionary Deportation, 20 GEO. IMMIGR. L.J. 611, 647–48 (2006). At the same time, judicial scrutiny of immigration law’s workings has diminished. In 1999, the Supreme Court held that “an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.” Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999).
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Section 411 of the October 2001 USA PATRIOT Act authorized the government to deny admission to any alien who had used a “position of prominence within any country to endorse or espouse terrorist activity” or to “persuade others to support terrorist activity or a terrorist organization.”\(^87\) A 2005 amendment enlarged the scope of this provision to include circumstances in which the Attorney General has a reasonable basis to believe an individual is engaged in, or likely to engage in, terrorist activity or that the individual endorses or espouses terrorist activity.\(^88\) This amendment empowers immigration officials to make predictive judgments about individuals based on inferences drawn from the individuals’ religious beliefs or statements. Under an earlier iteration of the provision, the Department of Homeland Security revoked in 2004 a visa granted to Swiss theologian Tariq Ramadan, telling journalists that Ramadan had “‘used a position of prominence . . . to endorse or espouse terrorist activity.’”\(^89\) Ramadan’s critics outside government also cited his doctrinal writings to justify the exclusion decision.\(^90\)

In the United Kingdom, immigration authorities scrutinize foreign imams’ religious views before admitting them into the country.\(^91\) In November 2003, British immigration authorities detained a senior Deobandi cleric, Yusuf Motala, and questioned him extensively about “the curricula of his seminaries, his views on aspects of Islam and

89. Pamela Constable, Divisive Scholar Draws Parallels Between Islam and Democracy, WASH. POST, Apr. 11, 2007, at B6; see also ACLU, THE EXCLUDED: IDEOLOGICAL EXCLUSION AND THE WAR OF IDEAS 11 (2007), available at http://www.aclu.org/files/pdfs/safefree/the_excluded_report.pdf (noting that Ramadan’s exclusion had initially been justified by the government on the ground that he “endorsed or espoused terrorism”). Ramadan’s exclusion was later justified under a different statutory provision. See Olivier Guitta, The State Dept. Was Right, WEEKLY STANDARD, Oct. 16, 2006, http://www.weeklystandard.com/Content/Public/Articles/000/000/012/800naxnt.asp (“[T]he State Department denied a visa to Muslim scholar Tariq Ramadan on the grounds that he had contributed around 600 euros to a French charity classified as a terrorist organization . . . .”).
90. See Guitta, supra note 89 (“Ramadan holds out Islam as the solution to all the problems of Muslim youth . . . .”). Ramadan himself attributed the exclusion to political differences. See Tariq Ramadan, Op-Ed., Why I’m Banned in the USA, WASH. POST, Oct. 1, 2006, at B1 (“I am increasingly convinced that the Bush administration has barred me for a much simpler reason: It doesn’t care for my political views.”). Ramadan was subsequently admitted into and entered the United States. See Am. Acad. Religion v. Napolitano, 573 F.3d 115, 134–39 (2d Cir. 2009) (vacating and remanding the initial refusal based on a possible procedural flaw in the consular decision); Kirk Semple, At Last Allowed, Muslim Scholar Visits, N.Y. TIMES, Apr. 8, 2010, at A29.
alleged connections with jihadist groups.” 92 Under rules promulgated in the aftermath of the July 2005 London bus and subway bombings, British authorities have the power to deport those who “foment, justify or glorify” terrorism. 93 After the attacks, deportation proceedings were initiated against a Jamaican imam, Abdullah el-Faisal, who influenced one of the July 2005 suicide bombers by arguing after September 2001 that “the Koran justified attacks on non-Muslims.” 94 In August 2005, then-Home Secretary Charles Clarke also banned Syrian-born cleric Omar Bakri Mohammed from returning to the United Kingdom on the ground that “his presence is not conducive to the public good.” 95 The same month, the government published a list of “Unacceptable Behaviours” that, if committed, could lead to exclusion or deportation. Items on this list include “public speaking including preaching; running [an extremist] website,” and expressing viewpoints that “foster hatred which might lead to inter-community violence in the UK.” 96 Enforcement of such rules means that government officials have to make decisions about what kinds of religious speech will “foster” hatred or “foment” violence. In so doing, they must make judgments about how a community of co-religionists will likely interpret religious speech or doctrine. This plunges officials into the heart of contested questions of religious epistemology.

The British government has also introduced a scheme of organization proscription on ideological grounds. After the July 2005 attacks, the British Parliament enacted legislation allowing the proscription of domestic organizations engaged in “unlawful glorification of the commission or preparation (whether in the past, in the future or generally) of acts of terrorism,” and organizations “associated with statements containing any such glorification.” 97 After the publication of cartoons caricaturing religious figures

92. Id. at 698.
97. Terrorism Act, 2006, c. 11, § 21 (emphasis added). In the same provision, glorification is defined to “include[] any form of praise or celebration.” Id.; cf. Saul, supra note 93, at 879 (describing a similar scheme introduced by the Howard government in Australia).
by the Danish newspaper Jyllens-Posten in September 2005, the British government outlawed two organizations—al Ghurabaa and al Firquat un-Nassjiyah (also known as the Saved Sect)—that organized protests at which individual protesters waved death threats against the cartoonists. On issuing the bans, the Home Office explained that both groups had “disseminate[d] materials that glorify acts of terrorism.”

D. Conclusion

Pressure to interdict terrorist conspiracies at a safe time and distance before their completion and a growing concern about homegrown plots create new challenges for law enforcement in both the United States and the United Kingdom. The most pressing challenge is the informational asymmetry that characterizes many terrorism prosecutions. Prosecutors bridge this gap by relying on religious speech. It is also plausible to suppose that religious speech serves a signaling function at an investigative stage. Not all enforcement actions will end, however, in criminal prosecutions that rely on religious speech. Hence, looking at prosecutions alone to determine the extent of state reliance on religious speech likely yields an undercount.

A caveat is warranted here. The phenomenon described here—reliance on religious speech as a signal in counterterrorism—is not the same as the practice of discriminatory policing based on racial or religious identity. My narrow claim here is that law enforcement entities have addressed the uniquely difficult problem of informational asymmetry in terrorism investigations by turning to religious speech as a plausible signal of and proxy for terrorist intent. That claim does not in any way rest on the distinct and different proposition that law enforcement entities in the United States or the United Kingdom operate on the basis of invidious biases. But nor should I be taken to imply

100. See supra subpart II(A).
an absence of animus. For the purposes of this Article, I am rather concerned with how the information-poor environment in which terrorist entities such as al Qaeda operate pushes law enforcement to use religious speech as a signal, or proxy, for unlawful intentions.

III. Constitutional Implications of the Use of Religious Speech as a Counterterrorism Signal

This Part focuses on the central question of constitutional law raised by the policies described in Part II: Under existing U.S. constitutional doctrine, does law enforcement reliance on religious speech as a signal in counterterrorism work violate the First Amendment and in particular its Religion Clauses? First Amendment doctrine recognizes the possibility of two harms from reliance on religious speech as a signal in counterterrorism enforcement. First, individuals may experience a chilling effect on speech and association. Second, religious communities may be burdened by constraints on their autonomy to debate and cultivate unique, distinctive religious views. This Part focuses on the second harm, which involves the epistemic autonomy of religious communities. I argue that current constitutional doctrine provides no constraining mechanism or remedy in response to those harms. In Lawrence Sager’s phrasing, the constitutional norms in play here are “underenforced,” so that “only a small part of the universe of plausible claims . . . is seriously considered by the federal courts.”

102 I first briefly describe two harms and then focus on the doctrinal protection of the epistemic autonomy interest. I conclude that the formal doctrine offers few protective resources for this species of religious liberty interest.

A. How Does the Signaling Function of Religious Speech Harm First Amendment Interests?

Government use of religious speech as a signal in domestic counterterrorism impinges on First Amendment interests in two ways. One implicates individual interests;
the other concerns a collective interest of religious communities in epistemic autonomy, i.e., the freedom to define and revise faith understandings and doctrine without interference by the state.

First, government’s reliance on religious speech directly affects individuals. By relying on religious speech as a basis for discerning private actors who merit punishment, government raises the public cost of using religious speech (i.e., by increasing the possibility of being targeted for investigation on the basis of that speech). Hence, it creates an incentive to use nonreligious speech. Reliance on religious speech as a signal has the potential as a result to chill individuals’ constitutionally protected speech. Because that speech concerns matters at the core of many individuals’ understanding of their identity, a chilling effect will impinge on “individual autonomy understood as the practical power to choose one’s ends”103 that is at the heart of some conceptions of the speech and association components of the First Amendment.

An additional stigmatic harm might be imagined. It is plausible that government reliance on religious speech in counterterrorism also could inflict “pervasive dignitary and stigmatic harms”104 on individuals by sending the message that members of a minority religious group are “presumptively disloyal and unworthy of empathy”105 and by “discrediting [its members’] participation in civil culture” through claims framed in religious terms.106

Yet if the constitutional significance of religious speech’s signaling function were exhausted by its impact upon individuals targeted for enforcement actions, then the constitutional costs would seem to be few. No general rule bars the government from using speech as evidence of either actus reus or mens rea of a criminal offense.107 A religious element in speech, the Supreme Court has instructed, does not change this

105. Id. at 938.
106. Id.
analysis.\textsuperscript{108} Any infringement of religious liberty would be an incidental byproduct of an otherwise legitimate enforcement action that triggers no free exercise concern. Further, reliance on religious speech as a signal in domestic counterterrorism entails no outright ban or direct burden on speech, no viewpoint-based distinction, and no content-based regulation.\textsuperscript{109} The individual constitutional interests burdened by the use of religious speech as a counterterrorism signal thus seem at least tolerable given the magnitude of the countervailing state interest.

But the second harm to First Amendment interests, while more unusual, raises complex questions with potentially greater normative heft. This second harm sounds in the Religion Clauses rather than the free speech part of the First Amendment. It is more unusual because the affected interest (in epistemic autonomy) belongs to groups, rather than individuals, and is linked less directly to governmental reliance on religious speech. The interest at stake here is the shared, collective interest that a religious community has in determining the content and direction of its religious beliefs without interference by the government. Call this the interest that a religious community has in epistemic autonomy.

Religious communities have a collective interest in epistemic autonomy. This encompasses control over the form and content of canonical religious texts such as the Bible, a point of considerable controversy in the history of American schooling.\textsuperscript{110} It entails the right of a religious community to form and revise collective understandings of its own faith, free of state interference. And it may reach the right of minority communities to protect their children from the perceived corrupting influences of public

\textsuperscript{108} See Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 109 (1952) (“Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense.”).


\textsuperscript{110} Catholics and Protestants in the United States have long clashed over the proper translation of the Bible. John C. Jeffries, Jr. & James E. Ryan, \textit{A Political History of the Establishment Clause}, 100 Mich. L. Rev. 279, 299–300 (2001). Even the text of the Ten Commandments is subject to debate. See Van Orden v. Perry, 545 U.S. 677, 717–18 (2005) (Stevens, J., dissenting) (“There are many distinctive versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned observer, these differences may be of enormous religious significance.”).
Epistemic autonomy, while somewhat conceptually elusive, has in other words been a central battlefield for religious liberty in the American twentieth century.

State reliance on religious speech as a signal in domestic counterterrorism imperils the epistemic autonomy of certain religious communities. When the government, in the course of a criminal or immigration proceeding, takes sides about the meaning of a religious text, or when it takes a position about the entailments of some religious doctrine for practical political action, it places a thumb on the scales of internal debate within the religious community. It may in effect endorse one side’s claims over another’s in a way that affects doctrinal development and changes the social meaning of a religious term. Or by indicating that some dogma or ideas will be treated as almost per se evidence of illegal intentions—as the prayer on Hayat’s throat note was—the government may close off possible avenues of debate. In so intervening, the state is of course not claiming an authoritative power to resolve hermeneutical disputes. Rather, the state is distorting the free evolution of religious thought within a community by changing the costs and benefits of certain doctrinal moves.

An illustration may be helpful here. Consider again the reception of Hamid Hayat’s trial and conviction among his co-religionists in California. Hayat’s trial was closely followed by his co-religionists. According to one Sacramento-based Muslim community activist, “[t]he entire Muslim community in Lodi is watching [the legal proceedings].”

After having followed Hayat’s trial and conviction, Muslims in Southern California knew that federal law enforcement authorities treated the throat note prayer as evidence of violent intent. As a result, they had a pro tanto reason not to use that prayer, whether or not they accepted the Government’s interpretation of it as an endorsement of violence.

Indeed that prayer is also commonly worn in the form of a talisman to ward off daily

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112. Cf. Lawrence Lessig, The Regulation of Social Meaning, 62 U. CHI. L. REV. 943, 951 (1995) (“Any society or social context has what I call here social meanings—the semiotic content attached to various actions, or inactions, or statuses, within a particular context.”).


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misfortune. 114 (The Government’s trial witness, in other words, erred seriously in his reading.) 115 Notwithstanding this error, and without claiming power to issue an authoritative interpretation, the state had signaled strongly to Hayat’s co-religionists that the prayer would be deemed evidence of violent intent.

Another illustration—where the Government did not err in its interpretation—is the Virginia case. 116 When the federal government used al-Timimi’s sermons as evidence of his dangerousness, his conviction catalyzed changes to the way that Muslims in Northern Virginia self-identified and expressed their identity. According to one account, al-Timimi’s arrest and conviction seeded a “sense of beleaguerment among many Muslims in the Washington area . . . particularly” among groups close to al-Timimi’s mosque, disarming them in ongoing doctrinal fights with competing sectarian factions. 117 A Muslim community activist from that area told a journalist, “In the past, people would say, ‘I’m Salafi’ [al-Timimi’s denomination]. Now, I never encounter people who say that.” 118 That is, the lesson of the al-Timimi trial for Virginia Muslims was that to call oneself a “Salafi” was to invite government scrutiny and possibly worse. The al-Timimi case suggests that a religious community can be affected by the government’s use of religious speech as a signal whether or not the interpretation is erroneous.

B. Constitutional Protection of Religious Epistemic Autonomy

The U.S. Supreme Court has recognized the epistemic autonomy interest of religious communities in two strands of often-overlooked precedent. In those lines of cases, the Supreme Court has interpreted the Religion Clauses of the First Amendment to shelter a religious community’s interest in defining and revising its own understanding of dogma

114. See Waldman, supra note 7, at 90 (noting the jury foreman’s skepticism of the testimony of a University of Oregon professor “who had testified that Pakistanis commonly carry a [Muslim talisman called a] tawiz to ward off evil, much the way Jews place a mezuzah outside their door”).
115. The prosecution’s specific interpretation of the throat note was at a minimum highly questionable. According to several experts, it was in fact “a traditional supplication . . . reported to have been said by the Prophet [Mohammad] when he feared harm from a group of people.” Id. In her excellent reporting on the trial, Amy Waldman sought views from two experts (Bernard Haykel and Ingrid Mattson) and a Pakistani New York Times reporter based in Islamabad and consulted published and online collections of traditional Islamic prayers. All confirmed that the prosecution’s interpretation was incorrect.
116. See supra notes 65–71 and accompanying text.
118. Id.
and doctrine and in fashioning its own normative commitments and epistemic criteria. But these cases are now dated. Religion Clause doctrine has shifted. Even though precedent on epistemic autonomy has not formally been revisited, the question may fairly be asked: Do these precedents still imply judicial protection for religious communities’ free normative development? Or are they outmoded outliers of another era, yielding little comfort or shelter from contemporary pressures on First Amendment values?

1. The Protection of Epistemic Autonomy Under the Religion Clauses.—The two lines of Religion Clause precedent both arise out of disputed dispositions of religious institutions’ property after a schism had ruptured an originally unitary church. Both lines of cases rely upon Establishment Clause and also Free Exercise Clause concerns.

In the first set of cases, the Court cautioned against inquiries into the fidelity of one side or another to original church doctrine. It did so in terms anticipating and prefiguring a later Establishment Clause rule against state “endorsement” of certain religious positions.119 This anti-endorsement strand of religious epistemic autonomy emerged first in nineteenth-century case law concerning church property division. A clear prohibition on state endorsement of religious orthodoxy emerged only after 1950.

In the 1871 case Watson v. Jones,120 the Court intimated a concern for epistemic autonomy when it delineated a three-part framework for resolving disputes about the disposition of church property.121 First, if a case involved an express trust that stipulated fidelity to church doctrine, that trust would be enforced.122 Second, in cases concerned with independent congregations that lacked hierarchal arrangements, “the rights of such bodies . . . [would] be determined by the ordinary principles which govern voluntary . . .

119. The idea of endorsement was first suggested by Justice O’Connor and later picked up by other Justices. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (asking whether the state had impermissibly “send[ed] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”); see also Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592–94 (1989) (engaging in an endorsement analysis based on Justice O’Connor’s concurrence in Lynch). Justice O’Connor later explained that the endorsement analysis is applied from the perspective of a “reasonable observer.” Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 779–80 (1995) (O’Connor, J., concurring).
120. 80 U.S. (13 Wall.) 679 (1871).
121. Id. at 722–28.
122. Id. at 722.
Finally, the Court explained that in cases involving hierarchical churches, the decision of the “highest of . . . church judicatories” would be respected.\textsuperscript{124} Sounding constitutional overtones, the Court explained that these three options protected “the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property.”\textsuperscript{125}

Yet within a year of \textit{Watson}, the Court was meddling again in the internal affairs of religious bodies. It first cautioned that judicial respect for churches’ internal decision making would be obtained only if a church abided by its own procedures.\textsuperscript{126} In 1929, the Court identified three exceptions to \textit{Watson} for “fraud, collusion, or arbitrariness.”\textsuperscript{127} In practical effect, these exceptions invited lower tribunals to interrogate churches’ internal decision making based on allegations that a decision was “arbitrary” or inconsistent without guidance as to how that standard would be applied to the peculiar context of religious associations. The invitation was not ignored.\textsuperscript{128}

Only after World War II did the Court revisit its conflicting instructions. In cases decided in 1952 and 1960, the Court created a zone of decisional autonomy for ecclesiastical bodies. In those cases, it held that neither New York’s legislature nor its courts could displace the governing body of the Russian Orthodox Church based on allegations that the latter had fallen under Soviet control.\textsuperscript{129} In 1969, the Court

\begin{itemize}
\item \textsuperscript{123} Id. at 725.
\item \textsuperscript{124} Id. at 727; \textit{see also} 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 263–65 (2006) (discussing the Court’s grouping of questions concerning the rights to church properties into three categories, including a category for when a congregation is subordinate to a larger church organization); Kent Greenawalt, \textit{Hands Off! Civil Court Involvement in Conflicts over Religious Property}, 98 COLUM. L. REV. 1843, 1847–52 (1998) (describing \textit{Watson} comprehensively).
\item \textsuperscript{125} \textit{Watson}, 80 U.S. at 728.
\item \textsuperscript{126} \textit{See, e.g.}, Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 140 (1872) (holding that a majority rule would be followed for congregational churches provided that the majority “adhere to the organization and to the doctrines” of the church).
\item \textsuperscript{127} Gonzales v. Roman Catholic Archbishop, 280 U.S. 1, 16–17 (1929).
\item \textsuperscript{128} \textit{See, e.g.}, Brundage v. Deardorf, 55 F. 839, 847–48 (C.C.N.D. Ohio 1893) (stating that only “a bona fide decision” of an ecclesiastical tribunal would be recognized); Note, \textit{Judicial Intervention in Church Property Disputes—Some Constitutional Considerations}, 74 YALE L.J. 1113, 1119 n.32 (1965) (collecting cases).
\item \textsuperscript{129} For legislatures, see \textit{Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church}, 344 U.S. 94, 120–21 (1952) (“Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls.”). For courts, see \textit{Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church}, 363 U.S. 190, 190–91 (1960) (per curiam) (holding that a state court could not deny a “right conferred under canon law”).
\end{itemize}
invalidated a Georgia state court decision because the state tribunal had relied on a state law rule that church property remained in the trust of a larger ecclesiastical entity provided that the entity did not “depart substantially from prior doctrine.”\footnote{Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 450 (1969). Akin to the arbitrariness exception, the “departure-from-doctrine” rule invited judicial scrutiny into church doctrine. \textit{Id.}} Recognizing the potential collision between arbitrariness review and desire to show respect for the unpredictable pathways of religious thinking, the Court opted for the latter. In 1976, the Court held that courts could not review ecclesiastical authorities’ decisions to determine whether they were “arbitrary.”\footnote{Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 712–16 (1976). While courts can still inquire into “fraud” or “collusion,” the continuing validity of these exceptions to the general rule of noninquiry into church decision making is uncertain. \textit{See} Douglas Laycock, \textit{Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy}, 81 COLUM. L. REV. 1373, 1397 (1981) (citing cases where state courts relying on fraud exceptions were reversed and commenting that such exceptions do not fit the Court’s broad rationale).} The Court rested this judgment on the perceived risk that state intervention might “inhibit[] the free development of religious doctrine” by placing a thumb on the scales of doctrinal debate.\footnote{Mary Elizabeth Blue Hull, 393 U.S. at 449.}

Like the endorsement test subsequently to be developed by Justice O’Connor, the final version of this rule aimed at barring the state from “send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”\footnote{Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring); \textit{see also} McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 860–61 (2005) (describing a showing of government purpose to favor one religion over another or adherence to religion generally as a message to nonadherents that they are outsiders); \textit{supra} note 119.} Whereas the church property cases concerned the play of factions within a religious community, Justice O’Connor’s endorsement test focused on the interaction of religious minorities with the larger society. Both church-property cases and the endorsement rule, nevertheless, have the purpose and effect of keeping the state clear of intramural sectarian disputes and preserving a communal right to religious self-determination.

The second relevant line of cases under the Religion Clauses prohibits judicial inquiry into religious doctrine. Again, this line of cases anticipates an idea in later
Establishment Clause jurisprudence—the “entanglement” test.\textsuperscript{134} This “anti-entanglement” rule differs from the anti-endorsement strand of church-property case law because it concerns the method and not the consequence of judicial inquiry.\textsuperscript{135} That is, it does not speak to the results or effects of state action. Rather it limits the manner in which the state—a court or another decision maker—may resolve a dispute linked to the epistemic life of a religious community.

This second line of precedent also emerged out of church-property disputes.\textsuperscript{136} In 1969, the Court had invalidated the Georgia state law rule that a general church held a local church’s property in implicit trust “on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches.”\textsuperscript{137} In the course of its decision, the Court observed that this test forced “[a] court . . . of necessity [to] make its own interpretation of the meaning of church doctrine” by “assessing the relative significance to the religion of the tenets.”\textsuperscript{138} No constitutionally permissible space obtained, in the Court’s opinion, for courts to engage in the “interpretation of particular church doctrines and the importance of those doctrines to the religion.”\textsuperscript{139}

Seven years later, the Court elaborated on that hint. In a 1976 decision, the Court squarely prohibited “detailed review” of ecclesiastical decision making in the course of determining whether a decision was “arbitrary.”\textsuperscript{140} In language colored by a concern for religious institutions’ epistemic autonomy, the Court cautioned that the First Amendment “commits exclusively to the highest ecclesiastical tribunals’” resolution of “quintessentially religious controversies.”\textsuperscript{141} Both cases tracked concerns expressed in

\textsuperscript{134} See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 615–23 (1971) (applying the entanglement test); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (“Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.”).

\textsuperscript{135} For instance, the Court has expressed concern that a tax regulation requiring the IRS to differentiate “secular” from “religious” benefits might lead to entangling inquiries. Hernandez v. Comm’r, 490 U.S. 680, 694 (1989).

\textsuperscript{136} Entanglement captures at least three different concerns: excessive state aid, excessive surveillance, and the fostering of divisive political competition on religious lines. Laycock, supra note 131, at 1392–94.

\textsuperscript{137} Mary Elizabeth Blue Hull, 393 U.S. at 443.

\textsuperscript{138} Id. at 450.

\textsuperscript{139} Id. Justice Brennan referred opaquely to the First Amendment as a source for this rule, citing Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963). Id. at 449.

\textsuperscript{140} Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 718 (1976).

\textsuperscript{141} Id. at 720. Mary Elizabeth Blue Hull and Serbian Eastern Orthodox were subsequently confirmed
other Establishment Clause case law about “[t]he prospect of church and state litigating in court about what does or does not have religious meaning.”

That concern was one elaborated and generalized in the anti-entanglement test for Establishment Clause violations set forth in Lemon v. Kurtzman. Epistemic autonomy protection, that is, prefigured the general contours of Religion Clause jurisprudence in more ways than one.

2. The Erosion of Epistemic Autonomy.—These two lines of cases date largely from the Warren and early Burger courts. But the Court’s view of the Religion Clauses has changed dramatically since then. The changes have undermined the intellectual foundations of case law protecting epistemic autonomy.

In its interpretation of both the Free Exercise and Establishment Clauses, the Court has veered away from treating religion and religious disputation as exceptional human activities that are unique and beyond the proper purview of state authority. It has also increasingly resisted the idea that religion warrants separate and special treatment. Instead it has moved toward a view of religion as singular only because it is historically vulnerable to invidious discrimination. As a result, the Court typically finds no Religion Clause violation unless religious persons or beliefs are facially singled out for

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143. See 403 U.S. 602, 612–13 (1971) (stating that “[a] law may be one ‘respecting’ the [establishment of religion] while falling short of its total realization” because the concern is to avoid “fostering an ‘excessive government entanglement with religion’” (quoting Walz v. Tax Comm’n, 397 U.S. 664, 674 (1970))).

144. See Kent Greenawalt, Religion and the Rehnquist Court, 99 NW. U. L. REV. 145, 146 (2004) (“In a brief decade and a half, we have moved from expansive readings of both of the religious clauses to narrow readings of the Free Exercise Clause and of very important aspects of the Establishment Clause.”).

145. I assume here the widely shared view of constitutional doctrine as implementing the Constitution’s values through a sequence of judicially crafted doctrinal rules that respond to institutional limitations and changing circumstances. See Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 2–3 (1975) (“A surprising amount of what passes as authoritative constitutional ‘interpretation’ is best understood as a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions . . . .”); David A. Strauss, Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877, 885 (1996) (“Our written constitution has become part of an evolutionary common law system, and the common law . . . provides the best way to understand the practices of American constitutional law.”).

Discriminatory treatment. Disparate-effect claims, by contrast, have not fared well. The emphasis on formal equality leaves less room for concepts of separation or concerns about epistemic autonomy.

The landmark case of *Employment Division v. Smith* transformed the Free Exercise Clause’s protection from a right against laws that burden religious liberty to a rule against facial discrimination. In *Smith* the Court held that neutral laws of general applicability are valid under the Free Exercise Clause regardless of their burden on religious liberty. In practical effect, *Smith* established a weak equality rule that is satisfied in all but the small set of cases in which legislators are foolish enough to flout facial neutrality (or almost-facial neutrality). In most instances, it will be feasible to mask impermissible motives.

Moreover, the Court’s sensitivity to anti-endorsement and anti-entanglement concerns has also diminished. Three trends in recent doctrine, palpable largely in Establishment Clause cases, undermine the claim that state action is unconstitutional if it impinges on a religious group’s autonomy and communicates a view about internal doctrinal debates. Coupled with *Smith*’s relaxed view of Free Exercise protections, these Establishment Clause trends mark a retreat from vigorous protection of epistemic religious autonomy.

First, the Court is less sensitive about government action that takes a position on religious meaning. It is less willing to intervene when the state echoes and endorses a majoritarian preference on religion. In 2005, for example, when the Court held that a

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150. *Smith*, 494 U.S. at 882; see also Lukumi Babalu, 508 U.S. at 536 (applying this rule).

151. The relevant Supreme Court precedent for this proposition, *Lukumi Babalu Aye*, is an outlier. In that case, the social and historical context of the local ordinance at issue could not have been more thoroughly imbricated with evidence of animus against a classically discrete, insular, and unpopular minority. *Lukumi Babalu Aye*, 508 U.S. at 526–27. The social meaning of a law will not necessarily be so obvious.

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Texas display of the Decalogue did not violate the Establishment Clause, a plurality of Justices invoked tradition and history as constitutionally sufficient justifications.\textsuperscript{152} Allowing inchoate ideas of tradition to trump otherwise applicable Establishment Clause values allows the state to take sides in important religious disputes if a historically powerful majority faction endorses it. More generally, support within the Court for Justice O’Connor’s anti-endorsement test has waned. Commentators criticize it as analytically incoherent and insufficiently responsive to minority sensitivities.\textsuperscript{153} Justice Scalia has already set forth an alternative view whereby government need not remain neutral between religion and nonreligion but can “acknowledg[e] a single Creator.”\textsuperscript{154} And a plurality of the Court has recently indicated an openness to some kinds of religious endorsement on the ground that “[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.”\textsuperscript{155} As the Court becomes less troubled by the expressive effects of state action on religious matters, it becomes less likely to take umbrage at the disruption of epistemic autonomy wrought by counterterrorism enforcement actions.

Second, the Court, in another line of cases, has authorized state-funding mechanisms that aggregate private choices in ways that set the state’s imprimatur upon one religious practice or another. In so doing, the Court has created another vehicle for majorities to give expressive effect to their religious preferences. As a result, it has corroded a little further the doctrinal grounds for treating incursions on epistemic autonomy as problematic. In 2002, the Court sanctioned government educational aid to parochial


\textsuperscript{153} See, e.g., Van Orden, 545 U.S. at 695–97 (Thomas, J., concurring) (criticizing the endorsement test). In the academic literature, endorsement has critics, see Feldman, supra note 146, at 710–18 (arguing that endorsement does not protect against certain forms of exclusion but that there is no reason religion should be singled out for endorsement-related protection), and putative reformers, see Adam Samaha, Endorsement Retires: From Religious Symbols to Anti-sorting Principles, 2005 SUP. CT. REV. 135, 144–58.


\textsuperscript{155} Salazar v. Buono, 130 S. Ct. 1803, 1818 (2010) (plurality opinion). But see id. at 1832–33 (Stevens, J., dissenting) (applying the endorsement test). The Court further diluted the endorsement test by suggesting that “text-based [public] monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable.” Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1135 (2009).
schools on the condition that the aid is “neutral with respect to religion[] and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice.”\(^{156}\) Then-Chief Justice Rehnquist explained this result by asserting that “numerous independent decisions of private individuals” do not add up to any “imprimatur of government endorsement.”\(^{157}\)

But Chief Justice Rehnquist’s analysis is incomplete. By gerrymandering “private-choice” mechanisms, the state can easily endorse one form of religious practice over others. The private-choice exception thereby enables state endorsement and entrenchment of one religious group. Neutrality at the level of individual choice does not entail neutrality in the treatment of competing religious collectivities. For the state chooses in which domains—education, health, prison services—private choice will be made available. And it can use this choice for distributive ends. As Justice Jackson pointed out in the first case incorporating the Establishment Clause against the states, state funding for religious educational institutions predictably aids certain faiths because only some sects maintain schools.\(^{158}\) A foreseeable result is state aid predictably flowing to some religious organizations, which can develop economies of scale, secure a larger market share of the social service in question (e.g., education), and discourage other faith groups from entering the same market.\(^{159}\) Deciding to introduce vouchers for schooling but not health care, hence, aids certain sects over others. The possibility of private choice is not neutral as between religions. But the Court to date has declined to register the risk that

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\(^{156}\) Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002); see also Mitchell v. Helms, 530 U.S. 793, 809–10 (2000) (plurality opinion) (stating that neutrality toward religious groups is required to ensure that no endorsement of religion has occurred).

\(^{157}\) Zelman, 536 U.S. at 655.

\(^{158}\) Everson v. Bd. of Educ., 330 U.S. 1, 20 (1947) (Jackson, J., dissenting) (arguing that an aid program discriminated because the New Jersey scheme in question “authorize[d] disbursement of . . . taxpayer’s money . . . to those who attend public schools and Catholic schools”). The extent to which school vouchers, for example, can yield predictable effects over time is debated. See Vincent Blasi, Vouchers and Steering, 18 J.L. & POL. 607, 619–20 (2002) (drawing attention to the differing opinions about the long-term effects of vouchers on schools’ independence). From early in the twentieth century, the no-aid principle was intended to control distributional outcomes and to stop financial distributions to Catholics. See Jeffries & Ryan, supra note 110, at 312–17 (describing the evolution of Protestant and Jewish opposition to distributions to Catholics and the general public secularist interest in limiting distributions in order to protect public education).

private-choice mechanisms alter the market in religious beliefs.\textsuperscript{160} Nor is it willing to inquire into how a private-choice scheme might be intentionally constructed so as to advantage one sect over others.\textsuperscript{161}

Finally, although entanglement was initially one of three tests for Establishment Clause violations,\textsuperscript{162} the Court no longer applies a freestanding entanglement test.\textsuperscript{163} In \textit{Agostini v. Felton},\textsuperscript{164} the Court assimilated “entanglement” into its analysis of a law’s effect.\textsuperscript{165} Entanglement is now a second-order justification for declining to scrutinize closely a sectarian recipient of state funds and hence a rationale for relaxing the judicial regulation of private-choice programs recently endorsed by the Court.\textsuperscript{166} The Court has also rejected challenges to substantial regulation of religious entities’ internal affairs in the course of general regulatory measures or the disbursement of special benefits.\textsuperscript{167}

\textsuperscript{160} In \textit{Zelman}, Chief Justice Rehnquist acknowledged the risk that financial incentives might skew a program toward religious schools but concluded that so long as “neutral, secular” criteria were used no constitutional problem obtained. \textit{See Zelman}, 536 U.S. at 653–54 \& n.3 (noting in addition that the Cleveland voucher program “in fact create[d] financial disincentives for religious schools,” which received less funding than community or magnet schools).

\textsuperscript{161} At the time of this writing, the Supreme Court has \textit{sub judice} a challenge to an Arizona school voucher system that raises a version of this concern. \textit{See} Garriott v. Winn, 130 S. Ct. 3324 (2010); Ariz. Christian Sch. Tuition Org. v. Winn, 130 S. Ct. 3350 (2010) (both granting writ of certiorari).


\textsuperscript{164} 521 U.S. 203 (1997).

\textsuperscript{165} \textit{Id.} at 232–33. Arguably, the end was visible earlier. \textit{See} Ripple, \textit{supra} note 162, at 1208–14. \textit{Agostini} abandoned the idea that a prohibition on entanglement reflected a value distinct from the no-aid and no-harm elements of the Establishment Clause. Justice Souter commented that excessive focus on entanglement in \textit{Aguilar} “obscured” constitutionally salient facts. \textit{Agostini}, 521 U.S. at 242 (Souter, J., dissenting).

\textsuperscript{166} \textit{See} Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion) (stating that “inquiry into the [state aid] recipient’s religious views . . . is not only unnecessary but also offensive” because “courts should refrain from trolling through a person’s or institution’s religious beliefs”). The \textit{Mitchell} plurality picked up a thread initially developed in cases concerning property-tax exceptions and aid to tertiary educational institutions. \textit{See Roemer}, 426 U.S. at 748 n.15 (“The importance of avoiding persistent and potentially frictional contact between governmental and religious authorities is such that it has been held to justify the extension, rather than the withholding, of certain benefits to religious organizations.”); \textit{Walz}, 397 U.S. at 691–92 \& n.12 (Brennan, J., concurring) (noting that state cessation of exemptions “might conflict with the demands of the Free Exercise Clause”).

By contrast, judicial inquiry into religious belief is now commonplace. Under the Religious Freedom Restoration Act (RFRA), courts must ascertain what constitutes a “substantial[] burden” on a person’s “exercise of religion.” This test means that RFRA cases plunge courts into religious exegesis. “[T]heological questions are begged throughout the testimony and opinions” in RFRA cases. And judges “confidently assert[] the entire and complete right of every American to believe as she or he chooses while at the same time thoroughly enjoying arbitrating among competing views.” The mere existence of the RFRA dilutes the force of entanglement concerns because it makes entanglements a routine part of federal court litigation notionally aimed at protecting religious liberty. Courts are becoming acclimatized to such entanglement, which obviously no longer provides an independent ground for invalidity on constitutional grounds. Rather, entanglement merely functions as a supernumerary factor in a constitutional calculus driven by extrinsic considerations.

C. Conclusion

This Part began by identifying two constitutional harms to individuals and religious communities respectively from the government’s reliance on religious speech as a signal in counterterrorism policing. It argued that these harms are plausibly at stake each time the federal government relies on religious speech as a signal in counterterrorism. Nevertheless, the individual harm, which takes the form of a chilling effect and an incursion on individual dignity, is not a significant marginal cost beyond the necessary expenditures of a criminal prosecution or other enforcement action. By contrast, the impact on a religious community’s interest in epistemic autonomy—i.e., free development of norms and beliefs independent of state interference—could be


substantial. Religion Clause doctrine, developed first in cases concerning the state’s treatment of religious property, recognizes and protects this epistemic autonomy interest. But that doctrine has been corroded by changes in Religion Clause doctrine. Epistemic autonomy is now unlikely to command substantial respect or protection in the federal courts. The government has little reason to factor in the costs to free speech or religious autonomy interests when it designs its policy responses to domestic terrorism.

This is not an unfamiliar result. Doctrine falls short of full specification or protection of constitutional norms for many reasons, including a Thayerian respect for legislative judgment or other “institutional concerns.” More importantly, the result of the analysis of this Part accords with the general approach taken by courts to constitutional rights imperiled by novel security policies adopted in the wake of the September 11 attacks. Courts have not emerged as robust defenders of individual liberties post-9/11. Even in areas in which judicial pushback has been seemingly robust, such as in the exercise of habeas corpus jurisdiction, the Supreme Court’s position may amount to more rhetoric than substance. In part, this may be because the Court has long been reluctant to regulate investigatory, prosecutorial, and immigration discretion, even when core constitutional liberty interests are at issue. Confrontations with law enforcement tend to be costly for the court’s public reputation. And these costs will be especially high in the wake of 9/11.


175. *See, e.g.*, Hartman v. Moore, 547 U.S. 250, 260 (2006) (holding that, for a retaliatory-prosecution case, once a claimant has made a prima facie showing of retaliatory harm, if the defendant official can show that “retaliation was not the but-for cause of the discharge, the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official’s mind”); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999) (holding that the doctrine of constitutional doubt does not require that 28 U.S.C. § 1252(g) be interpreted to permit immediate review of a respondent’s selective-enforcement claim); United States v. Armstrong, 517 U.S. 456, 462 (1996) (holding that Rule 16(a)(1)(c) of the Federal Rules of Criminal Procedure does not require the government to permit discovery of documents material to the “defense” of a selective-prosecution claim).

176. For example, the Warren Court’s criminal procedure cases provided a centerpiece for Richard Nixon’s presidential campaign, which in turn led to a change in the Court’s personnel and thus direction. *See Lucas A. Powe, Jr., The Warren Court and American Politics* 410 (2002).
Further, judicial responses to national security have not been acoustically separated from other bodies of law. “[T]here is nothing sui generis” about the federal bench’s responses to post-9/11 security policies. 177 Judicial responses to post-9/11 policies echo federal courts’ approaches to other complex state institutions with rights implications. 178 At the same time, the increasing concern for security bleeds over into other doctrinal areas, weakening rights protections that are only tangentially related to terrorism risk. 179 Consider the Fifth Amendment right against self-incrimination. In recent cases, the Court has made it easier for law enforcement to demand identification 180 and to secure waivers of the right in custodial interrogations. 181 By extension, it might be predicted that the judicial response to 9/11 will only weaken religious liberty interests.

Finally, there is little public or political pressure on the courts to recognize and remedy harms from the signaling function of religious speech. Public concern about counterterrorism law enforcement (to the extent that it exists) generally focuses on prosecutorial or enforcement actions that discriminate on racial or religious grounds. 182 Discriminatory enforcement and profiling are familiar and resonant criticisms of American law enforcement. 183 They are politically potent and recognizable, albeit intractable. 184 By contrast, the effects of using religious speech as a signal in counterterrorism enforcement are neither easy to identify nor plainly visible. The practice is partially buried in enforcement protocols. It generally comes to public attention only sporadically in geographically and temporally dispersed criminal trials. Reliance on

178. Id. at 257–65.
179. See, e.g., id. at 267–72 (discussing Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), as an example of the impact of security concerns on transsubstantive rules, such as civil pleading requirements).
181. See Berghuis v. Thompkins, 130 S. Ct. 2250, 2262–63 (2010) (finding a waiver of the right against self-incrimination based on a one-word answer given after two hours and forty-five minutes of silence in the face of questions).
182. See Gross & Livingston, supra note 4, at 1415 (defining “racial profiling”—at least the kind that provokes public outrage—as “whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person” because of his or her racial or ethnic background).
184. The Hayat case was criticized by the Muslim community of Lodi, California, where Hayat lived, as an instance of discrimination—not as a failure of interpretation. MacFarquhar, supra note 39.
religious speech as a signal in counterterrorism is as a result unlikely to precipitate public
outrage or pressure for reform either by legislation or through interest-group litigation.\footnote{185}
Whatever harm flows from the practice will instead be externalized onto the relevant
minority religious community.\footnote{186}

IV. Selecting the Optimal Signal for Domestic Counterterrorism

Government recourse to religious speech as a proxy in domestic counterterrorism
may not collide with constitutional doctrine, but does it provide an efficient signaling
mechanism? This Part switches from a legal, doctrinal lens to an institutional- and policy-
design inquiry. It considers whether law enforcement entities indeed have lighted on the
optimal signal for their aims. Recall that prosecutors and police turned to religious speech
relatively quickly after 9/11.\footnote{187} To minimize search time and costs, they may have
grapsed the most readily available, and the most obvious signal. If executive officials
came to rely on religious speech by default as the most obvious tool at hand, then
officials may not have considered the full range of possible signaling options. Moreover,
legislators and executive officials did not benefit from the new empirical research into the
dynamics of terrorism that emerged after 9/11. At a minimum, therefore, the
circumstances under which religious speech was adopted as a signaling device should
counsel for caution. Religious speech may not in fact be the most efficient signal for
resolving epistemic uncertainties in domestic counterterrorism.

This Part analyzes two reasons for questioning reliance on the signaling function of
religious speech. It further suggests that governments may be better off eschewing such
reliance and turning instead to a closer study of suspects’ associations to resolve the

\footnote{185. Commentators from across the political spectrum noted the lack of public reaction to the trial of
Ali al-Timimi. \textit{See, e.g.}, Debra Erdley, \textit{Al-Timimi Verdict Turning Point in Legal War on Terror}, TRIBLIVE
attorney in saying that the Muslim community “seem[s] resigned to what’s going on” and that they no
longer expect fair trials); Daniel Pipes, \textit{Convicting [Ali al-Timimi,] the “Paintball Sheikh,”}
DANIELPIPES.COM (May 2, 2005), http://www.danielpipes.org/2579/convicting-ali-al-timimi-the-paintball-
sheikh (observing that “the mainstream media stayed resolutely away from the case”).

186. \textit{See supra} notes 104–108 and accompanying text; \textit{cf.} Floyd D. Weatherspoon, \textit{Racial Profiling of
African-American Males: Stopped, Searched, and Stripped of Constitutional Protection}, 38 J. MARSHALL
L. REV. 439, 459 n.125 (2004) (summarizing congressional findings that racial profiling causes members of
minority communities to “experience fear, anxiety, humiliation, anger, resentment, and cynicism when they
are unjustifiably treated as criminal suspects”).

187. \textit{See supra} Part II.
signaling problem. The first reason is institutional: Government interpretation of religious speech is likely to be characterized by a high error rate because of the relative lack of institutional knowledge, the predictable incentives of law enforcement officials, and the semantic complexity of religious speech. The discrete interpretative error manifested in Hayat’s case, that is, is probably not an outlier.

Second, religious speech may not, in any event, be the optimal signal for terrorism—association may be a better signal. There is a rich and increasingly sophisticated empirical literature about terrorism that casts some light on the signaling question. It suggests that religious speech or conduct plays only a tangential role in the etiology of terrorism. Its inconsistent incidence in terrorism cases provides scant basis for inferring the correlation that current government practice presupposes. To the contrary, the empirical and social science literature suggests that a terrorist’s path generally passes through what Louise Richardson calls a “complicit surround”: an insular group with distinctive, even idiosyncratic, normative and ethical characteristics that influence the individual turn to political violence. There is surprising convergence on this finding. While its validity should remain open to new challenges based on new empirical evidence, there is sufficient consensus in the literature to suggest that it is certain forms of association, and not religious speech, that will be correlated with terrorism. At a minimum, this casts current counterterrorism practice into doubt. Moreover, it suggests that law enforcement should reorient toward the mapping and understanding of social networks and away from a preoccupation with religious speech. This Part concludes by considering what it would entail for law enforcement entities to retool their reliance on religious speech as a signal in counterterrorism.

A. The Error Rate in Current Signaling Practice

Even if religious speech provides an accurate signal for counterterrorism, it may be better for the state to use a different signal. This will be the case if the government cannot operationalize the correlation between religious speech and risk. Indeed, it is likely that the government will have high error rates in handling religious speech for three separate

188. See supra notes 38–57 and accompanying text.
reasons. First, religious speech is more complex and liable to misunderstanding than other nonreligious discourses. Second, in the American context there has been little state investment in developing a competency in religious interpretation. To the contrary, constitutional theorists and scholars have long insisted on the incompetence of the state in religious matters, providing an affirmative reason for not investing in such expertise. By now, this may have become a self-fulfilling prophecy. Finally, the distribution of incentives within policing and prosecutorial institutions will predictably increase the rate of error. These three reasons suggest that religious speech may not be an optimal signal for our government even if it might be an effective tool in the hands of some ideal government.

First, the risk of interpretive error is especially high with respect to religious speech because of its origins and nature. In the three main monotheistic faiths, most religious texts, doctrine, and dogma have survived centuries or more. Over extended use in different cultural and historical circumstances, they have accrued multiple and potentially inconsistent meanings. It is possible that religious texts must be especially open textured and receptive to reinterpretation and reappropriation if they are to maintain their relevance through changing times (because if they are not, they fall out of use). That is, there may be a selection effect that favors hermeneutic malleability. Even without adopting an ambitious account of religious texts’ evolution, it still seems plausible to posit that as a general matter, religious texts are likely to be more semantically elastic than the mine run of normative or political vocabulary.

By way of example, consider the word *jihad*. An Arabic word literally meaning “striving,” the term jihad is used in the Koran to refer in some places “to disputation and efforts made for the sake of God and in his cause” and, in other places, to the conduct of war related to the exercise of a communal duty. In the seventh century, the term

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190. Cf. Michael Pye, *Problems of Method in the Interpretation of Religion*, 1 Japanese J. Religious Stud. 107, 120–21 (1974) (“All sophisticated religions experience some degree of tension between the doctrinal norms and formulations which they have inherited and the changing needs of the times. This results in a constant string of new interpretations.”).


192. Id. at 21; see also Fred M. Donner, *The Sources of Islamic Conceptions of War* (“The Qur’an makes... frequent reference to ‘struggle’ or striving[,] (jihad and other derivations), by which physical confrontation or fighting appears often—but not always—to be intended.”), in *Just War and Jihad*:
evolved into a referent for a larger body of legal doctrine analogous to *jus in bello* and *jus ad bellum* in the Western legal tradition. More modern jurists, however, propounded another, much more expansive, understanding of jihad to justify terrorism. They draw on another distinctive strand of theological thought beginning with the thirteenth century Damascus-based scholar Taqī-d-dīn Ahmad ibn-Taymiyya. By contrast, yet another denomination, the ascetic Sufi tradition, uses the term “greater Holy War” (i.e., jihad) to describe the “constant struggle against the *nafs*, the ‘soul’—the lower self, the base instincts.” However it is generally used now, the term jihad clearly has a rich history that lends itself to more than one interpretation.

The second reason to posit that error rates may be high is related to the first: There is a long tradition in American constitutional law warning that the state is especially likely to make mistakes when it interprets religious texts. Whether or not this prediction was true when first made, it is plausible to posit now that the tradition has discouraged government from investing in expertise in religious speech. The prediction has become self-fulfilling.

Longstanding accounts of religious liberty in constitutional theory underscore a special government fallibility in religious matters. In the *Memorial and Remonstrance Against Religious Assessments*, James Madison warned that “the Civil Magistrate is [not]...
a competent Judge of Religious Truth." He was echoing John Locke’s 1689 first letter on toleration as well as an older Christian theological vein. The assumption of state incompetence in religious matters is widely echoed today by the courts and analysts of the Religion Clauses. The Supreme Court has repeatedly cautioned that “it is not within the judicial function and judicial competence to inquire whether [one person or another] more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.” Commentators concur. Michael McConnell posits that “government cannot be a competent judge of religious truth because there is no reason to believe that religious understanding has been vouchsafed to the majority, or any governmental elite.” And Kent Greenawalt, in a recent comprehensive treatment of the Religion Clauses, finds general agreement about the “limited competence of secular courts” in matters of faith. There is little dissent, in short, from the proposition that the state is not competent in matters of religious meaning.

The Madisonian discounting of governmental knowledge of religion rests on an ambitious and sophisticated epistemological account of religion. Yet, there is no need to endorse that sophisticated account to conclude that Madison may now be correct. Even if there is nothing special about religious meaning, there has long been a broad consensus that the government is not competent in the field of faith. Governments, at least in the United States, have scant incentive to accrue such knowledge. Long-standing pessimism about the state’s competence in religious matters yields a self-confirming result:

197. James Madison, Memorial and Remonstrance Against Religious Assessments (“Because the Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world.”), reprinted in 5 THE FOUNDERS CONSTITUTION 83 (Philip Kurland & Ralph Lerner eds., 1987).
200. Thomas v. Review Bd. of the Ind. Emp’t Sec. Div., 450 U.S. 707, 716 (1981); see also United States v. Ballard, 322 U.S. 78, 86–87 (1944) (“Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs . . . . If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.”).
202. 1 GREENAWALT, supra note 124, at 262. Other commentators provide specific grounds for concern about the status and treatment of religious identity. See, e.g., Blasi, supra note 158, at 613 (“[R]eligion remains as a distinctively dangerous political force, even as it serves for many individuals as an important source of communal identity, personal understanding, and comfort.”).
underinvestment in religious knowledge. Quite apart from more ambitious Madisonian
theories, this diachronic dynamic creates doubt about government’s ability to deal with
religious terms accurately.

The third and final source of error lies in the institutional context in which religious
speech is used as a signal. Absent the development of a centralized stock of religious
knowledge, decisions about how to interpret religious speech lie in the hands of
individual investigators and prosecutors. Their incentives push them toward finding
experts such as Khaleel Mohammed, the expert witness who testified in Hayat’s case,
who will confirm that costs sunk into investigations and prosecutions have been well
spent.203 To the extent that government now must rely on outside experts, it risks
compounding rather than mitigating error costs. Jurors, who are generally relied on to
filter out false positives proffered by the government,204 are unlikely to catch errors.
Moreover, to the extent that government must overcome a past failure to invest in
religious competence, its current incentives mean that any investments henceforth
undertaken likely will be tailored to maximize convictions rather than accuracy.

As a threshold matter, there is reason to be skeptical about the decentralized manner
in which decisions about religious speech’s meaning are made. The decision to hire an
expert for a terrorism trial, for example, is made on the retail level, not currently by a
centralized mechanism. The resulting dispersion of authority creates opportunities for
distortion. Pooling discretion at the base of a bureaucratic chain always makes it difficult
to determine whether animus or bias has influenced decision making. William Stuntz has
observed that “discriminatory policing is much harder to combat when the police deal
with individuals” because the retail is much more costly and intractable to monitor than
the wholesale.205 While Stuntz was focused on racial discrimination, the same holds for
religious animus. Writing about the distinct and different problem of discriminatory

203. See Waldman, supra note 7, at 89 (stating that the prosecution in Hayat’s case felt that a prayer
found in Hayat’s wallet was so critical to the case that the prosecution hired Mohammed—who affirmed
that the prayer had no other use than in connection with violent jihad—to interpret it).

trial system is that ‘the jury is the lie detector.’” (quoting United States v. Barnard, 490 F.2d 907, 912 (9th
Cir. 1973))); Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891) (stating that jurors “are presumed to be
fitted for [their task] by their natural intelligence and their practical knowledge of men and the ways of
men”).

allocation of subsidies for religious activities, Douglas Laycock argued that “discretion threatens religious liberty” by enabling line drawing distorted by bias.206 In the context of federal criminal prosecutions, for example, it is difficult to ensure that the diverse Assistant U.S. Attorneys making decisions about who to call and use as an expert will not exercise that discretion in ways that maximize the chances of conviction rather than the accuracy of trial results.207

Moreover, there are plausible reasons for being skeptical of the market for expertise that prosecutors must tap in these cases. The provision of terrorism expertise is lucrative.208 It is reasonable to assume that it will attract rent-seeking interest groups. Anecdotal evidence suggests state and local police departments depend on “self-described experts whose extremist views are considered inaccurate and harmful by the FBI.”209 By definition, a government ill equipped with the relevant knowledge cannot effectively screen out rent-seeking “experts.” Further, there is little empirical evidence that government imposes demanding requirements in terms of formal credentials.210 Anecdotal evidence from other countries with longer experience with Muslim minorities supports this skepticism.211 The federal Office for the Protection of the Constitution (BfV) in Germany, responsible for domestic counterterrorism, for example, has also been criticized for its incorrect translation of monitored religious groups’ documents, which have yielded accusations based on weak evidence.212


207. There is no reason to believe that the adversarial system will throw up the best available expertise to enable a fact finder to resolve an empirical question. See Christopher Tarver Robertson, Blind Expertise, 85 N.Y.U. L. REV. 174, 184 (2010) (arguing that “[t]hrough selection, affiliation, and compensation biases, litigants make experts more favorable but less accurate compared to their base rates of accuracy in the real world”).


210. Bartosiewicz, supra note 208 (describing one expert who lacked formal academic credentials and noting that those with credentials are often reluctant to take sides).

211 Elected officials generally evince low levels of understanding of Islam and Muslim constituencies. See Lorenzo Vidino, The New Muslim Brotherhood in the West 102-04 (2010).

212. INT’L CRISIS GRP., ISLAM AND IDENTITY IN GERMANY 17 (2007), available at
Countervailing incentives may mitigate these distortions. Government officials clearly have a strong incentive to prevent terrorist attacks and a strong fear of being blamed if they fail. But there is reason to doubt the latter constraint’s effectiveness. As a threshold matter, the costs and consequences of policy failure are not evenly distributed so as to encourage efficient policy responses. While the costs of developing a correct understanding of religious speech in any particular case fall on one official alone, blame in the case of a terrorist attack is dispersed widely. High-level, visible officials are more likely than line officials to be publicly held to account. Perceptive counterterrorism officials will have observed that few officials suffered due to their failure to prevent the September 11 attacks. For example, the 9/11 Commission highlighted institutional problems, rather than isolating and blaming particular individuals.\footnote{See 9/11 COMMISSION REPORT, supra note 26, at 73–107 (describing the evolution of counterterrorist activities in the United States and noting institutional failures in law enforcement, the FAA, the U.S. Intelligence Community, the State Department, the Department of Defense, the White House, and Congress that impaired effective counterterrorist efforts).} Moreover, there is scant evidence that the federal intelligence apparatus in fact can effectively respond to evolving threats. To the contrary, a leading political science account suggests that intelligence agencies suffer from a sclerosis that has prevented them from overcoming Cold War-era mindsets and investment strategies.\footnote{See generally AMY B. ZEGART, SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11, at 49–56 (2007) (describing how government agencies do not experience the market pressure to adapt that private firms experience). This was the case even before 9/11. See AMY B. ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JSC, AND NSC 9 (1999) (“[T]he modern American national security apparatus has not performed up to par. . . . We do not need a theory of optimal agency design to reach this conclusion.”).} As recent “near misses” suggest, American counterterrorism bureaucracies appear simply to be quite bad at adapting to new circumstances.\footnote{See, e.g., Ben Feller, Obama Acknowledges More ‘Red Flags’ in Flight Plot, BOSTON.COM, Jan. 6, 2010, http://www.boston.com/news/nation/washington/articles/2010/01/06/obama_acknowledges_more_red_flags_in_flight_plot/ (quoting President Obama as saying that the Intelligence Community failed to “connect [the] dots” and prevent an attempted bombing by Umar Farouk Abdulmutallab).}

In sum, the distinctive characteristics of religious speech and the institutional environment in which it is used as a signal for counterterrorism ends will predictably yield a high error rate. In turn, a high error rate means that even if religious speech is
otherwise reliable as a signal, the government should be cautious before adopting it to that end.

B. The Choice of Optimal Signal for Domestic Counterterrorism

Even if law enforcement could overcome these hurdles, there is still the question of whether religious speech is indeed the optimal signal for counterterrorism ends. This subpart suggests that it is not. Mounting empirical evidence points away from a correlation between religious speech and terrorism, and instead highlights the importance of association—the immediate, insular small groups to which a person is closely linked—in the development of terrorist violence.

This argument proceeds in four parts. The first introduces basic theories of signaling in conditions of asymmetric information from economic theory. The second addresses the question whether religious speech provides an effective signal. The third part looks at empirical and social science evidence about what does correlate with political violence. The final part considers constitutional objections to the use of association.

1. Signaling as a Solution to Information Asymmetries.—Governments are searching for a readily observable trait that reliably correlates with terrorist risk in order to sort between those who may warrant targeting for investigation or prosecution and those who do not. To understand solutions to the problem, it is helpful to contrast the position of the government to the position of an employer searching for productive employees—a situation that has received much scrutiny in the economics literature.216 An employer looking at a large pool of job applicants is searching for a candidate who will not shirk or misbehave once hired. Like the government, the employer operates in a context of shirk or misbehave than the employer does. Like government, employers seek low-cost signals that reliably sort out false positives in order to hone in on the best candidates for a position. Both the government searching for threats and the employer searching for

216. This is not the only instance in which government confronts a sorting problem. Identifying desired migrants from a larger immigration inflow is another example of the problem. See Adam B. Cox & Eric A. Posner, The Second-Order Structure of Immigration Law, 59 STAN. L. REV. 809, 824 (2007) (describing immigration as an example of a sorting problem where the information relevant to the sorting algorithm is unknown to the state but may be known to the immigrants).
employees confront an unsegregated population and seek to sort for a certain “type” within that population. Crucially, both are concerned that if they identify a signal to discern the favored population, the disfavored population will simply mimic that signal.  

Employers, that is, do not want to rely on some indicia of job performance that less attractive candidates can easily imitate. They must hence contend with two problems: first, the problem of accuracy in the original signal and, second, the fact that even if a signal is accurate it will be mimicked by the disfavored class to the extent that it can no longer serve the sorting function.

In the employer’s case, the sought-after population—i.e., productive potential employees—has an interest in signaling to the employer who they are. But the disfavored population—i.e., less productive employees—will try to mimic that signal so as to persuade the employer that they should be hired and thereby receive higher wages.

The entity seeking to use a signal must account for the strategic behavior of one portion of the population. Both government and employers must pick a signal that minimizes inaccuracy and also limits the strategic behavior of the disfavored class. In both cases, “the fact that actions convey information leads people to alter their behavior” so “even small information costs can have large consequences.”

Economists studying the dynamics of employment markets have developed a number of approaches and solutions to this distinctively bifurcated selection problem. In path-breaking work, Michael Spence identified one solution. He argued that there may be a “signal [that] actually does distinguish low- and high-productivity people and the reason it is able to do so is that the cost of the signal is negatively correlated with the unseen characteristic that is valuable to the employers.”

217. See Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. 460, 463–64 (2002) (describing incentives to either share or hide information regarding educational qualifications by individuals in the Kenyan employment market depending on how the Kenyan government valued education).

218. See id. (“[T]here are incentives on the part of individuals for information not to be revealed, for secrecy, or, in modern parlance, for a lack of transparency.”).

219. Id. at 473.


221. See id. at 1450–53 (noting different approaches to the selection problem).

222. Spence, *supra* note 13, at 437 (emphasis added). Spence emphasized the possibility of “multiple equilibria” in the market.” Id. That is, education does not always function as a signal; its capacity to do so depends on its cost profile.
education fulfills this function under certain conditions. Education is an accurate proxy for the characteristics sought by an employer. Moreover, the cost of obtaining education can be lower for productive candidates than for unproductive candidates. Hence, it is cheaper for a more productive employee to obtain education and to signal her worth than it is for an unproductive employee to mimic that signal. The inverse correlation between productivity and the cost of the signal (education) undercuts the ability of unproductive candidates to mimic the signal.223 By contrast, if education’s costs were identical for productive and nonproductive job candidates in the market, the latter would mimic the educational investments of their more productive peers.224 Education in that case would no longer play a useful signaling function.

The key to generalizing this model is the existence of two facts: (1) the appearance of the signal is positively correlated to the desired trait, and (2) the cost of the signal is negatively correlated with the underlying trait.225 It is, therefore, a necessary but not sufficient condition for an action to be correlated with a specific trait for it to function as a signal. There must also be a negative correlation between the favored trait and the cost of acquiring the signal in order to preclude strategic mimicry.

2. Religious Speech’s Limited Signaling Function.—It should be immediately apparent from this model that religious speech cannot play an effective signaling role. Religious speech fails to meet the second necessary criteria for an effective signal: the cost of either using or avoiding stipulated forms of religious speech is not correlated in any way with the characteristic government seeks to identify. It is not meaningfully more expensive for a terrorist to avoid telltale forms of religious speech than it is for a nonterrorist to do the same. A terrorist group with even a modicum of strategic sense

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223. If education is too expensive for either high- or low-productivity workers, it will obviously not serve the same function.
224. Id. at 440.
225. See DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 123 (1994) ("Employers are most likely to be able to draw [positive] inferences when there is an action that industrious applicants can take that is more attractive to them than to lazy applicants."); Nick Feltovich et al., Too Cool for School? Signalling and Countersignalling, 33 RAND J. ECON. 630, 631 (2002) (noting that standard models conclude that “in a separating equilibrium, ‘high’ types . . . send a costly signal to differentiate themselves from lower types").
would instead encourage its agents to eschew forms of religious behavior that mark them out as possible suspects.\textsuperscript{226}

The signaling function of religious—almost always Islamic in the current context—speech in counterterrorism might alternatively be predicated on the claim of a correlation between terrorist violence and Islamic texts on the assumption that for Muslims these texts are costly to avoid. Some commentators have indeed contended that there is a close connection between Islam as a faith and violence, quite apart from the connection between certain texts and violence.\textsuperscript{227} On this logic, religious speech works as a signal because it will be more costly for Muslims than for non-Muslims to abandon such speech.

But there is in fact very little evidence that religiosity, even in general, is correlated with the risk of terrorism. Compare the number of attempted terrorist attacks by Muslim-Americans in the United States since 9/11 with the fact that, according to the Pew Research Center, there are at least 1.4 million Muslim adults age eighteen or older living in the United States.\textsuperscript{228} The sheer disparity (measurable in orders of magnitude) between the number of American Muslims and the quanta of domestic terrorist violence makes a necessary connection between faith and violence implausible.\textsuperscript{229} Further, studies of terrorism fail to find a correlation between terrorism and a particular belief structure such as Islam. As RAND Institute scholar Bruce Hoffman has observed, any claim of a historical correlation between terrorism and religion (let alone a specific faith like Islam) is historically tenuous. None of the eleven identifiable terrorist groups operating in 1968

\begin{itemize}
\item \textsuperscript{226} Al Qaeda indeed did in preparing the September 11 attacks. See \textsc{Jerrold M. Post}, \textit{The Mind of the Terrorist: The Psychology of Terrorism from the IRA to Al-Qaeda} 200 (2007) (describing an al Qaeda training manual that instructs terrorists to avoid certain behaviors in order to “maintain their cover”).
\item \textsuperscript{227} See, e.g., \textsc{Sam Harris}, \textit{The End of Faith: Religion, Terror, and the Future of Reason} 123 (2004) (“Islam, more than any other religion human beings have devised, has all the makings of a thoroughgoing cult of death.”) Ralph Peters, \textit{Betraying Our Dead: Forgetting the Vows We Made}, N.Y. Post, Sept. 11, 2009, http://www.nypost.com/p/news/opinion/opedcolumnists/betraying_our_dead_H6T95r1BTCnkC1UbEdUfsO (arguing that Islam is not a religion of peace, as evidenced by “the curious absence of Baptist suicide bombers”).
\item \textsuperscript{228} \textsc{Pew Research Ctr.}, \textit{Muslim Americans: Middle Class and Mostly Mainstream} 9–10 (2007), available at http://pewresearch.org/assets/pdf/muslim-americans.pdf.
\item \textsuperscript{229} Across Muslim majority countries, support for terrorism also varies widely. \textsc{C. Christine Fair} & \textsc{Bryan Shepherd}, Research Note, \textit{Who Supports Terrorism? Evidence from Fourteen Muslim Countries}, \textsc{29 Stud. Conflict & Terrorism} 51, 53, 58 tbl.2 (2006).
\end{itemize}
was religious, Hoffman notes, and it was not until 1980 that “the first ‘modern’ religious
terrorist groups appear[ed].”230 Time-series studies of the geographic distribution of
global terrorism also illustrate considerable variance uncorrelated to patterns of religious
settlement.231 And a more discrete study of Dutch Muslims found no causal relationship
between religious orthodoxy and political discontent.232

Further evidence of the absence of correlation emerges from comparative analysis of
religious terrorists. Scholars who focus on religiously motivated terrorism instead
emphasize the invariant incidence of terrorist violence across faith groups. No faith has a
monopoly on terrorist violence.233 While religious belief can supply a “transcendent
moralism with which such acts are justified,” the actual content of that belief proves less
important than the social structures and the community of interest that belief binds
together.234 Hence, one study of religious terrorism has identified “remarkable regularity”
in the “organizational design” of Muslim, Jewish, and Christian groups that have resorted
to violence: a thick network of interpersonal linkages that enables “mutual aid.”235

This anticipates a point developed at greater length in the following section: What enables
the commission of terrorist violence is a person’s network of immediate associations, not his
or her particular beliefs. While religious belief can play an important functional part of
the process of endorsing the use of political violence, its actual content is not terribly
important in accomplishing that end.

230. BRUCE HOFFMAN, INSIDE TERRORISM 84–85 (rev. & expanded ed. 2006); see also MATTHEW
CARR, THE INFERNAL MACHINE: A HISTORY OF TERRORISM 239 (2006); ALAN B. KRUEGER, WHAT MAKES
among the many potential sources of the grievances that lead to terrorism. They are not the only
reason . . . [and] are not specific to any one religion.”).

231. See Gary LaFree et al., Cross-National Patterns of Terrorism: Comparing Trajectories for Total,
countries with the highest total number of terrorist attacks between 1970 and 2006 as Colombia, France,
India, Israel, Northern Ireland, Pakistan, Russia, Spain, Sri Lanka, and Turkey).

232. See MARIEKE SLOOTMAN & JEAN TILLIE, INST. FOR MIGRATION & ETHNIC STUDIES, PROCESSES
http://www.dmo.amsterdam.nl/publish/pages/85462/processesofradicalisationimes.pdf (stressing that
“orthodoxy does not lead automatically to political discontent (and from there to potential radicalisation),
and vice versa” because “the religious and political dimensions are independent of each other”).

233. See MARK JUEGENSMeyer, TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS
VIOLENCE, at xi (3d ed. 2003) (“Violent ideas and images are not the monopoly of any single religion.
Virtually every major religious tradition . . . has served as a resource for violent actors.”).

234. Id. at 10–11.

235. ELI BERMAN, RADICAL, RELIGIOUS, AND VIOLENT: THE NEW ECONOMICS OF TERRORISM 16
(2009).
This claim of correlation, however, might be amended to yield a narrower hypothesis: that there is a correlation between certain strands of Islam and political violence. Yet the relationship between the specific religious doctrine of sects in Islam and terrorist action appears fluid and contingent. Case studies of more rigidly doctrinaire strands of Islam yield surprisingly little evidence of connection between these traditions and political violence. Connections between violence and the revisionist puritanical Saudi strain of Wahhabism, for example, are slim. The Salafi movement out of which al Qaeda emerges has factions that support and factions that oppose violent political action. One Salafi group has even decreed “a general ban on politico and jihadi publications.” The most comprehensive study of a Western Salafist group currently available rejects the notion that “the uniqueness of Islam” explains political violence and instead favors an explanation focused on the “shared mechanisms of contention” particular to the group at hand, not the contents of doctrine. Investigations of developments among Salafist groups in Egypt also emphasize divisions inside the movement, with prominent leaders of that movement explicitly condemning the actions of al Qaeda, in particular the commission of terrorist attacks. Sects that agree on a political role for Islam diverge about the legitimacy of violence in achieving an Islamic state, and consensus on Islamic doctrine consistently coexists with sharp disagreement about the use of violence. The connection between religious ideology, even defined at

236. See El Fadl, supra note 194, at 10–11 (“Wahhabism and its militant offshoots share both attitudinal and ideological orientations…. But Wahhabism is distinctively inward-looking—although focused on power, it primarily asserts power over other Muslims.”).


238. Wiktorowicz, Anatomy, supra note 237, at 221.


240. See Fawaz A. Gerges, Journey of the Jihadist: Inside Muslim Militancy 224–29 (2007) (describing the fractured Islamist reaction to 9/11); Fawaz A. Gerges, The Far Enemy: Why Jihad Went Global 29–34 (2005) (illustrating the struggle between jihadi leaders about whether their efforts should be focused locally or globally); Peter Bergen & Paul Cruickshank, The Unraveling: Al Qaeda’s Revolt Against bin Laden, NEW REPUBLIC, June 11, 2008, at 16, 18 (describing the repudiation of al Qaeda by Sayyid Imam Al Sharif, the organization’s “ideological godfather”). Similarly, radical Islamists in Libya have also repudiated political violence. Id. at 17.


242. Wiktorowicz, Genealogy, supra note 237, at 75, 87.
a relatively specific level within a particular faith tradition, and attitudes to political violence is therefore thin.

Finally, it is worth noting that studies have also rejected other frequently suggested causes of terrorist violence. The political science, sociology, and psychology literature, for example, uniformly rejects dispositional, psychological accounts of terrorism, i.e., accounts grounded in terrorists’ individualized pathologies.243 Dean Louise Richardson pithily observes that “terrorists, by and large, are not insane.”244 Efforts to build “a terrorist profile” or to predict which individuals will engage in terrorism “have invariably failed.”245 Summarizing recent research, Richardson acknowledges that there are psychological traits common to those who use terrorist violence: “Terrorists see the world in Manichean, black-and-white terms; they identify with others [i.e., as part of a larger communal whole]; and they desire revenge.”246 But it is not clear whether these attitudes are a predisposition for the commission of terrorist violence or whether they are a consequence of having already become committed to terrorist action. Nor is poverty, another frequent suspect, meaningfully correlated with terrorism.247

In summary, not only religion but also other commonly assumed causes of

243. There is a large body of literature on psychological profiling. See MICHAEL P. ARENA & BRUCE A. ARRIGO, THE TERRORIST IDENTITY: EXPLAINING THE TERRORIST THREAT 4 (2006) (noting that research describing those who commit terrorist acts as “intrapsychically flawed, abnormal, and/or psychopathic is rare and typically of poor quality”); id. at 26, 229 (finding “serious limitations” in the focus on individual abnormality); JOHN HORGAN, THE PSYCHOLOGY OF TERRORISM 28–46 (2005) (discussing the limitation of psychology literature on terrorism but stressing the importance of an “environmental context which gives rise to, sustains, directs, and controls it”); MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS 83–91 (2004) (reviewing and rejecting psychological personality explanations); Arie Kruglanski & Shira Fishman, The Psychology of Terrorism: “Syndrome” versus “Tool” Perspectives, 18 TERRORISM & POL. VIOLENCE 193, 195, 200–01 (2006) (noting that “the systematic quest for a unique terrorist personality has yielded few encouraging results” and rejecting the idea of a “uniform socio-psychological phenomenon” of the terrorist “syndrome”); Max Taylor & John Horgan, A Conceptual Framework for Addressing Psychological Process in the Development of the Terrorist, 18 TERRORISM & POL. VIOLENCE 585, 585 (2006) (finding “little or no evidence of particular or distinctive individual qualities being associated with the terrorist”); Charles Tilly, Terror as Strategy and Relational Process, 46 INT’L J. COMP. SOC. 11, 21 (2005) (“If we are trying to explain when, where, and how people actually engage in terror, relational explanations will serve us far better than systemic or dispositional explanations.”).

244. RICHARDSON, supra note 189, at 14–15, 41. Psychologist Marc Sageman’s study found evidence of childhood conduct disorders in a small minority of the sample of Islamist terrorists he studied (four of sixty-one). SAGEMAN, supra note 243, at 80–83.

245. RICHARDSON, supra note 189, at 14–15, 41.

246. Id. at 41; see also id. at 41–44 (noting that these are reasons why individuals join a terrorist group in the first place).

terrorism—such as psychological defects or poverty—all fail to show the characteristics of a signal. They are not positively correlated to the incidence of terrorism. Even if there were proof of a correlation, there is no evidence that the cost of abandoning certain forms of religious speech would be negatively correlated with a likelihood of commitment to political violence. Religious speech, therefore, is a poor fit for the signaling function in counterterrorism.

3. Insular Groups and Terrorist Violence.—Another trait does, however, correlate with the incidence of political violence and has the appropriate cost profile to render it resilient to mimicry. There is growing empirical evidence that the characteristics of a suspect’s close and immediate associations have these two characteristics: Association with individuals who in turn are affiliated with terrorism, or are believed to present terrorist risks, is correlated with the risk of terrorism. Further, because such association is causally linked to the production of terrorism, it is more costly for those wishing to engage in terrorism to give up those associations than for others.

The basic insight was captured in the U.K. Guardian newspaper in late 2006 by humorist Urmee Khan, who offered a list of ten “do’s-and-don’ts” for British Muslims. Number four was “Don’t join groups or clubs”:

Somewhere there is a dusty office in Whitehall whose function is to ban organisations . . . . The room is probably full of mildewed, dusty files about Northern Ireland’s paramilitary groups, and there is no doubt a faded map of Belfast peeling from the wall. But now the dust has been blown off, because there is a use for the office again.

. . . .

If you are a barking mad, dangerous extremist, in a group prepared to countenance violence to get their way, then you better make sure that you are white. For Muslims, this is a no-no. So, to be a fully accredited ordinary, decent Muslim, you should join only the Scouts, the Brownies or—if force is your thing—the British Army. 248

The social science literature strongly suggests that Khan’s wit hits close to the mark. A consensus in that literature exists about one aspect of the process of becoming a terrorist: its connection with insular groups. This consensus suggests that “[i]f we are

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trying to explain when, where, and how people actually engage in terror, relational explanations will serve us far better than systemic or dispositional explanations." In particular, a person’s immediate, intimate circle of association plays an important role in becoming a terrorist: “[T]he process of radicalisation takes place in the framework of a small group of friends.” Associational context correlates better with the incidence of terrorist violence than religious speech. And, as explored in greater detail below, association has the necessary cost profile to limit mimicry: It appears to be difficult to become a terrorist without the appropriate cluster of associations.

The empirical and social science literature on political violence suggests that terrorism is frequently seeded in small groups with distinctive idioms and discourses. “Arguably the most important development for understanding the causes of terrorism are within group dynamics.” Such group dynamics and structures can be observed even within al Qaeda. Within groups, shared and insular idioms, identities, and discourses prove pivotal to terrorism’s etiology. The production of terrorism itself is “undeniably a group process,” in the sense that individuals almost invariably accrue necessary

249. Tilly, supra note 243, at 21. In his larger work, Tilly emphasizes the collective context of contentious political claim making in general. See CHARLES TILLY, THE POLITICS OF COLLECTIVE VIOLENCE 31 (2003) (“[E]very actor that engages in claim making includes at least one cluster of previously connected persons among whom have circulated widely accepted stories concerning their strategic situation . . . .”).


251. JASON FRANKS, RETHINKING THE ROOTS OF TERRORISM 41 (2006); see also ARENA & ARRIGO, supra note 243, at 73–74 (stressing the centrality of “group relationships” because “groups have a more immediate influence on shaping behavior” than traits such as race, religion, or ethnicity); RICHARDSON, supra note 189, at 45 (noting that becoming a terrorist “requires a charismatic leader or a functioning organization to mix these feelings [of simplification, identification, and revenge] . . . and turn them into action”); WIKTOROWICZ, supra note 239, at 14–15 (describing the importance of social networks to recruitment for Islamist groups); HORGAN, supra note 243, at 34, 104–07; Kruglanski & Fishman, supra note 243, at 199–201; Taylor & Horgan, supra note 243, at 590–91, 598 (all noting the importance of group context and emphasizing “gradual socialization” into committing terrorist acts).

252. See ROY, supra note 194, at 50 (“Islamic radical movements are always structured as a sect, with a tight-knit core and a looser network of sympathisers.”); David J. Kilcullen, Countering Global Insurgency, 28 J. STRATEGIC STUD. 597, 603 (2005) (describing al Qaeda as modeled “on a traditional Middle Eastern patronage network” with an intricate “web of dependency” that is “like a tribal group”).

253. See TILLY, supra note 249, at 32 (“[C]onstituent units of claim-making actors often consist not of living breathing individuals, but of groups, organizations, bundles of social relations, and social sites such as occupations and neighborhoods.”); Anthony Oberschall, Explaining Terrorism: The Contribution of Collective Action Theory, 22 SOC. THEORY 26, 27–28 (2004) (noting the importance of organizational capacity for achieving terrorist violence); Jerrold M. Post et al., The Terrorists in Their Own Words: Interviews with 35 Incarcerated Middle Eastern Terrorists, 15 TERRORISM & POL. VIOLENCE 171, 175 (2003) (observing the salience of group identity among the terrorists studied).
incentives and skills to commit terrorist violence within group contexts. These groups may be nested in a larger network structure with independent dynamics. But it is the intimate, insular circle of friends that warrants separate study for its incubational function in relation to terrorism. Absent this distinctive associational context, the literature suggests, terrorism is potentially prohibitively costly to generate.

To understand the central importance of insular groups, consider terrorism’s gestation in purely functional terms (and, solely for the purpose of analysis, stripped of moral implications). Recruitment to terrorism faces at least two obstacles. First, it confronts a collective-action problem. Commission of terrorist violence means a small minority shoulders the cost of political action on behalf of a larger group. Suicide terrorism, for instance, may be collectively rational; individually, it is (generally) considered not. Hence, a collective enterprise such as al Qaeda has quite different incentives when it comes to planning and committing terrorist acts than its constituent members. As one study of suicide bombing has observed, organizations “reap multiple benefits on various levels without incurring significant costs” from attacks—a characterization that would be inapposite applied to the individual attackers. In most cases, collective-action problems ought to render it unlikely that a discrete group will assume risks of political action otherwise spread across a broader population. How can a rational terrorist organization surmount this free-rider problem?

254. HORGAN, supra note 243, at 294.
255. But it not impossible: the claim here is probabilistic, not a matter of formal logic.
256. This is not to suggest that in every group there is a clearly identified facilitator. There are some anecdotal accounts of groups moving collectively toward endorsement and use of terrorist violence, rather than being moved in that direction by the conscious actions of one individual. Some studies of terrorist recruitment among European Muslims, for example, highlight the role of “gatekeepers[,] . . . veteran militants who fought against the Soviets in the 1980s, or radicals who have trained in jihad camps.” Petter Nesser, Jihadism in Western Europe After the Invasion of Iraq: Tracing Motivational Influences from the Iraq War on Jihadist Terrorism in Western Europe, 29 STUD. CONFLICT & TERRORISM 323, 326 (2006); see also Donald Black, The Geometry of Terrorism, 22 SOC. THEORY 14, 16 (2004) (“Pure terrorism is not only collective but well organized.”). But see Kruglanski & Fishman, supra note 243, at 199–200 (observing a variety of leadership, charismatic and otherwise, among terrorist groups).
257. MIA BLOOM, DYING TO KILL: THE ALLURE OF SUICIDE TERROR 76 (2005); cf. id. at 84 (distinguishing between the individual and group rationality of suicide bombing). For an individual, hypothesized posthumous spiritual rewards or the psychic gain of imagining an opponent’s losses might arguably suffice to make an act of suicide terrorism rational.
258. See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 1–3, 7 (1971) (“[W]hen a number of individuals have a common or collective interest—when they share a single purpose or objective—individual, unorganized action . . . will either not be able to advance that common interest at all, or will not be able to advance that interest adequately.”); id. at 33–36
The second obstacle is ethical in nature. Terrorism requires the commission of violence outside the accepted portfolio of political strategies and entails acts that often transgress widely shared ethical boundaries.\(^{260}\) Ethical scruples generally stand in the way of terrorist violence, or at least impose heavy costs on its commission, especially for those that a terrorist organization seeks to recruit from a culture and educational environment that otherwise rejects terrorism. Ethical scruples are often the focus of effective counterterrorism strategy, which have often been focused on persuading potential and actual users of terrorist violence that the latter is morally wrong.\(^{261}\) The United Kingdom takes this approach now. One analyst characterized British counterterrorism policy as bearing “far more resemblance to countering an insurgency than to countering terrorism” because it is aimed at “winning over the communities at the heart of the problem.”\(^{262}\)

It is the distinctive characteristics of small groups that provide the transformative environment for both preferences related to risk taking and also ethical tastes. In Dean Richardson’s evocative phrase, groups are “complicit surround[s].”\(^{263}\) They are environments “in which violence is condoned and even glorified” in ways that reorient individuals toward the willingness to use asymmetrical violence against strangers.\(^{264}\) While it is of course the case that not all small groups serve as incubators for violence, it is also the case that terrorism’s production is regularly linked to a small group environment and that complicit surrounds play a causal role in becoming a terrorist.

Consider first the collective-action barrier to terrorism. As sociologist Michael


260. See Charles Tilly, Terror, Terrorism, Terrorists, 22 SOC. THEORY 5, 5 (2004) (describing terrorism as the “asymmetrical deployment of threats and violence against enemies using means that fall outside the forms of political struggle routinely operating within some current regime”).

261. See Kruglanski & Fishman, supra note 243, at 202–03.


263. RICHARDSON, supra note 189, at 49.

264. Id. Richardson uses the phrase to describe broader public cultures, but it also has resonance here. Cf. Dennis Chong, Values Versus Interests in the Explanation of Social Conflict, 144 U. PA. L. REV. 2079, 2105 (1996) (“Individuals tend to form their views on social issues within the context of specific group memberships.”).
Munger explains, one way of overcoming free-rider problems is by altering tastes. Discussing terrorist recruitment, Munger identifies “culture” as the “shared understanding of something that identifies insiders.”265 It is these shared understandings and distinctive idioms and arguments that are pivotal to terrorism’s production. According to Munger, culture is the vehicle for changing “metaprefere nce[s], in the sense [that] it tells us what we should want to want.”266 For the terrorist recruiter, the complicit surround supplied by a group constitutes the medium for transforming tastes.267 And culture, in the form of shared idioms, understandings, and arguments, furnishes the lever for change.268 As Eric Hoffer, writing in 1951 in the shadow of Nazism and Stalinism, summarized the process: “For men to plunge headlong into an undertaking of vast change, they must be intensely discontented yet not destitute, and they must have the feeling that by possession of some potent doctrine, infallible leader, or some new technique, they have access to a source of irresistible power.”269

Terrorist groups have tools to overcome collective-action problems.270 Reviewing recent research, Max Taylor and John Horgan argue that groups provide cultural reorientation for terrorists. Groups are a “Community of Practice,” i.e., a “structure to understand the emergence of ideological and social control” that can fashion new ideological and practical political commitments.271 Within that framework, the group’s culture influences individual identity and “the meanings that persons attach to the

266. Id. at 144.
267. The salience of culture as a source of tastes and preferences is not limited to terrorism. Lauding networks of shared production, Yochai Benkler argues that such networks provide “shared frames of meaning” through which individuals decide what “institutions and decisions are considered ‘legitimate’ and worthy of compliance and participation,” and “what courses of action are attractive.” YOChai BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 274–75 (2006). Contemporary terrorism involves a similar pooling of ideas and social capital for quite different purposes. Another relevant analytic frame that might be applied here is Pierre Bourdieu’s notion of “habitus.” See PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 78 (Richard Nice trans., 1972) (defining habitus as a “durably installed generative principle of regulated improvisations” that produces regular behavioral patterns).
268. A religious “community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.” Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).
270. In some contexts, this includes provision of nonspiritual services, in the form of material aid to the families and intimates of group members. BERMAN, supra note 235, at 75–78 (describing the use of mutual aid).
multiple roles they typically play.\textsuperscript{272} The group’s tools are “shared symbols” whereby “members partake of common encapsulations of their orientations.”\textsuperscript{273} That common culture creates “interpretative schemata that provide a cognitive structure for comprehending the surrounding environment” and, significantly, “a language and cognitive tools for making sense of events and experiences by interpreting causation, evaluating situations, and offering prescriptive remedies.”\textsuperscript{274} It is, in Clifford Geertz’s famous summation, “context” that makes acts and expressions “intelligibl[e].”\textsuperscript{275} Through group identification, individuals revise their contextualized sense of individual interests.\textsuperscript{276} Acts of violence previously seen as “maladaptive or even self-destructive” are refashioned as rational.\textsuperscript{277}

Some legal scholars have noted the salience of sociolinguistic dynamics to the actions and internal dynamics of other violent or antisocial small groups. Examining the dynamics of criminal conspiracies, Neal Katyal has argued that small-group contexts facilitate transformations of individual preferences and self-identifications as members “tend to refer more to each other than they do to outsiders, listen more to each other, and reward each other more often.”\textsuperscript{278} Katyal also notes that “people are far more likely to experience doubts about their performance and disillusionment when they act as

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\textsuperscript{272} Sheldon Stryker & Peter J. Burke, The Past, Present, and Future of an Identity Theory, 63 SOC. PSYCHOL. Q. 284, 284 (2000). Relevant here, Stryker and Burke describe how the “structure and connectedness” of groups “provides the first level of social structures’ impact on identities.” Id. at 289.

\textsuperscript{273} Lawrence Rosen, The Integrity of Cultures, 34 AM. BEHAV. SCIENTIST 594, 595 (1991). As Alan Krueger notes, terrorists tend to be educated and thus to have developed a political vocabulary. The utterly dispossessed, by contrast, lack the rhetorical arsenal necessary for the turn to violence and thus rarely engage in terrorism. See Krueger, supra note 230, at 7, 46–48 (suggested terrorists are more likely to come from moderate-income and high-income countries than from low-income countries).

\textsuperscript{274} Wiktrowing, supra note 239, at 15–16 (emphasis added).

\textsuperscript{275} Clifford Geertz, The Interpretation of Cultures 14 (1973).

\textsuperscript{276} See Amy Gutmann, Identity in Democracy 14 (2003) (“[R]ecognition of interests often follows from group identification rather than being given simply by the pre-existing interests of individuals apart from their group identifications.”); Post et al., supra note 253, at 176 (“[I]ndividual measures of success become increasingly linked to the organization and stature and accomplishments within the organization.”).

\textsuperscript{277} George A. Akerlof & Rachel E. Kranton, Economics and Identity, 115 Q.J. ECON. 715, 717 (2000). Relevant here, Akerlof and Kranton observe that identity also underlies “a new type of externality.” Id. They give the example of socialization into gender roles, and how a man wearing a dress creates externalities in the form of other men’s anxieties about masculinity. Id. Analogously, an individual recruited to be a terrorist may experience new externalities as a result of exposure to “impure” cultures. These in turn may reinforce his turn toward the group.

\textsuperscript{278} Neal Kumar Katyal, Conspiracy Theory, 112 YALE L.J. 1307, 1317 (2003).
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individuals compared to when they act as groups.” The medium of such transformations is the shared idiom and discursive practice of the group. Elaborating on the idea of group polarization, Cass Sunstein identifies its mechanisms: informational cascades, whereby “small or even large groups of people end up believing something—even if that something is false—simply because other people seem to believe that it is true”; the effect of a “limited argument pool” that also “operate[s] in favor of group polarization”; and the tendency of a group’s members to view themselves in “self-contrast to others.” Through a distinctive way of speaking, groups reengineer individual preferences, often into closer alignment with group interests. This de-emphasis of individual interests, with a concomitant elevation of group-based interests, is concretely how group culture surmounts collective-action problems.

“Culture” within an insular group is also relevant to the second obstacle to recruitment to terrorism violence: the ethical tastes that would normally preclude violence. Terrorist recruitment entails “not only instrumental but also moral justification that would lend it legitimacy above and beyond its instrumentality as a means.” Ideologies inculcated by a terrorist group “relate distant events to immediate behaviour,” vesting specific acts and circumstances with new meaning. The “tight-knit” and “secret[ive]” clusters that constitute terrorist groups furnish an environment for this

279. Id. at 1322.
280. Psychological research, explains Katyal, demonstrates that groups often polarize to “extreme attitudes and behaviors,” and alter members’ perceptions of their own preferences. Id. at 1316–21. There are feedback loops between group identity and group rewards. See, e.g., id. at 1362–63. Group polarization is “a predictable shift within a group discussing a case or problem. As the shift occurs . . . groups coalesce, not toward the middle of antecedent dispositions, but toward a more extreme position in the direction indicated by those dispositions.” Cass R. Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 YALE L.J. 71, 85 (2000) [hereinafter Sunstein, Deliberative Trouble]; see also Cass R. Sunstein, Group Judgments: Statistical Means, Deliberation, and Information Markets, 80 N.Y.U. L. REV. 962, 979–81, 985–86 (2005) [hereinafter Sunstein, Group Judgments] (comparing the function of deliberation in problem solving and the ability of individuals and groups to answer questions correctly).
281. Sunstein, Deliberative Trouble, supra note 280, at 82 (asserting that “[p]eople think and do what they think . . . relevant others think and do” thanks to informational cascades and reputational sanctions).
282. Id. at 107.
283. Id. at 98.
284. See WIKTOROWICZ, supra note 239, at 18 (“For Islamist groups, socialization is thus critical for mobilizing support and activism in the face of extensive costs and risks.”).
286. Taylor & Horgan, supra note 243, at 58, 61.
287. ROY, supra note 194, at 50.
reorientation of ethical tastes. At the same time, groups satisfy a separate taste, supplying a new sense of camaraderie and belonging. Contemporary studies of terrorists also find strong beliefs in the justice of terror as a political strategy. Such new solidarities, indeed, are collateral consequences of the “decentralized norms” and “governance structures” that flourish in complicit surrounds. This also happens in other social groups that adopt violent tactics for expressive ends. In neo-Nazi groups, for example, participants acquire a taste for violence on joining the group. One female neo-Nazi explained, “It is remarkable how fast I shifted my boundaries regarding violence. I used to be against violence, but now it does not cost me a penny to beat up and take out my aggression on someone who represents what I hate.” Quite literally, group membership changes the personal cost of ethical transgression.

These models suggest that small groups could provide the environment for generating terrorism. Empirical case studies of violent Islamic political movements, especially in the recent European context, supplement the theoretical model by showing that complicit surrounds do provide a nurturing environment for terrorism. These studies bear out the theoretical insights about the role of group culture in overcoming collective-

288. Michael Walzer has suggested that “moral life is rooted in a kind of association that military discipline precludes or temporarily cuts off” because of the pressures of conformity, the presumption of superior orders’ validity, and the pervasive need to participate in unreflective coordinated action. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 316 (1977). One way of seeing the moral valence of terrorist groups is an effort to re-create, or even heighten, this aspect of military life.

289. Marc Sageman succinctly calls it the “‘bunch of guys’ phenomenon”: “cliques commonly produce social cohesion and a collective identity and foster solidarity, trust, community, political inclusion . . . and other valuable social outcomes.” SAGEMAN, supra note 243, at 155–57; see also RICHARDSON, supra note 189, at 48 (noting that many activists speak of an “intense feeling of camaraderie within the group”); Chong, supra note 264, at 2110 (“People will sometimes defend values that appear to run against their immediate self-interest in order to preserve social relationships that return long-term benefits.”); cf. Mariano-Florentino Cuéllar, The Untold Story of al Qaeda’s Administrative Law Dilemmas, 91 MINN. L. REV. 1302, 1339–40 (2007) (noting al Qaeda’s use of financial resources to secure loyalty). In his account of joining Hizb-ut-Tahrir, Ed Husain notes that members gained greater social standing within the group for “more extrovert[ed]” expressions of solidarity with the group. ED HUSAIN, THE ISLAMIST 67 (2007).

290. See Kruglanski & Fishman, supra note 243, at 203 (rejecting the idea of a “uniform sociopsychological phenomenon” of the terrorist “syndrome”); Post et al., supra note 253, at 179 (describing how different terrorists justified their actions as a means to affect political change).


293. One example of ethical reorientation is al-Muhajiroun’s use of the doctrine of takfîr, or “the process of declaring a Muslim an unbeliever.” WIKTOROWICZ, supra note 239, at 174. Al-Muhajiroun has developed an intricately exhaustive enumeration of reasons for declaring individuals takfiri, hence, moving them beyond the pale of ethical concern. Id. at 75.
action problems and dissolving ethical hurdles.

In the European context, sociologist Olivier Roy has found that most “militants broke with their own past and experienced an individual re-Islamisation in a small cell of uprooted fellows.” The group responsible for the July 2005 London attacks, for example, coalesced out of an “informal social network” in mosques and bookstores, a network that provided opportunities for the conspiracy’s leader “to identify candidates for indoctrination, even if the indoctrination itself took place more privately to avoid detection.”

Individuals generally portrayed as lone actors also prove to be embedded in intimate networks. The murderer of Dutch filmmaker Theo van Gogh, Muhammad Bouyeri, for example, was no lone actor, despite the solitary, idiosyncratic nature of his crime. He had drifted into the Hofstad Group, “a jihadist group headed by a Syrian radical preacher,” Abu Khatib. Comprising sixteen militants, the Hofstad Group included a spiritual leader and three people who had trained in Pakistan or Afghanistan. What first appeared as the act of a crazed psychopath in fact emerged from a thick local network of social relations and religious ideological commitments.

More relevant data comes from a study by the French sociologist Farhad Khosrokhavar. He conducted detailed interviews with fifteen of the twenty men imprisoned in France based on suspected or confirmed membership in an al Qaeda

294. Roy, supra note 194, at 52; see also id. at 316–19 (describing the formation of networks in Europe and the United States); Gilles Kepel, The War for Muslim Minds: Islam and the West 250 (Pascale Ghazaleh trans., 2004); Olivier Roy, The Politics of Chaos in the Middle East 144–45 (Ros Schwartz trans., 2008) (both noting the possibility of increasing cycles of alienation among Muslim youth in Europe).


296. Bruce Hoffman points out that the “terrorist is also very different from the lunatic assassin, who may use identical tactics,” and distinguishes the “political” goals of a group from the “intrinsically idiosyncratic, completely egocentric and deeply personal” attitude of an individual violent actor, even one such as Sirhan Sirhan (Robert Kennedy’s assassin), who acted for explicitly political ends. Hoffman, supra note 230, at 37. Hoffman argues that an individual acting alone is not properly categorized as a “terrorist.” Id.


298. Nesser, supra note 256, at 334–35. Evidence suggested that the group had planned attacks on Dutch public and governmental sites before being broken up by police. Id.
affiliate, and he found few common social or economic traits. Instead, Khosrokhavar identified shared representations of the world and life and shared idiosyncratic interpretation of symbols, events, and religious texts as the common ground among his interviewees. Through their complicit surrounds, Khosrokhavar’s respondents had developed idiosyncratic views of the world and idioms that would have been hard to develop in more diverse normative and ethical contexts. In another study of five terrorist organizations, Michael Arena and Bruce Arrigo also found that “symbols developed shared meanings within individual groups and among their respective memberships through exposure to history, culture, socialization, and social structure.”

Furthermore, studies of terrorists in the Middle East yield evidence that distinctive discourses and idioms are critical to terrorist groups. In a study of captured Middle Eastern terrorists, for example, Jerrold Post and his colleagues identified a characteristic “framework” and a “common bond of belief” as regularities among the terrorists they profiled. They found a consistent “readiness to merge . . . individual identity with that of the organization in pursuit of their cause.” Once this “clear fusing of individual identity and group identity” occurs, “the organization’s success become[s] central to individual identity and provides a ‘reason for living.’” Similarly, Bernard Rougier’s study of jihadist networks in Lebanon’s Palestinian camps emphasizes “the way preachers played a decisive role in reframing social reality exclusively in religious categories,” transforming “perceptions of self and other.”

Case studies of terrorist histories confirm that groups create and share an internal

300. “Il faut . . . tenter de comprendre les mécanismes subjectifs qui leur donnent leur spécificité, commandant leur représentation du monde et leur vécu, les sentiments religieux qui les animent.” Id. In one of Khoosrokhaev’s fascinating interviews, one informant sketches his view of an unbridgeable gap between Islam and the West and specifically describes the separation as a failure of interpretation: “Il y a une histoire commune entre l’Occident et l’islam mais en fait, rien n’est commun. L’interprétation n’est pas commune.” Id. at 178 (emphasis added).
301. Cf. FARHAD KHOSROKHAVAR, INSIDE JIHADISM: UNDERSTANDING JIHADI MOVEMENTS WORLDWIDE 9–10 (2009) (noting the evidence that shows that “Jihadist cells are formed in relation to ties of family, friendship, local residence, and kinship relations”).
303. Post et al., supra note 253, at 176.
304. Id. at 175.
305. Id.
“context . . . within which [acts and expressions] can be intelligibl[e].” It is the “shared symbols” of particular group cultures that give sense to doctrine and texts, from the throat note in the Hayat case to the Koranic verses and hadith on jihad. Consequently, it cannot be assumed that the meaning assigned by a broader religious culture to a particular text will be shared by a subgroup. The latter may take a more or less aggressive view of a text. In the prosecution of Hayat, by contrast, the state’s expert witness (and the jury) erroneously assumed that speech’s local context had no relevance and that meaning was fungible between different factions and strands of a religious community. The evidence about terrorism’s etiology suggests precisely the opposite: it is idiosyncratic and distinctive local discursive contexts, not universally available religious meanings, that enable the transformation of ethical tastes and preferences. Generalizing inferences from the communal to the individual creates a special risk of error when made without knowledge of an individual’s local circumstances, at least in the absence of countervailing factors.

Empirical evidence, in sum, suggests that the production of terrorist violence is correlated with the presence of an insular group that provides a complicit surround for recruits and enables the reorientation of individuals’ ethical values and normative commitments. Studies from varied disciplinary angles—from empirical sociology to history to rational-actor analysis—all confirm the importance of such groups.

The causal connection between complicit surrounds and the production of terrorist

307. GEERTZ, supra note 275, at 14.
308. Rosen, supra note 273, at 595; see also KHOSROKHavar, supra note 301, at 18 (emphasizing the coherence of “Jihadist ideology”).
309. Winnifred Sullivan observes that the vast majority of religious practice in America is made up of “folkways,” not “high tradition.” SULLIVAN, IMPOSSIBILITY OF RELIGIOUS FREEDOM, supra note 169, at 140–41, 146. In deciding which religious practices to recognize and protect, courts must decide what “counts legally [as] religion.” Id. at 147. Sullivan argues that courts have placed themselves “at odds with the mainstream of American religion” by failing to focus on local practices. Id.
310. See supra text accompanying notes 38–57.
311. Anthropologists have long been acutely aware of “the difficulty of grasping the world of alien peoples—the many years of learning and unlearning needed, the problems of acquiring a thorough linguistic competence” and, perhaps more relevant here, the “both subtle and blatant” ways understanding is “directed or circumscribed by . . . informants.” James Clifford, On Ethnographic Authority, REPRESENTATIONS, Spring 1983, at 118, 122, 135.
312. There may be other factors cutting in favor of wider judgments. For example, al Qaeda and its affiliates have invested in “ideological training.” ROHAN GUNARATNA, INSIDE AL-QAEDA: GLOBAL NETWORK OF TERROR 112–26 (3d ed. 2003). They have “intuitively grasped the enormous communicative potential of the Internet” in spreading their ideology. HOFFMAN, supra note 230, at 214–20.
violence is relevant to the signaling problem in domestic counterterrorism because association, understood in light of this empirical research, shows the two necessary characteristics of an effective signal. First, existence of an appropriate complicit surround—not just any close or intimate circle of associates, but a group where critiques of larger society and justifications of violence are common verbal currency—is positively correlated to the desired trait. Second, it is more costly for the aspirant terrorist to renounce this complicit surround than for others. There is a negative correlation between the cost of repudiating, renouncing, or avoiding such complicit surrounds and the likelihood of becoming a terrorist because complicit surrounds furnish the ethical and organizational tools that enable terrorism. The absence of a complicit surround is an effective signal of the absence of terror risk for law enforcement. Further, it is a signal that is difficult for the aspiring terrorist to mimic. Of course, it is possible to engage in terrorism without the benefit of a complicit surround. The relation is a probabilistic correlation, not a logical entailment. The rising level of concern about domestic terrorism and sleeper cells, however, renders it plausible that in many situations law enforcement will find some value in the use of associational context as a signal to sort for possible terrorism risk.

4. Constitutional Objections.—Before turning to the institutional-design questions implicated by any effort to incorporate these findings about association as a potential signaling tool in counterterrorism, it is worth asking whether there are constitutional objections that preclude such reliance. To the civil libertarian, the reorientation of domestic counterterrorism proposed here may seem unappealing: It appears to trade government pressure on religious liberty for the sacrifice of associational freedoms that are protected by another part of the First Amendment. But again, constitutional doctrine imposes very little constraint on the path proposed here. Gains to constitutional rights are to be had not from a strict delineation of protected interests but rather by increasing the efficacy of law enforcement interventions, eliminating tactics that generate errors, and minimizing overall the volume of false positives.

Like the Religion Clause doctrine examined in Part II, doctrine under the Free

313. See supra note 225 and accompanying text.
Speech Clause is ill designed to address the constitutional externalities of new law enforcement tactics prompted by terrorism concerns. Free speech doctrine received its definitive elaboration long after the Amendment’s adoption, with the 1950s and 1960s being pivotal moments in the Court’s elaboration of doctrinal protection for dissenting political speech. At the time, judges were immediately motivated by concerns about the overreach of anti-Communist efforts in Congress and across the states. Postbellum anti-Communism illustrated the perils of guilt by association. “[T]housands of Americans were targeted, investigated, blacklisted, harassed, and driven from public employment or office on charges that they were members of or fellow travelers with the Communist Party.” As a result, the Court crafted doctrine with special sensitivity to the risks of guilt by association. Now-canonical precedent directs that associational conduct can be punished only when evidence exists that a defendant has a “specific intent” regarding an organization’s criminal ends. This specific intent rule prevents jurors from using unpopular associational ties as a proxy for dangerousness. It hence mitigates “the special danger that juries trying defendants who have advocated unpopular social doctrines will find serious intent on the basis of ambiguous evidence.” That is, it responds to and attempts to mitigate the specific danger to First Amendment values that happened to be the most salient at the time of the doctrine’s articulation in the Cold War era.

This specific intent rule, however, does not preclude the turn to association to root out terrorist risk for at least three reasons. First, that rule does not preclude the use of association at the investigative stage. In investigations, iterative interactions with other suspects furnish grounds not merely for law enforcement attention but also for individual searches. It is only when police rely on “mere propinquity” to a crime that search becomes unlawful. Nor do suspects have any constitutional protection against

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317. Greenawalt, supra note 107, at 266.

informants,\textsuperscript{319} the most frequently used policing tool for piercing complicit surrounds. At the investigative stage, therefore, concerns about “guilt by association” do little constraining work.

Second, at the trial stage there is no bar to the introduction of evidence concerning association as one means of showing specific intent. In announcing the specific intent rule, the Supreme Court pointed to expressive evidence and directed that while that material was “not \textit{in itself} sufficient to show illegal advocacy,” it nonetheless was admissible and had potential inculpatory “value in showing illegal advocacy.”\textsuperscript{320} That dynamic was visible in prosecutions under the Smith Act.\textsuperscript{321} Smith Act prosecutions involved “routine introduction” by the prosecution of “massive collections of books, tracts, pamphlets, newspapers, and manifestoes discussing Communism, Socialism, Capitalism, Feudalism and governmental institutions in general . . . Guilt or innocence . . . turn[ed] on what Marx or Engels or someone else wrote or advocated as much as a hundred or more years ago.”\textsuperscript{322} Blocked from using associations against a defendant, the federal government nevertheless could use her words against her. If specific intent can be demonstrated by evidence of expressive conduct, it is difficult to see why evidence of association should not also be probative.

Third, the Supreme Court has recently loosened the First Amendment’s constraint on criminal penalties for associational conduct. Upholding speech-related applications of one prong of the material support law, the Court held that speech coordinated with a proscribed terrorist organization could be criminalized.\textsuperscript{323} The Court’s decision in \textit{Holder v. Humanitarian Law Project} unconvincingly distinguished between constitutional protection of membership and constitutional indifference to material support in the form of speech, implying that it was a constitutionally protected activity to join an organization

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\item \textsuperscript{319} See Hoffa v. United States, 385 U.S. 293, 300–03 (1966) (rejecting Fourth Amendment arguments against the use of informants).
\item \textsuperscript{320} Scales, 367 U.S. at 232–33.
\item \textsuperscript{323} Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724–27 (2010).
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but a potentially criminal one to engage in any speech that aided the organization.\footnote{See id. at 2730 ("The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. . . . What [§ 2339B] prohibits is the act of giving material support . . . ." (quoting Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133 (9th Cir. 2000))). The protection of membership simpliciter, but not membership plus any affirmative collaboration, in effect renders collective action impossible.}} In so doing, the Court applied a standard of review that, while notionally robust, in practice resembled rational basis scrutiny of the proffered governmental justifications.\footnote{See id. at 2724–31 (affirming that the case was controlled by precedents dictating a high level of scrutiny but nonetheless liberally hypothesizing as to how plaintiffs’ speech could aid proscribed terrorist organizations).} The net result was to reduce constitutional protection against guilt by association in a class of cases defined by the government to a token ban on membership proscription that government can easily circumvent. As in other areas of the law, the Court’s post-9/11 amendments to constitutional doctrine are less adaptation and more abrogation.

Current constitutional doctrine, in short, has no more of a constraining role with respect to government use of association as a signal than it does with respect to religious speech. Constitutional law is path dependent.\footnote{For a general explanation of path dependency, see Paul Pierson, Increasing Returns, Path Dependence, and the Study of Politics, 94 AM. POL. SCI. REV. 251, 260–62 (2000). For applications in law, see Oona A. Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 IOWA L. REV. 601, 603–06 (2001); John O. McGinnis & Michael B. Rappaport, Supermajority Rules and the Judicial Confirmation Process, 26 CARDOZO L. REV. 543, 570 (2005); R. George Wright, Originalism and the Problem of Fundamental Fairness, 91 MARQ. L. REV. 687, 694 (2008).} It is shaped by the problems that were salient when doctrine was fashioned. Change is difficult and costly. And in the face of rising concerns about terrorism, change in ways favorable to suspects and defendants is especially unlikely.\footnote{See Andrew E. Taslitz, Fortune Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future, 58 RUTGERS L. REV. 195, 234–35 (2005) (explaining how fresh acts of terrorism increase pressure to relax civil liberties).}

5. Conclusion.—After 9/11, reliance on the signaling function of religious speech in domestic counterterrorism may have seemed plausible and even necessary in light of al Qaeda’s open appeal to religious justifications and solidarities. But increasing evidence from empirical and social science studies of terrorism casts doubt on that approach. There is scant reason to believe that religious doctrine or speech correlates with political violence. Rather, the social science and empirical evidence suggests that one of the regularities of terrorism’s production is the presence of closely knit complicit surrounds

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324. See id. at 2730 (“The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. . . . What [§ 2339B] prohibits is the act of giving material support . . . .” (quoting Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133 (9th Cir. 2000))). The protection of membership simpliciter, but not membership plus any affirmative collaboration, in effect renders collective action impossible.

325. See id. at 2724–31 (affirming that the case was controlled by precedents dictating a high level of scrutiny but nonetheless liberally hypothesizing as to how plaintiffs’ speech could aid proscribed terrorist organizations).


in which individual tastes and preferences concerning violence and political change are reengineered. Evidence of a person’s immediate associations appears correlated with terrorism’s incidence. It is also costly for aspirant terrorists to mimic nonterrorists by eschewing such associations. Extending Spence’s model of signaling on job markets, it is therefore plausible to posit that one way in which law enforcement can sort for possible terrorist risk is by searching for complicit surrounds of the appropriate kind.

C. Retooling Signaling Policy

For terrorist conspiracies generated domestically—which is the category that law enforcement is increasingly concerned about—an insular associational environment serving as the complicit surround appears to be almost always—or at least with great empirical regularity—pivotal to the production of terrorism. It is more costly for aspirant terrorists than for members of the general population to give up their complicit surrounds. But how then can law enforcement use association as a differentially “costly signal” \(^{328}\) to sort possible aspirant terrorists from the general population? This subpart identifies three strands of current counterterrorism practice in the United States and the United Kingdom that build on association as a signal for counterterrorism ends. Its aim is not to endorse any of these measures, or to evaluate comprehensively costs and benefits, but rather to point to possibilities.

First, in the United States, police have invested heavily in invasive and noncooperative tactics such as surveillance, electronic monitoring, and informants. The New York Police Department (NYPD), for example, aggressively deploys informants within New York’s Muslim community to monitor conversations there. In 2006, testimony in the federal criminal prosecution of 23-year-old Shahawar Matin Siraj, who was charged with plotting an explosion at the Herald Square subway station, revealed that at least three informants working for the NYPD’s Terrorist Interdiction Unit had been attending services regularly at a Brooklyn mosque, the Islamic Society of Bay Ridge, in winter 2003.\(^ {329}\) In May 2009, another set of arrests in an alleged terrorist conspiracy

\(^{328}\) Feltovich et al., supra note 225, at 631.

\(^{329}\) See William K. Rashbaum, At Trial on Subway Bomb Plot, Informer Finishes Star Turn, N.Y. TIMES, May 9, 2006, at B2 (illustrating the mosque police informant’s colorful testimony); William K. Rashbaum, Closing Arguments in Trial of Subway Bombing Case, N.Y. TIMES, May 23, 2006, at B3
again hinged on the testimony of an informant who cultivated contacts through a Newburgh, New York, mosque.  

This strategy risks considerable harms. Aggressive use of informants, especially within religious communities, not only imposes burdens on third parties’ constitutional rights but also risks false positives. In the Siraj case, for example, evidence at trial cast doubt on whether Siraj would ever have acted absent the informant’s encouragement. A federal informant in Orange County, California, “aggressively promot[ed] terrorism plots and tr[ied] to recruit others to join him.” Creating complicit surrounds by the deployment of agent provocateurs may also risk the inefficient deployment of policing resources even aside from constitutional costs.

An alternative to hostile acquisition of information is the cultivation of information-sharing networks with religious and ethnic minorities through collaborative means. In the United Kingdom, police have taken this tack. Leading this approach is a new unit within the Special Branch of London’s Metropolitan Police called the Muslim Contact Unit. This unit cultivates relations with the London Salafist and Islamist communities with the aim of identifying potential recruits to violence early. It was formed after a member of one of these mosques approached local police to urge them to investigate a man called Richard Reid, later the so-called shoe bomber, who had expressed an interest in violence. The British strategy leverages the insight that transparency will be cheaper
for groups that do not intend to cultivate political violence.\textsuperscript{334} By affirmatively offering the benefits of a closer relationship with police—for example, by serving as a liaison between cooperating groups and other parts of the police and government—the Muslim Contact Unit obtains much of the local knowledge gleaned via informants without the false positives or damage to constitutional rights and police–community relations.\textsuperscript{335} The American reliance on informants, by contrast, may well prove less effective in the long term than the British approach as trust in the police declines (leading to fewer leads through cooperation) and potential terrorists find ways to work around the problem of informants.\textsuperscript{336}

Second, governments have tried to build a more textured understanding of social contexts in order to more accurately identify complicit surrounds. Some governments stumbling toward this goal have turned to data-collection efforts so broad-brush and indiscriminate that they raise concerns about racial and religious profiling. In Germany, for example, the BfV monitors the publications, statements, meetings, and mosques of both federally registered and “homegrown,” or underground, civil-society groups even if these organizations are entirely law-abiding.\textsuperscript{337} In the United States, similar efforts proved controversial. In October 2007, for example, the Los Angeles Police Department (LAPD) announced a decision to implement a “community mapping” plan in order to “lay out the geographic locations of the many different Muslim population groups around Los Angeles . . . [and] take a deeper look at their history, demographics, language, culture, ethnic breakdown, socio-economic status, and social interactions” so as to “identify communities, within the larger Muslim community, which may be susceptible to violent ideologically-based extremism.”\textsuperscript{338} The breadth of the plan, and its presentation

\textsuperscript{334} To be sure, information privacy is valuable to many people without respect to their links to crime or terror.

\textsuperscript{335} Lambert, \textit{supra} note 333, at 32.

\textsuperscript{336} See, e.g., Teresa Watanabe & Paloma Esquivel, \textit{Muslims Say FBISpying is Causing Anxiety: Use of an Informant in Orange County Leads Some to Shun Mosques}, \textit{L.A. TIMES}, Mar. 1, 2009, at B1 (describing community outrage and degradation of the FBI’s reputation with the community as effects of the FBI’s use of undercover informants in local mosques).

\textsuperscript{337} \textit{Int’l Crisis Grp.}, \textit{supra} note 212, at 14–15.

\textsuperscript{338} \textit{The Role of Local Law Enforcement in Countering Violent Islamist Extremism: Before the S. Comm. on Homeland Sec. and Gov. Affairs, 110th Cong.} (2007) (statement of Michael P. Downing, Commanding Officer, Counter-Terrorism/Criminal Intelligence Bureau, LAPD), available at
as a *fait accompli*, elicited vigorous opposition from Los Angeles’s Muslim-American community. In response, Mayor Antonio Villaraigosa scrapped the plan, citing the “fear and apprehension” prompted by its disclosure.339

But community mapping may have been a lost opportunity for both police and the Muslim-American community in Los Angeles. Rather than an invasive, onerous, and racially disparate scheme of surveillance, the project could have been a collaborative measure aimed at diminishing the need for more intrusive measures, such as the insertion of informants into religious communities.340 It could have been the ground for closer relationships between mosques and police that would not just facilitate more focused investigations but that would enable community leaders to secure policing against hate crimes.341 Rather than confrontation, it could have been a platform of cooperation to alleviate tensions over profiling or intrusive policing.342 Alas, the opportunity was squandered on both sides.

Third, governments now use information about associations to condition benefits or privileges in ways that raise the costs of membership in a complicit surround and so sort for aspirant terrorists. Consider an example from the United Kingdom:

Mr. Tariq commenced employment with the Home Office in April 2003 as an immigration officer. He received the necessary security clearance. However, in August 2006, he was suspended from duty due to national security concerns and


340. Similar frictions arose in the United Kingdom around the government’s “Prevent” strategy, which included local government agencies in counterterrorism strategies. Some Muslim community groups objected to “the requirement in the [Prevent] strategy for local authorities to have a ‘sophisticated understanding of local Muslim communities.’” HOUSE OF COMMONS COMMUNITIES & LOCAL GOV’T COMM., PREVENTING VIOLENT EXTREMISM: SIXTH REPORT OF SESSION 2009–10, at 15 (2010), http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcomloc/65/65.pdf [hereinafter HOUSE OF COMMONS REPORT]. Non-Muslim ethnic groups also objected to the greater local government attention toward Muslims. Id. at 18.


342. Cf. KEPEL, supra note 294, at 8 (“The most important battle in the war for Muslim minds during the next decade will be fought not in Palestine or Iraq but in these communities of believers on the outskirts of London, Paris, and other European cities, where Islam is already a growing part of the West.”).
on 20 December 2006 all levels of security clearance were withdrawn from him. He was told that this was based on his close association with individuals suspected of planning to mount terrorist attacks and that it was considered that association with such individuals might put him at risk of their attempting to exert influence on him to abuse his position as an immigration officer.343

The fact of association with a potential complicit surround was here the basis for denial of an employment-related benefit. The same approach, it is worth noting, is feasible under U.S. law because of the absence of judicial review of such employment decisions.344 More generally, this tactic raises the possibility that association can be used to condition benefits in ways that sort for potential terrorism risk.

Again, this approach raises risks of inequitable error and collateral harm. At a minimum, in cases like Mr. Tariq’s, it would seem generally feasible for the state to mitigate those costs by reassigning the barred individual to an equivalent, nonsensitive position and by taking steps to dissipate any downstream reputational consequences of the transfer. Alternatively, government might use subsidies to sort among private groups and to encourage groups to be transparent so as to preclude their functioning as a complicit surround. Groups that aim at violence will find transparency more costly than groups that are innocent. Insularity is more valuable to the former. Of course, this is not to say that transparency has no cost for nonterrorist groups. Privacy and resistance to state surveillance are valued by many private groups. Private groups allow ideas and norms to develop free of potentially distorting state influences by providing “a vital margin of political safety from control by outside elites.”345 Social spaces free of state supervision “enable[] people to engage in worthwhile activities in ways that they would otherwise find difficult or impossible.”346 Rather, the point is that transparency will be

344. Federal courts have declined to review the merits of decisions to deny security clearances. See Bennett v. Chertoff, 425 F.3d 999, 1001 (D.C. Cir. 2005) (“Because the authority to issue a security clearance is a discretionary function of the Executive Branch and involves the complex area of foreign relations and national security, employment actions based on denial of security clearance are not subject to judicial review, including under Title VII.”); Ryan v. Reno, 168 F.3d 520, 523 (D.C. Cir. 1999) (collecting like authority from other circuits).
345. JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 54 (1998).
more costly for a group connected to terrorism than for one concerned with privacy alone. A group aimed at political violence has an additional and especially powerful reason for valuing the freedom from state supervision. By finding ways to enable suspected groups to signal the absence of terrorism risk through transparency, the state may be able to better isolate possible threats from some larger pool of suspects.

Although current constitutional doctrine forbids the state from conditioning subsidies on the forfeiture of constitutional rights, government can channel funds to religious or ethnic groups that affirmatively engage in collaborative partnerships with law enforcement. In the United Kingdom, the British government has channeled funding to some domestic imams through a program called “the Radical Middle Way,” which is aimed at promoting nonrejectionist strands of Islam. In October 2006, the British government announced £5 million scheme to be disbursed through local governments to train imams, establish study circles for young people, and engage with at-risk youth. Several of these interventions explicitly aimed to strengthen “mainstream Islamic voices” at the expense of more marginal groups. In the United States, similar efforts occur in the foreign-aid realm. The U.S. Agency for International Development has programs in Indonesia that “promote[] a moderate or liberal form of Islam over more extreme sects” via conditional federal funding. Such efforts have been controversial. Critics in the United Kingdom have argued that they have the effect of “singling out” Muslims from other ethnic communities.

347. Rumsfeld v. Forum for Acad. & Institutional Rights, 547 U.S. 47, 59 (2006) (stating that the government cannot withhold benefits from a person due the constitutionally protected exercise of free speech, even if the person is not entitled to the benefit).
349. See House of Commons, Communities & Local Gov’t Comm., Preventing Violent Extremism Pathfinder Fund 2007/08: Case Studies 4 (2007) (discussing the objectives of the Preventing Violent Extremism Pathfinder Fund, including establishing dialogues with communities and working with mosques and educational institutions, and deciding to increase the funding available to six million pounds for fiscal year 2007–2008); see also House of Commons, Communities & Local Gov’t Comm., Preventing Violent Extremism: Community Leadership Fund Guidance 3 (2008) (describing availability of funds for community groups); Alan Travis, New Plan to Tackle Violent Extremism, Guardian (U.K.), June 3, 2008 (describing the plan as a “nationwide ‘deradicalisation’ programme”).
352. House of Commons Report, supra note 340, at 21 (citation and quotation marks omitted).
identity because it only approaches Muslims through their faith rather than recognizing that everyone, all communities, all people, has lots of different identities and multiple identities.”353 Such criticisms may be blunted by careful policy design. They may also lose their force if the alternative is more coercive forms of law enforcement.

This method of distinguishing dangerous groups has a historical precedent of sorts. In the aftermath of the English Civil War, the English 1689 Toleration Act relieved Protestant dissenters of the statutory penalties that had previously been imposed on them out of fear of their political disloyalty—but at a price: “[D]issenters had to certify the place of their congregation to local authorities, . . . they had to leave the doors of their chapels unlocked during meetings, and . . . they had to take oaths of fidelity.”354 The price of avoiding generalized suspicion of sedition, in short, was increased transparency—literally opening their doors to the state. In the short term, this imposed a heavy cost on a minority of religious dissenting groups. In the long term, however, historians argue that it eased the path of religious toleration in Britain as “the monopoly of the established Church gave way to consumers’ choice in religion.”355 Short-term costs, therefore, may be balanced by the long-term gain in the mitigation of friction and animus directed at minority groups.

V. Conclusion

One of the most difficult challenges in contemporary counterterrorism policy is identifying signals or proxies for the risk of terrorism in an information-poor context. By drift or default, law enforcement has turned to religious speech to serve as that signal in American and British domestic counterterrorism. In the American context, the First Amendment, which might be thought to preclude such reliance, in fact places few constraints on this approach. As has been generally the case, constitutional doctrine has not adapted or responded to the way in which post-9/11 counterterrorism policies may impose new costs on constitutional rights. Although constitutional doctrine yields no

353. Id. (citation and quotation marks omitted); see also Vikram Dodd, Communities Fear Project to Counter Extremism Is Not What It Seems, GUARDIAN (U.K.), Oct. 19, 2010, http://www.guardian.co.uk/society/2009/oct/16/prevent-counter-islamic-extremism-intelligence (noting concerns about information sharing as a consequence of the Prevent strategy).


impetus for the state to change tack, the emerging social science evidence about terrorism suggests a reason for rebooting. That literature shows there is scant evidence of a correlation between religious speech or particular religious ideologies and terrorism. By contrast, one observed regularity in the incidence of terrorism is the salience of complicit surrounds in the development of terrorism. Governments should focus on association, rather than religious speech. Law enforcement policies are already edging tentatively toward this goal, albeit in occasionally problematic ways. This Article has aimed to encourage further experimentation and investment to that end as part of a larger ongoing reconsideration of the first generation of post-9/11 responses to al Qaeda-related terrorism.

Readers with comments may address them to:

Professor Aziz Z. Huq
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
huq@uchicago.edu
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