

## COMMENT

# EYE ON ISLAM: JUDICIAL SCRUTINY ALONG THE RELIGIOUS PROFILING/SUSPECT DESCRIPTION RELIANCE SPECTRUM

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### I. INTRODUCTION

Immediately after the September 11th terrorist attacks, Attorney General John Ashcroft converted the Federal Bureau of Investigation into a counterterrorism agency: “That day, in those early hours,” said Ashcroft in a 2002 press conference announcing the Bureau’s reorientation, “the prevention of terrorist acts became the central goal of the law enforcement and national security mission of the FBI.”<sup>1</sup> But, while Ashcroft may have properly redirected the FBI toward confronting the primary threat to United States safety and security, his identification of our enemy was not as particular as it could have been. In 2004, the 9/11 Commission aimed for further clarity:

[T]he enemy is not just “terrorism,” some generic evil. This vagueness blurs the strategy. The catastrophic threat at this moment in history is more specific. It is the threat posed by *Islamist* terrorism—especially the al Qaeda network, its affiliates, and its ideology.<sup>2</sup>

Indeed, no characteristic unites the perpetrators of recent terrorist acts so much as their Muslim identity. Middle Eastern nationality may be thought to provide the link, but this trait proves to be underinclusive: to name just a few examples, Richard Reid, the “shoe bomber,” is a Muslim who was born and educated in the United Kingdom,<sup>3</sup> as were the four July

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\* J.D. May 2006.

1. John Ashcroft, Remarks of Attorney General John Ashcroft (May 30, 2002), *available at* <http://www.fas.org/irp/news/2002/05/ag053002.html>; *see also* Robert S. Mueller III, The FBI’s New Mission: Preventing Terrorist Attacks While Protecting Civil Liberties, Address of the Director of the Federal Bureau of Investigation on the Occasion of the Jackson H. Ralston Price Ceremony (Oct. 18, 2002), *in* 39 STAN. J. INT’L L. 117 (2003).

2. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 362 (2004), *available at* <http://www.9-11commission.gov/report/911Report.pdf> (italics in original)(footnotes omitted).

3. *Richard Reid Pleads Guilty*, CNN, Jan. 22, 2003, <http://archives.cnn.com/2002/LAW/10/04/reid.guilty.plea/index.html>.

7th London Underground bombers.<sup>4</sup> Zacarias Moussaoui, the only person to be charged and convicted by United States courts in connection with the September 11th terrorist attacks, is a French Muslim.<sup>5</sup> Earnest James Ujaama, an indicted al-Qaeda associate, is a Muslim convert who was born in Denver and raised in Seattle.<sup>6</sup> Furthermore, of the twenty-six terrorists currently on the FBI's Most Wanted List, three are from the Philippines; two are from Kenya; one, Abdul Rahman Yasin, is from Indiana—all are Muslims.<sup>7</sup>

Nor does Arab ethnicity serve as a reliably accurate terrorist-identifying characteristic: on December 5th, 2005, a white woman who was raised as a Catholic in Belgium became the first European Muslim suicide bomber when she detonated herself in Baquba.<sup>8</sup> Indeed, the use of stereotype-defying terrorist operatives is entirely consistent with al-Qaeda's expressed intent to employ deceptive tactics in carrying out its attacks.<sup>9</sup> Of course, the one characteristic that Islamist radicals cannot obscure by selective con-scription is Islamic identity. Accordingly, Muslim identity should be considered the attribute that correlates most positively with terrorist involvement; or, in the words of Abdel Rahman al-Rashed, the general manager of Al-Arabiya, a top pan-Arab television station in the Middle East,<sup>10</sup> "It is a certain fact that not all Muslims are terrorists, but it is equally certain, and exceptionally painful, that almost all terrorists are Muslims."<sup>11</sup>

Our question then becomes, what is the proper role for Muslim identity in our law-enforcement officials' preventive counterterrorism efforts? It is a

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4. Matthew Chance, *Britain's Home-Grown Terrorists*, CNN, July 14, 2005, <http://www.cnn.com/2005/WORLD/europe/07/14/homegrown.terror/>.

5. Phil Hirschhorn, *Jury Spares 9/11 Plotter Moussaoui*, CNN, May 3, 2006, <http://www.cnn.com/2006/LAW/05/03/moussaoui.verdict/index.html>.

6. Kelli Arena, *Seattle Man Indicted on Terror Charges*, CNN, Sept. 3, 2002, <http://archives.cnn.com/2002/LAW/08/28/ujaama.indictment/index.html>.

7. FBI, Most Wanted Terrorists, <http://www.fbi.gov/wanted/terrorists/fugitives.htm> (last visited Feb. 5, 2007).

8. Craig S. Smith, *More 'White Muslim' Female Suicide Bomber Converts Expected—Belgian Woman Bomber 'Was Anchored in Islam'*, MILITANT ISLAM MONITOR, Dec. 6, 2005, <http://www.militantislammonitor.org/article/id/1353>.

9. Richard H. Schultz, Jr. & Ruth Margolies Beitler, *Tactical Deception and Strategic Surprise in Al-Qai'Da's Operations*, 8 MIDDLE E. REV. OF INT'L AFF. 56 (2004), available at <http://meria.idc.ac.il/journal/2004/issue2/jv8n2a6.html>. These deceptive tactics are rooted in the Islamic concept of *taqiyya*, which means "precautionary dissimulation and keeping one's convictions secret." *Id.* at 58.

10. Samantha M. Shapiro, *The War Inside the Arab Newsroom*, N.Y. TIMES MAG., Jan. 2, 2005, at 27, available at <http://www.nytimes.com/2005/01/02/magazine/02ARAB.html?ex=1262408400&en=dcb356cbe8dead19&ei=5090&partner=rssuserland>.

11. Abdel Rahman al-Rashed, *Innocent Religion is Now a Message of Hate*, TELEGRAPH, Apr. 9, 2004, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/09/05/wosse605.xml>. See also Heather MacDonald, *Homeland Security? Not Yet: Political Correctness Still Makes Us Pull Our Punches*, CITY JOURNAL, Autumn 2004, available at [http://www.city-journal.org/html/14\\_4\\_homeland.html](http://www.city-journal.org/html/14_4_homeland.html).

question that calls for a survey of our Constitution as well as our conscience, as the answer may compel us to contemplate taking permissible but regrettable measures against a particular religious group. In 1785, James Madison wrote: “[A just government] will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property.”<sup>12</sup> But what shall be done when those two ideals are incompatible, when protecting persons and their property requires the government to take action that may infringe on others’ religious enjoyment? We are faced with bad (ostracizing Muslims) and worse (suffering another terrorist attack) choices, a predicament expressed in the dour words of the reliably relevant Winston Churchill, who, speaking in a different context, said, “We seem to be very near the bleak choice between War and Shame. My feeling is that we shall choose Shame, and then have War thrown in a little later on even more adverse terms than at present.”<sup>13</sup>

To assist legal and law enforcement authorities in avoiding both Shame and War, this Article will aim to provide a legal framework allowing law enforcement officials greater flexibility in targeting religious groups. In doing so, it will focus exclusively on religious-group targeting and will not address the related issues of racial and ethnic profiling, which have been adequately covered by other commentators.

I will begin by discussing the difference between acts of *religious profiling* and acts of *suspect description reliance*, and then discuss how most acts of religious-group targeting can be plausibly characterized as either. Finally, I will recommend that courts adopt a view toward religious-group targeting that allows law-enforcement officials greater flexibility in countering the Islamist terrorist threat.

## II. LEGAL ANALYSIS

“Religious profiling,” in this Article, will be understood as the situation in which law-enforcement authorities act on the inference that a particular adherent of a certain religion is more likely to engage in criminal or terrorist behavior than any particular adherent of another religion.<sup>14</sup> Put an-

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12. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), available at [http://religiousfreedom.lib.virginia.edu/sacred/madison\\_m&r\\_1785.html](http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html) (describing reasons for his opposition to a bill for an ecumenical Virginia tax that would go toward supporting ministers of religious denominations).

13. GRETCHEN RUBIN, FORTY WAYS TO LOOK AT WINSTON CHURCHILL 60 (Ballantine Books 2003). Churchill was rebuking Neville Chamberlain for his appeasement strategy towards the Nazis.

14. This definition is a modification of the Department of Justice’s definition for racial profiling: “Racial profiling rests on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of other races or ethnicities.” U.S. DEP’T OF JUSTICE, FACT SHEET: RACIAL PROFILING (2003), [www.usdoj.gov/opa/pr/2003/June/racial\\_profiling\\_fact\\_sheet.pdf](http://www.usdoj.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf).

other way, acts of religious profiling stem from an unfair prejudice towards members of a religious group, a prejudice that attributes criminal or terrorist propensities to all members of the group. But discriminatory bias will not account for all counterterrorist action based on the trait of Muslim identity. Muslim identity can simply be a part of a suspect description, and be as legitimate a trait for the police to rely upon in targeting potential suspects as height, weight, gender, or skin color. This Article's next section will discuss the difference between religious profiling and suspect description reliance, a difference that becomes crucial when determining the degree of judicial scrutiny to give police action that targets Muslims.

A. *Suspect Description Reliance, Religious Profiling, and the Question of Discrimination*

Profiling—understood as presuming a person's criminal propensity from their membership in a particular group—is located at the unconstitutional end of the investigative-technique gamut. The other end of this spectrum is maintained by the permissible and wholly logical law-enforcement technique of relying on suspect descriptions. Whether a court will consider law-enforcement targeting of Muslims to be unconstitutional will largely turn on which end of the suspect description reliance/religious profiling spectrum that the court locates the targeting, as religious profiling will trigger the nearly insurmountable strict scrutiny, while suspect description reliance triggers the deferential rational basis scrutiny.

Suspect description reliance is the rather simple concept that police officers, in choosing whom to investigate, may take into account certain characteristics—e.g., race, gender, physical markings, visible religious manifestations—because those characteristics match the physical description of the suspect provided by a victim or witness.<sup>15</sup> Such a technique is neither invidious nor unconstitutional; it is, simply put, “police work.” For example, if a white robbery suspect is seen running into a bar where only three of the bar's patrons are white, the sole fact that the three men are white undoubtedly provides the police with the reasonable suspicion needed to justify detaining those men (or even probable cause justifying their arrest).<sup>16</sup> While this police action involves targeting persons based on race, it is not “profiling”—presuming criminality from group membership; it is seeking and arresting individuals who match the suspect's description, which in this case happens to be based on race.

Though legally unproblematic, police actions based on suspect description reliance are often plagued by the same concerns that trouble us

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15. R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2004) (offering overview of the divide between profiling/suspect description).

16. Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1428 (2002) (offering this example).

about profiling: particularly, imposing the ignominy of being an investigatory target on members of a class of people, the overwhelming majority of whom are innocent. When police take action against a vast suspect pool—which generally becomes vaster with the fewer number of characteristics deemed actionable—it becomes difficult to discern which police actions are based on the suspect description and which on wrongful discrimination. The Second Circuit's decision in *Brown v. City of Oneonta, New York*<sup>17</sup> illustrates both the distinction between suspect description reliance and profiling and the specter of discrimination both share.

In the small New York town of Oneonta, in her home and in the dark, an elderly woman was attacked by an assailant whom she could only identify as a young black male with a cut on his hand.<sup>18</sup> In response, the police obtained a list of all black male students at the local college, found them, and then questioned them and inspected their hands for cuts.<sup>19</sup> They also conducted a sweep of the streets of Oneonta, questioning, in all, more than two hundred non-white persons and inspecting their hands for cuts.<sup>20</sup> Both efforts were utterly fruitless, except for producing a class action by the interviewees based on, among other things, the Fourteenth Amendment's Equal Protection Clause.<sup>21</sup>

In dismissing the interviewees' Fourteenth Amendment claim, the Second Circuit enforced two principles that are relevant to a religious-group targeting analysis. First, the court held that the police's dragnet was not actionable under the Equal Protection Clause because it was based on a suspect description. Selecting black persons for questioning was not a racial classification triggering scrutiny under the Equal Protection Clause, the court held, it was a "legitimate classification within which potential suspects might be found."<sup>22</sup> The court further noted that the physical characteristics that guided the police's investigatory choices were not, and could not have been, born of any police "profiling," as they "originated not with the state but with the victim."<sup>23</sup> The first principle to draw from *Oneonta*, then, is that legitimate suspect description reliance, even when its scope is such as to include a large number of innocent people, is not to be considered "discrimination" triggering constitutional concerns.

The caveat, though, is that not all acts of suspect description reliance will be reliably viewed as such: the second principle established by *Oneonta* that has relevance to our religious-group targeting analysis is that the line between legitimate suspect description reliance and profiling is so fine

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17. 221 F.3d 329 (2d Cir. 2000), *reh'g en banc denied*, 235 F.3d 769, 770 (2d Cir. 2000).

18. *Id.* at 334.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 338.

23. 221 F.3d 329, at 338.

that one can easily be viewed as the other. Even in the obviously non-“profiling” case of *Oneonta*, the court, after taking notice of the indignation suffered by Oneonta’s black residents as a result of the broad-sweeping investigation, cautioned the police on the profiling-related harms that such a dragnet can effect: “Law enforcement officials should always be cognizant of the impressions they leave on a community, lest distrust of law enforcement undermine its effectiveness.”<sup>24</sup> Through this exhortation, the court is emphasizing the discriminatory specter of suspect description reliance, a specter that will increasingly resemble genuine discrimination when the descriptions come to encompass large numbers of “suspects” and are *anticipatory*, i.e., based on an estimation—albeit one empirically grounded—of who is likely to commit a crime.

### B. First and Fourteenth Amendments

For the issue of *religious*-group targeting, of course, one must address an issue that *Oneonta* did not. While *Oneonta*’s issue of racial profiling is a Fourteenth Amendment question exclusively, the issue of religious-group targeting—involving a potentially discriminatory infringement of religious exercise—represents a point of convergence for the protections of the First and Fourteenth Amendments.<sup>25</sup>

When these two constitutional claims are collapsed, a court’s analysis of them collapses as well, such that a court will use the Fourteenth Amendment’s analytical framework to evaluate the state’s imposition on First Amendment free exercise rights. Put another way, in reviewing a potentially unconstitutional state infringement on free exercise, a court will evaluate the infringement with one of two levels of scrutiny<sup>26</sup>: it will determine whether the infringement is either (1) rationally related to a legitimate government purpose (“rational basis scrutiny”),<sup>27</sup> or (2) whether it is necessary to achieve a compelling government purpose (“strict scrutiny”).<sup>28</sup> The question of which level of scrutiny will be applied is, of course, the crux of the matter, as rational basis scrutiny is enormously deferential, while strict scrutiny has generally proven to be, to quote Professor Gunther, “strict in theory and fatal in fact.”<sup>29</sup>

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24. *Id.* at 339 (citation omitted).

25. The criminal procedure issues of the Fourth Amendment, which may also be implicated when law enforcement officials target religious groups, are beyond this comment’s scope.

26. The Supreme Court has not carved out a role for “intermediate scrutiny” in the merged First-and-Fourteenth-Amendment analysis.

27. See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

28. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

29. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

### 1. *Level of Scrutiny*

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>30</sup> the Court employed the converged First-and-Fourteenth-Amendment analysis and established that its critical question of scrutiny turns on whether government officials, in imposing upon religious exercise, have done so with *intent to suppress* the targeted religion—discriminatory intent.

At issue in *Lukumi* was the constitutionality of the City of Hialeah's animal sacrifice prohibition, a prohibition contained in a series of ordinances that the city's Santeria practitioners challenged as being a thinly veiled effort to curtail their religious activities.<sup>31</sup> Justice Kennedy, writing for the *Lukumi* majority, began describing the mechanics of the Court's merged First-and-Fourteenth-Amendment analysis by discussing *Employment Division v. Smith*,<sup>32</sup> the case in which the Court gave a rational basis review to an Oregon peyote prohibition that frustrated Native American religious practice.<sup>33</sup> According to Kennedy, *Smith* establishes the first direction that a court can take in the merged analysis: when it finds that conditions similar to those in *Smith* are present—i.e., when the state's action is neutrally postured towards religion—a court should review that action with light scrutiny. To this effect, Kennedy wrote, "A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."<sup>34</sup>

Kennedy then continued, moving on to describe the second direction of the merged analysis, which he deemed to be the proper direction to take in *Lukumi*: when a court finds that the conditions of *Smith* are not met, such that discriminatory intent is the state action's *raison d'être*, the state's action will be subjected to strict scrutiny. Kennedy worded the second direction this way: "If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."<sup>35</sup> Ultimately, the Court determined that discriminatory intent lay behind *Lukumi*'s animal sacrifice prohibition—that it "had as [its] object the suppression of religion"—and struck it down as unconstitutional.

Accordingly, from Kennedy's description of the mechanics of the *Smith* and *Lukumi* First-and-Fourteenth-Amendment merged analysis, we know that: per *Lukumi*, government action that is found to be discriminatorily motivated towards a particular religious group will be subjected to strict

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30. 508 U.S. 520 (1993).

31. *Id.* at 521-29.

32. 494 U.S. 872, 888 (1990).

33. *Id.*

34. *Church of Lukumi Babalu Aye*, 508 U.S. at 531.

35. *Id.* at 533 (citations omitted).

scrutiny. Per *Smith*, government action that has an incidental adverse impact on religious practice—action that is neutral and generally applicable—will receive rational basis scrutiny.

## 2. *Smith, Lukumi, and the Religious Profiling/Suspect Description Reliance Divide*

Having established the means for determining the applicable level of scrutiny in a merged First-and-Fourteenth-Amendment claim, we can return to our discussion of the profiling/suspect description reliance divide and put that discussion into the context of religious-group targeting.

Parenthetically, though, let us first note that just as certain police action can straddle the line between *racial* profiling and suspect description reliance based on race (as *Oneonta* illustrates), so too can police action straddle the line between *religious* profiling and suspect description reliance based on religion. The scenarios presented in the following pages should help to illustrate this ambiguity.

Now, moving on to discuss religious-group targeting and the *Smith/Lukumi* merged analysis: Recall that from *Oneonta*, we established that suspect description reliance based on *race* does not equate to “discrimination” based on race—that’s why the *Oneonta* court did not subject the police dragnet to strict scrutiny under the Fourteenth Amendment. Analogously, suspect description reliance based on *religion* should not be considered “discrimination” based on religion, and so it should not trigger strict scrutiny under *Lukumi*. Instead, suspect description reliance based on religion should be considered “generally applicable and neutral” toward religion (even if accompanied by an incidental adverse impact on religion), warranting mere rational basis scrutiny under *Smith*. On the other hand, if police action is indeed religious profiling—presuming criminality or an inclination to commit terrorist acts based on an individual’s religion—then that act is discrimination and should warrant *Lukumi* strict scrutiny.

Also important to remember is our second *Oneonta* principle: when police action is based on preventing threats at higher levels of abstraction, and entails acting against large numbers of people based on a suspect description containing only a small number of characteristics, it becomes difficult to determine if police action is truly suspect description reliance or if it is motivated by unconstitutional prejudice.

To demonstrate this ambiguity, I will set forth three scenarios—scenarios with facts offering varying degrees of threat abstraction and suspect specificity—in which law enforcement officials are targeting individuals based on their Muslim identity.<sup>36</sup> I will then discuss how a court can choose to deem the officials’ conduct *suspect description reliance* and evaluate it

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36. The scenarios presented are adapted for a religious profiling analysis from the scenarios offered in another article on racial profiling: Roger Clegg & Keith Noreika, *Racial Profiling*,

with *Smith* rational basis scrutiny, or deem it *religious profiling* and evaluate it with *Lukumi* strict scrutiny. Although some of the police action depicted in these scenarios may not actually inflict legally cognizable harms on the Muslim targets, nevertheless, all the police action depicted could potentially have a chilling effect on Muslim free exercise rights. It is important for legal commentators to address this potential chilling effect, as it is our responsibility to contemplate what relationship the government should have with its citizens, and to develop ways to think about our legal structures to effect the relationship we want.

The scenarios are set forth below:<sup>37</sup>

*Scenario 1: Specific Threat, Specific Muslim Suspects.* A prominent government official receives a threatening letter laced with anthrax bacteria. The letter reads, "Now you know of our power and capacity, granted by Allah, to attack you when and how we want, as the Prophet demands of us."<sup>38</sup> A forensic analysis of the anthrax spores reveals that only university-level microbiologists would have access to the equipment and chemicals necessary to cultivate and deliver the contaminant. As the letter was mailed from a mailbox in Rolla, Missouri, the police begin to surveil the small number of Muslims who work within the University of Missouri's biology department, observing and recording their public activities.

*Scenario 2: Specific Threat, Non-Specific Muslim Suspects.* Reliable evidence indicates that al-Qaeda terrorists are planning a chemical attack on St. Louis using a crop-dusting plane. In response, the FBI contacts its agents in the Midwest who have been surveilling mosques and asks these agents for detailed descriptive information on all Caucasian persons who have been attending mosques recently. The FBI then gives this descriptive information to all businesses in the Midwest that rent crop-dusters and directs these businesses not to rent crop-dusters to these individuals.

A white man fitting one of the FBI's detailed descriptions shows up at one of these plane-renting establishments and asks to rent a

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*Equal Protection, and the War Against Terrorism* (2003), <http://www.fed-soc.org/Publications/Terrorism/racialprofiling.htm>.

37. Other scenarios in which the constitutionality of religious-group targeting would be an issue can be conceived. For example, a series of abortion-clinic bombings could trigger investigations into certain Christian groups. Or, Muslim prison chaplains may be subject to greater scrutiny in higher security environments than chaplains of other faiths. See Austin Cline, *Feds to Screen Muslim Prison Chaplains?* (2004), <http://atheism.about.com/b/a/083989.htm>. Or, law-enforcement authorities may also target Catholic or other religious groups who have questioned the morality of the U.S. immigration system. See U.S. Conference of Catholic Bishops, *Bishop Calls For Reform Of 'Morally Unacceptable' Immigration System* (July 27, 2005), <http://www.usccb.org/comm/archives/2005/05-167.shtml>.

38. Spanish authorities received similarly worded messages after the Madrid train bombing. Lawrence Wright, *The Terror Web*, NEW YORKER, July 26, 2004, at 40, available at [http://www.newyorker.com/printables/fact/040802fa\\_fact](http://www.newyorker.com/printables/fact/040802fa_fact).

crop-duster. Given the man's background (he owns a large-acreage farm, has the necessary pilot's license, etc.), there is nothing unusual about the request. The rental-business refuses to rent to the man based on the FBI's directive.

*Scenario 3: General Threat, Non-Specific Muslim Suspects.* After studying the March 11 Madrid bombing and the July 7 London bombings,<sup>39</sup> the FBI determines to take measures to identify and intercept ad-hoc domestic terrorist-emulators: small groups of disaffected Muslim youths who are ideologically aligned with al-Qaeda but who have few links to any international terrorist networks.<sup>40</sup> To learn more about such individuals, the FBI begins efforts to conduct voluntary interviews with members of the Muslim community in high-risk areas such as New York and Washington, D.C.

### C. *The Two Views*

For the most part, the police action in all three scenarios could be plausibly viewed as belonging on either side of the suspect description reliance/religious profiling divide. In what follows, I will present the scenarios in the context of each party's view—the law-enforcement officers' view that their actions are merely based on suspect descriptions, and the Muslim suspects' view that the officers' actions constitute religious profiling. I will then discuss how a court would analyze the scenarios under the *Smith* rational basis scrutiny effected by the law-enforcement officers' view, and the *Lukumi* strict scrutiny effected by Muslim suspects' view. To conclude, I will discuss which view should prevail given the current national security environment.

#### 1. *View 1: The Police Action Constitutes Suspect Description Reliance*

This first view ("View 1") holds that none of the police action depicted in the scenarios constitutes profiling—that is, in none of these situations did the officials select these individuals for investigation based upon the presumption that, because of their Islamic identity, they have a propensity to commit terrorist acts. Rather, this view holds, these investigative efforts are based on the fact that Muslim identity is the predominant feature of a suspect description, a description created from the best evidence available of who the terrorist perpetrators are likely to be. Accordingly, under this view, the police action described in these scenarios is not "discriminatory" as that term is understood in the context of the merged First-and-Fourteenth-

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39. Both terrorist acts were perpetrated by such small, loosely-affiliated terrorist groups. Marc Sageman, *Understanding Terror Networks* (Nov. 1, 2004), <http://www.fpri.org/enotes/20041101.middleeast.sageman.understandingterrornetworks.html>.

40. *Id.*; Wright, *supra* note 38.

Amendment analysis, and so to the extent the police action infringes on Muslims' free exercise rights, a court should evaluate this infringement using *Smith* rational basis scrutiny.

*i. Applying View 1 (Presumption of Suspect Description Reliance) to the Scenarios*

View 1 is most compatible with police targeting of Muslims when the police are responding to a specific threat and suspect description, as exemplified in Scenarios 1 and 2. In Scenario 1, the composition of the anthrax, the explicit references to Islam in the language of the letter received with the anthrax, and the mailing location of the letter inform investigators that the threat involves Islamic biologists who are most likely working within, or have a connection to, Missouri's principal university. Given the particularity of this evidence, it becomes more difficult to view the targeting of Muslims in the university's biology department (using more intensive measures against them than against the non-Muslim biologists) as based on some stereotype about the terrorist propensities of Muslim biologists. Rather, the facts are readily conformable to the view that the investigators are taking action against Muslims because Muslim identity (along with biological know-how) is the predominant characteristic in the anthrax terrorist's suspect description.

Specificity of the threat is also the feature that makes View 1 easily applicable to Scenario 2. The FBI knows that the crop-duster attack will be perpetrated by a member of a specific terrorist network, al-Qaeda, that consists entirely of Muslim persons.<sup>41</sup> By blocking the rental of crop-dusters to Muslims, then, the FBI should not be seen to be acting on a prejudiced imputation of terrorist motives to all Muslims; rather, they should be seen as acting based on a suspect description that (however unfortunately) contains only one ineluctable characteristic, Muslim identity.

Finally, View 1 can also be applied to situations in which the threat is more abstract, such as in Scenario 3. For adherents of View 1, the Muslim-interview campaign is simply based on a new, empirically grounded understanding of global Islamist terrorist operations—one whereby the simplest and most straightforward means of identifying and intercepting such operations involves speaking with Muslims about any knowledge they may have about likely perpetrators of terrorist acts. The FBI's operating assumption with regard to the interviewees, adherents to View 1 will point out, is that they are *not* terrorists—so, for adherents of View 1, the FBI is not imputing terrorist motives to Muslims as a category, they are simply acting on the knowledge that *particular* Muslims pose a threat, and that it is probable that

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41. See Peter Bergen, *Excerpt: The Osama bin Laden I Know* (Jan. 18, 2006), <http://www.tpmcafe.com/story/2006/1/18/13810/7770> ("Al Qaeda is basically an organized Islamic faction; its goal will be to lift the word of God, to make His religion victorious.").

other Muslims will have knowledge that could help identify who those particular Muslims are. Thus, for adherents of View 1, the interview campaign is based on a suspect description, and has nothing to do with a discriminatory prejudice towards Muslims.

ii. *Evaluating the Law Enforcement Action Under Rational Basis Scrutiny*

If a court adopts View 1 toward the law-enforcement officials' actions—deeming them acts of suspect description reliance and not ascribing any prejudicial motive to them—it will review the actions with *Smith* rational basis scrutiny, requiring the officials to demonstrate that their actions are rationally related to a legitimate government purpose. Of course, this rational basis inquiry will turn entirely on the *rational relation* component, as the officials' purpose—achieving national security—unquestionably constitutes a legitimate, indeed compelling, government interest.<sup>42</sup>

When the threat is specific, as in Scenarios 1 and 2, the law-enforcement officials should have no trouble demonstrating that their actions are rationally related to pursuing national security interests. With the threat so concrete, and the successive steps to actualizing the threat so easily cognizable, it is obvious that national security interests are furthered by surveilling suspected anthrax terrorists and disallowing a legitimate terror suspect to rent an instrument of destruction.

Nor will Scenario 3's voluntary Muslim-interview campaign be deemed an irrational technique with which to pursue national security interests, though the Muslims challenging such a campaign will likely have numerous amici join them in contesting its rationality. Many commentators have decried group-based interview campaigns, questioning the efficacy of targeting a large group to apprehend a few dangerous individuals. For example, Professor Tom Lininger wrote, "The tiny proportion of terrorists among U.S. Muslims does not furnish any credible basis for religious profiling," after citing William Blake's observation, "To Generalize is to be an Idiot."<sup>43</sup> Others argue that targeting Muslims as a group for an information-gathering interview campaign is an inefficient use of law-enforcement resources because radical Islamists, in keeping with the terrorist's strategy of deception, do not express their malevolent purposes publicly.<sup>44</sup> Still others

42. See *Korematsu v. U.S.*, 323 U.S. 214, 218 (1944); *Hirabayashi v. U.S.*, 320 U.S. 81, 100–01 (1943); see also *Lee v. Washington*, 390 U.S. 333, 334 (1968). Of course, *Korematsu* and *Hirabayashi* are nearly universally condemned today, but this condemnation is based on the fact that the Supreme Court approved a program that was not at all narrowly tailored to achieve national security. The Court's affirmation in these cases that national security is a compelling governmental interest is universally recognized as valid.

43. Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1285 n. 213 (2004).

44. Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 659 (2004).

argue that targeting Muslims for investigation only serves to antagonize and ostracize Muslims and their leaders, individuals whose cooperation with the government—not their alienation from it—would be valuable in the country's national security efforts.<sup>45</sup>

But none of these objections undermine the fundamental rationality of the government's undertaking an information-gathering interview campaign during a war in which the government's best defense against the enemy is good intelligence. In defending the FBI's voluntary interview program of Arab-Americans in 2002, John Bell, the Special Agent in Charge of the FBI for the state of Michigan, put it this way:

A terrorist organization[,] like a business organization or any other criminal enterprise[,] has got to recruit and its got to expand its membership if it's going to thrive and it's going to function. So what were the purposes of the interviews? . . . [T]o identify Al-Qaeda leadership and members, and to determine how the members were recruited, trained, and deployed. . . . [W]ho was the organization targeting? . . . [W]ho was making the approach? . . . Where was the approach made?

. . . What incentives were used to entice the members . . . [a]nd if they were financial what was the nature of the financial reward? . . . [W]hat was the nature of the training that that individual took and where was that training held? . . . Why did we not know ahead of time that that 9-11 attack was planned? I'll tell you why[,] we didn't know because we didn't have the information I've just listed.<sup>46</sup>

The FBI does not undertake an interview program to incriminate interviewees, the FBI undertakes it to find out, in the words of columnist James Lileks, whether the interviewee "has a brother who [knows] some guys who have some sympathies with some guys who hang around some rather energetic fellows who attend that one mosque where the [imam] talks about jihad 24/7,"<sup>47</sup> and whether such information could be useful in anticipating a terrorist attack. As such, the voluntary interview program should be regarded as sufficiently related to national security to pass muster under the rational basis test.

## 2. *View 2: The Actions of the Law-Enforcement Officers Constitute Profiling*

This second view ("View 2") holds that the actions of the law-enforcement officials, in at least the second and third scenarios, constitute religious

45. Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L. J. 161, 180 (2005).

46. John Bell, *Comments on the FBI in the Wake of 9/11 and Legal Standards and Procedures for Homeland Investigations*, 10 MICH. ST. J. INT'L L. 552, 557-58 (2001).

47. Posting of James Lileks, Screedblog (Feb. 22, 2006), <http://www.lileks.com/screedblog/06/02222406.html>.

profiling—that is, this view holds that the officials’ actions in these scenarios are based on a stereotype that Muslims as a class are more prone to commit terrorist acts than non-Muslims. Because taking action based on a group stereotype equates to invidious discrimination, View 2 adherents argue that any group-targeting of Muslims that results in an infringement on Muslims’ free exercise rights should be reviewed with *Lukumi* strict scrutiny.

With regard to the facts of Scenario 1—in which the Islamic references in the anthrax letter give law-enforcement officials a specific reason to target Muslims—adherents of View 2, unable to characterize the officials’ action in that scenario as “profiling,” will argue for subjecting their actions to strict scrutiny anyway because *targeting* individuals *based on their religious beliefs* is incompatible with the Constitution’s protection of religious exercise. In so arguing, View 2 adherents take their cue from Justice Kennedy’s emphasis on the Constitution’s protection of religious rights in his *Lukumi* conclusion: “[U]pon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and the rights it secures.”<sup>48</sup>

*i. Applying View 2 (Presumption of Religious Profiling) to the Scenarios*

View 2 best conforms to overinclusive police actions against religious groups that are based on a generalized threat, as exemplified in Scenario 3. The assumption underlying Scenario 3’s interview campaign—that Muslims as a group have information on a general terrorist threat—can easily be viewed, adherents of View 2 will argue, as rooted in a stereotyped attribution of terroristic proclivities to Muslims as a group: why else would the FBI take action against all Muslims in a community when it knows only a small number of them, if any at all, will have interacted with or have any knowledge about terrorist operatives?

Adherents of View 2 could argue that this interview campaign is not merely based on a “suspect description” by analogizing the FBI’s treatment of Muslims with regard to terrorism to its treatment of Christians with regard to abortion-clinic bombing. View 2 adherents would argue that the beliefs of particular Christian denominations create a suspect description for potential abortion clinic bombers that suggests—at least in the same attenuated way that all Muslims are supposed to know about terrorist perpetrators—that other Christians may have knowledge about these potential bombers. Yet, the FBI does not undertake information gathering efforts directed at all Christians in a community, and this is because it does not stereotype all Christians as abortion-clinic bombers or people who are likely to

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48. *Church of Lukumi Babalu Aye*, 508 U.S. at 547.

interact with and be knowledgeable about them; with regard to Muslims and terrorist activity, such a stereotype is made. Accordingly, adherents of View 2 argue, the FBI's overinclusive targeting of Muslims for its voluntary-interview campaign should be viewed as rooted in discrimination towards Muslims.

Similarly, View 2 adherents will argue that the overinclusiveness of the FBI's denial of crop-duster rentals to all Muslims in Scenario 2 also serves as evidence of discrimination towards Muslims. Even though the FBI's action in Scenario 2 is based on a specific threat, adherents of View 2 will argue that the FBI's directive still indicates a discriminatory imputing of terrorist inclinations to all Muslims: in imposing a blanket prohibition on renting crop-dusters to Muslims, the FBI has failed to acknowledge that certain Muslims—particularly those with a verifiable, legitimate need for accessing such equipment—pose no terrorist threat. Categorical impositions on all Muslims, adherents to View 2 will argue, indicate a discriminatory attitude towards Muslims as a group, and such overinclusive measures should be subjected to the strict scrutiny that characterizing them as discriminatory will cause.

When police efforts directed toward Muslims are based on a specific threat with specific Muslim suspects—the situation depicted in Scenario 1—it becomes more difficult for adherents of View 2 to characterize such efforts as discriminatory. In Scenario 1, for example, it is most apparent that the police are basing their investigation of the Muslim biologists on a particularized and objective basis—the Islamic references in the note accompanying the anthrax—and not on any prejudice towards Muslims. Still, however, an adherent to View 2 could argue that because the purpose of the strict scrutiny test is to ensure that the government treats each person as an individual without regard for his or her group affiliation,<sup>49</sup> any targeting of individuals based on their religious beliefs should be evaluated with *Lukumi* strict scrutiny.

*ii. Evaluating the Law Enforcement Action Under Strict Scrutiny*

If a court adopts View 2 toward the police action in the scenarios, the court will evaluate their actions with a strict scrutiny review, calling upon the law-enforcement officials to show that their actions were narrowly tailored to achieve national security interests.

With regard to Scenarios 2 and 3, the very overinclusiveness that served as evidence of the officers' discriminatory intent will also be

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49. See *Adarand Constructors*, 515 U.S. at 241 (Thomas, J., concurring) (arguing that all racial classifications should be subjected to strict scrutiny: "In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.").

grounds for a court to rule that these actions are not narrowly tailored. This same strict scrutiny predicament was evident in *Lukumi*. In that case, the Court stated that it assumed discriminatory intent motivated the animal sacrifice prohibition because the prohibition was overinclusive: "It is not unreasonable to infer . . . that a law which visits gratuitous restrictions on religious conduct seeks not to effectuate the state governmental interests, but to suppress the conduct because of its religious motivation."<sup>50</sup> The Court then said that this overinclusiveness provided, by itself, sufficient grounds to strike down the prohibition: "The absence of narrow tailoring suffices to establish the invalidity of the ordinances."<sup>51</sup> Similarly, when a court considers police action targeting Muslims as a group—in these scenarios, through broad-sweeping interview campaigns or through categorical prohibitions on their access to certain articles of commerce—as sufficiently overinclusive to indicate a discriminatory motive towards Muslims, a court would also view these actions as not narrowly tailored to pursue national security interests, and deem them unconstitutional under a strict scrutiny review.

On the other hand, the police officers' actions in Scenario 1 may be among those "rare cases,"<sup>52</sup> as Justice Kennedy in *Lukumi* put it, when the government's targeting of a religious group survives strict scrutiny. With the language of the anthrax letter generating a profile of specific Muslim suspects, the police have no other means of pursuing national security without targeting individuals based on their Muslim identity: the evidence provides an unavoidable link between the threat and the religion.<sup>53</sup> Thus, even if a court decides that strict scrutiny is warranted for any police action taken against an individual based on his or her religious beliefs, when the police, in so targeting the individual for his or her beliefs, are acting pursuant to a specific threat and a specific suspect description based on religion, the court will likely find that the police action is narrowly tailored.

#### D. Which View Should Prevail?

The foregoing section aims to establish that the level of scrutiny with which a court will evaluate religious-group targeting is a matter of which attitude toward the targeting that the court chooses to embrace. If a court adopts View 1—employing a presumption that law-enforcement action against Muslims is based on suspect description reliance—it would be recognizing the need of law-enforcement officials to take action based on Muslim identity in a period when Islamic terrorism is the nation's primary security threat. If a court adopts View 2—viewing police targeting of relig-

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50. *Church of Lukumi Babalu Aye*, 508 U.S. at 538 (citation omitted).

51. *Id.* at 546.

52. *Id.*

53. See generally Fisher, *supra* note 44, at 662–73.

ious groups as discriminatory treatment warranting strict scrutiny—it would be recognizing our nation’s commitment to religious liberty. This section aims to determine which attitude is most appropriate in the nation’s current national security climate. In evaluating which attitude is most appropriate, I will move to examine the issue in its broader context: the conflict between national security concerns and the preservation of the civil rights enshrined in the First and Fourteenth Amendments.

It can surely be said that the *end* of national security, as compelling as it is, does not justify any *means* employed by the government to attain it. To hear the Supreme Court on this point: “The gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.”<sup>54</sup> And in particular, Americans have evinced discomfort with the government’s pursuing national security by taking broad, group-based action. This unease with group-based governmental action is evident even during wartime, a point we can conclude from our country’s lingering shame over the deprivation of Japanese-Americans’ civil rights in *Korematsu*.<sup>55</sup> Thus, even when coping with the difficulties of preventing terrorist attacks—a difficulty rooted in their unpredictable, ever-present imminence—we cannot forget that our constitutional rights are in place in order to maintain a fair and just relationship between the government and the citizenry.

These concerns over violating individuals’ constitutional rights (at least as they are presently enshrined in Supreme Court jurisprudence) would incline us toward adopting View 2 when evaluating law-enforcement actions that target Muslims. And given that our current Supreme Court has expressed sympathy with these concerns, perhaps we should expect the Court to embrace View 2. The Court manifested this sympathy in 2005’s *Johnson v. California*. In that case, the Court held that even in the prison context, when governmental power over civil liberties is at its fullest, concern about inmates’ mortal safety did not justify broad race-based protective action.<sup>56</sup> Given this strong affirmation of civil rights over protective measures, perhaps we should not expect the Court to allow its civil-liberties jurisprudence to yield alacriously to the pressures of national-security exigencies.

But this Article concludes by urging the courts to adopt View 1, recognizing that the characters of constitutional rights are adaptable to national security concerns. Our rights’ characters are indeed mutable, a fact that

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54. *Ferguson v. City of Charleston*, 532 U.S. 67, 85–86 (2001).

55. *Korematsu*, 323 U.S. at 214.

56. *Johnson v. California*, 543 U.S. 499, 500 (2005) (The Supreme Court held that the prison’s policy of segregating prisoners based on race during the first sixty days of their incarceration—a policy implemented due to the exigencies of race-based violence—violated the Fourteenth Amendment: “[T]he necessities of prison security and discipline are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities.”) (citation omitted).

Judge Posner, among others, has deduced from the Constitution's taciturn nature. "[T]he Framers left most of the constitutional provisions that confer rights pretty vague," writes Posner, "[t]he courts have made them definite."<sup>57</sup> For Posner, because the colors that our civil rights presently possess were shaded by judicial interpretation—by judges who were weighing the rights' importance against contemporary "public safety" interests—Americans should remember that the Constitution and the courts have taken a fluid, rather than a doctrinaire, approach to the character of their civil rights.<sup>58</sup> Based on their fluid character, the qualities of our civil rights are malleable by national-security necessities. And this is as it should be, Posner believes: "[The law] is an instrument for promoting social welfare, and as the conditions essential to that welfare change, so must it change."<sup>59</sup> Or, put more directly, "The Constitution is not a suicide pact."<sup>60</sup> Critics may charge that adopting this approach to the First and Fourteenth Amendments is like having an umbrella that we only take down when it rains. But this critique fails to acknowledge the need of our nation's law enforcement agencies to take effective countermeasures against what the 9/11 Commission, as we saw at the beginning of this Article, deemed the "catastrophic threat at this moment in history"<sup>61</sup>—the threat from Islamist terrorists.

Americans know that aggressive governmental action is the currency with which national security is purchased, but they often find it difficult to accept governmental action taken on this fundamental truth. Wrote T.S. Eliot on that score: "It is hard for those who live near a Police Station [t]o believe in the triumph of violence."<sup>62</sup> But in a time of war, Americans should recognize that a change in the character of their rights is necessary: they should permit the courts to recharacterize their rights as long as the courts act responsibly in doing so. Only through such recharacterization can judges allow law-enforcement authorities the flexibility they need to ensure that the first terrorist attack on U.S. soil was also the last.

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57. Richard A. Posner, *Security Versus Civil Liberties*, ATLANTIC MONTHLY, Dec. 2001, at 46, available at <http://www.theatlantic.com/doc/200112/posner>.

58. *Id.*

59. *Id.*

60. The phrase is a common paraphrasing of Justice Jackson's concluding sentence of his *Terminiello v. City of Chicago* dissent: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." 337 U.S. 1, 37 (1949).

61. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE U.S., *supra* note 2.

62. T.S. ELIOT, *THE ROCK* 41 (Faber & Faber, Ltd.) (1934).