

# **GUILT BY EXPRESSIVE ASSOCIATION: POLITICAL PROFILING, SURVEILLANCE AND THE PRIVACY OF GROUPS**

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“I have been here so long . . . and have children and parents and brothers and nephews here. . . . To come to a house of worship where you can release your tensions and worship God and help yourself become a better citizen, and to worry about the FBI doing some kind of surveillance, that is very uncomfortable.”<sup>1</sup>

### INTRODUCTION

Since September 11, Americans have accepted new restrictions on their freedom in return for the promise of increased security in their daily lives. Most people have reconciled themselves to increased governmental surveillance and some limitations on their daily activities, such as security screenings and enhanced video surveillance, with the belief that these measures will reduce the likelihood of terrorist attacks. While people are rightly concerned that the United States (U.S.) might be subject to another attack by Al Qaeda,<sup>2</sup> there is a risk that increased security measures and surveillance will unduly focus on individuals and groups unlikely to be involved in terrorism.<sup>3</sup> Those likely to be targeted by law enforcement, such as Muslims attending mosques or political dissidents protesting war in Iraq, can face repercussions considerably more serious than waiting in line to pass through a metal detector.<sup>4</sup>

The history of the FBI and other law enforcement surveillance gives scant comfort to those engaged in lawful political and religious activities who are

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1. Charles Austin, *Worshipping Under Pressure; War on Terrorism Still Shadows Paterson's Mosques*, THE RECORD (Bergen County, N.J.), Feb. 11, 2003 at L01 (quoting Nabil Abassi, president of the Islamic Center of Passaic County, Paterson, New Jersey).

2. See generally WALTER LAQUEUR, NO END TO WAR: TERRORISM IN THE TWENTY-FIRST CENTURY, 24–25, 226–31 (Continuum 2003).

3. For instance, the Inspector General of the Justice Department has released a study confirming that many of those detained after September 11 were arrested merely for minor visa infractions and that none of the over 700 detainees in New York or New Jersey were ever charged with a terrorism-related crime. See OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (Apr. 2003), available at <http://www.fas.org/irp/agency/doj/oig/detainees.pdf> [hereinafter Inspector General Report]; Steve Fainaru, *Report: 9/11 Detainees Abused: Justice Dept. Review Outlines Immigrant Rights Violations*, WASH. POST, June 3, 2003, at A1.

4. In addition to facing scrutiny at airports, Muslim and Arab-Americans who are U.S. residents have had their financial activities monitored, their assets and computer records seized, and over 1,200 have been detained. Only a handful—a minuscule percentage—have been shown to have any connection with terrorism. See Scott J. Paltrow, *American Mystery: Immigrant's Path from Tech Success to Terror Charges*, WALL ST. J., Apr. 29, 2003, at A1; Dan Eggen, *About 600 Still Detained in Connection with Attacks, Ashcroft Says*, WASH. POST, Nov. 28, 2001, at A15.

concerned about becoming targets of surveillance.<sup>5</sup> From its inception until restrictions on its activities were imposed in the mid-1970s—and even sometimes thereafter—the FBI regularly conducted politically motivated surveillance, choosing targets based on their political or religious beliefs. As part of its investigations, it compiled and widely disseminated political dossiers, engaged in warrantless searches, and disrupted the lawful First Amendment activities of a wide array of groups opposed to government policy.<sup>6</sup> Local police “Red Squads” did the same.<sup>7</sup> During the war in Vietnam, the CIA, despite restriction of its mission to foreign intelligence, also conducted domestic surveillance operations.<sup>8</sup> Religious groups engaged in political activity were among the targets of intelligence agency investigations.<sup>9</sup>

The most notorious example of FBI overreaching was its five-year campaign to discredit Martin Luther King, Jr. and to “neutralize” him as an effective civil rights leader.<sup>10</sup> These efforts included sending Dr. King’s wife a tape recording obtained from microphone surveillance, accompanied by a note that many have interpreted as an attempt to induce him to commit suicide.<sup>11</sup>

Muslims who frequent mosques and Islamic centers—particularly those that express religious or political views considered “extreme”—are now concerned about being subjected to abusive and unjustified law enforcement behaviors similar to those documented by the Senate Committee to Study Governmental Operations with respect to Intelligence Activities (hereinafter Church Committee Report) in 1976.<sup>12</sup> Without external constraints, law enforcement almost inevitably investigates dissidents based on their political or religious expression. Moreover, legal controls on surveillance have recently been lifted or modified, potentially facilitating renewed political surveillance.<sup>13</sup>

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5. See *infra* text accompanying notes 39–92.

6. See *infra* text accompanying notes 39–73.

7. See *infra* text accompanying notes 74–92.

8. See Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities Report, S. REP. NO. 94-775, 94TH CONG., 2d Sess., Book III, at 679–732 (1976), available in part at [www.cointel.org](http://www.cointel.org) [hereinafter Church Committee Report]. This comprehensive four-volume report exhaustively catalogues FBI abuses of its investigative authority from 1936–1976.

9. See *infra* text accompanying notes 72–73.

10. See Church Committee Report, *supra* note 8, Book III, at 81–184.

11. *Id.* at 82.

12. *Id.* at 81–184; see Tanya Schevitz, *FBI Watch on Mosque No Surprise to Muslims; Many in Bay Area Feel Under a Microscope*, S.F. CHRON., Oct. 5, 2002, at A13 (explaining that many Muslims just accept surveillance as a part of being a Muslim in America: as Hatem Bazian stated, “I assume that is standard operating procedure at this point. It seems that the assumption, the attitude, is that Muslims are guilty and it is just a matter of catching them in the act.”).

13. In May of 2002, the FBI guidelines that previously limited the agency’s domestic political surveillance operations were revised to allow surveillance under much more lenient standards. THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE & TERRORISM ENTERPRISE INVESTIGATIONS, §§ I, II, III, VI

Politically motivated surveillance such as that previously engaged in by the FBI raises serious First Amendment concerns, including potential violations of associational rights. When investigations focus not on legitimate law enforcement purposes but rather on subjects' First Amendment conduct,<sup>14</sup> fundamental yet fragile constitutional rights are abridged.<sup>15</sup> One could accurately dub this

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(May 30, 2002), available at <http://www.usdoj.gov/olp/generalcrimes2.pdf> (creating new guidelines with multiple broad exceptions to prior versions' requirement of a reasonable indication of crime before investigation can begin, including unrestricted searches of public information and private information voluntarily obtained, as well as expanded provisions for extensions of preliminary inquiries) [hereinafter ATTORNEY GENERAL GUIDELINES]; see also Susan Schmidt and Dan Eggen, *FBI Given More Latitude; New Surveillance Rules Remove Evidentiary Hurdle*, WASH. POST, May 30, 2002, at A1. For a recent critique of the new guidelines, see Thomas Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201 (2004).

Earlier, in October, 2001, Congress hurriedly passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA-PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001), which, *inter alia*, created a broadly defined new federal crime of domestic terrorism, USA-PATRIOT Act, § 802, amending 18 U.S.C. § 2331; eased requirements for obtaining wiretap authority, permitting information obtained for foreign intelligence purposes to be used for domestic law enforcement, *id.* at § 204, (codified at 50 U.S.C. § 1804(a)(7)(B)); and granted law enforcement expanded power to search and seize computer, financial, and other private records, see, e.g., *id.* at § 210 (codified at 18 U.S.C. § 2703(c)(2)) (authorizing access to internet service provider records) and § 216 (codified at 18 U.S.C. § 3127(3)) (expanding the definition of pen registers and trap and trace devices to cover e-mail and web page addresses). For further analysis of the USA PATRIOT Act, see John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002); Marc Rotenberg, *Privacy and Secrecy After September 11*, 86 MINN. L. REV. 1115 (2002); Sharon H. Rackow, Comment, *How the USA PATRIOT Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of "Intelligence" Investigations*, 150 U. PA. L. REV. 1651 (2002); Jennifer C. Evans, Comment, *Hijacking Civil Liberties: The USA PATRIOT Act of 2001*, 33 LOY. U. CHI. L.J. 933 (2002).

14. First Amendment conduct is expressive speech and conduct that is protected by the First Amendment, such as political speech or religious ritual. See *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 562 (N.D. Ill. 1982), modified on other grounds, 237 F.3d 799 (7th Cir. 2001).

15. See *United States v. United States Dist. Court*, 407 U.S. 297, 314 (1972) ("[C]onstitutional protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'").

phenomenon “political profiling.”<sup>16</sup> This form of profiling relies on guilt by association and is simply not an effective law enforcement technique.<sup>17</sup>

Targets of political surveillance typically report being chilled in the exercise of their rights to engage in free speech and the free exercise of religion. And, suffering actual or potential damage to their reputations, they change their behavior accordingly.<sup>18</sup> Many citizens and lawful residents are reluctant to engage in First Amendment conduct if that activity will result in an FBI file branding them as extremists or terrorists. And in the most extreme cases, information gathered can be used to destroy organizations and lives.<sup>19</sup>

The FBI recently has admitted surveilling mosques in nine U.S. cities, and to keeping certain Muslims in the U.S. under intensive surveillance.<sup>20</sup> Agents

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16. See Chip Berlet & Abby Scher, *Political Profiling: Police Spy on Peaceful Activists*, AMNESTY NOW 20 (Spring 2003) (discussing how the magazine of *Amnesty International* recounts incidents of recent political surveillance in Denver and groups such as the American Friends Service Committee were identified as “criminal extremists.”).

17. See *infra* text accompanying notes 211–19, 249–50. As with ethnic and racial profiling in general, the likelihood that a particular politically profiled individual or group is connected with terrorism is minuscule. Actual terrorists can easily conceal their political and religious views, as the September 11 hijackers did.

18. Many Muslims now feel chilled because of fear of FBI or police surveillance. See *infra* notes 165, 170, 174.

19. See *infra* text accompanying notes 66–68.

20. See U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON THE JUDICIARY, SENSENBRENNER/CONYERS RELEASE JUSTICE DEPARTMENT OVERSIGHT ANSWERS REGARDING USA PATRIOT ACT AND WAR ON TERRORISM, May 20, 2003, at 39–40, available at <http://www.house.gov/judiciary/patriotlet051303.pdf>, (informal survey of FBI field offices revealed that fewer than ten have investigated mosques since September 11); Jack Kelley, Al-Qaeda Fragmented, Smaller, but Still Deadly, USA TODAY, Sept. 9, 2002, at A1 (“Mosques in nine U.S. cities are under surveillance by the FBI for possible links to [Al-Qaeda] cells. They are in Cleveland; Falls Church, Va.; Ft. Lauderdale; Jersey City; Laurel, Md.; Norman, Okla.; Pembroke Pines, Florida; San Diego; and Tucson, FBI officials said.”); Associated Press, *FBI Calls Its Mosque Survey Part of Broad Security Plan*, L.A. TIMES, Jan. 29, 2003 (explaining that the FBI director defended FBI policy of asking all fifty-six field offices to identify all mosques in their area, but critics claimed the data facilitated surveillance); Philip Shenon & David Johnston, *Seeking Terrorist Plots, FBI Is Tracking Hundreds of Muslims*, N.Y. TIMES, Oct. 6, 2002, at 1 (“Senior law enforcement officials say the [FBI] surveillance campaign is being carried out by every major F.B.I. office in the country and involves 24-hour monitoring of the suspects’ telephone calls e-mail messages, and Internet use, as well as scrutiny of their credit-card charges, their travel and their visits to neighborhood gathering places, including mosques.”). See also Ann Davis, *Some Colleges Balk at FBI Request for Data on Foreigners*, WALL ST. J., Nov. 25, 2002, at B1 (describing how FBI agents have asked universities in Kentucky to produce lists of their foreign students and faculty, which include “names, addresses, telephone numbers, citizenship information, places of birth, dates of birth and any foreign contact information.”). The extent to which this surveillance is based on political or religious beliefs and expression is not clear, as much of the information is classified.

have insisted that certain mosques provide them with lists of worshippers.<sup>21</sup> In February of 2004, the Justice Department subpoenaed university records concerning peaceful on-campus meetings of local antiwar activists.<sup>22</sup> In 2003, the New York City Police Department questioned arrestees at antiwar demonstrations about their political affiliations and entered the information into a database.<sup>23</sup> Months later, the media reported that the FBI was collecting extensive information on the antiwar movement, in a search for “extremist[s].”<sup>24</sup> Moreover, the FBI has continued to question political demonstrators across the country, while the Justice Department has approved an FBI tactic of encouraging local police to report suspicious behavior at political and antiwar demonstrations to counterterrorism units.<sup>25</sup>

In 2002, Chicago Police infiltrated five protest groups, including the American Friends Service Committee.<sup>26</sup> Although information concerning the full extent and nature of current surveillance is not available, history demonstrates that, absent meaningful restrictions, politically motivated surveillance will increase, as the Church Committee concluded.<sup>27</sup>

The Supreme Court’s expansive construction of the First Amendment-based right of association, as originally defined in *NAACP v. Alabama*,<sup>28</sup> and delineated most recently in *Boy Scouts v. Dale*,<sup>29</sup> can protect groups engaged in First Amendment conduct from unjustified political or religious surveillance that causes them cognizable harm. Because privacy in association is fundamental to the First Amendment, because political surveillance causes significant harm to expressive association, and because a group’s conception of the conduct that would interfere with its expression must be taken into account, the right of association may outweigh the State’s interest in appropriate instances.

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21. See MUZAFFIR A. CHISHTI ET AL., *AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11* 41 (Migration Policy Institute, 2003).

22. Monica Davey, *An Antiwar Forum in Iowa Brings Federal Subpoenas*, N.Y. TIMES, Feb. 10, 2004, at A14 (explaining that federal prosecutors subpoenaed information on an antiwar forum’s sponsor at Drake University, its leadership list, its annual report, its office location, its attendance rolls, and the event itself). See also Eric Lichtblau, *F.B.I. Goes Knocking for Political Troublemakers*, N.Y. TIMES, Aug. 16, 2004, at A1 (stating that several political protesters were subpoenaed to testify before a grand jury in July of 2004, the same day they were to appear at a demonstration).

23. Joyce Purnick, *Speak Out. The Police Are All Ears*, N.Y. TIMES, Apr. 21, 2003, at B1. The police ceased the practice of recording individuals’ names after it came to light. *Id.*

24. Eric Lichtblau, *F.B.I. Scrutinizes Antiwar Rallies*, N.Y. TIMES, Nov. 23, 2003, at A1.

25. Lichtblau, *supra* note 22.

26. Frank Main, *Police Infiltration of Protest Groups Has Civil Rights Activists Fuming*, CHI. SUN-TIMES, Feb. 19, 2004, at 26.

27. See Church Committee Report, *supra* note 8.

28. 357 U.S. 449 (1958).

29. 530 U.S. 640 (2000).

While limitations on surveillance cannot unduly restrict the Government's ability to conduct necessary intelligence-gathering, requiring a reasonable suspicion of criminal activity before investigating First Amendment activity can help achieve a suitable balance between national security interests and associational rights.<sup>30</sup> This evidence of criminal activity supplies the compelling state interest that justifies narrowly tailored investigations. Thus, protection of national security can coexist with civil liberties, and political profiling can be eliminated when investigations are premised upon a legitimate law enforcement purpose, rather than on protected beliefs.

In fact, the thesis of this Article is that the Constitution should prohibit domestic surveillance of U.S. persons' First Amendment activity<sup>31</sup> in the absence of a reasonable suspicion of criminal activity.<sup>32</sup> Politically motivated investigations are not permissible, since the mission of law enforcement is to enforce the criminal laws, not to monitor political or religious expression. The history and purposes of the constitutional right of association corroborate this conclusion.<sup>33</sup>

A consent decree that essentially adopts the approach I endorse was recently entered in a political surveillance lawsuit against the Denver Police Department.<sup>34</sup> In addition, the reasonable suspicion standard should be adopted—or retained—in legislation, regulations, and guidelines that apply to the FBI and other law enforcement agencies. This standard remains for police departments accepting federal aid.<sup>35</sup> The FBI's guidelines on domestic terrorism investigations employed the standard, or its substantial equivalent, for twenty-six years, before severely curtailing its use.<sup>36</sup> The Church Committee Report recommended

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30. See *infra* text accompanying notes 221–68. Note that although this standard has been borrowed from Fourth Amendment doctrine, political surveillance should be analyzed under the stricter standards of the First Amendment, since political and religious speech—forms given the highest degree of protection—are implicated.

31. Note that my arguments apply both to situations involving U.S. persons (generally defined as including United States citizens and lawful permanent resident aliens, as well as U.S. corporations and unincorporated associations primarily composed of U.S. persons). *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182, 201 (N.D. Ill. 1981), as well as aliens in other categories, who are also protected by the Constitution. See *infra* note 154.

32. See *infra* text accompanying notes 221–68. I outline a narrowly defined emergency exception, involving an imminent likelihood of serious violence, that is subject to strict limitations and constraints.

33. See *infra* text accompanying notes 97–145.

34. See Kevin Vaughan, *Police Will Still Gather Intelligence; but 'Spy Files' Settlement Places Restrictions on How It Can Be Done*, ROCKY MTN. NEWS, Apr. 18, 2003, at 12A.

35. See 28 C.F.R. § 23.20; see also *infra* note 237.

36. See Lininger, *supra* note 13, at 1231; Eric Lardiere, Comment, *The Justiciability and Constitutionality of Political Intelligence Gathering*, 30 UCLA L. REV. 976, 1036–39 (1983) (setting forth relevant provisions of the 1976 and 1983 Attorney General Guidelines). The current guidelines—revised in 2002—retain the reasonable indication of crime standard, but it is now riddled with exceptions that virtually eliminate

employing the standard in terrorism investigations as early as 1976.<sup>37</sup> In light of the Supreme Court's current conception of the constitutional right of association, the legal arguments favoring restraints on political surveillance are stronger than ever. Those legal restraints should now be strengthened, rather than removed.

Section I of this Article gives a historical overview of past surveillance practices, including a description of the various techniques employed. Section II elaborates on the overlapping doctrines of associational privacy and expressive association, along with the underlying policies embedded in them. Section III analyzes the relationship between expressive association and political or religious surveillance. It identifies both the costs and benefits of political surveillance. It also argues—from a First Amendment perspective—that politically motivated and targeted surveillance unconstitutionally violates the right of association unless a reasonable suspicion of criminal activity exists. Moreover, even if a reasonable suspicion exists, the least restrictive method of investigation must be employed. The Article then concludes by urging restraint and recollection of past abuses of civil liberties in times of national trauma.<sup>38</sup>

## I. HISTORICAL OVERVIEW OF POLITICAL SURVEILLANCE

As set forth in the introduction, the history of political surveillance in the last century reveals a disturbing pattern of overreaction to national security threats. Overzealousness, public hysteria, secrecy, and bureaucratic expansion have frequently combined to result in disruption and destruction of organizations, as well as overly-broad investigations based on little more than generalized suspicion. By sleight-of-hand, political or religious beliefs or association, no matter how attenuated, have been converted into a dire threat to security, justifying intrusive investigations. Compounding the problem, personal and political information has often been improperly disseminated, sometimes resulting in loss of employment or relationships. Resources that could have been better spent pursuing concrete leads instead have been dissipated pursuing unconventional, out-of-the-mainstream political groups for neutralization.

### A. *The FBI's Domestic Intelligence-Gathering*

The Bureau of Investigation—the precursor of the FBI—was formed in 1908 without formal congressional approval. Its original mission was solely to

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its efficacy. For instance, unrestricted monitoring of public gatherings and websites is now permitted. ATTORNEY GENERAL GUIDELINES, *supra* note 13, at § VI(A)(1), (2); (B)(1), (2).

37. Church Committee Report, *supra* note 8, Book II, at 318–23.

38. *See generally* JEFFREY ROSEN, THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE (Random House 2004) (arguing that emotional reactions to remote but terrifying events cause people to overestimate the risk of recurrence and the likelihood that unproven security measures will actually protect them while not undermining other important values like liberty).



investigate violations of federal criminal law.<sup>39</sup> But its mandate was expanded in 1916 to allow additional investigations at the behest of the Attorney General.<sup>40</sup> During World War I, the domestic political intelligence activities of the Bureau increased dramatically: “Criticism of the war, opposition to the draft, expression of pro-German or pacifist sympathies, and militant labor organizing efforts were all considered dangerous, targeted for investigation, and often prosecution.”<sup>41</sup>

After the war, the Bureau of Investigation expanded again, focusing on gathering intelligence concerning radical and anarchist groups. After a series of terrorist bombings in 1919—including one at the home of Attorney General A. Mitchell Palmer—a new General Intelligence Division (GID) of the Justice Department, headed by J. Edgar Hoover, was created to engage in political intelligence-gathering.<sup>42</sup> One result of these investigations was the “Palmer Raids” of 1920, a roundup of approximately 10,000 persons believed to be Communists, though a large number of those arrested were not connected to communism.<sup>43</sup> Dossiers detailing the political beliefs of these and other radicals were compiled as the GID increased its investigations of political activities unconnected to crime, including labor disturbances.<sup>44</sup> The GID was soon made part of the Bureau of Investigation.<sup>45</sup>

The excesses of this time led Attorney General Harlan Fiske Stone to attempt in 1924 to prohibit federal agencies from “investigating ‘political or other opinions,’ as opposed to conduct . . . forbidden by the laws.”<sup>46</sup> The Attorney General declared:

When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish . . . . There is always a possibility that a secret police may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood.<sup>47</sup>

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39. Church Committee Report, *supra* note 8, Book III, at 379. For a similar history, see William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 10–35 (2000). See generally FRANK J. DONNER, *THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA’S POLITICAL INTELLIGENCE SYSTEM* (Random House 1980).

40. Church Committee Report, *supra* note 8, Book III, at 379.

41. *Id.* at 382.

42. *Id.* at 382–83.

43. *Id.* at 383–84.

44. *Id.* at 386.

45. *Id.* at 387.

46. *Id.* Book II, at 3.

47. *Id.* (quoting May 13, 1924 *New York Times*); see also JOHN T. ELLIFF, *THE REFORM OF FBI INTELLIGENCE OPERATIONS* 30–31 (1979) (“The touchstone of virtually every aspect of FBI intelligence reform has been Attorney General Harlan Fiske Stone’s statement in 1924 that the FBI should not be ‘concerned with political or other opinions of individuals.’”).

After this, FBI domestic intelligence investigations declined for a time.<sup>48</sup>

In 1936, President Roosevelt issued the first of a number of secret orders conferring authority upon the FBI to engage in domestic intelligence<sup>49</sup> concerning “subversive activities in the United States, particularly Fascism and Communism,”<sup>50</sup> even if unrelated to crime. The FBI complied aggressively, also investigating purely domestic organizations “advocating the overthrow or replacement of the Government of the United States by illegal methods.”<sup>51</sup> According to the Church Committee, these investigations were so broad that “the program could not have been based on any reasonable interpretation of the power to investigate violations of law. The investigations were built upon a theory of ‘subversive infiltration’ which remained an essential part of domestic intelligence thereafter.”<sup>52</sup>

During and after World War II, the Bureau continued to compile dossiers on and to investigate liberal and leftist groups in its search for subversives.<sup>53</sup> It employed a variety of methods, including use of informants, physical surveillance, and electronic surveillance.<sup>54</sup> The NAACP, for example, was a primary target of FBI surveillance for decades, despite its peaceful mission.<sup>55</sup>

The stories of the FBI and federal government excess in investigations during the McCarthy Era and Cold War are legion.<sup>56</sup> The breadth of the investigations was at times staggering. For instance,

The FBI collected intelligence about Communist influence under the following categories: Political activities, Legislative activities, Domestic administration issues, Negro question, Youth matters, Women’s matters, Farmers’ matters, Cultural activities, Veterans’ matters, Religion, Education, Industry. FBI investigations covered “the entire spectrum of the social and labor movement in the country.” The purpose was pure intelligence—to “fortify” the government against “subversive campaigns” . . . .<sup>57</sup>

The reports of these investigations invariably described legitimate activities of the individuals and groups monitored that were wholly unrelated to any “subversive” activity.<sup>58</sup>

Despite the dramatic waning of Communist influence, the FBI persisted in its search for Communists through the 1960s and early 1970s,<sup>59</sup> particularly

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48. Church Committee Report, *supra* note 8, Book III, at 390–91.

49. *Id.* at 392.

50. *Id.* at 394.

51. *Id.* at 396.

52. *Id.* at 412.

53. *Id.* at 415.

54. *Id.* at 433, 448.

55. *Id.* at 416–17.

56. *See id.* Book II, at 38–65.

57. *Id.* Book III, at 449.

58. *Id.* at 450.

targeting the Civil Rights and Antiwar Movements.<sup>60</sup> The techniques employed included warrantless electronic surveillance<sup>61</sup> as well as warrantless break-ins, searches, and seizures.<sup>62</sup> Dr. King was placed in the “radical and violence-prone” category because Dr. King might “abandon his supposed ‘obedience’ to ‘white, liberal doctrines’ (nonviolence) and embrace black nationalism.”<sup>63</sup> Other groups targeted included the entire women’s liberation movement, as well as “a wide variety of university, church and political groups opposed to the Vietnam War.”<sup>64</sup> The danger presented by these investigations is exemplified by J. Edgar Hoover’s testimony before a congressional committee on his exaggerated beliefs concerning Communist influence on the Civil Rights Movement in 1964, which the Church Committee claimed “risked poisoning the political climate in the months before passage of the 1964 Civil Rights Act.”<sup>65</sup>

Between 1956 and 1971, the FBI’s COINTELPRO (Counterintelligence Program) reached the zenith of its activity. The program involved domestic covert action, designed to “disrupt” and “neutralize” its targets.<sup>66</sup> According to the Church Committee, “the Bureau conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence.”<sup>67</sup> Techniques included “sending anonymous poison-pen letters intended to break up marriages” and “encouraging gang warfare and falsely labeling members of a violent group as police informers.”<sup>68</sup>

Beginning in 1971, a series of congressional inquiries into domestic intelligence policies led to a gradual curtailment of many of the programs.<sup>69</sup> The level of investigations fell off sharply after Watergate and the Church Committee Report in 1976. In the 1980s, however, the FBI conducted a major political surveillance campaign against the Committee in Solidarity with the People of El Salvador (CISPES), an organization critical of government policy in Central America.<sup>70</sup> Later, the FBI Director admitted that the investigation of First

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59. *Id.* at 470.

60. *See id.* at 475–89.

61. *Id.* at 271–351.

62. *Id.* at 355–71.

63. *Id.* at 477.

64. *Id.* Book II, at 167.

65. *Id.* at 481.

66. *Id.* Book III, at 3.

67. *Id.*

68. *Id.*

69. *Id.* at 73–77, 548–58.

70. *See* ROSS GELBSPAN, *BREAK-INS, DEATH THREATS AND THE FBI: THE COVERT WAR AGAINST THE CENTRAL AMERICA MOVEMENT* (South End Press 1991). *See also* United States General Accounting Office, *Report to the Chairman, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives, International Terrorism: FBI Investigates Domestic Activities to Identify Terrorists* (Sept. 1990), at 26, available at <http://161.203.16.4/d22t8/142382.pdf> (concluding that, between 1982 and

Amendment activity continued long after any suspicions of criminal activity had evaporated.<sup>71</sup> Around the same time, the FBI also investigated the Central America sanctuary movement, which provided shelter in churches to aliens from El Salvador and other countries.<sup>72</sup> These investigations included surveillance of the religious activities of churches, leading members to withdraw from attendance.<sup>73</sup>

### *B. Local Police Red Squads*

The City of Chicago provides a prime example of the operation of local Red Squads, or political intelligence-gathering units that had no mission to investigate crime, but only to compile political information on local groups.<sup>74</sup> Beginning no later than the 1930's, Chicago police monitored and conducted surveillance on:

- civic groups like the League of Women Voters, the City Club of Chicago, the Chicago Council on Foreign Relations, and the Jewish War Veterans;
- religious groups such as the Catholic Interracial Council of Chicago, the National Council of Churches, and the American Jewish Congress;
- labor unions including the Chicago Teachers Union and the United Steel Workers Union;
- publications like the Southtown Economist and the New York Review of Books; and,
- civil rights organizations such as the NAACP, the Anti-Defamation League, and the DuSable Museum of African-American History.<sup>75</sup>

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1988, 11.5% of FBI international terrorism investigations included monitoring of First Amendment activities and that the FBI indexed information obtained in 25.7% of these cases).

71. GELBSPAN, *supra* note 70, at 210.

72. *See id.* at 37, 98–99, 200. Note that some of these investigations might have been acceptable under the threshold standard I propose, as they concerned undocumented aliens.

73. *See Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989).

74. *See Alliance to End Repression v. City of Chicago*, 627 F. Supp. 1044, 1046 (N.D. Ill. 1985); FRANK DONNER, PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA 90–154 (Univ. of Cal. Press 1990) (“Until its dissolution in September 1975, the political surveillance operation of the Chicago Police Department was the outstanding example of its kind in the United States—whether measured in terms of size, number, and range of targets or operational scope and diversity.”).

75. *Alliance to End Repression v. City of Chicago*, #74C3268, at 5 (N.D. Ill., Mar. 9, 1999) [hereinafter *Report of Magistrate*] (unpublished decision on file with the Author).

The surveillance began after these groups took allegedly radical or extreme position such as opposing the city administration.<sup>76</sup> Despite widespread use of informants and undercover agents,<sup>77</sup> the investigators failed to uncover any evidence of illegality in these groups.<sup>78</sup> Police across the country carried out similar investigations, with similar results.<sup>79</sup>

Not only did police Red Squads investigate and surveil groups, but they often harassed and disrupted organizational functioning. For example, undercover agents frequently became officers and assumed other leadership positions of organizations they infiltrated.<sup>80</sup> The Chicago Red Squad even infiltrated the legal team that sued them in order to report on the plaintiffs' litigation strategy.<sup>81</sup> Red Squads also utilized unlawful techniques such as break-ins and warrantless electronic surveillance.<sup>82</sup>

Most of the surveillance and monitoring conducted by Red Squads consisted of collecting information about organizations, their activities, members, and associates.<sup>83</sup> Using a "vacuum-cleaner" approach, infiltrators would attend events and record the names and license plate numbers of all those in attendance, as well as everything said.<sup>84</sup> In many cases, individuals' beliefs and affiliations were assumed solely based on temporary association with others or with an organization that espoused particular beliefs, with no evidence that the individual subject shared those views.<sup>85</sup> In other cases, agents speculated about beliefs. For instance, the Chicago Red Squad considered degrading abstract modern sculpture to be a Communist goal.<sup>86</sup>

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76. DONNER, *supra* note 74, at 93–94.

77. *Id.* at 109–28; *Report of Magistrate*, *supra* note 75, at 6.

78. Interview with Richard Gutman, Attorney for the Alliance to End Repression, Aug. 25, 2003 [hereinafter Interview with Gutman].

79. See Paul G. Chevigny, *Politics and Law in the Control of Local Surveillance*, 69 CORNELL L. REV. 735, 735–38 (1984).

80. *Alliance to End Repression*, 627 F. Supp. at 1046; *Report of Magistrate*, *supra* note 75, at 6.

81. Chevigny, *supra* note 79, at 749. See also *Alliance to End Repression v. Rochford*, 75 F.R.D. 435 (issuing an injunction to prevent further City infiltration of plaintiffs' legal team), *aff'd*, 558 F.2d 1031 (7th Cir.), *cert. denied*, 434 U.S. 828 (1977).

82. *Report of Magistrate*, *supra* note 75, at 7.

83. Interview with Gutman, *supra* note 78.

84. For instance, an informer produced a seven-page report on a fund-raising party that a wealthy Chicago socialite, Lucy Montgomery, held for a legal defense team. The political affiliations of attendees were recorded, as well as detailed descriptions of the statements of all speakers, and private conversations that were overheard. Chicago Police Department, Intelligence Division, *Surveillance Report*, Oct. 21, 1970 (on file with the Author).

85. See *id.*

86. *Report of Magistrate*, *supra* note 75, at 6 n.3.

These problems were compounded when files were held long-term or disseminated to those without legitimate law enforcement purposes,<sup>87</sup> implicating both the privacy of the subjects and their interest in avoiding guilt by association. In many cases, subjects were unaware that files—often replete with inaccuracies—were being maintained on them; in other cases, however, subjects either knew or had strong reason to believe that their activities were being monitored. Police would openly film and photograph people at peaceful demonstrations and take down license-plate numbers.<sup>88</sup> Red Squad officers would become familiar to members of groups that operated entirely peacefully and lawfully; some would taunt the members in apparent attempts to intimidate them.<sup>89</sup> Red Squads leaked information to the media to defame targets, cause them to lose employment, or destroy organizations.<sup>90</sup>

Moreover, once widespread surveillance and files were revealed, members and associates of similar groups had real reason to believe that their activities were being similarly monitored. Many changed their behavior and became less outspoken and politically active as a result.<sup>91</sup> Groups monitored included not just overtly political groups, but also numerous religious groups that at times took stands on political issues.<sup>92</sup>

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87. See *Phila. Yearly Meeting of the Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1337–38 (3d Cir. 1975); *Jabara v. Kelley*, 476 F. Supp. 561, 567–69 (E.D. Mich. 1979), *vacated on other grounds*, 691 F.2d 272 (6th Cir. 1982); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 150–51 (D.D.C. 1976).

88. See *Alliance to End Repression v. City of Chicago*, 627 F. Supp. 1044, 1046 (N.D. Ill. 1985). Indeed, the Chicago Police filmed demonstrators even after the decree went into effect, resulting in an enforcement proceeding and finding that the consent decree had been violated. Chevigny, *supra* note 79, at 760.

89. Interview with Richard Gutman, *supra* note 78.

90. *Alliance to End Repression*, 627 F. Supp. at 1047 (explaining that Chicago Police fed false information to a Chicago Tribune reporter that the Chicago Peace Council was conducting a “secret revolutionary planning session” at its camp, in addition to testifying falsely before a Senate committee that the Alliance to End Repression was a “Communist Party front group”); *Alliance to End Repression v. City of Chicago*, *Brief and Appendix of Alliance Plaintiffs-Appellees*, # 99-3825 (7th Cir., May 30, 2000), at 6 (unpublished Brief and Appendix of Plaintiffs on file with the Author) [hereinafter *Brief and Appendix of Alliance Plaintiffs-Appellees*]. The Spanish Action Committee of Chicago (“SACC”), the Chicago Red Squad, attempted to destroy the Spanish Action Committee of Chicago, the Chicago Red Squad infiltrated the organization with an undercover officer who urged members to resign and form a competing organization. *Id.* The new organization using a press release secretly written by the Red Squad, publicly smeared SACC as communist-influenced. In 1984, a jury awarded SACC \$60,000 in damages for its injuries. *Id.*

91. Interview with Gutman, *supra* note 78.

92. *Report of Magistrate*, *supra* note 75, at 5.

*C. Postscript*

Many are concerned that the level of political surveillance has been increasing since September 11, on both federal and local levels.<sup>93</sup> While the need to ferret out terrorism remains critical, politically based surveillance will not assist in that effort. Because most intelligence-gathering and file-keeping is done clandestinely, there is no accurate way to estimate the current level of surveillance activity, nor to know to what extent investigations are legitimately confined to cases involving potential criminal activity. Since restrictions on surveillance have been loosened,<sup>94</sup> and since funding for intelligence activities has greatly increased,<sup>95</sup> there is reason to believe that the pattern of unjustified surveillance that occurred in past decades is recurring. In addition, because of recent spectacular advances in surveillance technology and computer capacity to mine data, the ability to gather and disseminate information far exceeds that in the past, raising further concerns about unwarranted loss of privacy and damage to reputations.<sup>96</sup>

## II. THE RIGHT OF ASSOCIATION

### A. *The Nature of the Right—Associational Privacy and Expressive Association*

The constitutional right of association ensures the inviolability and integrity of groups against unjustified government interference. The right is unenumerated, but clearly established as protected by the First Amendment.<sup>97</sup> The

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93. See, e.g., Editorial, *Of Security and Civil Liberties*, CHI. TRIB., June 2, 2002, at 6. “But Ashcroft also is allowing the FBI to monitor organizations, including religious groups. Presumably mosques and other Arab-related organizations will be prime targets of such surveillance, even in the absence of any reasonable cause or evidence of wrongdoing. *Id.* A . . . serious potential threat to the [First] Amendment is allowing the FBI to monitor organizations—including mosques or Muslim groups—just on the hunch that something illegal might be going on.” *Id.*

94. See *supra* note 36 and accompanying text. See also *Brief and Appendix of Alliance Plaintiffs-Appellees*, *supra* note 90 at 10–11, 34–36 (replying to the City of Chicago’s brief, in which it indicated the City intended to begin conducting political surveillance again if restraints were lifted). The Seventh Circuit modified the consent decree in 2001 to remove the reasonable suspicion predicate for political surveillance. See *Alliance to End Repression v. City of Chicago*, 237 F. 3d 799, 800 (2001).

95. Antiterrorism and Effective Death Penalty Act of 1996 § 811, Pub. L. No. 104-132, 110 Stat. 1214, 1312 (codified as amended 28 U.S.C. § 531).

96. See Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1084 (2002); Joyce W. Luk, Note, *Identifying Terrorists: Privacy Rights in the United States and United Kingdom*, 25 HASTINGS INT’L & COMP. L. REV. 223, 226, 229–32 (2002) (explaining modern uses of video surveillance, facial recognition technology and advanced infrared devices).

97. See *infra* notes 98–116; see also David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 203 (“The freedom of association vies with privacy and state sovereign immunity as one of the most potentially capacious and least textually based rights that the Supreme Court has ever

Supreme Court first recognized it in *NAACP*<sup>98</sup> as the right to associational privacy, which protected the NAACP from disclosing the identities of its members to state officials.<sup>99</sup> The right is not freestanding, but exists only in order to enable the exercise of other constitutional rights.

The Court in *NAACP* defined association as foundational to First Amendment rights:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable part of the . . . freedom of speech.<sup>100</sup>

The Court also emphasized the need for privacy in association:

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [affirmative governmental action in other cases.] This Court has recognized the vital relationship between freedom of association and privacy in one's associations.<sup>101</sup>

Specifically, revelation of identity “may induce members to withdraw . . . and dissuade others from joining [the group] because of fear of exposure of their beliefs . . . and of the consequences of this exposure.”<sup>102</sup> These consequences are particularly pronounced when groups espouse dissident beliefs.<sup>103</sup> The seriousness

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found in the Constitution . . . [I]t is impossible to imagine a democratic society—much less the First Amendment rights of speech, assembly, religion and petition—without a corresponding right of association, so it is not surprising that the absence of any explicit mention of association in the Constitution has proven little barrier to recognition of the right.”).

98. 357 U.S. 449 (1958).

99. *Cf. Whalen v. Roe*, 429 U.S. 589 (1977) (explaining that there is a substantive due process right not to have information regarding one's identity as holder of a prescription for addictive medicine unreasonably disclosed); *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425 (1977) (stating that ex-President had constitutional privacy interest in communicating with his family); *see also* Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1436–37 (2001).

100. *NAACP*, 357 U.S. at 460 (citations omitted).

101. *Id.* at 462.

102. *Id.* at 463. *See also* *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963) (stating that the First Amendment was violated when the government inquired into the identity of persons interested in a particular political organization); *Paton v. LaPrade*, 469 F. Supp. 773 (D.N.J. 1978) (relying on *NAACP* and *Gibson* to hold that FBI investigation of minor student who contacted the Socialist Workers Party as part of a school project contravened the First Amendment).

103. *NAACP*, 357 U.S. at 462.



of the harm requires that the government's conduct be "subject to the closest scrutiny."<sup>104</sup> In this case, NAACP members had previously been subjected to economic reprisals and physical threats from private individuals when their identities were divulged, making similar consequences a likely result of future revelations of membership rosters. The government claimed a need for the list in order to determine whether the organization was conducting intrastate business in violation of the Alabama Foreign Corporation Act. The Court held the link between the statute and the list too insubstantial to require revelation.<sup>105</sup>

The scope and contours of the right of association have shifted somewhat over time. In *Roberts v. United States Jaycees*,<sup>106</sup> the Court subdivided the right into two related but distinct components: expressive association—the right to associate to engage in protected First Amendment expression—and intimate association—the right to associate to pursue private relationships.<sup>107</sup> The right of intimate association protects relationships involving "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."<sup>108</sup>

The right of expressive association, by contrast, emphasizes protecting the ability to associate to advocate public or private viewpoints.<sup>109</sup> As developed in *Roberts* and subsequent cases, the right is infringed when organizations must "abandon or alter" activities protected by the First Amendment.<sup>110</sup> Relevant factors in this analysis include whether the organization's ability to disseminate its views or engage in protected First Amendment activities is impeded, as well as whether the organization loses its ability to exclude individuals with ideologies different from existing members.<sup>111</sup> Infringement can also occur when an association is "organized for specific expressive purposes, and . . . it will not be able to advocate its desired viewpoints nearly as effectively" as a result of government action, such as forced inclusion of unwanted members.<sup>112</sup> Mandating acceptance of undesired

104. *Id.* at 461.

105. *Id.* at 464.

106. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

107. *Id.* at 618.

108. *Id.* at 619–20. Relevant factors in analyzing whether a particular category of relationships is protected include "size, purpose, selectivity and whether others are excluded from critical aspects of the relationship." *Bd. of Dirs. of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987) (citing *Roberts*). Also important are "the kind of role that strangers play in [private associations'] ordinary existence, as is the regular participation of strangers at meetings . . ." *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 12 (1988).

109. *N.Y. State Club Ass'n*, 487 U.S. at 13; see also Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000) (articulating a theory of "expressive identity" based in part on expression and group membership as constitutive of identity).

110. *Rotary Club of Duarte*, 481 U.S. at 548.

111. *Roberts*, 468 U.S. at 627.

112. *N.Y. State Club Ass'n*, 487 U.S. at 13.

members is but one type of “intrusion into the internal structure or affairs of an association” that expressive association guards against.<sup>113</sup> The right is not absolute, however, and could be overridden by “regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>114</sup>

While the term “associational privacy” has disappeared from the Court’s definition of the right in recent years, the underlying concept is still integral to the right of association, apart from the right of intimate association. The right of association entails the right not to associate, or to avoid the presence of unwanted others,<sup>115</sup> as well as the right to keep membership rolls confidential. In this sense, and others, the privacy of the group and its members remains the core of the right.<sup>116</sup>

### *B. The Underlying Purposes and Policy Bases of the Right*

Freedom of speech and religion are largely collective rights, requiring association for their full expression. Therefore, courts also take account of the inherently communal nature of human social, political, and spiritual life in construing the right of association.<sup>117</sup> As social creatures, we develop and express our identities and character in community by relating and reacting to each other. This right corresponds to the political philosopher Isaiah Berlin’s notion of positive liberty, or the right to affirmative development of the self.<sup>118</sup> It follows that many important religious practices and rituals take place communally as well. Politics is similarly a collective endeavor, almost by definition. Few individuals can influence government or the course of public life alone.

Nonetheless, in the last century, courts and commentators often have focused solely on the individual aspects of First Amendment rights, losing sight of the role of community in expressive activity.<sup>119</sup> As a result, associational rights sometimes have seemed anomalous within the overall constitutional framework.

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113. *Roberts*, 468 U.S. at 623.

114. *Id.*

115. *Id.*

116. See Ronald R. Garet, *Communitarity and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1018–23 (1983) (contending that the opinion in *NAACP v. Alabama* correctly noted the connection between free speech and groups, but failed to make explicit the intrinsic value of groups—or “communitarity”—in contributing to human welfare).

117. See generally *id.*

118. See ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 131 (1969).

119. See Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 5–9 (1990); see also Joseph Grinstein, Note, *Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism*, 105 YALE L.J. 1347, 1349 (1996) (arguing that the Supreme Court’s overly individualistic definition of religious belief “gives the government the latitude to employ sedition laws to censor the sermons of both peaceful and violent religious leaders”).

But expanding one's frame of reference to include the relational aspects of expression, as well as the individual, restores perspective on the role of the individual within the larger political and religious community.<sup>120</sup>

More generally, participation in intermediate associations enhances democracy in a number of ways: it reduces alienation by cementing bonds between people, it trains citizens for democratic participation, and it gives them influence over group expression and action, thereby inculcating civic virtue. It also enhances popular sovereignty by amplifying the individual voice, joining it to that of the larger group.<sup>121</sup> In addition, associations provide a buffer between individuals and the State, and help prevent the State from exerting overweening power against individuals.<sup>122</sup> Consistent with this insight, the Supreme Court has elevated associational rights to a more central role within First Amendment doctrine.<sup>123</sup>

The privacy protection function of the right—whether expressive or intimate—also recognizes that government's gathering or revealing of personal information unduly chills association as a foundational breeding ground of democracy (or intimate association as an exercise of freedom). Self-consciousness and fear of disclosure of personal information inhibit the freedom that Isaiah Berlin dubbed negative liberty, or the right to be left alone.<sup>124</sup> The aggregation of individual members' fears inevitably affects the vitality and autonomy of the group.

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120. According to Stanley Ingber:

To view the individual and the community as radically distinct and antagonistic is to suppress the essential truth that to a significant degree we are not self-sustaining, but define ourselves as members of communities. The moral development of individuals cannot be understood without recognizing that individuals are social beings who draw their understandings of themselves and the meaning of their lives from their participation with others . . . . Indeed, human consciousness may be little more than a structure that constrains and predisposes through this process of socialization.

Ingber, *supra* note 119, at 21–22. *See also* Garet, *supra* note 116; Aviam Soifer, *Freedom of Association: Indian Tribes, Workers, and Communal Ghosts*, 48 MD. L. REV. 350 (1989); James W. Torke, *What Price Belonging: An Essay on Groups, Community, and the Constitution*, 24 IND. L. REV. 1, 45–50 (1990).

121. *See* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000) (arguing that associations are vital to our democracy because they promote social integration and support democratic legitimacy, and that the workplace should be considered a central institution of civil society). *See also* Mark Tushnet, *The Constitution of Civil Society*, 75 CHI.-KENT L. REV. 379 (2000).

122. *See* Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1842 (2001).

123. *See supra* text accompanying notes 98–116; *see also* Garnett, *supra* note 122, at 1857–82.

124. BERLIN, *supra* note 118, at 122; *see* Solove, *supra* note 99, at 1413–19, 1430–38.

Briefly, constitutional history indicates the importance of community and association to the political debates occurring at the time of the framing. Although the federalists generally proceeded from the individualistic Enlightenment tradition,<sup>125</sup> the antifederalists, or republicans, derived many of their views from European republican theory.<sup>126</sup> The antifederalists focused on the common good and the effects of institutions—both governmental and intermediate nongovernmental groups—in shaping individual lives.<sup>127</sup> Believing that government should support character development, the antifederalists “were the force that galvanized support for the inclusion of a Bill of Rights—ironically, a document most often interpreted through the language of individualism.”<sup>128</sup> Thus, concerns for association and its benefits informed the development of the First Amendment from the beginning.<sup>129</sup>

Because association is central to American democracy and its constitutional framework, it is imperative to maintain a vigorous right of association in order fully to protect First Amendment activities.<sup>130</sup> In the absence

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125. Ingber, *supra* note 119, at 26–27.

126. *Id.* at 28.

127. *Id.*; see also Cole, *supra* note 97, at 227–28 (“The right of association also finds support in the intent of the Framers of the Constitution. The centrality of collective action to a republican government was so accepted by the Framers that the only objection to including the right to assemble in the First Amendment was that the right was so obvious that it did not need to be mentioned . . . If the right of assembly is implicit in a republican government, so too is the right of association, since the very reason assembly was considered implicit was that it made association possible.”). Cf. Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 639 (2002) (asserting that associations were understood in terms of freedom of assembly and popular sovereignty in the early Republic; they are important because they provide for self-government. Modern claims of associational rights should be evaluated in light of their effect on popular sovereignty).

128. Ingber, *supra* note 119, at 31; see also Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 91–92 (1992) (“For republicans, participation by citizens in deliberation concerning [the] collective pursuit of the public good was the highest act of individual self-realization. This participation required civic virtue: both a public-spiritedness that prompted citizens to engage in a discourse about the public good and traits of individual character necessary to attain that good. So important was civic virtue to the success of the republican enterprise that republicans typically believed government should act affirmatively to imbue its citizens with civic virtue.”).

129. DeToqueville’s observations about the American character corroborate the conclusion that individualism was not the only—or necessarily even the dominant—political attitude in the early years of the nation. Observing the American penchant for forming and joining intermediate communities of all types, Toqueville concluded that this participatory streak in the American character augured well for its democracy. ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 1489–92 (Harvey C. Mansfield & Delba Winthrop eds., Univ. of Chi. Press 2000). Simultaneously, he criticized the overly individualistic, materialistic strain in American and democratic thought generally. *Id.* at 482–85. Cf. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (espousing theory of First Amendment based on the model of a town meeting).

130. The Supreme Court has recognized that associational rights are particularly important to religious organizations. See Daniel A. Farber, *Speaking in the First Person*

of a strong right of association, not only individual civil liberties, but also the stability of intermediate groups, a fundamental pillar of our system, is in jeopardy.<sup>131</sup> The critical need to ferret out terrorism cannot be allowed to collapse the necessary tension between First Amendment freedoms and protecting the national security. As will be demonstrated *infra*, the two interests can be accommodated and balanced in a fashion that respects both and enhances the efficiency of law enforcement.<sup>132</sup>

### *C. Expansion of Expressive Association and Deference to Groups' Self-Understanding*

The Court's recent expansion of the right of association is reflected in *Boy Scouts v. Dale*.<sup>133</sup> Extending the right to exclude members—the right not to associate—beyond the *Roberts* line of cases,<sup>134</sup> the Court declared that forced inclusion of a gay Scoutmaster would violate the Boy Scouts' right of expressive association. With minimal scrutiny, the majority accepted the Scouts' assertion that its official values, and hence message, disapproved of homosexuality.<sup>135</sup>

The majority also deferred to the Scouts' further assertion that James Dale's presence as a Scoutmaster would seriously burden the organization's ability to express its values: "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."<sup>136</sup> Moreover, an association need not prove that its message has been impaired or certainly will be impaired, but only that it "could be impaired."<sup>137</sup> Therefore, the Court determined that the New Jersey Law Against Discrimination's prohibition of discrimination against gays and lesbians in places of public accommodation, as applied in this case, contravened the First Amendment.<sup>138</sup> The Court acknowledged, as set forth in *Roberts*, that compelling state interests can override expressive association, but it concluded that the burden on the Scouts outweighed the State interest in eliminating discrimination.<sup>139</sup> The opinion interpreted *Roberts* and its progeny as requiring weighing of the respective interests of the association and the State.<sup>140</sup>

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*Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1502–03 (2001).

131. See *supra* text accompanying notes 120–24.

132. See *infra* text accompanying notes 221–73.

133. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

134. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

135. *Dale*, 530 U.S. at 650–51.

136. *Id.* at 653.

137. *Id.* at 655.

138. *Id.* at 656.

139. The Court did not repudiate, or even address, the *Roberts* formulation of the governmental interests that can overcome assertion of an expressive association claim. Presumably, the *Roberts* test remains the law, as folded into *Dale*'s balancing test.

140. *Id.* at 658–59.

After *Dale*, a group compelled by government to accept unwanted members who express a message contrary to the group's has an extensive right to create its own message, to declare an official message from among a welter of perhaps contradictory tendencies, and to define what government action would seriously burden and unduly disrupt that message.<sup>141</sup> By deferring to associations, the decision acknowledges the independence and privacy of expressive groups, even when confronted with a governmental interest as important as a state statute outlawing discrimination against disfavored groups. In this context, it is enormously protective of civil society and private associations.<sup>142</sup>

This is the paradox of associational privacy: in the absence of a compelling state interest, the group, ostensibly open to the public, is off-limits to outsiders whose presence the leadership deems seriously burdensome to expression of its message and values. In this sense, the group itself, and not just its individual members, has a right to privacy, regardless of its size; thus, the group can have privacy rights that an individual member may not have.<sup>143</sup> Moreover, the leadership has considerable discretion to define the association's message. Even when the interloper is the government, *Dale* holds that it can be stopped at the group's insistence if its burdens outweigh the strength of the governmental interests.

In sum, the body of Supreme Court case law creates a strong associational right, combining both expressive and privacy elements. From *NAACP* through *Dale*, the Court has emphasized the centrality of self-determination in membership decisions and protection of groups from outside interference.<sup>144</sup> It has also upheld the ability to associate and to form communities that has been one of the fundamental underpinnings of American democracy since the time of the Framers.<sup>145</sup>

This version of associational privacy is unlike the Fourth Amendment right to privacy, which is confined to individual, or intimate family-type settings, such as one's home. The existence of the right to be free from unreasonable government searches and seizures depends upon proper articulation of a

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141. Cf. *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group*, 515 U.S. 557 (1995) (holding on free speech grounds that private parade organizers may exclude gay group that they claim undermines their message despite state law prohibition on sexual orientation discrimination).

142. See Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 848 (2000); Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001); Marc Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 LAW & SEXUALITY 271 (2003).

143. See *supra* notes 116–32.

144. *NAACP v. Alabama*, 357 U.S. 449 (1958).

145. See *supra* text accompanying notes 98–132.

reasonable expectation of privacy.<sup>146</sup> An individual is not considered to have a reasonable expectation of privacy in a group that is, at a minimum, open to third parties.<sup>147</sup> It is similarly unlike the constitutional right to privacy—and its corollary right to intimate association.<sup>148</sup> The overlapping constitutional right to informational privacy is also distinguishable in that it focuses on protecting personal information from unreasonable dissemination, rather than on avoiding outside interference with expressive activities.<sup>149</sup> By contrast, public settings such as open meetings can invoke the “public privacy” of expressive association.<sup>150</sup> Focused on the fragility of collective expression, the Court’s doctrine of the right of association elevates the liberty of civil society to foster and nurture its own values and expression.<sup>151</sup>

### III. EXPRESSIVE ASSOCIATION AND POLITICAL/RELIGIOUS SURVEILLANCE

This Section examines the governmental and associational interests implicated in surveillance of First Amendment activity, employing the Supreme Court’s decisions on associational rights beginning with *NAACP* and culminating with *Dale*. Although surveillance issues are generally analyzed solely under the

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146. See *Katz v. United States*, 389 U.S. 347, 352 (1967); see also Solove, *supra* note 96, at 1117–24.

147. See *Hoffa v. United States*, 385 U.S. 293, 301–03 (1966).

148. See *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-21, at 985–90 (1978).

149. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 599–606 (1977).

150. Poirier, *supra* note 142, at n.167. Cf. Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 *MISS. L.J.* 213 (2002) (arguing for Fourth Amendment-based right to privacy and anonymity in public).

151. In addition to expressive association, the right to free exercise of religion is also implicated when religious expression is monitored, raising the issue whether surveillance of Muslims unconstitutionally impinges on free exercise rights. See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (holding that an ordinance criminalizing animal sacrifice and specifically implicating traditional Santeria religious practice is unconstitutional under the Free Exercise Clause because “even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices” will cause them to be viewed as suspect; and, under no circumstances may “[l]egislators . . . devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices”). *But see* *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990) (denying unemployment compensation to Native Americans for using an illegal hallucinogen consistent with their religious traditions is constitutional under the Free Exercise Clause because even when “otherwise prohibitable conduct is accompanied by religious convictions,” it is only the convictions that “must be free from governmental regulations,” not the conduct itself). While in all likelihood courts would be reluctant to hold that post-September 11 law enforcement practices such as attending mosques for purposes of preventing terrorism is unconstitutional under the Free Exercise Clause, the mere fact that such investigations focus exclusively on monitoring Muslims is cause for concern under the principles set forth in *Church of Lukumi Babalu Aye*.

Fourth Amendment, political surveillance should be analyzed primarily under the stricter standards of the First Amendment because it is directed at political and religious speech. At the point of convergence of the First and Fourth Amendments, the reasonableness restrictions of the latter inform analysis, but the compelling state interest standard of the First Amendment should govern; otherwise, expressive activity is not adequately and consistently protected.<sup>152</sup> To be consistent, First Amendment standards should govern across the board, regardless of whether a search or seizure might occur.

Moreover, the Fourth Amendment does not cover much of the investigative activity involved in political surveillance, either because no potential search or seizure is involved, or because individuals in a group setting do not have the requisite “reasonable expectation of privacy.”<sup>153</sup> Even so, the First Amendment protects these individuals and groups from unjustified investigations that intrude upon their lawful expressive activity.<sup>154</sup>

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152. Cf. *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972) (“National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of ‘ordinary’ crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.”). The Court held in this case that prior judicial approval is required for wiretapping even in domestic security cases. *Id.*

153. See *supra* notes 146–47.

154. See Dolores A. Donovan, *Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments*, 33 *BUFF. L. REV.* 333, 380–81 (1984) (arguing that use of informers can violate the First Amendment even if the Fourth is not violated).

Both citizens and aliens enjoy First Amendment protections. United States citizens receive the full panoply of rights guaranteed by the Constitution, but the Constitution also provides certain guarantees to aliens within the territorial jurisdiction of the United States, including First Amendment rights. *Bridges v. Wixon*, 326 U.S. 135 (1945). As Justice Murphy noted in his concurrence, “[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First . . . Amendment.” *Id.* at 161. None of these provisions acknowledges any distinctions between citizens and resident aliens. *Id.* “They extend their inalienable privileges to all ‘persons’ and guard against any encroachment on those rights by federal or state authority.” *Id.* See also *Plyler v. Doe*, 457 U.S. 202, 211–12 (1982) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), concluding that the Fourteenth Amendment applies to aliens unlawfully within the borders of this country); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (extending the Fifth and Sixth Amendments to “all persons within the territory of the United States,” whether they are here lawfully or unlawfully and including those lawful aliens charged with crimes) (emphasis added).

In immigration proceedings however, the level of protection afforded to the various categories of aliens in this country changes according to their legal status. The Supreme Court firmly held that “Congress may make rules as to aliens that would be unacceptable if applied to citizens.” *Demore v. Kim*, 538 U.S. 510, 522 (2003). Explaining this proposition, the Court held that the no-bail provision of the Immigration and Naturalization Act did not violate a legal permanent resident’s due process rights under the Fifth Amendment. *Id.* at 522–29. Similarly, the Court has noted in dicta that an alien generally has no constitutional



Political surveillance is defined as an array of techniques employed by government agents to investigate and record the political and religious beliefs and activities of those engaged in First Amendment expression, ranging from infiltrating and disrupting organizational leadership to observing and recording public events.<sup>155</sup> Note that the definition does not include terrorism investigations that are not based on First Amendment expression.

In addition, I do not focus on investigations that are based on non-First Amendment conduct, but that incidentally include First Amendment expression. These situations would include, for instance, an investigation of certain members of a mosque because a known terrorist had held a meeting there. The investigation could incidentally encompass First Amendment activity. Videotaping of demonstrators who have announced a plan to engage in civil disobedience by blocking traffic could also fall into this category.<sup>156</sup> Cases such as this would be analyzed under the more lenient test of *United States v. O'Brien*,<sup>157</sup> which rejected a First Amendment challenge to a federal statute prohibiting the destruction of draft cards. The statute punished conduct that was not inherently expressive, and served an important state interest.<sup>158</sup> O'Brien's prosecution after symbolically burning his draft card was constitutional because the expressive component of his action was ancillary to, though intertwined with, the conduct itself.<sup>159</sup> By contrast, the investigations I discuss in this Article are initiated because of First Amendment expression. Targets are chosen—or profiled—on the basis of lawful political or religious expression, not because of conduct.

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right to raise the defense of selective prosecution in deportation proceedings. *Reno v. American-Arab Anti Discrimination Comm.*, 525 U.S. 471, 488 (1999). Justice Scalia's opinion further noted that "[w]hen an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activities." *Id.* at 491–92. However, it is important to note that this holding is limited to aliens already in violation of the terms of their visas and subject to deportation proceedings. This holding does not change the fundamental proposition that persons lawfully in this country are entitled to basic First Amendment rights. *See Bridges*, 326 U.S. at 148.

155. Further, one need not inquire into the actual subjective intent of law enforcement personnel to determine whether surveillance was improperly motivated by political considerations. Instead, improper intent can be inferred if the surveillance is not justified by the analysis set forth herein.

156. The announced intent to break the law distinguishes this instance from one where no evidence of likely illegality is present. Peaceful demonstrations could not be recorded under the standard I elaborate in this Article absent a reasonable suspicion of crime.

157. *United States v. O'Brien*, 391 U.S. 367 (1968).

158. *Id.* at 375–77.

159. *Id.* at 376 (“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”).

### A. *The Costs of Political Surveillance*

This Section is structured according to the *Dale* balancing framework; that is, I weigh the interests of expressive association against the State's interest in determining whether and when political surveillance is warranted under the compelling state interest standard. I also propose a test to ascertain when surveillance may be justified in a particular situation.

#### 1. *Nature of the Harm*

At one end of the spectrum of costs occasioned by political surveillance, the harms of intentional disruption and intimidation by officers and undercover agents are self-evident. There can be practically no clearer violation of the constitutional right of association than intentional government interference with the peaceful functioning of an intermediate association. Unintentional disruption of an organization can also occur when law enforcement agents occupy important positions in groups as leaders or members—they are operating for reasons other than furtherance of the organization's goals. When this occurs, the integrity of the group's expression is centrally compromised and its core message distorted.

The membership of surveillance agents in these situations is akin to the form of coerced membership repudiated by *Dale* and its antecedents as antithetical to expressive association.<sup>160</sup> Concededly, the harm is not identical to that in the *Roberts* line of cases—the interloper does not generally express a message directly contrary to that of the group, except when engaging in deliberate disruption.<sup>161</sup> But adding the voices of dissembling law enforcement agents to group discussion affects the group's message. Thus, this harm is of the same general type and severity as that in the case law because the group's expressive ability is diluted and distorted by the presence and influence of unwelcome outsiders; the group's identity, as exemplified by its message, is altered.<sup>162</sup>

The mere presence of law enforcement officers or agents—particularly when known and not just suspected—can also interfere substantially with expression. It is even more acute when agents are present at private or semi-private meetings, functioning as a form of unintentional intimidation. Members are forced to accept the agents and their intelligence-gathering if they wish to continue engaging in expressive activity.<sup>163</sup> Many are afraid to speak out when they know, or even suspect, that their speech is being monitored.<sup>164</sup> Others quit attending

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160. See *supra* text accompanying notes 97–145.

161. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

162. See *supra* text accompanying notes 97–145. See also *Donaldson v. Farrakhan*, 762 N.E.2d 835 (Mass. 2002) (relying on *Dale*, the court held that women could be barred from attending a male-only event sponsored by the Nation of Islam and held in a public venue because the separation of the sexes was an integral part of the association's core message); see generally *Hunter*, *supra* note 109.

163. See *supra* text accompanying notes 39–96.

164. See *Slobogin*, *supra* note 150, at 242–51 (enumerating consequences of surveillance); Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1130–31

meetings or associating with a group for fear of surveillance and its often untoward consequences.<sup>165</sup> The consequences are especially severe when targets are aware that they could be branded as terrorists and ostracized, or detained for

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(2002); see generally Church Committee Report, *supra* note 8; see also *infra* notes 165, 170.

165. See Susan Stamberg & Barbara Bradley, *How the FBI Is Conducting Its Domestic War on Terrorism in Florida*, NATIONAL PUBLIC RADIO: MORNING EDITION, Sept. 6, 2002. "At a local north Miami mosque, the windows are papered and the front door is locked." *Id.* Before September 11 between thirty to fifty people visited the mosque for evening prayers. Nidal Sikar, a local congregant, says that the mosque is virtually empty now. *Id.* "People are afraid to come to the mosque because they don't know who's going to be waiting for them at the mosque. I mean, you come to pray here. I mean, you don't know if the one praying next to you might be somebody who's counting every breath that you have for some made-up reasons." *Id.*

Attorney Sohail Mohammed represents many Muslims in northern New Jersey and acts as spokesman for the Muslim community in the Paterson area. He confirms that both attendance at area mosques and donations to mosques have dropped dramatically since September 11, because Muslims are afraid that their religious activities will attract the attention of the FBI and cause them to be investigated or detained. Interview with Sohail Mohammed, Attorney, Aug. 26, 2003 [hereinafter Interview with Sohail Mohammad].

See also Kelly Thornton, *Local Muslims Feel Eyes of FBI; Fear of Being Watched, of Talking Freely Is Rampant*, SAN DIEGO UNION-TRIB., Sept. 10, 2002, at A1. Mohamad Nasser, president of the San Diego chapter of the Muslim American Society, stated that "[San Diego Muslims] are afraid to be in big congregations because they fear Big Brother is watching them . . . Big Brother is watching, I can tell you that." *Id.* Muslims fear that if someone praying in the corner is suspected of terrorism, anyone who speaks to or associates with him will likewise become a suspect. *Id.* As Rania Elbanna points out, "I feel like I don't know who I am talking to that could be a part of a terrorist group, that I could get in trouble just by talking to them, I could be linked to them." *Id.* Other community members stated that fear of misdirected law enforcement has led some community members to go back to their native countries, while others attend community services less often and some even avoid the mosque altogether. *Id.* Shaker A. Lashuel, *Surveillance Tactics Victimize U.S. Muslims*, NEWSDAY (N.Y.), Dec. 3, 2002, at A33 (describing how a twenty-year-old Muslim student has stopped going to the mosque daily because he believes that his religious observance will be misinterpreted as fanaticism and how many Muslims refrain from expressing political views because they fear someone will incorrectly report them to law enforcement).

*Cf.* Lynne Duke, *Worship and Worry; At a Brooklyn Mosque, Muslims Pray in the Shadow of Terrorism*, WASH. POST, Apr. 16, 2003, at C01. At the Al-Farooq Mosque in Brooklyn, the local imam has watched attendance dwindle and witnessed congregants refrain from making charitable contributions to the mosque. *Id.* Many Muslims now feel that even their most innocent contributions will be swept within the ambit of criminality. *Id.* The result is that "[p]eople are afraid to donate . . . People don't want to get their names involved." *Id.* The imam also knows that the FBI is present during his sermons and services. *Id.* To him it has become a fact of life. *Id.* This mosque, however, has a history of involvement with individuals preaching violence against the U.S. *Id.* It is possible that surveillance is justified under the reasonable suspicion standard detailed *infra* at Section III(C).

long periods, even when they have no connection to terrorism.<sup>166</sup> The stigma and reputational harm that flow from being wrongly associated with terrorism are undeniably severe.

The harms are amplified when agents record First Amendment information, compile it into dossiers, and disseminate it. Indeed, the unconsented-to collection and maintenance of information is itself an invasion of privacy, particularly because of the power of government bureaucracies and the likelihood of error and unwarranted dissemination of First Amendment information.<sup>167</sup> Expressive association of all types is vulnerable to the self-censoring and guardedness that accompany law enforcement's compiling of information.

These injuries are akin to those suffered in *NAACP* and the *Roberts* line of cases: deleterious consequences that can follow a lack of control over group affiliations and information pertaining to beliefs.<sup>168</sup> The chilling of protected expression that accompanies political surveillance impedes the group's ability to realize fully its political or religious purposes. Losing its ability to exclude members who do not endorse the group's philosophy leads to alteration of a group's values and message.<sup>169</sup> The cumulative effect of invasion of the group's privacy, likelihood of reputational harm, and consequent chilling of members'

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166. See David Cole, *We've Aimed, Detained and Missed Before*, WASH. POST, June 8, 2003, at B1.

167. See Solove, *supra* note 99, at 1422–23 (recounting misuse of personal information by bureaucracies).

168. See *Anderson v. Sills*, 256 A.2d 298, 305 (N.J. Super. Ct. 1969), *rev'd* 265 A.2d 678 (N.J. Sup. Ct. 1970) (“The secret files that would be maintained as a result of this intelligence gathering system are inherently dangerous and *by their very existence* tend to restrict those who would advocate . . . social and political change.”) (emphasis added). This decision was one of the first—and few—to hold political surveillance unconstitutional under the First Amendment. *Id.* Frank Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196 (1970) (elaborating First Amendment basis for claims that political surveillance chills speech); Lardiere, *supra* note 36, at 983–85.

169. See *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984).

voices mutes or weakens the group's expressive ability.<sup>170</sup> In the absence of a compelling state interest, the test for impairing expressive association is met.<sup>171</sup>

Further, under *Dale*, courts should defer to a group's self-conception of harm, and many Muslims have indicated their dissatisfaction with infiltration of their religious activities.<sup>172</sup> The deference principle, however, may not fully transfer to a national security context, where the interest in combating terrorism can trump the harms to association. Nonetheless, to protect the robust associational right developed in the case law, groups' notions of harm should be taken into account. They can be subjected to scrutiny or outweighed by investigative interests, but not dismissed as irrelevant. Granted, harms such as those identified by Muslim groups can also accompany legitimate investigations of potential terrorist activity, but given the likelihood of chilling expressive association, investigations should be limited to situations involving a real possibility of terrorism.

In addition, targets of political surveillance experience the harms of political profiling, which also create stigma, chill speech, and impair the ability to associate. Targets can be chosen either because they have expressed political or religious views that law enforcement considers "extremist," or because of an assumed political or religious affiliation.<sup>173</sup> In the first instance—expression of "extreme" views—the authorities conflate and confuse expression of political belief with evidence of criminality.<sup>174</sup> For instance, a Muslim college student

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170. See *supra* text accompanying notes 109–45; see also George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION, 53–54 (Amy Gutmann ed., 1998) (“[A]n association is tied together by speech; its internal relations are comprised, to a great extent, of speech. To regulate the membership of an organization is often to alter its speech and hence to regulate its speakers.”). Frequently, Muslims feel pressured to change their usual religious practices because they fear reprisal at the hands of law enforcement. Austin, *supra* note 1. For example, at the Jalalabad Jam E Mosque in Paterson, N.J. the doors remain locked during the afternoon prayer session. Similarly, at another mosque in Paterson, congregants seem hesitant to discuss their names and any details concerning the mosque fearing that any information given may be misunderstood and result in unnecessary harassment. *Id.* Since FBI surveillance has become evident, imams refrain from using words like “jihad” in their sermons because they fear that a spy may overhear it and misinterpret it as a political statement. Thornton, *supra* note 165.

171. See *supra* text accompanying notes 109–14.

172. See *supra* notes 165, 170.

173. See *supra* text accompanying notes 39–92. See also Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY OF AM. LAW 295 (2002).

174. See DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION 13 (2d ed. 2002) (“The FBI’s predominant approach, followed throughout its history, has been to designate certain ideologies or groups as suspect, to attempt to identify their adherents, members, supporters or associates, and then to monitor the activities of all those identified. This ‘guilt by association’ intelligence model presumes that all those who share a particular ideology or political position must be monitored on the chance that they will slip into criminal activity in order to achieve their political objectives. It blurs the distinction between ‘support’ for a cause and participation in violence.”). The Church Committee

should be able to tell his friends that he believes that Palestinian suicide bombings are justified without becoming a target of surveillance. His abstract advocacy is unrelated to a domestic crime. Even stating that the September 11 attacks were justified should not warrant an investigation in itself, since it is an abstract assertion concerning a past event and does not indicate any personal involvement with terrorism.<sup>175</sup> The same principle holds with respect to groups.

Historically, however, police agencies have assumed that anyone holding views such as those in the examples above must also be inclined to violence, since terrorists hold similar views. But many individuals hold beliefs in common with terrorists without any intent to engage in violence themselves. For example, millions harbor racist beliefs, but only a tiny percentage engage in racist violence. While it is undoubtedly true that individuals holding extremist beliefs are more likely than the general population to engage in terrorism, the proportion of those holding extremist beliefs who engage in terrorism is so minuscule that the mere existence of their beliefs, without more, cannot justify surveillance. Any policy to the contrary would not only violate First Amendment rights, it would also divert scarce law enforcement resources from investigating those more likely to act illegally.

In the second instance, conducting surveillance because of any association with a suspect group, agencies have assumed that individuals share a

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recommended prohibiting investigations of ‘subversives’ or local civil disobedience. *See* Church Committee Report *supra*, note 8, Book II at 319 (“[T]hose investigations inherently risk abuse because they inevitably require surveillance of lawful speech and association rather than criminal conduct. The Committee’s examination of forty years of investigations into ‘subversion’ has found the term to be so vague as to constitute a license to investigate almost any activity of practically any group that actively opposes the policies of the administration in power.”).

Attorney Sohail Mohammed states that the FBI has followed its usual practice of focusing on political and religious beliefs and practices in its interviews of Muslims in the Paterson and Clifton, New Jersey, area since September 11. Interview with Sohail Mohammed, *supra* note 165. Although FBI agents claimed to be seeking the cooperation of the local Islamic community in their investigation of the September 11 hijackings, agents would question residents closely about their personal political and religious beliefs, affiliations, and practices. *Id.* Agents asked, for instance, how often interviewees prayed, what they thought about the events of September 11, and the like. *Id.*

175. While First Amendment-protected expressions can form the basis of a reasonable suspicion of criminal activity, they must relate to participation in an actual crime; otherwise, there is no indication of criminal behavior by this individual. *See* *Yates v. United States*, 354 U.S. 298 (1957), *overruled by* *Burks v. United States*, 437 U.S. 1 (1978); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. REV. 685, 723 (1978) (“The lawful advocacy of ideas is often most effective when it approaches incitement; to punish mistakenly a speaker for exhortations [involving abstract advocacy that is close to incitement] is to suppress protected speech at the point where it may have the greatest impact. Moreover, the probability of error increases as we draw near to that legal line dividing the punishable and the protected. . . . [A] margin for error is needed, and . . . this margin must be drawn in favor of speech.”); *see also* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

group's goals regardless of the level of association, so that the most fleeting and transitory of associations have triggered intrusive surveillance of individuals.<sup>176</sup> For instance, those attending a demonstration organized by a group considered "extremist" would also be targeted, even if they were unaware of the group's sponsorship or goals.<sup>177</sup> Note that I am not referring here to investigations of individual members of groups that are legitimately targeted for terrorism investigations; rather, I refer to investigations of individuals with only the most attenuated ties to a suspect group, as well as to investigations of individuals associated with a group that is not a legitimate target. The group is harmed when the costs of affiliation increase, distorting the group's identity and message. Unless additional evidence reveals further ties, or an emergency justifies a preliminary inquiry, investigations of people in these situations should be discontinued.<sup>178</sup>

This political profiling occurs despite the high value of political speech in the First Amendment hierarchy, the high likelihood of harm, and the lack of a significant or demonstrated link—particularly in an individual case—between expression of religious or political beliefs and criminality.<sup>179</sup> The combination of harm from both ongoing surveillance and targeting is potent because the decision to target itself chills speech.<sup>180</sup> Therefore, the group's message is ultimately affected or altered in a myriad ways.

The political profiling I discuss here is in some respects analogous to racial and ethnic profiling: both are based on a surrogate characteristic that is thought to correlate with criminality.<sup>181</sup> A primary justification, then, is the focusing of scarce law enforcement resources where they can be more efficiently

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176. As evidence of guilt by association, consider the case of forty Mauritians who were arrested in Louisville, Kentucky when someone anonymously tipped off the police that one of them was taking flying lessons and another looked like one of the hijackers. Even though the tip referred to two men, all forty were detained overnight. Of the forty, none was charged with terrorism. See HUSSEIN IBISH ET AL., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: THE POST-SEPTEMBER 11 BACKLASH SEPTEMBER 11, 2001–OCTOBER 11, 2002, at 35 (ADCRI 2003).

177. See *supra* text accompanying notes 39–92.

178. In terrorist emergencies involving a risk of imminent violence, preliminary inquiries may be made. See *infra* text accompanying notes 251–55.

179. See Robert A. Pape, *Dying to Kill Us*, N.Y. TIMES, Sept. 22, 2003, at A17.

180. Americans tend to assume that Muslims or Arabs are responsible for domestic terrorism. The 1995 Oklahoma City bombing provides a good example. Many initially assumed that it was perpetrated by Arabs. See Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 727 (2000).

181. Racial and ethnic profiling also play a part in law enforcement treatment of Muslims since September 11, but an analysis of those equal protection issues is beyond the scope of this Article, which focuses on First Amendment associational rights. For further analysis of those issues, see Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675 (2002–03); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002); cf. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002).

deployed.<sup>182</sup> The model breaks down, though, insofar as the profiled trait does not correlate cleanly or well with criminality. With political profiling, as indicated *supra*, the correlation between general expression of radical political beliefs, that is, abstract advocacy, and criminal actions is insufficient.<sup>183</sup> With respect to racial profiling, empirical studies have indicated, for instance, no correlation between African-American drivers and disproportionate involvement in either drug crime or traffic offenses as compared to other drivers.<sup>184</sup> In the absence of validation, keeping in mind the history of race discrimination, and the significant harms of profiling, the practice is not justified.<sup>185</sup>

In addition, there are inefficiencies in the sweeping, overbroad types of political surveillance typically conducted. Resources are diverted from legitimate law enforcement when investigations focus on politics, rather than criminality. Political or religious investigations are not sufficiently focused to produce good intelligence information—only a focus on criminality can target likely suspects.<sup>186</sup> Monitoring and surveillance also create resentment that impedes the cooperation necessary for good intelligence-gathering and criminal investigation.<sup>187</sup> Law enforcement and intelligence agencies need the cooperation of Muslim

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182. See Bernard E. Harcourt, *The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-First Century*, 70 U. CHI. L. REV. 105, 109–10 (2003) (“The idea of criminal profiling is to develop correlations between specific criminal activity and certain group-based traits in order to help the police identify potential suspects for investigation. Criminal profiling uses probabilistic analysis in order to identify suspects and target them for surveillance.”).

183. Targeted advocacy of violence is to be distinguished from abstract advocacy of political violence, which is protected by the First Amendment. See *Yates v. United States*, 354 U.S. 298 (1957), *overruled by* *Burks v. United States*, 437 U.S. 1 (1978); see also Pape, *supra* note 179 (relying on a database he compiled of every suicide bombing and attack from 1980 to 2001, the author concludes “there is little connection between suicide terrorism and Islamic fundamentalism, or any religion for that matter”). Pape states that “what nearly all suicide terrorist campaigns have [in common is a goal] to compel liberal democracies to withdraw military forces from territory that the terrorists consider to be their homeland.” *Id.*

184. See DAVID A. HARRIS, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999); David A. Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, ACLU SPECIAL REPORTS (June 1999), available at <http://archive.aclu.org/profiling/report/index.html>.

185. See Johnson, *supra* note 180, at 684–85, 707–16, 722–36.

186. Church Committee Report, *supra* note 8, Book II, at 318–22.

187. See COLE & DEMPSEY, *supra* note 174, at 15–16, 179–80. See also Tom Brune, *Taking Liberties/Collateral Damage/Government Efforts to Prevent Future Terrorist Acts Are Putting Civil Liberties at Risk*, *Critics Say*, NEWSDAY (N.Y.), Sept. 15, 2002, at A03 (“The large Muslim community in Paterson, New Jersey, horrified by the Sept. 11 attacks, initially responded to investigators’ entreaties for information. But after a while, many in the community began to feel the government was heavy-handed and insensitive in its profiling of them in constant interrogations, immigration restrictions and deportations.”). CHISHTI ET AL., *supra* note 21, at 95 (“[R]esidents of Paterson, New Jersey . . . initially responsive to the FBI, felt alienated after what they perceived as the agency’s harassment in questioning and detaining a large number of residents.”).



communities to develop the intelligence that can help discover real terrorists, who are unlikely to tip off authorities by making rash political statements.<sup>188</sup>

Political surveillance of religious groups' rituals and other expressive activities also undermines the sanctity of the gathering and its independence as an identity-forming and affirming enclave and refuge from the larger society. It denigrates the civic standing of Muslims in the U.S.<sup>189</sup> The net effect is to dramatically reduce the privacy and anonymity of both the group and its members, which leads in turn to impairment of the basic functions of intermediate associations.<sup>190</sup>

The costs of unjustified political surveillance are not always direct or immediately evident. Fear spreads slowly and insidiously. The long-term effect is to undermine the general level of trust and social bonds, as well as to increase alienation.<sup>191</sup> A phenomenon that begins as the chilling of speech leads to an erosion of the quality of free association, which in turns leads to a breakdown of civil society, undermining the foundation of our democracy. As recounted *supra*, American democracy relies on the strength of our intermediate associations to foster a sense of community and responsibility to the larger society. Without the unimpeded ability to participate in these institutions, one of the building blocks of a strong democracy is weakened. Only a compelling state interest in monitoring terrorists can justify the practice of political or religious surveillance.

### 2. Objective Harm?

A threshold question in this inquiry is whether and under what circumstances the harms of surveillance outlined *supra* are sufficiently objective and serious to outweigh the Government's assertion of a compelling need for domestic security purposes. A related, and narrower, formulation of this issue is whether, despite an assertion of harm that is supported by some evidence, a group subjected to surveillance has suffered objective harm sufficient to render the claim justiciable. I explore the issues of harm and standing here because they illuminate the types of harms courts have considered both direct and serious.

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188. See COLE & DEMPSEY, *supra* note 174, at 15–16, 179–80.

189. See Nancy L. Rosenblum, *Compelled Association, Public Standing, Self-Respect, and the Dynamic of Exclusion*, in FREEDOM OF ASSOCIATION 83 (Amy Gutmann ed., 1998) (arguing that dignitary harms are tied to civic standing in a liberal democracy and can therefore transcend an individual's subjective experience and violate actual rights or public norms of civic equality).

190. See Slobogin, *supra* note 150, at 8–12 (recounting importance of anonymity to privacy and selfhood).

191. See Adam Liptak, *Changing the Standard*, N.Y. TIMES, May 31, 2002, at A1 (quoting Jason Erb, Council on American-Islamic Relations, stating: "It starts to erode some of the trust and good will that exists in these institutions if you're afraid they have been infiltrated by an undercover agent.").

In 1972, the Supreme Court held in *Laird v. Tatum*<sup>192</sup> that plaintiff antiwar activists, complaining that an Army intelligence surveillance program chilled their First Amendment expression, had no standing under Article III because the harm they alleged was subjective. According to the five-to-four majority opinion, plaintiffs alleged only that the existence of the program chilled their expression, not that they themselves were targeted for surveillance that caused them direct harm.<sup>193</sup> These allegations were considered too indirect and tenuous to render the claims justiciable.<sup>194</sup>

The Court distinguished a number of previous cases in which it had allowed standing based upon alleged chilling effects.<sup>195</sup> According to the majority,

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192. *Laird v. Tatum*, 408 U.S. 1 (1972).

193. *Id.* at 3, 9–10. It is interesting to note that the decision could have come down differently had Justice Rehnquist recused himself. *Laird v. Tatum*, 409 U.S. 824, 824–33 (1972). He declined to recuse himself from the Court's decision, despite the respondents' allegations concerning Justice Rehnquist:

[His] impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department in Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims.

*Id.* Justice Rehnquist defended his decision to join the opinion, stating "my total lack of connection while in the Department of Justice with the defense of the case of *Laird v. Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department" and the requested recusal "does not appear to me to be supported by the practice of previous Justices of this Court." *Id.* at 830–34. Partly in response to this situation, the rules of judicial conduct were amended in 1974 to include a more specific and expanded list of situations in which recusal is required. 28 U.S.C. § 455 (a), (b) (2003).

194. *Laird*, 408 U.S. at 13. *See also* *Anderson v. Sills*, 265 A.2d 678, 684 (N.J. Sup. Ct. 1970) (alleging chilling effect of political surveillance of New Jersey State Police insufficient to confer standing).

195. *Laird*, 408 U.S. at 11–12. The cases distinguished were: *Baird v. State Bar of Ariz.*, 401 U.S. 1, 7 (1971) (ruling that "a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes" where individual was denied bar admission because she refused to identify past organizational associations); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (ruling that it is unlawful for a State to set a vague standard of loyalty for teachers in failing to distinguish permissible from impermissible conduct because "when one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone . . .,'" quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (ruling that the Government is prohibited from targeting certain political literature by requiring interested parties to specifically authorize delivery of such material before it is delivered because "any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda'"); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (ruling that a government agency is not allowed to condition employment on an ambiguously defined oath because "[t]hose with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of

the governmental action challenged in those cases, to which the plaintiffs were subject, was “regulatory, proscriptive, or compulsory.”<sup>196</sup> Therefore, those plaintiffs faced an objective harm—the government likely would act directly against them in a foreseeable way if they did not conform their conduct to the challenged standard.<sup>197</sup> The opinion thus left open the possibility of justiciability in cases where plaintiffs were directly targeted or otherwise affected by surveillance that caused them specific, foreseeable harm.<sup>198</sup>

Indeed, in *Meese v. Keene*, the Court subsequently held that a state senator who wished to show Canadian films on acid rain presented a justiciable claim that the Justice Department’s labeling of these films as “political propaganda” would cause him objective harm.<sup>199</sup> Although the designation did not prohibit showing the films, the senator claimed he was deterred from doing so because his reputation would suffer, adversely influencing his career.<sup>200</sup> An opinion poll buttressed his claim.<sup>201</sup> The likely reputational harm constituted an injury sufficiently objective to confer standing.<sup>202</sup>

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employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.”).

196. *Laird*, 408 U.S. at 11.

197. In those cases, the plaintiffs faced the loss of a job or employment opportunity. *See* cases cited *supra* note 195.

198. The *Laird* opinion is problematic in a number of ways. Notably, the majority seems to have mischaracterized the nature of the harm that the plaintiffs alleged. The plaintiffs had alleged the following:

[T]he purpose and effect of the system of surveillance is to harass and intimidate the respondents and to deter them from exercising their rights of political expression, protest, and dissent “by invading their privacy, damaging their reputations, adversely affecting their employment and their opportunities for employment, and in other ways.”

*Laird*, 408 U.S. at 25 (Douglas, J., dissenting). This alleged harm does not appear to be merely “subjective” and “indirect” as the slim majority held, but rather to indicate that the plaintiffs truly “were targets of the Army’s surveillance.” *Id.* at 26.

199. *Meese v. Keene*, 481 U.S. 465, 473 (1987).

200. The designation of the films “threatens to cause him cognizable injury . . . [and] ‘if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired.’” *Id.* In another case, Justice Marshall, sitting as Circuit Justice, found that Plaintiffs alleging surveillance of their political party’s convention presented a justiciable controversy:

[T]he challenged investigative activity will have the concrete effects of dissuading some [Young Socialist Alliance] delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance . . . . The specificity of the injury claimed by the applicants is sufficient, under *Laird* . . . .

*Socialist Workers Party v. Att’y Gen.*, 419 U.S. 1314, 1319 (1974).

201. *Meese*, 481 U.S. at 473.

202. *Id.*

Since *Laird*, numerous lower courts have held political surveillance claims justiciable where the surveillance targeted a particular group or individual.<sup>203</sup> However, courts have not agreed on the particular type of harm that must result from the surveillance to make a claim justiciable. Some have required merely that the surveillance have “chilled” a plaintiff’s freedom of association or expression,<sup>204</sup> while others have required specific, noticeable harm such as the loss of a job opportunity.<sup>205</sup> In addition, several courts have required a showing of bad

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203. See *infra* notes 204–06.

204. See, e.g., *Williams v. Price*, 25 F. Supp. 2d 623, 629–30 (W.D. Pa. 1998) (concluding that not providing plaintiffs with a private area to confer with attorneys is unconstitutional because there is actual, objective injury where “[p]laintiffs have shown that the ability of other persons to overhear their conversations with their attorneys prevents them from being able to discuss private matters with their attorneys and results in limiting their discussions with their attorneys.”); *White v. Davis*, 533 P.2d 222, 224, 228–32 (Cal. 1975) (holding it is unconstitutional for “police officers, posing as students, to enroll in a major university and engage in the covert practice of recording class discussions, compiling police dossiers and filing ‘intelligence’ reports, so that police have ‘records’ on the professors and students” because this police conduct will have a “chilling effect,” making students and professors reluctant to speak freely in fear that the government is listening and recording every word); cf. *Local 309 United Furniture Workers of Am. v. Gates*, 75 F. Supp. 620, 621–22 (N.D. Ind. 1948) (stating that police cannot attend and set up surveillance at weekly union meetings during a strike because “the presence of the state police has kept the members of the Union from openly discussing the matters which relate to [the] purposes of the meetings . . . [and] little actual business is accomplished when the state police are in attendance because the plaintiffs feel restrained from discussing their union problems and affairs at such times”).

205. See *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989) (explaining that plaintiffs presented a justiciable claim where “INS surveillance has chilled *individual congregants* from attending worship services, and that this effect on the congregants has in turn interfered with the churches’ ability to carry out their ministries. The alleged effect on the *churches* is not a mere subjective chill . . . it is a concrete, demonstrable decrease in attendance”) (emphasis in original); *Clark v. Library of Cong.*, 750 F.2d 89, 92–94 (D.C. Cir. 1984) (holding lower court’s reliance on *Laird* in rejecting plaintiff’s claim inappropriate where plaintiff was investigated and denied promotions as a result of his lawful involvement with a Socialist group because plaintiff suffered objective, actual harm); *Phila. Yearly Meeting of the Religious Soc’y of Friends v. Tate*, 519 F.2d 1335, 1338 (3d Cir. 1975) (stating that where plaintiffs participated in lawful political and social organizations “[i]t is not apparent how making information concerning the lawful activities of plaintiffs available to non-police groups or individuals could be considered . . . [proper and] . . . at a minimum [it shows] immediately threatened injury to plaintiffs . . . [that] could interfere with the job opportunities, careers or travel rights of the individual plaintiffs”); *Jabara v. Kelley*, 476 F. Supp. 561, 568 (E.D. Mich. 1979), *vacated on other grounds*, 691 F.2d 272 (6th Cir. 1982) (holding that Plaintiff presented a justiciable controversy where the FBI used physical and electronic surveillance, informants, and inspected bank records because Plaintiff has felt “fear at expressing his political views [and] . . . others have been deterred from associating with him because of the FBI investigation,” and his reputation in business and in public was ruined, making his alleged injuries “outside the realm of speculation and subjectivity”); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 148–49 (D.D.C. 1976) (holding that plaintiffs presented a justiciable claim that

intent, which can be circumstantial and inferred from outrageous police conduct.<sup>206</sup> Other courts have applied *Laird* straightforwardly and held surveillance claims nonjusticiable.<sup>207</sup> But, at the very least, the line between subjective and objective harm is appropriately crossed when an individual is able

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alleged intelligence gathering—consisting of electronic surveillance and infiltration—is unconstitutional where there was “purposeful dissemination of intelligence information resulting in termination or restriction of employment opportunities, unfair military trials, or damaged reputations”); *Alliance to End Repression v. Rochford*, 407 F. Supp. 115, 117–18 (N.D. Ill. 1975) (holding that plaintiffs presented a justiciable controversy where the Intelligence Division of the Chicago Police Department instituted intelligence gathering and surveillance operations because “[the plaintiffs] . . . have alleged that they were the specific objects of both overt and covert surveillance . . . [and] that defendants specifically impinged upon their constitutional rights through various types of activities,” making this claim clearly distinguishable from that in *Laird* which merely alleged “subjective chill”).

206. See *Anderson v. Davila*, 125 F.3d 148, 159–60 (3d Cir. 1997) (stating that Plaintiff presented a justiciable claim alleging a violation of constitutional rights where the Virgin Islands government set up surveillance operations solely in retaliation for Plaintiff’s lawsuit filed against the government); *Smith v. Brady*, 972 F.2d 1095, 1098 (9th Cir. 1992) (stating that plaintiffs presented a justiciable claim alleging a violation of constitutional rights where the IRS individually targeted the Church of Scientology, demonstrating “impermissible hostility” towards this religion and treating it differently than other religions); *Riggs v. City of Albuquerque*, 916 F.2d 582, 583–85 (10th Cir. 1990) (holding that controversial figures involved in a mayoral campaign “were so targeted . . . and . . . have been subjected to and harmed by a policy or practice that systematically violates citizens’ rights” as a result of the Intelligence Unit of the Albuquerque Police Department keeping investigative files on the “innocent behavior” of these figures); *Doe v. Martin*, 404 F. Supp. 753, 760 (D.D.C. 1975) (“[W]here the government can be shown to have gone beyond mere enforcement of a valid general policy and to have used its special powers to embark on active facilitation of private harassment, the resulting ‘chilling’ intermesh of governmental and private harassment improperly violates [First] Amendment rights.”); *Handschu v. Special Servs. Div.*, 349 F. Supp. 766, 770 (S.D.N.Y. 1972) (holding that plaintiffs presented a justiciable claim that certain conduct of the police “goes far beyond legitimate surveillance activities with the intent and purpose to invade their constitutional right of free association and communication” and infiltration that encourages unlawful conduct or discourages others from joining political organizations and imposing police records on law-abiding citizens would rise to this level); *People v. Collier*, 376 N.Y.S.2d 954, 979, 989 (N.Y. Sup. Ct. 1975) (stating that constant, intrusive surveillance of Plaintiff and community, without evidence of criminal activity, is impermissible because this type of surveillance “will destroy our capacity to tolerate—and even encourage—dissent and nonconformity; it promotes a climate of fear; it intimidates, demoralizes and frightens the community into silence”).

207. *Fifth Ave. Peace Parade Comm. v. Gray*, 480 F.2d 326, 332–33 (2d Cir. 1973) (holding that FBI’s investigation of a planned anti-war protest, including examination of bank and transportation records was a lawful exercise of the agency’s duty to maintain public safety). In dissent, Judge Oakes indicated that the *Laird* Court may have erred in failing to recognize the “size and scope of Army intelligence activities which included gathering public and private information on hundreds of thousands of ‘politically suspect’ persons.” *Id.* at 336–37 (Oakes, J., dissenting). See also *Donohoe v. Duling*, 465 F.2d 196, 199–202 (4th Cir. 1972) (explaining that photographic surveillance by police at political and religious events does not present justiciable claim of injury).

to assert that she was chilled from exercising her rights to expressive association because she was a target of surveillance and that she was harmed in specific ways, such as loss of reputation, or that the defendants' intent was illegal. This sort of harm is objective.

### *B. The Need for and Benefits of Political Surveillance*

While the costs of unjustified surveillance can be severe, in other instances surveillance is necessary to avert violence and apprehend terrorists. Although some commentators claim that proper analysis of existing intelligence data could have prevented the September 11 attacks,<sup>208</sup> others believe that the intelligence agencies' failure to obtain detailed information on the operation of domestic terrorist cells was a major cause.<sup>209</sup> In any event, good intelligence data is undeniably necessary to prevent future attacks.

As a society, we remain haunted by the specter of September 11, and policymakers are understandably reluctant to forgo any possibility of gaining useful intelligence. Since Al Qaeda, like other criminal organizations, operates clandestinely, counterterrorism agencies are themselves required to gather intelligence secretly using informers and infiltrators. Those investigations, however, need to focus on areas and subjects most likely to yield information about terrorists.<sup>210</sup> Because resources are limited, and investigators cannot follow up on all leads, only the most likely targets should be subjected to surveillance and infiltration. That a group is engaged in religious and political activity does not immunize it from law enforcement scrutiny, but its involvement in out-of-the-mainstream First Amendment activity also does not make it likely to be involved

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208. See *Of Security and Civil Liberties*, *supra* note 93. Mounting evidence points to the FBI's failure to properly use the ample investigative and judicial tools already at its disposal . . . . Blame the FBI's sclerotic bureaucracy, risk-averse atmosphere, excessive centralization, or a dozen other factors. Likewise, the failure of the FBI and CIA to exchange vital information has nothing to do with operational restrictions but with traditional turf wars among agencies." *Id. Cf.* THE 9/11 COMMISSION REPORT, § 12.4, at 383–98 (2004) (listing and analyzing recommendations for various federal government actions that could assist in preventing terrorist attacks); *id.* § 13, at 399–428 (recommending reorganization of intelligence agencies and strengthening of congressional oversight), available at <http://a257.g.akamaitech.net/7/257/2422/05aug20041050/www.gpoaccess.gov/911/pdf/fullreport.pdf>.

209. See David Johnston, *Lack of Pre-9/11 Sources Is to Be Cited as a Failure of Intelligence Agencies*, N.Y. TIMES, July 17, 2003, at A13; *cf.* THE 9/11 COMMISSION REPORT, *supra* note 208; Deborah Solomon, *Questions for Tom Kean: Want to Know a Secret?*, N.Y. TIMES MAG., Jan. 4, 2004, at 9 (“[T]here is a good chance that 9/11 could have been prevented by any number of people along the way. Everybody pretty well agrees our intelligence agencies were not set up to deal with domestic terrorism.”).

210. See Peter Margulies, *Judging Terror in the “Zone of Twilight”: Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 386 (2004) (explaining that heightened vigilance about terrorism can generate a disproportionate increase in “false positives,” or those “wrongly identified, detained, or adjudicated”).

in crime. Expression of unpopular—and sometimes even repugnant—views is distinct from evidence of crime.<sup>211</sup>

An easy-to-identify proxy or profile for terrorism would be immensely useful if a sufficiently accurate one could be found. But general expression of political or religious beliefs has not proved to be a meaningful indicator in individual cases. Internationally, and in the U.S., radical Islamists have committed numerous crimes of violence, but the assumption that abstract advocacy of religious or political violence by Muslims in the U.S. in itself indicates an intent to engage in domestic terrorism is erroneous.<sup>212</sup> For example, proclaiming that citizens of countries that occupy Muslim lands all deserve to die does not demonstrate criminal intent. It stands to reason that such mutable characteristics, which can be changed at will, would generally be poor indicators of terrorism, which relies on deception. In fact, the available evidence indicates that terrorists tend to avoid expressing political beliefs publicly, in an effort not to attract attention.<sup>213</sup>

Nonetheless, certain terrorists may express beliefs endorsing violence, at least privately. Even so, abstract political or religious advocacy of violence—which is not a crime—cannot in itself justify an investigation. More evidence is needed, such as advocacy of violence against a specific target or advocating imminent violence.<sup>214</sup> Any other standard would facilitate investigations that could only rarely, at best, be useful, at the price of seriously compromising the right of association. And requiring evidence of concrete endorsement of violence will not inhibit investigations unduly.

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211. Cf. Adam Liptak, *Prison to Mosques; Hate Speech and the American Way*, N.Y. TIMES, Jan. 11, 2004, § 4, at 3 (“[Floyd Abrams] and others stressed that context matters, that speech that once did not seem to signal a direct exhortation to immediate violent action might, given recent history, mean something different. ‘In a post-9/11 context,’ Mr. Abrams said, ‘a call in a mosque for a killing might not be protected by the First Amendment.’”).

212. See Pape, *supra* note 179. Relying on a database he compiled of every suicide bombing and attack from 1980–2001, the author concludes that “there is little connection between suicide terrorism and Islamic fundamentalism, or any religion for that matter. . . . Rather, what nearly all suicide terrorist campaigns have [in common is a goal] to compel liberal democracies to withdraw military forces from territory that the terrorists consider to be their homeland.” *Id.*

213. See K. JACK RILEY, RACIAL PROFILING: LESSONS FROM THE DRUG WAR 2 (“The Al Qaeda training manual instructs its adherents to blend in through disguise and the avoidance of practices (such as prayer) that draw attention. Suicide bombers in Israel have disguised themselves as blond tourists and Israeli soldiers.”), available at [www.rand.org/publications/randreview/issues/rr.08.02/profiling.html](http://www.rand.org/publications/randreview/issues/rr.08.02/profiling.html) (last visited Oct. 30, 2004). See also Adam Liptak, *Traces of Terror: News Analysis; Changing the Standard*, N.Y. TIMES, May 31, 2002, at A1 (“James X. Dempsey, the deputy director of the Center for Democracy and Technology, said that monitoring of political activity would not have uncovered the perpetrators of the September 11 attacks. ‘Not a single one of the 19 guys . . . did anything overtly political,’ Mr. Dempsey said. ‘Not one of them said, ‘I support Palestinian rights’ or ‘I hate America’ in a public way.’”).

214. See *infra* text accompanying notes 252–55.

Nor does it appear that religion or ethnicity can accurately serve as a proxy for involvement in terrorism.<sup>215</sup> One need only cite the detention of over 700 Muslim men in New York and New Jersey—virtually all unconnected to terrorism—after September 11.<sup>216</sup> Other interrogations and arrests of Muslims across the country corroborate the point.<sup>217</sup> Because profiling based on these characteristics causes great harm and has not been demonstrated to provide effective indicators of criminality, another standard must be employed, as set forth in the next Section.

Nonetheless, some contend that any correlation, even the slightest one, between the profiled characteristic and crime can justify use of a profiling practice when the potential danger is severe. Terrorism certainly would fall within that category. Might not the extreme danger posed by terrorism, combined with the possibility that Muslims with radical beliefs are more likely to be terrorists than the remainder of the population, justify political profiling in certain circumstances? My response, is that this justification for surveillance is generally insufficient, though a terrorist emergency involving a serious threat of imminent violence could justify a preliminary inquiry on less than an individualized reasonable suspicion of crime.<sup>218</sup>

The threat presented by international terrorism is not more dangerous than other threats faced by the U. S. in the twentieth century. On the contrary, it is substantially less dangerous than the Cold War's nuclear standoff, which threatened the immediate destruction of not only the United States but also the entire world. It is not sufficiently qualitatively distinct from past threats to justify abrogation of basic civil liberties. Past civil liberties violations such as the Palmer Raids, the excesses of the McCarthy era, the injustice of the internment of Japanese-Americans during World War II, or the abuses of surveillance in the 1960's did little to increase national security.

The nature of the current domestic threat does not justify complete deference to the executive branch with respect to the associational rights of those within the U.S. Although courts often defer to the political branches in cases

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215. Nonetheless, it does appear that those involved in the current wave of terrorism in the U.S. and Europe are disproportionately from a limited number of Arab and/or Muslim countries. Still, only a handful of indictments have come down and two prominent defendants—Richard Reid and Jose Padilla—are neither Arab nor Muslim by birth. And the vast majority of those monitored have no demonstrable connection to terrorism. See Guy Taylor, *FBI Nets Suspects in Global Manhunt; Attacks Led to New Urgency to Find Al-Qaeda Terrorists*, WASH. TIMES, Sept. 9, 2002, at A01; see also Bill Gertz, *5,000 in U.S. Suspected of Ties to Al-Qaeda; Groups Nationwide Under Surveillance*, WASH. TIMES, July 11, 2002, at A01. A full analysis of ethnic profiling is beyond the scope of this Article.

216. See Inspector General Report, *supra* note 3.

217. See Jean AbiNader & Kate Martin, Editorial, *Just the Facts, Mr. Ashcroft*, WASH. POST, July 25, 2002, at A21; Parastou Hassouri, Editorial, *War on Terrorism Looks Like a War on Immigrants*, STAR-LEDGER (Newark, N.J.), Feb. 19, 2003, at 15.

218. See *infra* text accompanying notes 251–55. Cf. Ellmann, *supra* note 181, at 710–11.



where national security is at stake, that deference is not absolute and is “subject to important constitutional limits.”<sup>219</sup> In particular, courts hesitate to defer where constitutional rights are heavily implicated,<sup>220</sup> as they undeniably are in the case of political or religious surveillance. Although courts lack expertise in adjudicating questions concerning the national defense, reasonable restrictions on domestic political surveillance will not hamper the necessary defense of our national security.

*C. Weighing the Associational and Government Interests in Political Surveillance*

When assessing whether political surveillance is warranted, the need for political surveillance should be weighed against the associational harms likely to occur. The *NAACP* Court’s requirement of preserving group privacy when revelation of identity is likely to cause significant harm, in conjunction with the *Dale* Court’s deference to groups’ own definitions of what would seriously harm their message, creates a strong counterbalance to the government’s need to ferret out terrorists, requiring restraints on investigations lacking a reasonable basis.

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219. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001), citing *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889); *cf. Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (“It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”).

220. *See e.g., Aptheker v. Sec’y of State*, 378 U.S. 500, 509–14 (1964) (explaining that while the Executive and Legislative branches have authority to take steps to protect national security, it is constitutionally impermissible for the Secretary of State to invalidate individuals’ passports based solely on their communist ideology and association because this “prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe”); *Harman v. City of New York*, 140 F.3d 111, 121–24 (2d Cir. 1998) (arguing that while “[c]ourts traditionally grant great deference to the government’s interest in national defense and security” even in the context of prior restraints and injunctions which prohibit proscribed activity before it even occurs, it must always be asserted that the “harms [prevented] are real, rather than conjectural” and that “the executive orders are designed to address the asserted harm in a ‘direct and material way’”; otherwise, government actions which interfere with an individual’s constitutional rights will be considered overly intrusive and thus unconstitutional). *But see People’s Mojahedin Org. of Iran v. United States Dep’t of State*, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (citing *People’s Mojahedin Org. of Iran (“PMOI”) v. Dep’t. of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (holding that Secretary of State’s designation of petitioner’s organization as a “terrorist organization” is not a justiciable issue because “it is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch” in this context)); *Smith v. Nixon*, 807 F.2d 197, 201–02 (D.C. Cir. 1986) (explaining that electronic surveillance is justified where plaintiffs failed to “allege[] concrete facts contradicting these assertions or otherwise casting doubt on . . . the national security justification” of the government, despite allegations that the surveillance violated their constitutional rights”).

*1. Compelling State Interests and the Reasonable Suspicion Presumption*

In the political surveillance context, the application of balancing should result in a threshold presumption: a particular situation will be presumed not to involve a sufficiently compelling state interest if there is no reasonable suspicion of criminal activity before a full investigation of First Amendment activity is conducted.<sup>221</sup> Criminal activity should be defined to exclude minor offenses such as violations of municipal ordinances, technical misdemeanors—such as minor traffic code offenses—or technical immigration offenses.<sup>222</sup> If there is no indication of unlawful activity, full investigations are not permitted; the presumption is irrebuttable, although I also propose an emergency exception.

This standard is an appropriate alternative to political or religious profiling, as it permits legitimate law enforcement while disallowing investigations based purely on politics, which contravene the First Amendment. Its deployment would eliminate virtually all of the abuses that have occurred in the past, as detailed in Section I, *supra*. At the same time, terrorism investigations that focus on meaningful evidence of terrorism can proceed unimpeded.

This presumption also represents a conclusion that political surveillance will, on balance, be harmful and intrusive with an insignificant likelihood of gain in useful intelligence if the initial evidentiary standard is not met.<sup>223</sup> Stated

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221. See *Clark v. Library of Cong.*, 750 F.2d 89, 98–99 (D.C. Cir. 1984) (holding there is no compelling interest to merit surveillance where a government library’s “request for a full field investigation of Clark was predicated solely on the basis of Clark’s membership in a lawful political organization” because Clark, a non-sensitive government employee, was not a national security threat and the Library failed to “limit the investigation to that which would least harm Clark’s reputation and chance for future employment”); *Alliance to End Repression v. City of Chicago*, 627 F. Supp. 1044, 1055–57 (N.D. Ill. 1985) (holding political surveillance of private activities of organizations and individuals, consisting of infiltration, observation, recording and dissemination of information, is unconstitutional absent a reasonable suspicion of criminal activity); see also *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 559 (N.D. Ill. 1982) (setting forth text of consent decree on class claims that contained reasonable suspicion predicate for investigations), *modified*, *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 800 (7th Cir. 2001) (limiting the 2001 consent decree’s coverage to “investigations intended to interfere with or deter the exercise of freedom of expression that the First Amendment protects”).

Limited exceptions exist. For example, the Chicago consent decree also allows investigations directed toward First Amendment conduct in situations involving dignitary protection, public gatherings, or regulatory investigations. See *Chevigny*, *supra* note 79, at 756. Preliminary inquiries where no reasonable suspicion exists can be made to determine whether advocacy of force or violence is “directed to inciting or producing imminent violent conduct and is likely to incite or produce such action.” *Alliance to End Repression*, 561 F. Supp. at 565.

222. Cf. *Vaughan* *supra* note 34 (discussing the consent decree entered in the Denver political surveillance litigation limiting Denver police to initiating investigations only when a reasonable suspicion concerning a serious crime exists). See *supra* text accompanying note 34.

223. See *supra* text accompanying notes 160–207.

differently, the general compelling state interest in investigating terrorism does not exist sufficiently in a particular case when evidence of criminality is lacking; mere suspicion or political profiling cannot justify intrusions into a group's private affairs. Thus, the generalized compelling need to uncover terrorist activities does not constitute a sufficient reason to surveil a particular mosque unless there is a reasonable suspicion of criminality at that particular mosque, such as that the imam preaches extremist doctrine and raises funds for what appears to be an affiliate of a terrorist organization.<sup>224</sup> It is not acceptable to investigate and compile dossiers on all mosques holding radical views, even if the surveillance is limited to mosques whose members come from countries that have produced terrorists, such as Saudi Arabia.<sup>225</sup>

The standard of reasonable suspicion for political surveillance is similar to, and borrowed from, the Fourth Amendment standard employed in criminal procedure<sup>226</sup> to determine the constitutionality of a stop-and-frisk situation. I adopt it here because it provides a suitable delineation point between political surveillance and legitimate law enforcement. In order for a stop-and-frisk investigation to be lawful, a police officer must "reasonably . . . conclude in light of his experience that criminal activity may be afoot"<sup>227</sup> and "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a search.<sup>228</sup> Recognizing the public safety interest in thwarting crimes before they occur, this standard is lower than the probable cause standard required for a police officer to actually make an arrest.<sup>229</sup>

What constitutes reasonable suspicion in a particular situation depends upon "whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger."<sup>230</sup> While this is a somewhat nebulous determination, reasonable suspicion never exists

224. See Antiterrorism and Effective Death Penalty Act of 1996, § 303, Pub. L. No. 104-32, 110 Stat. 1214, 1250 (codified at 18 U.S.C. § 2339B(g)(4)). The prohibition in the 1996 Antiterrorism Act on providing "material support" to designated "terrorist organizations" can be quite problematic from a First Amendment perspective. It does not distinguish between the legitimate—often humanitarian—activities of organizations that also may engage in illegal terrorist activities. A discussion of that provision is beyond the scope of this Article. See Cole, *supra* note 97, at 205.

225. Cf. Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481, 495-99 (2002) (discussing problems with immigration detention based on nationality).

226. See *Terry v. Ohio*, 392 U.S. 1 (1968). Since *Terry*, the Supreme Court has frequently dealt with the reasonable suspicion standard, especially as it relates to border control and drug law enforcement. See generally *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Florida v. Bostick*, 501 U.S. 429 (1991); *United States v. Sokolow*, 490 U.S. 1 (1989); *United States v. Sharpe*, 470 U.S. 675 (1985); *Florida v. Rodriguez*, 469 U.S. 1 (1984); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

227. *Terry*, 392 U.S. at 30.

228. *Id.* at 21.

229. *Id.* at 22.

230. *Id.* at 27.

based on mere “hunch[es]” or general suspicion.<sup>231</sup> Rather, police “must have a particularized and objective basis for suspecting [that] the particular person” being investigated has committed or plans to commit a crime.<sup>232</sup>

In a First Amendment context, the standard should not be interpreted identically to the reasonable suspicion standard employed in a pure Fourth Amendment situation where no expressive activity is involved. Courts have developed a number of “special needs” exceptions to the pure Fourth Amendment standard.<sup>233</sup> Those exceptions must be limited where First Amendment rights are

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231. *Id.*

232. *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). When officers receive an anonymous tip regarding possible criminal activity, objective reasonable suspicion may or may not exist depending on the circumstances. There is no reasonable suspicion when an anonymous informant tells police a suspect is carrying a gun. *Florida v. J.L.*, 529 U.S. 266, 274 (2000) (“[A]n anonymous tip lacking indicia of reliability . . . does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.” But an anonymous tip is sufficient if it proves reliable and credible under the “totality of the circumstances.”). *See Alabama v. White*, 496 U.S. 325, 327–32 (1990) (explaining that officers were justified in searching defendant’s vehicle based on information provided by an anonymous caller because the informant correctly predicted “respondent’s future behavior,” including the time she would be leaving her apartment, her destination, and the contents of her car); *Illinois v. Gates*, 462 U.S. 213, 245–46 (1983) (stating that the court could rely on anonymous letter as basis for probable cause because “the anonymous letter contained a range of details relating . . . to future actions of third parties ordinarily not easily predicted,” including precise travel plans and individual movements).

233. In certain situations “the Government’s need to discover . . . latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.” *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989). This “special need” has relaxed the reasonable suspicion standard in airport searches. *See United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (“When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.”) (emphasis added). And, the reasonable suspicion standard has been relaxed in public schools. *See New Jersey v. T.L.O.*, 469 U.S. 325, 339–40 (1985) (“[T]he school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject” because “[a]gainst the child’s interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.”). And, the standard has been relaxed in the administrative and safety regulation context. *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (“[I]n certain circumstances government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements as long as their searches meet ‘reasonable legislative or administrative standards.’”). Similarly, an anonymous tip that ordinarily would not rise to the level of a reasonable suspicion might suffice to initiate a search where the danger is particularly great. *J.L.*, 529 U.S. at 273–74. However, the Supreme Court recently found no “special need” where Georgia enacted a statute mandating that all state office job applicants pass a pre-

implicated, because most courts likely would consider prevention of terrorism a “special need” in situations not involving First Amendment expression. In order to preserve fragile First Amendment rights, the scope of the exceptions should be confined.

Further, even if the Fourth Amendment’s special needs doctrine applies, the existence of a special need is not always dispositive. In some respects, this situation is analogous to that in *Ferguson v. City of Charleston*,<sup>234</sup> one of the Supreme Court’s most recent pronouncements on the special needs exception. In that case, the Court balanced the state interest in conducting drug testing on pregnant women to prevent fetal drug abuse against the women’s interest in avoiding dissemination of personal—and potentially incriminating—information to law enforcement. Striking down the drug testing policy, the Court held it unconstitutional because “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>235</sup> A policy designed to obtain information for criminal prosecution by means of nonconsensual drug-testing is draconian. Analogously, the fundamental right to engage in First Amendment-based association should override the State’s interest in having free rein to monitor all group activity whenever any suspicion of terrorism arises. Given the risk of misuse of religious and political information, as well as of disruption of organizational functioning, the end does not justify the means.<sup>236</sup>

There is ample precedent for adopting a reasonable suspicion of criminality standard for political surveillance. This standard remains as a requirement for police departments accepting federal aid.<sup>237</sup> Its substantial equivalent was successfully employed in the FBI’s domestic surveillance guidelines for over twenty-five years.<sup>238</sup> It was also incorporated into the Chicago

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employment drug test. *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (stating that despite an interest in preventing drug users from gaining employment, the state failed to prove that “public safety [was] genuinely in jeopardy” unless all state office employees were subjected to drug testing). Similarly, the Court did not find a special need where South Carolina instituted a hospital policy that required drug tests to be administered to certain pregnant patients. *Ferguson v. City of Charleston*, 532 U.S. 67, 85–86 (2001).

234. *Ferguson*, 532 U.S. 67.

235. *Id.* at 85–86.

236. Instead of a special needs exception for terrorism cases, I propose a restricted terrorist emergency exception. *See infra* text accompanying notes 251–55.

237. *See* 28 C.F.R. § 23, which applies to all multijurisdictional criminal intelligence systems operating under Title I of the Omnibus Crime Control and Safe Streets Act of 1968. Section 23.20 specifically addresses the reasonable suspicion standard.

238. *See* ATTORNEY GENERAL GUIDELINES, *supra* note 13; Lininger, *supra* note 13. These guidelines apply to domestic surveillance only; that is, surveillance of conduct that involves potential criminal activity, rather than foreign intelligence. The guidelines governing foreign intelligence are classified. Portions of prior foreign intelligence surveillance guidelines from 1995 have been released, but nothing since that time has been made available to the public. The 1995 guidelines give investigators much greater leeway to collect intelligence than do the domestic surveillance guidelines. *See* ATTORNEY GENERAL

Red Squad consent decree.<sup>239</sup> The Church Committee endorsed the reasonable suspicion standard as a predicate for terrorism investigations in 1976.<sup>240</sup> Notably, it was recently adopted in the Denver police spying consent decree.<sup>241</sup> And it was enacted in a Seattle ordinance.<sup>242</sup> Other political surveillance litigation was not as successful.<sup>243</sup> However, the *Dale* Court's affirmation of a robust right of association strengthens and reinforces those First Amendment arguments previously available.

Additionally, reasonable suspicion is a relatively lenient evidentiary standard that allows legitimate law enforcement activity.<sup>244</sup> Absent even this indicia of crime, it is difficult to imagine—outside of an imminent threat of serious violence—how the government could present a state interest sufficiently compelling to ever outweigh harm to First Amendment rights. A lower standard would unduly interfere with the integrity of associations and contravene the Supreme Court's many pronouncements concerning the centrality of associational

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GUIDELINES FOR FBI FOREIGN INTELLIGENCE COLLECTION AND FOREIGN COUNTERINTELLIGENCE INVESTIGATIONS (1995), available at <http://www.politrix.org/foia/fbi/fbi-guide.htm>.

239. *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 550 (N.D. Ill. 1982). *Cf. Handschu v. Special Servs. Div.*, 605 F. Supp. 1384 (S.D.N.Y. 1985), *aff'd*, 787 F.2d 828 (2d Cir. 1986) (referencing the consent decree in the New York political spying litigation).

240. *See Church Committee Report*, *supra* note 8, Book II, at 319 (“The Committee’s recommendations limit preventive intelligence investigations to situations where information indicates that the prohibited activity will ‘soon’ occur . . . [T]o open or continue a full investigation, there should be a substantial indication of terrorism . . . in the near future.”).

241. The consent decree recently entered in the Denver police spying case requires a reasonable suspicion of a serious crime before surveillance can begin. *See Vaughan*, *supra* note 34; *see also* Jeff Kass, ‘*Spy Files*’ Suit Draws National Attention, *BOSTON GLOBE*, Feb. 26, 2003, at A3.

242. *Chevigny*, *supra* note 79, at 779.

243. *See, e.g., Socialist Workers Party v. Att’y Gen.*, 419 U.S. 1314, 1319–20 (1974) (denying preliminary injunction to the SWP because FBI surveillance of party’s political convention was limited and not disruptive); *Phila. Yearly Meeting of the Religious Soc’y of Friends v. Tate*, 519 F.2d 1335, 1337–38 (3d Cir. 1975) (“[M]ere police photographing and data gathering at public meetings . . . without more, is legally unobjectionable . . .” because it is only “a so-called subjective chill” and “the sharing of this information with other . . . legitimate law enforcement [agencies does not] give rise to a constitutional violation.”); *Jabara v. Kelley*, 476 F. Supp. 561, 570 (E.D. Mich. 1979) (holding no relief granted where “physical surveillance, the use of informers, the inspection of bank records and the maintenance and dissemination of information obtained through these practices” is a constitutionally permissible use of police powers).

244. *Cf. James Q. Wilson, Antiterrorism Measures Do Not Threaten Civil Liberties*, in *URBAN TERRORISM* 148 (A.E. Sadler & Paul A. Winters eds., 1996) (arguing that the FBI’s intelligence guidelines that included the reasonable suspicion standard would not have barred infiltration of the group responsible for the Oklahoma federal building bombing).

rights to preservation of the First Amendment.<sup>245</sup> And the standard does not apply at all to investigations not based on First Amendment conduct, such as investigation of an individual because of his purchase of explosives.

Indeed, one could readily question whether the reasonable suspicion standard is sufficiently high to deter excessive, unnecessary surveillance. But the need to investigate terrorism where evidence of crime exists does not permit imposition of a higher standard, such as probable cause.<sup>246</sup> The purpose of the investigation is to obtain probable cause. That standard is the result of an investigation, rather than its predicate.

While the reasonable suspicion standard is a relatively low threshold, it is effective. The history of political surveillance reveals that almost all of the abuses could have been avoided had a reasonable suspicion threshold been observed.<sup>247</sup> Requiring reasonable, articulable evidence of crime prevents investigations based on pure politics, mere whim, or baseless suspicion.<sup>248</sup> Its use should practically eliminate political profiling.

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245. See *supra* text accompanying notes 97–145.

246. Chevigny, *supra* note 79, at 756.

247. See *supra* text accompanying notes 39–92 (recounting the myriad abuses of the FBI and local police in conducting political intelligence-gathering where no criminal activity was suspected).

248. For an example of FBI surveillance that was not based on the reasonable suspicion standard proposed in this Article, consider the case of a Palestinian civil engineer in New York City. In November 2001, the FBI responded to an anonymous tip alleging that the Palestinian man had a gun; this tip turned out to be false. IBISH ET AL., *supra* note 176, at 35. “The engineer suspected that a contractor with a [personal] grudge against him sent the tip to the FBI.” *Id.* Five days later, as a result of this tip, INS agents arrested him at his workplace for “overstaying his visa.” *Id.* The man’s visa had indeed expired but he had applied for an adjustment of status,” therefore he was legally in the country. *Id.* It seems evident here that the INS would not have arrested this man had the FBI not received the anonymous tip. *Id.* The FBI was acting on a false tip rather than on reasonable suspicion; nonetheless, the man was incarcerated for twenty-two days before being released on bond. *Id.* Subsequently, the man received a visa extension from the INS office in Vermont while he was detained. See *id.*

In Torrington, Connecticut, police officers arrested three Pakistani men and an Indian-Muslim businessman after a local resident (who later failed a voluntary polygraph test conducted by the police) informed them that two of the Pakistani men had a conversation about anthrax at a gas station. *Id.* The Indian businessman was merely watching the gas station temporarily for his uncle, who owns the gas station. *Id.* The third Pakistani was simply at the gas station and had no involvement with any criminal conduct. *Id.* The Indian businessman was legally in the country, nonetheless, he was detained for eighteen days before he was released on bond. *Id.*

Another example of detention *not* based on any reasonable suspicion is the case of a University of Florida student. *Id.* at 34. This student was attending a convention with his class when police searched the entire group at the building’s entrance. *Id.* However, when the police found tapes of the Koran in this student’s car, they immediately arrested him and took him to the INS. He was detained and his family was forbidden from visiting him. *Id.*

In opposition to this standard, Attorney General Ashcroft argues that only an investigation can uncover evidence, and that a standard requiring prior evidence therefore undermines law enforcement by prohibiting the very process that compiles relevant evidence in the first place.<sup>249</sup> His logic is superficially appealing, but ultimately unpersuasive; in reality, surveillance is only conducted when a reason or suspicion triggers it. Resource limitations prevent either random or total surveillance; thus, investigations are begun for a reason. Historically, illegitimate reasons such as dissident political views have frequently triggered investigations.<sup>250</sup> By contrast, this standard requires that the inevitable triggering reason must reasonably relate to criminal behavior.

Finally, in certain circumstances where the need is exceptionally compelling, brief preliminary inquiries using a lower threshold may be conducted. True terrorist emergencies may occasionally necessitate immediate investigation of First Amendment conduct with less than an individualized reasonable suspicion of crime.<sup>251</sup> I propose the standard recommended by the Church Committee: “The FBI should be permitted to conduct a preliminary preventive intelligence investigation . . . where it has a specific allegation or specific or substantiated information that the [subject(s)] will soon engage in terrorist activity.”<sup>252</sup> Where the First Amendment is implicated, exceptions to the reasonable suspicion threshold should be limited to situations involving a serious risk of imminent violence, to avoid swallowing the reasonable suspicion threshold with an exception invoked any time an officer suspects terrorism.<sup>253</sup> The need to protect

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Other than an expired visa, no criminal charges have been filed against him and law enforcement has not discovered any links to terrorism. *Id.*

In Texas City, Texas, two Somali men were arrested when they stopped in a parking lot to pray. *Id.* at 35. A bystander reported that the men were acting suspicious. *Id.* When the police arrived they searched their car and discovered a knife and a driver’s license that police claim was altered. *Id.*

249. Attorney General John Ashcroft, Remarks on Attorney General Guidelines (May 30, 2002), <http://www.usdoj.gov/ag/speeches/2002/53002agpreparedremarks.htm>.

250. See *supra* text accompanying notes 39–42.

251. Cf. Ellmann, *supra* note 181, at 710–11 (stating that a terrorism emergency is “a situation in which we have a substantially based fear of imminent terrorist attack on the nation or its people”).

252. Church Committee Report, *supra* note 8, Book II, at 320. The recommendation continues by imposing an initial thirty-day limit on preliminary investigations, though the Attorney General may extend the limit for up to sixty days. *Id.* Further, “[i]n no event should the FBI open a preliminary or full preventive intelligence investigation based upon information that an American is advocating political ideas or engaging in lawful political activities or is associating with others for the purpose of petitioning the government for redress of grievances or other such constitutionally protected purpose.” *Id.*

253. In addition, in terrorist emergencies involving First Amendment conduct, the scope of an investigation may even occasionally need to extend beyond an identifiable individual subject to a group of subjects. In emergencies where the specific subject is not known, individuals closely fitting a suspect’s description may be monitored where investigations are not intrusive and the need is particularly compelling. Of course, searching



First Amendment activity requires the qualification, as well as durational limits and approval by high-ranking personnel.<sup>254</sup>

Advocacy of specific terrorist violence in the U.S. could meet the terrorist emergency definition in some situations and lead to a preliminary inquiry, but only to determine if the advocacy constitutes a real threat. To hold otherwise would disable law enforcement from dealing with the likely prospect of severe and imminent danger solely because First Amendment activity is involved. It is important, however, that this exception be limited by additional restrictions to ensure that the emergency authority is not misused. For instance, use of infiltrators or electronic surveillance could be prohibited.<sup>255</sup> The underlying principle is that the intrusiveness of the inquiry must be proportional to the threat presented.

Attorney General Ashcroft's objection to a reasonable suspicion predicate arises against the backdrop of the larger shift in the FBI's mission from investigation of crime to prevention of terrorism.<sup>256</sup> Writ large, the claim can be

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for individuals sharing a suspect's characteristics, *e.g.*, Muslims attending a mosque in the New York metropolitan area, comes awfully close to religious profiling. *Cf.* Gross & Livingston, *supra* note 181, at 1420–21, 1436. This technique should only be permitted when—in addition to the emergency—the government is able to demonstrate a link between the profiled characteristic and the crime. Links could include tips from reliable sources or recent crimes of threats in the same area by the same group. For example, imagine a situation where FBI agents conducting a wiretap of a known terrorist overhear a conversation about a small group making a bomb in a mosque somewhere in the New York City metropolitan area. There is no reasonable suspicion to infiltrate a particular mosque, but the emergency appears to be real. *Cf.* Ellmann, *supra* note 181, at 684 (analyzing hypothetical situation in which an extremist Islamic group claims responsibility for blowing up a building in lower Manhattan and threatens further such crimes in the near future). Mosques in the New York metropolitan area may be investigated, but only for bombs and only for a brief, specified time period, despite the fact that First Amendment expression likely will be monitored.

254. For example, the Chicago consent decree requires approval by a section commander within twenty-four hours, and executive authorization to continue the inquiry beyond seventy-two hours. *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 564 (N.D. Ill. 1982). The 1976 Attorney General Guidelines require that preliminary inquiries be completed within ninety days. Office of the United States Attorney General, Attorney General Guidelines on Domestic Security, § II.H (1976) [hereinafter AG Guidelines on Domestic Security]. *See also* David M. Park, Note, *Re-Examining the Attorney General's Guidelines for FBI Investigations of Domestic Groups*, 39 ARIZ. L. REV. 769, 791 (1997).

255. *See, e.g., Alliance to End Repression*, 561 F. Supp. at 565 (ordering a consent decree requiring, for instance, termination and purging of files if no reasonable suspicion of criminality is found). The 1976 Attorney General Guidelines prohibit "recruitment or placement of informants in groups, 'mail covers,' or electronic surveillance." AG Guidelines on Domestic Security, *supra* note 254, at § II.G.

256. *See* Brune, *supra* note 187 ("Soon after the Sept. 11 hijackings, Attorney General John Ashcroft announced a welcomed shift in priorities for the Justice Department, from prosecution of past terrorist acts to the prevention of future attacks . . . . Making prevention a priority means the government now operates with an increased reliance on suspicion, a more frequent use of confidential information, and a more broadly cast policy

restated as an objection to transferring a standard born of a policing model that focuses on gathering evidence of a completed—or ongoing—crime to a context that requires preventive investigation before a terrorist act occurs.<sup>257</sup> Is a standard adopted in a street-crime context really suitable for the new era of global terrorism? Might not an intelligence-gathering model be more appropriate?

This objection is not warranted, however, because the reasonable suspicion standard can be incorporated into a policing model that focuses on collecting intelligence to prevent ongoing or future crimes. Although it arose in a stop-and-frisk case, its application is not limited to that context, as the Church Committee recognized in 1976.<sup>258</sup> Terrorist organizations are criminal enterprises. The purpose of their existence is to commit politically motivated crimes; thus, their criminal conduct is ongoing. And even if a suspected terrorist cell is involved solely in planning or supporting a future crime—such as an act of domestic terrorism—the reasonable suspicion standard allows investigation of conspiracies in the planning stage.<sup>259</sup> For instance, a reasonable suspicion of conspiracy to commit terrorist acts would exist when the suspects are affiliated with a group that espouses jihad against anti-Muslim aggressors and one of them purchases materials that could be used to make bombs.<sup>260</sup> Thus, the reasonable suspicion requirement permits the government to investigate members of a terrorist organization early enough to prevent terrorist attacks.<sup>261</sup> What it does not allow is investigations based on political or religious beliefs rather than apparently unlawful behavior.

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of secrecy than before.”); *see also* Karen Branch-Brioso, *Looser Rules Spark Old Fears*, ST. LOUIS POST-DISPATCH, June 2, 2002, at B1 (quoting Attorney General John Ashcroft: “Our philosophy today is not to wait and sift through the rubble following a terrorist attack . . . . Rather, the FBI must intervene early and investigate aggressively where information exists and that existing information suggests the possibility of terrorism.”).

257. *Cf.* Harcourt, *supra* note 182, at 106, 109–10 (explaining that policing generally has been shifting to a forward-looking crime prevention model from a prior model that emphasized response to completed crime).

258. Church Committee Report, *supra* note 8, Book II, at 318–23.

259. The *Terry* stop-and-frisk standard explicitly covers completed, ongoing, or future crimes that will soon be committed; in this context, its scope is broad enough to cover planning of future terrorist strikes. *See* COLE & DEMPSEY, *supra* note 174, at 183–84 (“‘Intelligence’ in this context means the collection and analysis of information about a criminal enterprise that goes beyond what is necessary to solve a particular crime. Intelligence of this type is intended to aid law enforcement agencies in drawing a fuller picture of the enterprise.”).

260. In this example and others in the Article, First Amendment activity can form the basis of a reasonable suspicion when a suspect advocates acts of violence or other crimes.

261. In the Seventh Circuit’s opinion modifying the Chicago consent decree to eliminate the reasonable suspicion predicate, Judge Posner erroneously claims the predicate disabled the police from conducting investigations in time to prevent an attack. *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 802 (7th Cir. 2001). He misconceives the application of the standard, asserting it requires a great deal of evidence before investigations can begin. *See id.*

We should not abandon a proven standard that protects the constitutional rights of U.S. persons in domestic surveillance contexts because intelligence-gathering may also be involved. The reasonable suspicion standard merely mandates a link between the investigation and crime, including ongoing or imminent crimes. Because the scope of criminal statutes addressing terrorism is broad, it is likely that evidence of crime will exist when it is prudent to conduct surveillance of potential criminal activity.<sup>262</sup> For example, a reasonable suspicion of crime exists to investigate a suspect when he claims the September 11 attacks were justified and holds a commercial drivers license for hazardous materials.

The reasonable suspicion standard does not, however, give carte blanche to investigators to conduct surveillance of the suspect's associates or groups to which he or she belongs. In order to avoid overly broad investigations, the subject's associates cannot be fully and independently investigated without a reasonable suspicion that they are also involved in crime. Because groups themselves have a right to associational privacy,<sup>263</sup> an investigation of an individual group member cannot expand (beyond a brief initial inquiry if the situation qualifies as an emergency) to cover the entire group unless the individual is in a sufficiently high leadership position to act as the association's alter ego, or unless an initial inquiry reveals evidence of the group's involvement in crime.<sup>264</sup> Having an institutionalized procedure for approving surveillance under the

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262. For example, the definition of the new crime of domestic terrorism from Section 202 of the USA PATRIOT Act (codified at 18 U.S.C. § 2331(5)) reads as follows:

- (5) the term "domestic terrorism" means activities that—
- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
  - (B) appear to be intended—
    - (i) to intimidate or coerce a civilian population;
    - (ii) to influence the policy of a government by intimidation or coercion; or
    - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
  - (C) occur primarily within the territorial jurisdiction of the United States.

The broad definitions contained in this provision raise potential policy and constitutional concerns that are beyond the scope of this Article. For instance, would the civil disobedience of organizations like Greenpeace render them susceptible to prosecution as terrorists? *See also* Mike Kaszuba, *A Rush for Cash to Fight Terror; In Bids for Funds, Counties, Cities and Medical Units Will Submit Lists of Potential Terror Groups to the State*, MINNEAPOLIS-ST. PAUL STAR-TRIBUNE, Jan. 5, 2003, at 1B (explaining that the State of Minnesota, using information from the U.S. Department of Justice, included anti-tobacco activists on a list of possible terrorist groups).

263. *See supra* text accompanying notes 97–116, 133–42.

264. For example, if the imam of a mosque preaches violence against the U.S. and endorses particular acts of violence, the entire mosque could be investigated unless it was apparent that the mosque disavowed the statements.

reasonable suspicion standard also helps ensure that officers do not make erroneous ad hoc decisions.<sup>265</sup>

The standard also does not permit political profiling, since a person or group's political beliefs—other than specific advocacy of crime—do not in themselves create a reasonable suspicion. For instance, a general endorsement of violent jihad in defense of Muslim lands is abstract advocacy and unrelated to a U.S. crime. On the other hand, the threshold could be crossed by a combination of abstract political beliefs and other evidence, even if the evidence consisted only of First Amendment conduct.<sup>266</sup> For instance, belonging to a political or religious group that espouses violent revolution generally and personally endorsing violence

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265. Investigators should be permitted to check their records and make limited inquiries to ascertain the affiliations of the subject's associates.

266. Compare courts' treatment of racial profiling. One of the most controversial aspects of the reasonable suspicion doctrine is the theory that it tends to encourage racial profiling in certain situations. Courts have held that it is entirely impermissible for a suspect's race to be the sole factor in determining that reasonable suspicion exists. *See United States v. Avery*, 137 F.3d 343, 354 (6th Cir. 1997) ("A person cannot become the target of a police investigation solely on the basis of skin color. Such selective law enforcement is forbidden."); *United States v. Travis*, 62 F.3d 170, 173–74 (6th Cir. 1995) ("[C]onsensual searches may violate the Equal Protection Clause when they are initiated solely based on racial considerations. The government concedes that consensual encounters and searches based solely on race may violate the Equal Protection Clause of the Fourteenth Amendment even though they are permissible under the Fourth Amendment.").

But other courts have ruled that a suspect's race, in combination with additional circumstances and evidence, could constitute reasonable suspicion. *See Avery*, 62 F.3d at 353 ("If at the point an officer decides to *interview/encounter* a suspect he has gathered many reasons for that interview—one being race—the focus of the court is the *consensual encounter*, and the use of race as *one* factor in the pre-contact stage may not violate equal protection principles.") (emphasis in original). Also, proving that a suspect was targeted solely on the basis of race is difficult. The burden of proof is on the suspect "to demonstrate by a 'preponderance of the evidence' that a police officer decided to approach him or her solely because of his or her race." *Travis*, 62 F.3d at 174. But, courts have been careful in distinguishing lawful investigations from unlawful investigations in this context, clarifying that "while race is an appropriate characteristic for identifying a particular suspect, it is wholly inappropriate to define a class of suspects." *See Whitfield v. Bd. of Commr's.*, 837 F. Supp. 338, 344 (D. Colo. 1993) The court went on to say, "Without particularization as to a specific person, transaction or incident, the naked inference would be that race correlates to criminal behavior. Such an equation of race with suspicious criminal activity would be nothing more than a racist assumption . . ." *Id.* *See also United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Specifically, where a large number of persons in a certain area have a particular ethnic background or common ancestry, using this characteristic as a basis for reasonable suspicion is inappropriate because it would be "of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required." *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000). The assumption that ethnic Mexican occupants of a car near the Mexican border were aliens was misplaced because "[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens." *Id.* at 886–87.

against a particular local target could create a reasonable suspicion. (Indeed, in certain circumstances it could create probable cause.) Although one may not be prosecuted for expressions that involve advocacy of violence unless there is incitement to immediate violence and likelihood of its occurrence,<sup>267</sup> criminal investigations may be initiated on a lesser standard. In this example, solely First Amendment activity is involved, but the individual, targeted endorsement could lead a reasonable person to conclude that a violent crime could occur absent intervention.<sup>268</sup> Only an investigation could establish whether that was the case.

*2. Associational Interests and the Least Restrictive Means of Investigation*

Even when a reasonable suspicion exists, associational interests must be further taken into account before the constitutionality of surveillance can be determined. The reasonable suspicion presumption will not always be dispositive, such as where overly intrusive investigative methods are used.<sup>269</sup> The least restrictive means required to conduct the investigation effectively must be employed. Otherwise, unnecessary harm that is not justified by a compelling state interest accrues to the organization.<sup>270</sup>

In the case of surveillance against mosques and other Islamic organizations, many methods of surveillance can seriously hinder Islamic practice and expression. Investigations involving intrusive methods, such as infiltrators who influence organizational practices and issue detailed reports containing First

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267. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

268. *See supra* notes 226–32.

269. In the absence of a reasonable suspicion, though, further inquiry stops, as the investigation presumptively involves no compelling state interest and therefore violates the right of association.

270. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *see also Alliance to End Repression v. City of Chicago*, 627 F. Supp. 1044, 1055–57 (N.D. Ill. 1985) (stating there was no compelling interest to merit surveillance where the City of Chicago, without reasonable suspicion of criminal conduct, infiltrated private meetings of political organizations and maliciously provided false testimony because this form of investigation is especially disruptive, in bad faith, and not the “least drastic means” to gather intelligence); *White v. Davis*, 533 P.2d 222, 232 (Cal. 1975) (stating that once it has been established that government surveillance has chilled one’s freedom of speech or association, the burden of proof shifts to the Government to demonstrate a “‘compelling’ state interest which justifies the resultant deterrence of First Amendment rights and which cannot be served by alternative means less intrusive on fundamental rights”). *But cf. Socialist Workers Party v. Att’y Gen.*, 419 U.S. 1314, 1319–20 (1974) (denying preliminary injunction and holding surveillance justified where the FBI monitored political activities of the SWP by sending informants to public meetings, because the surveillance was limited, the FBI did not authorize disruptive activity, and “the Government has represented that it has no intention of transmitting any information obtained . . . to nongovernmental entities such as schools or employers”).

Amendment information, ordinarily will hinder religious practices.<sup>271</sup> In some cases, however, less intrusive means, such as voluntary interviews, could be effective. To the extent possible, interviews should be conducted without probing political or religious beliefs. Potential interviewees may agree to be interviewed or not; therefore, privacy is not invaded if the interviews are truly voluntary.<sup>272</sup> By contrast, the clandestine nature of most surveillance precludes consent.

If an intrusive investigative method does not serve the needs of the investigation, it is not the least restrictive alternative. For example, while government may have a reasonable suspicion regarding a suspected member of a terrorist organization, the government's interest is not served by disrupting his mosque's operations or harassing other members. Nor is it served by investigating an entire Islamic center's activities because an associate of a suspected terrorist has prayed there. To avoid unnecessary harm to associational rights, investigative methods should be narrowly tailored to fit the need.<sup>273</sup>

On the other hand, surveillance would be justified if the least restrictive means were employed, and it was initiated based upon the reasonable suspicion standard. By contrast, using infiltrators who attend and influence private meetings should not be permitted except where other investigative means are ineffective to address a serious potential crime.

### CONCLUSION

Recently, some commentators have queried whether September 11 was a constitutional moment—a term coined by Bruce Ackerman to refer to decisive historical events that usher in a new paradigm of constitutional interpretation.<sup>274</sup> Instead, I would suggest that September 11 was a crisis that requires renewed

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271. See *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989).

272. Law enforcement officials do not need reasonable suspicion to merely question a suspect. See *Florida v. Royer*, 460 U.S. 491, 497 (1983) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.”). As long as the suspect's participation is voluntary, questioning is constitutional.

273. Further minimization procedures provide additional protections from overreaching by requiring narrow tailoring of investigations. For instance, investigations should use the least intrusive method of surveillance (*e.g.*, infiltrators are more intrusive). They should also employ the least disruptive method (*e.g.*, overt surveillance is disruptive). Irrelevant First Amendment information should not be gathered in the first place; relevant information should be maintained for as short a period as possible. Information should be disseminated only to law enforcement agencies when necessary. Safeguards such as these can minimize abuses. See *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 561 (N.D. Ill. 1982) (containing the Chicago consent decree).

274. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (The Belknap Press of Harvard Univ. Press 1991); Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519, 1519 (1997).

fidelity to the enduring core values of American constitutionalism, including scrupulous protections of First Amendment freedoms.<sup>275</sup> Rather than lift all restraints on law enforcement, it is critical in the current period that we retain reasonable restrictions that simultaneously allow legitimate investigation into terrorist activity and protect the constitutional rights of those wrongly targeted for political surveillance.

Undoubtedly, the September 11 attack demonstrated that the threat of terrorism in the U.S. is greater than many believed. But the pressing need to investigate suspects to prevent future terrorist attacks can coexist with protection of basic civil liberties. It serves neither the interests of protecting constitutional rights nor those of devising effective law enforcement tactics to profile, monitor, and investigate U.S. persons based on general political or religious belief. Throughout American history, threats to national security have resulted in violations of civil liberties that did nothing actually to increase our security.

The Constitution requires that political surveillance only be initiated based upon an individualized reasonable suspicion of involvement in crime, with exceptions only for true emergencies. In the absence of this predicate, we will only diminish our democratic freedoms and look back at the current era with the dismay that hindsight will bring.<sup>276</sup>

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275. See Margulies, *supra* note 210, at 387 (citing JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT*, 168 (2000) (“[D]emocratic self-government involves a nation’s generation-spanning struggle to live under self-given foundational law over time, apart from or even contrary to popular will at any given moment.”)).

276. See CHISHTI ET AL., *supra* note 21, at 39 (“Over the course of American history, in times of national securities crisis the high courts have consistently acquiesced to executive branch crackdowns on civil liberties. Just as consistently, Americans have later come to view these crackdowns with regret, as misguided and ineffective attempts to scapegoat immigrants, and as undermining fundamental principles of American justice.”).