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ON MADISON, MUSLIMS, AND THE NEW YORK CITY POLICE DEPARTMENT

*Eric Lane**

"News" signifies something which has just happened, and which is new just because it deviates from the old and regular. But its meaning depends upon relation to what it imports, to what its social consequences are. This import cannot be determined unless the new is placed in relation to the old, to what has happened and been integrated into the course of events.

– John Dewey¹

I. INTRODUCTION

An exchange of letters between James Madison and Thomas Jefferson frames this Article. In October of 1787, Madison, the intellectual and political force behind the successful adoption of the Constitution in September of that year, had forwarded a copy of the newly proposed document to Jefferson, who was then serving in Paris as America's Minister to France.² Jefferson's reply was immediate.³ While mostly complimentary, he was highly critical of the absence of a bill of

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1. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 179-80 (Swallow Press 1954) (1927).

2. ERIC LANE & MICHAEL ORESKES, *THE GENIUS OF AMERICA: HOW THE CONSTITUTION SAVED OUR COUNTRY—AND WHY IT CAN AGAIN* 54 (2007) (explaining Madison's significance to the constitutional convention); GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 67 (2009) (describing Madison's stature as an intellectual politician); Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 *THE PAPERS OF THOMAS JEFFERSON: 7 AUGUST 1787 TO 31 MARCH 1788*, at 271 (Julian P. Boyd ed., 1955) [full collection hereinafter 12 *THE PAPERS OF THOMAS JEFFERSON*]; Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 *THE PAPERS OF THOMAS JEFFERSON*, *supra*, at 438.

3. See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 2, at 438-39 (acknowledging recent receipt of Madison's letters).

rights.⁴ “[A] bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse,” he wrote.⁵ In fact, not only did the proposed constitution fail to include a bill of rights, the subject itself had barely been discussed by the delegates to the Constitutional Convention.⁶ It was raised only at the end of the Convention by Virginia’s George Mason and was then unanimously defeated by the represented states.⁷

While Madison did not receive Jefferson’s December 1787 response until July 1788,⁸ it is clear that by the beginning of 1788, Madison and other Federalists recognized that the absence of a bill of rights provided the Anti-Federalist delegates with a powerful argument against ratification.⁹ To counter this claim, the Federalist delegates (including the Virginia delegate Madison), in state convention after state convention, agreed to support a bill of rights as an amendment to the Constitution, if it was ratified.¹⁰

But this alone did not satisfy Madison. He still wanted to explain his initial reluctance to include a bill of rights within the Constitution. In October 1788, several months after the ratification campaign had been successfully completed, he responded to Jefferson’s earlier letter.¹¹ His reasons were several, but most relevant to this discussion was his judgment both from his study of history and from his experience as a political actor that the enumeration of rights was but a “parchment barrier[]” that could be violated at any time by “overbearing majorities.”¹² From Madison’s perspective, the real protection of Americans’ freedom was the limited powers given to the federal government and the system of checks and balances the new Constitution

4. See *id.* at 439-40 (conveying Jefferson’s critique of the Constitution); see also WOOD, *supra* note 2, at 67 (noting that while Jefferson “was not unsympathetic to the new Constitution,” he took issue with the lack of a bill of rights).

5. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 2, at 440.

6. See WOOD, *supra* note 2, at 66.

7. *Id.*

8. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 443 (2010).

9. See LANE & ORESKES, *supra* note 2, at 86-87, 92; WOOD, *supra* note 2, at 66-67.

10. LANE & ORESKES, *supra* note 2, at 95; MAIER, *supra* note 8, at 443; WOOD, *supra* note 2, at 67-68.

11. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON: 8 OCTOBER 1788 TO 26 MARCH 1789, at 16 (Julian P. Boyd ed., 1958) [full collection hereinafter 14 THE PAPERS OF THOMAS JEFFERSON]; LANE & ORESKES, *supra* note 2, at 96; MAIER, *supra* note 8, at 444.

12. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 11, at 18-19.

contained.¹³ If those safeguards failed, a bill of rights, he wrote, would prove no safe harbor.¹⁴

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. This is a truth of great importance, but not yet sufficiently attended to Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince.¹⁵

Last year, in the week leading up to the tenth anniversary of September 11, 2001 (“9/11”), news came of a possible terrorist car bomb attack aimed at New York City or Washington, D.C.¹⁶ Law enforcement agencies characterized the report as “credible” and “specific,” but “unconfirmed.”¹⁷ This characterization suggested that the source was someone trusted and that the report described both the mode and locations of the attack, but that the information itself was hearsay and thus unconfirmed.¹⁸

As the news spread to New York City, so too spread the efforts of the New York City Police Department (“NYPD”) to prevent any such tragedy. Squads of police raced throughout the city as a warning to potential terrorists or perhaps terrorists on actual missions.¹⁹ Police boats filled the city’s rivers and police helicopters filled its skies.²⁰ And at its

13. See MAIER, *supra* note 8, at 446.

14. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 11, at 18-20; see also MAIER, *supra* note 8, at 444-45.

15. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 11, at 19. This view was also shared by Alexander Hamilton:

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.

The Federalist No. 8, at 34 (Alexander Hamilton) (ABA ed., 2009).

16. Al Baker & Scott Shane, *Sweeping Security Effort Planned for 9/11 Events*, N.Y. TIMES, Sept. 11, 2011, at A17.

17. Scott Shane, *Investigators Assess Threat of Attack Tied to 9/11*, N.Y. TIMES, Sept. 9, 2011, at A15.

18. See Baker & Shane, *supra* note 16, at A17.

19. See *id.*

20. *Id.*

tunnels, bridges, and other ports of entry, heavily armed police stood watch, occasionally checking incoming vehicles for explosives.²¹ All of this was, as intended, highly visible to New Yorkers, the city's many commercial or recreational visitors, and potential terrorists.

Beneath this surface, the news also spurred the increased surveillance of New York City's more than 600,000 Muslims.²² For the New York City police officers, these communities are presumed to be, at the least, likely hiding places for terrorists acting in the name of Islam or, at worst, the places in which they live and from which they may receive support and succor.²³

The NYPD did not publicly announce this particular policing strategy.²⁴ Surveillance demands such secrecy both for its operational efficiencies²⁵ and, in a case such as this, to avoid criticism.²⁶

Since 9/11, the NYPD has dramatically, and understandably, directed its attention, energy, and considerable resources to preventing a recurrence of a similar terrorist attack.²⁷ But they have done so effectively by staking out New York's Muslim communities.²⁸ NYPD Commissioner Raymond Kelly himself has declared:

We want to know how individuals traveling here to do us harm might communicate and conceal themselves. We must be able to quickly pinpoint the likely areas in which a foreign operative might find resources, or evade law enforcement. What internet café in which

21. *See id.*

22. *See* MITCHELL D. SILBER & ARVIN BHATT, NYPD INTELLIGENCE DIVISION, *RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT* 69 (2007), available at http://www.nyc.gov/html/nypd/downloads/pdf/public_information/NYPD_Report-Radicalization_in_the_West.pdf; Matt Apuzzo & Adam Goldman, *Documents Show NY Police Watched Devout Muslims*, ASSOCIATED PRESS, Sept. 6, 2011 [hereinafter *NY Police Watched Devout Muslims*], available at <http://www.ap.org/Content/AP-In-The-News/2011/Documents-show-NY-police-watched-devout-Muslims>.

23. *See* SILBER & BHATT, *supra* note 22, at 24, 69.

24. *See* Joseph Goldstein, *City Council Grills Kelly on Police Surveillance of Muslims*, N.Y. TIMES, Oct. 7, 2011, at A23.

25. *See, e.g., Oversight – Safety in NYC Ten Years After 9-11: Hearing Before Comm. on Pub. Safety*, 2011 N.Y. City Council 24 (Oct. 6, 2011) [hereinafter *N.Y.C. Public Safety Hearing*] (statement of Raymond Kelly, Comm'r of the New York City Police Department), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=984766&GUID=C6F59E3A-12DE-4C99-9A82-9E53C83719A5>.

26. *See* Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS, Aug. 23, 2011 [hereinafter *NYPD Moves Covertly*], available at <http://www.ap.org/Content/AP-in-the-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas>.

27. *See N.Y.C. Public Safety Hearing*, *supra* note 25, at 6, 10 (statement of Raymond Kelly, Comm'r of the New York City Police Department).

28. *See, e.g., NY Police Watched Devout Muslims*, *supra* note 22.

borough would they be likely to use? At which SRO [single room occupancy] might they find lodging?²⁹

In that same testimony, he added that, “[h]aving a comprehensive understanding of the communities we serve enhances our ability to disrupt drug dealing, human trafficking, organized crime, fraud and other complex criminal activities. Why wouldn’t we do the same to combat terrorism?”³⁰

II. COMPREHENSIVE POLICING AND EXAMPLES OF ITS HISTORICAL CONSEQUENCES

The term “comprehensive” should give pause. Of course, good policing practices should include a police force knowledgeable of, and connected to, all of its jurisdiction’s communities.³¹ But history warns that, in law enforcement lexicon, “comprehensive” means gathering as much information as possible without particular regard to constitutional limits.³² This should not be surprising. While in principle the police are committed to the protection of constitutional rights,³³ in reality they win their merit badges for preventing and fighting crime.³⁴ That is why the Supreme Court has limited police activity through such decisions as *Mapp v. Ohio*³⁵ and *Miranda v. Arizona*.³⁶ As Jerome Skolnick has written:

The policeman views criminal procedure with the *administrative bias of the craftsman*, a prejudice contradictory to due process of law. That is, the policeman tends to emphasize his own expertness and

29. *N.Y.C. Public Safety Hearing*, *supra* note 25, at 25 (statement of Raymond Kelly, Comm’r of the New York City Police Department).

30. *Id.* at 25-26.

31. See David Alan Sklansky, *The Persistent Pull of Police Professionalism*, NEW PERSPECTIVES IN POLICING, Mar. 2011, at 5, available at http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/ExecSessionPolicing/NPIP-ThePersistentPullOfPoliceProfessionalism-03-11.pdf.

32. See, e.g., Editorial, *Police Powers in New York*, N.Y. TIMES, Mar. 18, 2012, at SR10 [hereinafter *Police Powers*] (commenting on Attorney General Holder’s review of the New York City Police Department’s surveillance practices, including its monitoring of the Muslim community, stop-and-frisk, and conduct at Occupy Wall Street).

33. See *id.* (implying, by commenting negatively on constitutionally suspect practices, that the police are tasked with following the Constitution and the limits it imposes on them).

34. See Sklansky, *supra* note 31, at 4.

35. 367 U.S. 643 (1961). The Supreme Court held that under the Fourth Amendment, in criminal prosecutions, unconstitutionally obtained evidence cannot be used to convict a defendant. *Id.* at 657.

36. 384 U.S. 436 (1966). The Supreme Court held that in police interrogations, statements obtained from defendants can only be admissible if the defendants have been given a full warning of their constitutional rights. *Id.* at 458, 460-61, 467.

specialized abilities to make judgment about the measures to be applied to apprehend “criminals,” as well as the ability to estimate accurately the guilt or innocence of suspects. He sees himself as a craftsman, at his best, a master of his trade. As such, he feels he ought to be free to employ the technique of his trade and the *system* ought to provide regulation contributing to his freedom to improvise, rather than constricting it.³⁷

This all-important commitment to craft becomes particularly acute in a democracy, as Madison noted, when public stress over security is high, as it has appropriately been in New York City at least since 9/11.³⁸

Historical examples of public stress stimulating aggressive policing practices that compromise civil liberties are many, but three are particularly relevant to New York. The first was the 1942 decision to authorize the relocation and internment of more than 110,000 West Coast people of Japanese origin, over 70,000 of who were Japanese Americans, after the Japanese attack on Pearl Harbor.³⁹ And this occurred after the government had separately rounded up some 1000 Japanese residents whom they actually suspected of subversive activities.⁴⁰ According to the Supreme Court, the reason for the relocation was that “there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.”⁴¹ That, at least, is what the government represented to the Court.⁴² But, as the Justice Department later acknowledged, the Solicitor General had lied.⁴³ In fact, at the time of the Solicitor General’s argument, he was aware of information held by “the Federal Communications Commission, the Department of the Navy, and the Justice Department which directly contradicted” the “evidence” of Japanese-American complicity that framed his argument and the Court’s decision.⁴⁴ “And to make matters worse, [the Solicitor General] relied on

37. JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 191 (1994).

38. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 11, at 20-21; *infra* text accompanying notes 70-72.

39. See Allie Shay, *Remembering 110,000 Japanese Americans Interned in the 1940s*, PUBLISHING THE LONG CIVIL RIGHTS MOVEMENT (Dec. 19, 2011), <https://lcrm.lib.unc.edu/blog/index.php/2011/12/19/remembering-110000-japanese-americans-interned-in-the-1940s/>.

40. See *Alien Detention Center*, THE HISTORICAL MUSEUM AT FORT MISSOULA, <http://www.fortmissoulamuseum.org/aliendetention.php> (last visited July 27, 2012).

41. *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943).

42. See *id.*; Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, U.S. DEP’T JUST. (May 20, 2011), <http://blogs.justice.gov/main/archives/1346>.

43. Katyal, *supra* note 42.

44. *Korematsu v. United States*, 584 F. Supp. 1406, 1419 (N.D. Cal. 1984); Katyal, *supra*

gross generalizations about Japanese Americans, such as that they were disloyal and motivated by ‘racial solidarity.’”⁴⁵ This was untrue. In fact, as concluded by The Commission on Wartime Relocation and Internment of Civilians, “[t]he broad historical causes that shaped these decisions were race prejudice, war hysteria and a failure of political leadership.”⁴⁶ This emphasis on the failure of political leadership was underscored in the 1984 decision that overturned the conviction of Fred Korematsu, the Japanese American convicted of failing to relocate and the defendant in the infamous Supreme Court decision, *Korematsu v. United States*.⁴⁷ In the 1984 decision, the District Court reviewing the conviction warned that in the face of “petty fears and prejudices that are so easily aroused,” political leaders, including the judiciary, “must be prepared to exercise their authority to protect all citizens.”⁴⁸

But political restraint is not such a simple matter in a democracy where the concerns of the public are expected to be reflected in the conduct of their elected officials and are often expressed in the views of the courts.⁴⁹ And the more intense public sentiment toward a particular outcome, the more palatable that particular issue will become to an elected official. That is, as Madison noted in a letter to Jefferson, an inevitable weakness of democracy and a bill of rights.⁵⁰

The other relevant examples of overzealous policing in times of stress come first from the Federal Bureau of Investigation (“FBI”), second from the New York State Police, and finally, from the NYPD itself. The public’s intense fear of communism during the Cold War and onward,⁵¹ and its fear of the various other polarizing movements of the

note 42.

45. Katyal, *supra* note 42.

46. COMM’N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, *Personal Justice Denied Part 2: Recommendations* 5 (1983), in REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS PERSONAL JUSTICE DENIED. The Commission was established in 1980 by an Act of Congress to “review the facts and circumstances surrounding Executive Order Numbered 9066” and its impact “on American citizens and permanent resident aliens;” to “review directives of United States military forces requiring the relocation and, in some cases, detention in internment camps of American citizens,” including those of Japanese ancestry; and to “recommend appropriate remedies.” Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96–317, § 2(b), 94 Stat. 964 (1980) (codified as amended at 50 U.S.C. app. § 1981 (2006)).

47. 323 U.S. 214 (1944). The District Court that vacated the Supreme Court’s original decision upholding Fred Korematsu’s conviction pointed to the ethical failure of the government in its intentional suppression of evidence as an example of a failure of leadership. *Korematsu*, 584 F. Supp. at 1419–20.

48. *Korematsu*, 584 F. Supp. at 1420.

49. See LANE & ORESKES, *supra* note 2, at 51–53.

50. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 11, at 19–20.

51. FREDERICK A.O. SCHWARZ JR. & AZIZ A. HUQ, UNCHECKED AND UNBALANCED:

1960s and 1970s (anti-war, civil rights, black power, feminist, and pro-choice and pro-life),⁵² spurred all levels of law enforcement agencies throughout the country to aggressively, and sometimes illegally, collect information on significant numbers of law abiding Americans whom the police judged to be subversive or potentially subversive.⁵³ As the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (“Church Committee”) concluded with respect to the surveillance efforts of the FBI, the Central Intelligence Agency (“CIA”), and the National Security Agency (“NSA”), these efforts were often “illegal, improper or unethical” and did not reflect “the ideals which have given the people of this country and of the world hope for a better, fuller, fairer life.”⁵⁴ Nor were these efforts “governed and controlled in accord with the fundamental principles of our constitutional system of government.”⁵⁵

Closer to home and emphasizing the relationship between the security concerns of the public and the corresponding responses of law enforcement agencies were the far overreaching efforts of the N.Y. State Police and the NYPD to spy on law-abiding New Yorkers whom the police had defined as subversives.⁵⁶

In New York State, this effort was revealed in the more than 500,000 files that the State Police maintained on several hundred thousand law-abiding New Yorkers whom the police themselves characterized as “non-criminal.”⁵⁷ To the police, these New Yorkers were “subversives” because they “espouse[d] ideas which challenged the status quo.”⁵⁸ Responsibility for these efforts belonged to the Special Services Unit of the State Police, whose broad mandate for gathering, recording, analyzing, and disseminating information resulted in “[t]he

PRESIDENTIAL POWER IN A TIME OF TERROR 13 (2007). Frederick A.O. Schwarz Jr. served as Chief Counsel to the Church Committee. *Frederick A.O. (“Fritz”) Schwarz, Jr.*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/people/frederick_a_o_schwarz_jr (last visited July 27, 2012).

52. SCHWARZ & HUQ, *supra* note 51, at 6; see Eric Lane, *Political Surveillance in New York—An Administrative Challenge to Democratic Values*, 55 U. DETROIT J. URBAN L. 1079, 1082 (1978).

53. See SCHWARZ & HUQ, *supra* note 51, at 15-16, 22.

54. *Id.* at 23 (citation omitted) (internal quotation marks omitted).

55. *Id.* (citation omitted) (internal quotation marks omitted).

56. Lane, *supra* note 52, at 1082-83.

57. See SPECIAL TASK FORCE ON STATE POLICE NON-CRIMINAL FILES, N.Y. ASSEMBLY, STATE POLICE SURVEILLANCE: REPORT OF THE SPECIAL TASK FORCE ON STATE POLICE NON-CRIMINAL FILES, at i, 1 (1977).

58. See *id.* at 7, 47.

indiscriminate application of criminal investigative techniques to non-criminal matters.”⁵⁹

Again it was the times, according to the New York Report that detailed these law enforcement methods, that pushed such police activity:

We believe that . . . the overzealousness of the Police in conducting their investigations was due partially to the tenor of the 1960’s and to external and internal pressures upon the State Police. In the sense that there were scores of demonstrations, marches, sit-ins and racial disturbances, it is understandable that Police agencies . . . were deeply concerned with keeping order. This concern with order created pressure upon the Police from the Legislature, the Governor, the Criminal Justice System and from citizens, to be cognizant of any disturbance that was likely to occur within their jurisdiction.⁶⁰

And in New York City, during this very same period and responding to the same pressures “of heightened American public awareness of political unrest and law enforcement response,”⁶¹ the NYPD was similarly engaged in the “surreptitious surveillance and undercover infiltration of the political activities of individuals and groups.”⁶²

III. SURVEILLANCE, INTEL, AND THE MODIFIED HANDSCHU STANDARD

Whatever pressure the NYPD felt to ensure public safety during the 1960s pales in comparison to what they must currently feel in post-9/11 New York City. “September 11th forever changed how the NYPD views its mission and the world around us,” Police Commissioner Raymond Kelly told the New York City Council’s Committee on Public Safety at a 2011 hearing, where he added, “[m]ore than any other place in the world, New York City remains in the crosshairs of Al Qaeda and its affiliated groups.”⁶³

Since those attacks, multiple government officials have predicted future attacks of one kind or another and jihadists have promised them.⁶⁴

59. *Id.* at 7, 48.

60. *Id.* at 46.

61. *Handschu v. Special Servs. Div. (Handschu II)*, 605 F. Supp. 1384, 1398 (S.D.N.Y. 1985).

62. *Id.* at 1396 (internal quotation marks omitted) (citation omitted).

63. *N.Y.C. Public Safety Hearing*, *supra* note 25, at 9, 21 (statement of Raymond Kelly, Comm’r of the New York City Police Department).

64. See, e.g., David Johnston & James Risen, *New Signs of Terror Not Evident*, N.Y. TIMES, Apr. 6, 2003, at B1; David Johnston & David Stout, *Bin Laden Is Said to Be Organizing for a U.S.*

New Yorkers continue to believe that the city is a target for terrorists.⁶⁵ A CBS News/New York Times Poll in 2006 found that 69% of New Yorkers were “very concerned about another terrorist attack in New York City,” and 72% in this same poll also agreed that the federal government had not “done all it could reasonably be expected to do to make the country safe from future terrorist attacks.”⁶⁶ Furthermore, 63% of New Yorkers in this poll felt either “uneasy” with (47%), or “in danger” from (16%), the prospect of future terrorists attacks.⁶⁷

To protect New York and New Yorkers from future threats, the NYPD has reorganized itself, effectively creating a freestanding Intelligence Division that reports directly to the Commissioner.⁶⁸ That division includes a “Demographics Unit” for the purpose, in its own words, of “[i]dentify[ing] and map[ping] ethnic residential concentrations within the Tri-State area,” “[i]dentify[ing] and map[ping] ethnic hot spots,” and “[m]onitor[ing] current events and investigations and puls[ing] the identified hot spots as appropriate.”⁶⁹ To effectuate these efforts, the NYPD employs both undercover agents and informants.⁷⁰ A recently revealed demographic report on Newark, New Jersey shows both the breadth and depth of the NYPD’s surveillance efforts.⁷¹ Using the census and other official and unofficial documents to locate “the largest geographic population concentrations of people from countries of concern,” and then using “field work,” the unit determined and mapped “the major Locations of Concern.”⁷² Locations of Concern are identified as, *inter alia*, a “[l]ocalized center of activity for a particular ethnic group,” “[l]ocation[s] that persons of concern may be

Attack, N.Y. TIMES, July 9, 2004, at A1; Richard W. Stevenson & Eric Lichtblau, *As Ashcroft Warns of Qaeda Plan to Attack U.S., Some Question the Threat and Its Timing*, N.Y. TIMES, May 27, 2004, at A16; Massimo Calabresi, *Warning: U.S. Unsure About Terror Threat*, TIME (Oct. 4, 2010), <http://swampland.time.com/2010/10/04/warning-u-s-unsure-about-terror-threat/>.

65. See CBS NEWS & N.Y. TIMES, FIVE YEARS AFTER THE 9/11 ATTACKS: ARE AMERICANS SAFER? (2006), available at <http://www.cbsnews.com/htdocs/pdf/poll090606.pdf>.

66. *Id.*

67. *Id.*

68. N.Y.C. Public Safety Hearing, *supra* note 25, at 9-10 (statement of Raymond Kelly, Comm’r of the New York City Police Department).

69. DEMOGRAPHICS UNIT, N.Y. POLICE DEP’T, THE DEMOGRAPHICS UNIT, available at <http://wid.ap.org/documents/nypd-demo.pdf>; see also Public Safety Hearing, *supra* note 25, at 49 (statement of Raymond Kelly, Comm’r of the New York City Police Department).

70. NYPD Moves Covertly, *supra* note 26.

71. See generally DEMOGRAPHICS UNIT, N.Y. POLICE DEP’T, NEWARK, NEW JERSEY DEMOGRAPHICS REPORT (2007), available at http://hosted.ap.org/specials/interactives/documents/nypd/nypd_newark.pdf.

72. *Id.* at 3.

attracted to,” and “[l]ocation[s] that individuals may frequent to search for ethnic companionship.”⁷³

A. *Watching Muslims*

The common denominator for each grouping of people investigated by the Demographics Unit is the Muslim religion.⁷⁴ It is only Muslims who are being mapped and watched. This has been made clear by the Pulitzer Prize-winning series of investigative reports by the Associated Press (“AP”) and by the documents released with these reports.⁷⁵

Since August 2011, in dozens of articles, AP reporters have painted the picture of communities whose public life is under constant police watch.⁷⁶ The NYPD has essentially “monitored every aspect of Muslim life and built databases on where innocent Muslims eat, shop, work and pray.”⁷⁷ Mosques, work places, Internet cafes, and bookstores are among the many locations that have attracted NYPD attention,⁷⁸ as have student groups and individual Muslims who have “Americanized” their names.⁷⁹ Muslim college students have been a special target of NYPD surveillance. Not only have police undercover agents infiltrated student groups at “Yale; Columbia; the University of Pennsylvania; Syracuse; New York University; Clarkson University, the Newark and New Brunswick campuses of Rutgers; and the State University of New York campuses in Buffalo, Albany, Stony Brook and Potsdam; Queens College, Baruch College, Brooklyn College and La Guardia Community College,” but one undercover agent went on a student rafting trip “where he recorded students’ names and . . . how many times they prayed.”⁸⁰

The police have not denied these stories; indeed, they have responded only by averring that, in their intelligence efforts, no laws

73. *Id.*

74. *See, e.g., id.* at 39, 48 (labeling a Muslim book store and a Halal restaurant as “Identified Locations”).

75. *See Highlights of AP’s Pulitzer Prize-Winning Probe into NYPD Intelligence Operations*, ASSOCIATED PRESS, <http://www.ap.org/media-center/nypd/investigation> (last visited July 27, 2012).

76. *See id.*

77. Matt Apuzzo, *NYPD-CIA Alliance’s Authority Questioned*, ASSOCIATED PRESS, Jan. 21, 2012, available at http://www.usatoday.com/USCP/PNI/NEWS/2012-01-21-BCUSNYPD-Intelligence3rd-LdWritethru_ST_U.htm.

78. *See* Eric W. Dolan, *NYPD Proposed Spying on Muslims Based Solely on Their Religion*, THE RAW STORY (Feb. 2, 2012 17:51 EDT), <http://www.rawstory.com/rs/2012/02/02/nypd-proposed-spying-on-muslims-based-solely-on-their-religion/>.

79. Chris Hawley, *NYPD Monitored Muslim Students*, WASH. POST, FEB. 19, 2012, at A12; Matt Apuzzo & Adam Goldman, *NYPD Keeps Files on Muslims Who Change Their Names*, ASSOCIATED PRESS, Oct. 26, 2011, available at <http://www.ap.org/Content/AP-In-The-News/2011/NYPD-keeps-files-on-Muslims-who-change-their-names>.

80. Hawley, *supra* note 80.

were broken. They are only “following leads,” Commissioner Raymond Kelly has continuously repeated.⁸¹ “We go where the leads take us,” he told the Public Safety Committee of the New York City Council.⁸² And if these leads take the NYPD into, for example, “religious institutions” then “[w]e’re not going to be deterred.”⁸³ NYPD spokesman Paul Browne, in the same vein, stated, “[w]e will go into a location, whether it’s a mosque or a bookstore, if the lead warrants it”⁸⁴

The NYPD’s definition of a “lead”—the threshold standard that is a predicate for NYPD surveillance—is ambiguous.⁸⁵ According to Kelly, “a lead is information that indicates the possibility of unlawful activity.”⁸⁶ It would be hard for an explanation to ever explain less. For example, in response to a question concerning the NYPD’s predicate for infiltrating student Muslim associations, Browne “provided a list of 12 people arrested or convicted on terrorism charges in the United States and abroad who had once been members of Muslim student associations”⁸⁷ Of course, if an expectation of a similar outcome was the only basis for an investigation, the NYPD could target every student association in America.

B. *The Handschu Orders, Then and Now*

The NYPD’s claim that they are following leads only and not monitoring particular religious groups is rooted in a number of judicial decisions known as the *Handschu* Cases,⁸⁸ which have resulted in the

81. *N.Y.C. Public Safety Hearing*, *supra* note 25, at 24, 37, 53, 64 (statement of Raymond Kelly, Comm’r of the New York City Police Department).

82. *Id.* at 24.

83. *Id.* at 40.

84. *NYPD Moves Covertly*, *supra* note 26.

85. See *Handschu v. Special Servs. Div. (Handschu IV)*, 273 F. Supp. 2d 327, 331-32 (S.D.N.Y. 2003). The court noted that:

[w]hen specific information has been received by the Police Department that a person or group engaged in political activity is engaged in, about to engage in or has threatened to engage in conduct which constitutes a crime the [intelligence unit] is authorized to commence an investigation of such person or group

Id. (quoting *Handschu v. Special Servs. Div. (Handschu II)*, 605 F. Supp. 1384, 1421 (S.D.N.Y. 1985)).

86. *N.Y.C. Public Safety Hearing*, *supra* note 25, at 57 (statement of Raymond Kelly, Comm’r of the New York City Police Department).

87. Hawley, *supra* note 80.

88. Although there have been numerous *Handschu* decisions, four in particular are relevant to this discussion: *Handschu v. Special Servs. Div. (Handschu I)*, 349 F. Supp. 766, 771 (S.D.N.Y. 1972) (denying defendants’ motion to dismiss complaint); *Handschu II*, 605 F. Supp. at 1417 (approving the settlement and the *Handschu* Guidelines); *Handschu v. Special Servs. Div. (Handschu III)*, 787 F.2d 828, 831 (2d Cir. 1986) (affirming the approval in *Handschu II*); and *Handschu IV*, 273 F. Supp. 2d at 349 (modifying the *Handschu* Guidelines).

Handschu Stipulation of Settlement and the accompanying Handschu Guidelines first approved by the court in 1985⁸⁹ and judicially modified in 2003.⁹⁰ Kelly himself makes this connection several times in his 2011 testimony before the Public Safety Committee of the City Council, including his statement that “we follow leads that are authorized by the Handschu Stipulation.”⁹¹ In response to questions about the AP stories and the targeting of Muslims, Kelly repeated, “Again, we’re following the Handschu Guidelines.”⁹²

Barbara Handschu and fifteen other plaintiffs brought a class action under 42 U.S.C. Section 1983 for injunctive relief against the Mayor of the City, the NYPD Commissioner, other police officials, and the NYPD’s then-Special Services Division to halt various activities of the department, including surveillance efforts that had “the effect of chilling, discouraging and inhibiting plaintiffs . . . from expressing and advocating unpopular political and social views and from communicating and associating with one another for that purpose.”⁹³ Many of the alleged methods of surveillance were similar to those that the NYPD has employed in performing surveillance of the Muslim community, such as the use of “informers . . . infiltration . . . interrogation . . . [and] electronic surveillance.”⁹⁴ Additionally, “[t]his intelligence gathering was *not* limited to investigations of crime, but related to any activity likely to result in a serious police problem.”⁹⁵ The conduct complained of was not the lawfulness of the policing methods themselves, but among other things, the excessiveness of such efforts, which the plaintiffs claimed deterred them from joining or maintaining membership in their respective lawful organizations.⁹⁶ The question presented was never answered by the court.⁹⁷ In 1985, in a new political climate and under a different administration,⁹⁸ the City of New York entered into a consent decree that

89. *Handschu II*, 605 F. Supp. at 1417-24.

90. *Handschu IV*, 273 F. Supp. 2d at 349-51.

91. *N.Y.C. Public Safety Hearing*, *supra* note 25, at 23-24, 53, 84-85 (statement of Raymond Kelly, Comm’r of the New York City Police Department).

92. *Id.* at 59-60.

93. *Handschu I*, 349 F. Supp. 766, 767 (S.D.N.Y. 1972).

94. *Id.* at 768; *see NYPD Moves Covertly*, *supra* note 26.

95. *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384, 1396 (S.D.N.Y. 1985) (*Handschu II*) (citation omitted) (quoting the Affidavit of then-Police Commissioner Patrick V. Murphy) (internal quotation marks omitted).

96. *See Handschu I*, 349 F. Supp. at 767.

97. *Id.* at 770-71.

98. Ed Koch was Mayor of New York City at the time of *Handschu II*, having been elected in 1978. *Ed Koch*, HUFFINGTON POST, <http://www.huffingtonpost.com/ed-koch/> (last visited July 27, 2012).

discontinued the action and created “an Authority to oversee the activities of the PSS [Public Security Section] of the Intelligence Division.”⁹⁹ The Handschu Authority was comprised of two police administrators, including the Deputy Commissioner for Legal Affairs, and one civilian chosen by the Mayor in consultation with the Police Commissioner.¹⁰⁰ Under the terms of the agreement, only the PSS could engage in “any investigation of political activity,” and any such investigation continuing for more than thirty days would require filing a notice of investigation with “factual predicate” with the Authority and obtaining the Authority’s approval.¹⁰¹ The term “political activity” was defined as “[t]he exercise of a right of expression or association for the purpose of maintaining or changing governmental policies or social conditions.”¹⁰² And “investigation” was defined as “police activity undertaken to obtain information or evidence.”¹⁰³ The NYPD also needed to obtain approval from the Handschu Authority for use of undercover agents in investigations of political activity.¹⁰⁴ The entire Handschu agreement is described and attached to Judge Charles Haight’s Memorandum Opinion and Order that was issued in 1985 for *Handschu v. Special Services Division*.¹⁰⁵

After 9/11, the NYPD moved for an order modifying the original order, arguing that enforcement of the Guidelines was no longer consistent with the public interest because “they limit the effective investigation of terrorism.”¹⁰⁶ The NYPD’s proposal would have deleted nearly all of the original provisions and would have only required that the NYPD act in conformance with the Constitution.¹⁰⁷ More specifically, the NYPD proposed that the Authority be stripped of its role as gatekeeper to the initiation of investigations into political activity and that the Authority’s sole function be limited to performing reviews of the PSS’s records when requested to do so by an individual who believes that he or she has been named in the PSS’s records.¹⁰⁸ Most importantly, the NYPD proposed that the new order remove the

99. *Handschu II*, 605 F. Supp. at 1390, 1417.

100. *Id.* at 1390.

101. *Id.*

102. *Id.* at 1420.

103. *Id.*

104. *Id.* at 1422.

105. *Id.* at 1417 app. A.

106. *Handschu IV*, 273 F. Supp. 2d 327, 337 (S.D.N.Y. 2003) (internal quotation marks omitted).

107. Compare *Handschu IV*, 273 F. Supp. 2d at 349-51, with *Handschu II*, 605 F. Supp. at 1420-24.

108. See *Handschu IV*, 273 F. Supp. 2d at 334-35, 349-50.

requirement of a criminal predicate for initiating “political activity” investigations.¹⁰⁹

Acknowledging that adoption of this modified order “may be purchased at ‘a cost to the values protected by the First Amendment’” and that “the modification elevator may have descended close to the constitutional floor,” the court granted the motion on the basis that such a cost was justified due to the “public dangers of terrorism.”¹¹⁰ The court’s final order incorporated the text of the modified Handschu Guidelines.¹¹¹

The adopted modified order also accepted a NYPD proposal that the 2002 FBI Guidelines become the guidelines governing political activity investigations.¹¹² These would then be embedded within the NYPD Patrol Guide.¹¹³ These guidelines became the “Guidelines for Investigations Involving Political Activity” (“NYPD Guidelines”).¹¹⁴ The NYPD Guidelines apply only when the police are “collecting information or evidence about political activity *in order to* investigate the activity;” thus, the NYPD Guidelines apply only when the NYPD is acting with an investigative purpose directed towards political activity.¹¹⁵ Under these new guidelines, the NYPD can perform undercover surveillance without any prior approval from an overseeing authority; the NYPD need only obtain authorization from the Deputy Commissioner of the Intelligence Division.¹¹⁶ The only predicates required for undercover investigations are that the undercover operation be “the most effective means of obtaining information,”¹¹⁷ and that there be “facts or circumstances [which] reasonably indicate that [such] unlawful [conduct] has been, is being, or will be committed.”¹¹⁸ The NYPD is also authorized to conduct a slightly more limited undercover surveillance operation for a maximum of 180 days upon the receipt of information “indicating the possibility of unlawful activity.”¹¹⁹

109. *See id.* at 337, 340-42.

110. *Id.* at 344, 349. “Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated.” *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 389 (1992).

111. *Handschu IV*, 273 F. Supp. 2d at 349.

112. *Id.* at 335, 344, 346-47, 349.

113. *Id.* at 349.

114. *Handschu v. Special Servs. Div. (Handschu V)*, No. 71 Civ. 2203 (CSH), 2007 WL 1711775, at *3 (S.D.N.Y. June 13, 2007).

115. *Id.* at *14.

116. *See id.* at *17.

117. *Handschu v. Special Servs. Div. (Handschu VI)*, 288 F. Supp. 2d 411, 428 (S.D.N.Y. 2003).

118. *Id.* at 424.

119. *Id.* at 422-23.

IV. WATCHING MUSLIMS REDUX: BELOW THE CONSTITUTIONAL BASEMENT?

The court's conclusion that "the modification elevator" remained sufficiently elevated above the constitutional basement was, at best, problematic.¹²⁰ But the question now is whether the NYPD has descended below the constitutional basement in implementing its new power under the modified Handschu Order.

Any answer to this question must start with the recognition that the surveillance of the New York region's Muslim communities is based on religion or ethnic identity. This was discussed earlier.¹²¹ But as a reminder, consider, for example, the Intelligence Division's report on the half-Jewish, half-Muslim Syrian community: "The Demographics Unit found that the Syrian community in NYC is divided into two parts, a Jewish Syrian and a Muslim Syrian community This report . . . focus[es] on the smaller Muslim community."¹²² And in a similar report about Egyptians, the NYPD wrote: "This report does not represent the Coptic Egyptian community, and is merely an insight into the Muslim Egyptian community of New York City."¹²³

For the police, this focus makes sense. They have publicized its logic. In its own 2003 report titled *Radicalization in the West: The Homegrown Threat* (the "Report"), the NYPD takes the view that the major threat to New York City is not from overseas (and there is far less they can do about this anyway), but rather plots "conceptualized and planned by 'unremarkable' local residents/citizens who sought to attack their country of residence, utilizing al-Qaeda as their inspiration and ideological reference point."¹²⁴ The term "unremarkable" has special meaning in this report; it defines the residents of these communities who have "'ordinary' jobs, [have] lived 'ordinary' lives and [have] had little, if any criminal history."¹²⁵ Among these unremarkable Muslims are those who experience "a cognitive opening, or crisis, which shakes one's certitude in previously held beliefs and opens an individual to be receptive to new worldviews."¹²⁶ This crisis, according to the report,

120. See *Handschu IV*, 273 F. Supp. 2d 327, 344-46 (S.D.N.Y. 2003).

121. See *supra* Part III.A.

122. DEMOGRAPHICS UNIT, N.Y. POLICE DEP'T, SYRIAN LOCATIONS OF CONCERN REPORT, available at <http://hosted.ap.org/specials/interactives/documents/nypd/nypd-syria.pdf>.

123. DEMOGRAPHICS UNIT, N.Y. POLICE DEP'T, EGYPTIAN LOCATIONS OF INTEREST REPORT 2 (2006), available at <http://hosted.ap.org/specials/interactives/documents/nypd/nypd-egypt.pdf>.

124. SILBER & BHATT, *supra* note 22, at 5.

125. *Id.* at 6.

126. *Id.*

may be economic, social, political, or personal.¹²⁷ In short, almost any kind of conflict or problem might create in an “unremarkable” person a sense of isolation or alienation that he or she addresses, following the report’s path, through first associating “with like-minded people” and finding an “identity” in “extremist Islam.”¹²⁸ That identification may then lead these “unremarkable” people to an indoctrination stage of radicalization in which “this self-selecting group becomes increasingly important as radical views are encouraged and reinforced.”¹²⁹ And this “indoctrination” is the penultimate step to “jihadization”—the radicalization stage in which the formerly unremarkable members of society “accept their individual duty to participate in jihad and self-designate themselves as holy warriors or mujahedeen.”¹³⁰ Upon reaching this stage of radicalization, the group then will “begin operational planning for . . . a terrorist attack.”¹³¹ According to the Report, not every radicalized Muslim will become a terrorist, but all remain dangerous nonetheless: “Individuals who have been radicalized but are not jihadists may serve as mentors and agents of influence to those who might become the terrorists of tomorrow.”¹³²

This psychological-sociological portrayal of the path from “unremarkable” community resident to “terrorist” is itself not remarkable. Its conclusions about the relationship between individual alienation and social destructiveness is at the center of the work by noted social psychologist and psychiatrist Erich Fromm on the success of Nazism, in particular, and of “isms” in general: “modern man still is anxious and tempted to surrender his freedom to dictators of all kinds or to lose it by transforming himself into a small cog in the machine, well fed, and well clothed, yet not a free man but an automaton.”¹³³

In describing the NYPD’s definition of the radicalization process, the Report compares it to a funnel: “Entering the process does not mean one will progress through all four stages and become a terrorist. However, it also does not mean that if one doesn’t become a terrorist, he or she is no longer a threat.”¹³⁴

But what is unique about the NYPD’s radicalization report is its “operationalization.” In response to a question posed by Senator Joseph Lieberman, then NYPD Assistant Commissioner Lawrence Sanchez

127. *Id.* at 7.

128. *Id.* at 6-8.

129. *Id.* at 7.

130. *Id.*

131. *Id.*

132. *Id.* at 10.

133. ERICH FROMM, *ESCAPE FROM FREEDOM*, at xii (Avon Books 1965).

134. SILBER & BHATT, *supra* note 22, at 10.

testified before the Senate Homeland Security Committee that “the key to it was . . . to start appreciating what most people would say would be non-criminal, would be innocuous looking behaviors that could easily be argued . . . to be protected by First and Fourth Amendment Rights but . . . to look across to them as potential precursors to terrorism.”¹³⁵ Today’s surveillance of the region’s Muslim communities is the logical product of the Report’s conclusion:

Where once we would have defined the initial indicator of the threat at the point where a terrorist or group of terrorists would actually plan an attack, we have now shifted our focus to a much earlier point—a point where we believe the potential terrorist or group of terrorists begin and progress through a process of radicalization. The culmination of this process is a terrorist attack.¹³⁶

Shifting police focus to this earlier point makes perfect police sense from the perspective of the Report’s conclusions. But identifying that “earlier point” is a tricky business. As the NYPD itself acknowledges, the alienated “unremarkable” person is basically invisible: “There is no useful profile to assist law enforcement or intelligence to predict who will follow this trajectory of radicalization.”¹³⁷

This practical uncertainty has been the common theme of the criticisms of the NYPD’s Report or its overall approach. They are discussed in Faiza Patel’s report for the Brennan Center for Justice, *Rethinking Radicalization*.¹³⁸ After reviewing the literature on terrorist psychology, Patel concludes: “In short, government studies and scholars have repeatedly highlighted the difficulty of predicting which individuals are likely to commit violent acts. They have cautioned against viewing radicalization as a ‘conveyor belt’ that starts with grievances and ends with violence, with easily discernible signposts along the way.”¹³⁹

The conceded difficulty of determining who will become a Muslim terrorist is what drives the NYPD to monitor the Muslim community in the close manner described by the AP stories.¹⁴⁰ If the NYPD cannot

135. Memorandum of Law in Support of Plaintiff Class Application for Leave to Conduct Discovery and for a Restraining Order at 6, *Handschu v. Special Services Division*, No. 71 Civ. 2203 (CSH) (S.D.N.Y. Oct. 3, 2011).

136. SILBER & BHATT, *supra* note 22, at 5.

137. *Id.* at 8.

138. FAIZA PATEL, BRENNAN CTR. FOR JUSTICE, *RETHINKING RADICALIZATION* 8-10 (2011), available at http://brennan.3cdn.net/f737600b433d98d25e_6pm6beukt.pdf.

139. *Id.* at 9.

140. See SILBER & BHATT, *supra* note 22, at 10; see also *supra* notes 80-82 and accompanying text.

find the unremarkable Muslim, they will watch as many as possible in hopes of catching a glimpse of one who appears to be traveling along the route they judge to be leading to committing or aiding in terrorism.

What is the harm? Does this matter? Assuming *arguendo* that the NYPD's premise is valid and solid enough to rationally support the NYPD's intelligence gathering strategies, are there actual consequences from the implementation of these policies that caution against their continuation?

One such consequence, as raised by law enforcement scholars and officials, is that the NYPD's aggressive intelligence efforts have undermined the community policing efforts that "ha[ve] been the nation's prevailing policing model,"¹⁴¹ to one degree or another, "[s]ince the early 1990s."¹⁴²

A police chief explained that "the collection of intelligence will come from the community. So a relationship and confidence with the [Arab American] community is important . . . We can't afford to alienate them. Otherwise, we cut off our sources of information, explained one police chief."¹⁴³ He continued: "[c]ommunity policing is a lot of work, and when it started it wasn't considered police work. [But] it is prevention."¹⁴⁴

This was also the complaint of the FBI agent in charge of the Bureau's Newark office after the release of the NYPD Report detailing

141. NICOLE J. HENDERSON ET AL., VERA INST. OF JUSTICE, LAW ENFORCEMENT & ARAB AMERICAN COMMUNITY RELATIONS AFTER SEPTEMBER 11, 2001: ENGAGEMENT IN A TIME OF UNCERTAINTY 6-7 (2006), available at <http://www.vera.org/download?file=147/Arab%2B American%2Bcommunity%2Brelations.pdf>. Community policing as used here is broadly inclusive of "[a]most any activity that increases face-to-face interactions and builds relationships with the community, such as bike and foot patrols, liaisons with ethnic groups, substations placed in high crime areas, and working groups and monthly forums, may qualify as a form of community policing." *Id.* at 6. Community policing in any form may be on the decline. According to Professor David Sklansky, "professional policing is mounting a comeback," as seen by increased "sympathy for the notions that police departments should focus on crime suppression, that they should do so in ways dictated by objective analysis rather than public whims, and that authority should be centralized and rationalized." Sklansky, *supra* note 31, at 2. The federal government seems to endorse this view, as seen by the decline in support for community policing and the encouragement of "intelligence-led policing" and "predictive policing." *Id.* at 3. Intelligence-led policing is an objective approach to policing that involves the collection and analysis of crime data and intelligence. *Id.* This approach "stresses the importance of centralizing much of the handling and analysis of data above the department level" and employs a "centralized, 'top-down' decision-making" model. *Id.* Similarly, predictive policing "puts intelligence collection and data analysis at the center of police decision-making." *Id.* It "refocuses the police on 'fighting crime,' emphasizes the objective, scientific selection of strategies and tactics, and puts a premium on centralized, rationalized, bureaucratic decision-making." *Id.* at 4.

142. HENDERSON ET AL., *supra* note 141, at 6.

143. *Id.* at 17 (omission in original) (internal quotation marks omitted).

144. *Id.* (internal quotation marks omitted).

its investigations in Newark.¹⁴⁵ Characterizing the efforts of the NYPD as fomenting distrust and creating “additional risk [and] blind spots, it hinders our ability to have our finger on the pulse of what’s going on around the state.”¹⁴⁶

Beyond the question of whether aggressive police surveillance undermines the efforts to build cooperation with members of New York’s Muslim communities, there is the question of whether the mass surveillance of New York’s Muslim communities causes harm. As a basic proposition, it seems clear that most Americans would recoil from the idea that they were being subject to surveillance where, for example, they worship, work, recreate, or eat solely because of their religion or their ethnicity. Americans have expressed concern for their civil liberties in polls.¹⁴⁷ In the year following 9/11, 49% of respondents believed that the First Amendment “goes too far in the rights it guarantees,”¹⁴⁸ but this percentage plummeted to 23% just three years later in 2005.¹⁴⁹ When asked if they would be willing to forego certain civil liberties in order to prevent terrorism, 55% of Americans favored protecting civil liberties.¹⁵⁰ This same result was found in a second study concluding that a majority of Americans favor protecting their civil liberties over limiting those liberties to curb terrorism.¹⁵¹ But polls also show that if the question is whether the police should watch the Muslim communities in this same way, the answer is a resounding yes.¹⁵² For example, a 2002 national poll by the First Amendment Center found that 42% of Americans agreed with the proposition that “government should have more power to monitor Muslims than others.”¹⁵³ A Cornell University study performed in 2004 found that 44% of respondents believed that “some

145. See Al Baker, *F.B.I. Official Faults Police Tactics by the Police on Muslims*, N.Y. TIMES, Mar. 8, 2012, at A25.

146. *Id.*

147. See, e.g., FIRST AMENDMENT CTR., STATE OF THE FIRST AMENDMENT SURVEY 2005, at 3 (2005), available at <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/SOFA2005.pdf> (discussing the decline in respondents who believed that the first amendment was over-inclusive).

148. *Id.*

149. *Id.*

150. Darren W. Davis & Brian D. Silver, *Civil Liberties vs. Security in the Context of the Terrorist Attacks on America*, 48 AM. J. POL. SCI. 28, 33 tbl.1 (2004).

151. INST. FOR PUBLIC POLICY AND SOC. RESEARCH, POLICY BRIEF: AMERICANS PROTECT CIVIL LIBERTIES 4 (2002), available at <http://ippsr.msu.edu/Documents/PolicyBrief/911Briefing.pdf>.

152. See *Islamophobia*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS, <http://www.cair.com/Issues/Islamophobia/Islamophobia.aspx> (last visited July 27, 2012) [hereinafter CAIR]; Ken Paulson, *Too Free?*, AM. JOURNALISM REV. (Sept. 2002), <http://www.ajr.org/article.asp?id=2621>.

153. Paulson, *supra* note 152.

curtailment of civil liberties is necessary for Muslim Americans.”¹⁵⁴ More recently, a Quinnipiac University poll released in March 2012, soon after the considerable publicity and criticisms of the NYPD’s surveillance of the region’s Muslim communities, showed that 58% of New Yorkers believe that the police have not “unfairly targeted Muslims,”¹⁵⁵ but have “acted appropriately” in dealing with Muslims.¹⁵⁶ A 2011 Harris Poll found that 86% of respondents were in favor of increasing undercover surveillance of suspected terrorists.¹⁵⁷

Most members of the Muslim communities react as most Americans would if they were being spied on—they do not like it. And they like it less, no doubt, because the singular attention on Muslim Americans as potential purveyors of terror denigrates them in the eyes of other Americans and challenge their own self-identities.¹⁵⁸ Polls since 9/11 have shown consistent skepticism towards Muslims by large segments of the American population.¹⁵⁹ A 2006 *USA Today* headline vividly makes this point: “USA’s Muslims Under a Cloud,” which is followed by a story that reports on a USA Today/Gallup Poll’s findings showing “strong anti-Muslim feeling” throughout the country.¹⁶⁰ According to this poll, 39% of respondents believed that Muslim Americans should be required to carry special identification “as a means of preventing terrorist attacks in the United States.”¹⁶¹ One-third said that Muslim Americans were “sympathetic to al-Qaeda.”¹⁶² In that same year, an ABC News poll found that nearly “46 percent of Americans expressed a generally unfavorable opinion of Islam.”¹⁶³ These levels have not changed since then.¹⁶⁴ In a 2010 New York Times poll, 33% of respondents believed that Muslims were “more sympathetic to terrorists”

154. CAIR, *supra* note 152.

155. *New Yorkers Say 2-1 Cops Treat Muslims Fairly, Quinnipiac University Poll Finds; Strong Approval for NYPD, Kelly, Bloomberg On Crime*, QUINNIPIAC UNIV. POLL (Mar. 13, 2012), <http://www.quinnipiac.edu/institutes-and-centers/polling-institute/new-york-city/release-detail?ReleaseID=1716> [hereinafter QUINNIPIAC POLL March 13].

156. *Id.*

157. *See Ten Years Later, a Look at Safety, Possible Terror Attacks, and Security After 9/11*, HARRIS INTERACTIVE (Sept. 7, 2011), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/857/Default.aspx> [hereinafter HARRIS POLL].

158. Marilyn Elias, *USA’s Muslims Under a Cloud*, USA TODAY, http://www.usatoday.com/news/nation/2006-08-09-muslim-american-cover_x.htm (last updated Aug. 10, 2006).

159. *See id.*; QUINNIPIAC POLL March 13, *supra* note 155.

160. Elias, *supra* note 158.

161. *Id.* (internal quotation marks omitted).

162. *Id.*

163. Jon Cohen, *Poll: Americans Skeptical of Islam and Arabs*, ABC NEWS (Mar. 8, 2006), <http://abcnews.go.com/US/story?id=1700599>.

164. *See* Editorial, *Mistrust and the Mosque*, N.Y. TIMES, Sept. 3, 2010, at A20.

than other citizens, a figure which was consistent with polls taken after 9/11.¹⁶⁵

Additionally, the percentage of hate crimes motivated by an anti-Islamic bias, which spiked to 27.2% right after 9/11, has continued at high rates since then.¹⁶⁶ For example, in 2004, the percentage of hate crimes motivated by anti-Islamic bias went down to 12.7%,¹⁶⁷ but has stayed within five percentage points, reaching a low of 7.7% in 2008¹⁶⁸ and a high of 13.2% in 2010.¹⁶⁹ As a result, Arab Americans and Muslim Americans have been harmed not only in their person and property, but have also been harmed psychologically. The Vera Report found that Arab Americans throughout the country, as a result of varying degrees of surveillance, had “an increased sense of being victimized and harassed; heightened suspicion of government and law enforcement; anxiety about their place in American society . . . and concerns about protecting their civil liberties.”¹⁷⁰ In fact, various reports by psychologists have indicated growing negative psychological effects, such as anxiety, depression, and post-traumatic stress disorder.¹⁷¹ Muslims have been called “doubly traumatized;” once as a result of the 9/11 attacks, and twice because of the anti-Muslim discrimination and violence.¹⁷² Overall, one-third of Arab Americans report being a victim of ethnic-based discrimination at some point in their lives and “[o]ne-fifth experienced such discrimination after September 11.”¹⁷³ According to the FBI, “anti-Muslim crimes increased by 1,700% during 2001”¹⁷⁴ and, according to the Council on American Islamic Relations, anti-Muslim acts have

165. *Id.*

166. FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, 2001, at i, 5 (2001), *available at* <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2001>.

167. FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, 2004, at 6 (2004), *available at* <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2004>.

168. FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, 2008: INCIDENTS AND OFFENSES, 2008, at 3 (2008), *available at* <http://www2.fbi.gov/ucr/hc2008/documents/incidentsandoffenses.pdf>.

169. FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, 2010: INCIDENTS AND OFFENSES, 2010, at 2 (2010) [hereinafter FBI 2010 STATISTICS], *available at* <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-incidents-and-offenses.pdf>.

170. HENDERSON ET AL., *supra* note 141, at 10.

171. Rebecca A. Clay, *Muslims in America, Post 9/11*, AM. PSYCH. ASSOC. (Sept. 2011), <http://www.apa.org/monitor/2011/09/muslims.aspx>.

172. *Id.*

173. Mona M. Amer, Arab American Mental Health in the Post September 11 Era: Acculturation, Stress, and Coping 46 (May 2005) (unpublished Ph.D. dissertation, University of Toledo), *available at* http://etd.ohiolink.edu/view.cgi?acc_num=toledo1115395141.

174. Mona M. Amer & Joseph D. Hovey, *Anxiety and Depression in a Post-September 11 Sample of Arabs in the USA*, 47 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 409, 410 (2012).

increased each year since 2001.¹⁷⁵ It is important to note that these are the very perceptions that the NYPD, in their report on homegrown terrorism, points to as fundamental to radicalization.¹⁷⁶

Many Arab Americans fear that the U.S. government will gain “the power to arrest persons without due process and even deport them to their country of origin for further interrogation.”¹⁷⁷ Additionally, Arab Americans fear that they eventually “will be essentially under ‘house arrest’ with every aspect of their personal and professional lives monitored.”¹⁷⁸ In order to prove their loyalty to the United States and to distance themselves from the terrorist stereotype, many Arab Americans have “felt the need to denounce the very culture and religion that they were raised in, stirring a great deal of psychological distress regarding their personal identities.”¹⁷⁹

V. THE MADISON DILEMMA: WHAT CAN BE DONE?

Presuming from the above discussion that surveillance of the New York region’s Muslim communities goes beyond the limits of constitutionally legitimate policing and causes harms, but at the same time is supported by the public, what can be done to rein it in? Jefferson saw a bill of rights as an answer to such a question.¹⁸⁰ Madison, at least initially, thought that a bill of rights would only create a false expectation that such rights could be protected against democratic passions.¹⁸¹ Certainly his observation concerning the connection between democracy and civil rights in times of public stress has proven prescient throughout American history. Its wisdom is currently evidenced by the responses of important N.Y. political figures to the NYPD’s surveillance of Muslim communities. Most have remained noticeably silent, but two with direct power over the NYPD have been proponents of its methods.¹⁸² Mayor Michael Bloomberg, although strongly in favor of the establishment of a controversial mosque near the 9/11 site, has repeated the NYPD’s refrain: “Everything the New York City Police Department has done is legal, it is appropriate, it is

175. *Id.*

176. *See supra* text accompanying notes 29-30.

177. Amer, *supra* note 173, at 47.

178. *Id.*

179. *Id.* at 48.

180. WOOD, *supra* note 2, at 67.

181. *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 11, at 19.

182. *See infra* notes 185-86.

constitutional.”¹⁸³ N.Y. City Council Speaker Christine Quinn has essentially mirrored the Mayor’s remarks: “Unless we know that laws were broken or someone’s civil liberties were violated, I do not think the NYPD should stop the practice [of monitoring Muslims].”¹⁸⁴

On the other hand, a significant number of City Council members have opposed this view and are considering legislation to change it.¹⁸⁵ Also, Attorney General Eric Holder has begun reviewing the NYPD’s surveillance practices¹⁸⁶ and a number of members of Congress have expressed concern.¹⁸⁷ Perhaps it was the distance from 9/11 or the information provided in the AP investigatory reports, but now there is a growing willingness of some members of the City Council and groups such as the Brennan Center for Justice and the New York Civil Liberties Union to push back politically against the NYPD’s surveillance strategy through the introduction of legislation establishing an NYPD inspector general with authority to review surveillance strategies such as those described herein. While such legislation does not draw lines for the NYPD, it does provide an independent monitor of NYPD conduct who would have the power to cabin overly broad or religiously based police surveillance.

What about the courts? They are often seen as the forum in which unpopular views are vindicated by an independent judiciary. Whatever role the courts have played historically in maintaining America’s democracy, there have been moments when they have not furthered America’s constitutional principles. Examples of this are the Supreme Court’s decision to uphold the constitutionality of the Espionage Act of 1918¹⁸⁸ and its decision to validate the relocation of Japanese Americans in 1941.¹⁸⁹ Significantly, these decisions were often rendered during

183. Michael Barbaro, *Mayor’s Stance on Muslim Center Has Deep Roots*, N.Y. TIMES, Aug. 13, 2010, at A1; Mirela Iverac, *Bloomberg: NYPD’s Monitoring of Muslims Was Legal*, WNYC NEWS (Feb. 24, 2012 1:03 P.M.), <http://www.wnyc.org/blogs/wnyc-news-blog/2012/feb/24/bloomberg-nypds-monitoring-muslims-was-legal/>.

184. Michael Howard Saul, *Speaker Quinn Voices Support for NYPD Monitoring of Muslims*, WALL ST. J. (Feb. 27, 2012), <http://blogs.wsj.com/metropolis/2012/02/27/speaker-quinn-voices-support-for-nypd-monitoring-of-muslims/>.

185. See, e.g., Brad Lander, *NYPD Surveillance: What We Don’t Know, and Why It Matters*, HUFFINGTON POST (Mar. 15, 2012, 10:19 AM), http://www.huffingtonpost.com/brad-lander/nypd-surveillance-oversight_b_1347173.html (discussing Councilmember Brad Lander’s criticism of NYPD surveillance practices and his work on legislation to create an NYPD Inspector General as an “independent voice, focusing on how police policies square with civil liberties”).

186. *Police Powers*, *supra* note 32.

187. Adam Goldman, *NYPD Muslim Spying: House Democrats Slam Mayor Bloomberg Over ‘Unprofessional’ Response*, HUFFINGTON POST (Apr. 2, 2012, 3:36 PM), http://www.huffingtonpost.com/2012/04/02/nypd-muslim-spying-house-democrats-mayor-bloomberg_n_1397400.html.

188. See *Abrams v. United States*, 250 U.S. 616, 616-17, 624 (1919).

189. See *Korematsu v. United States*, 323 U.S. 214, 215-16 (1944).

times of social stress,¹⁹⁰ one of which could coincide with the stressor of the current war against terrorism. The 2003 decision of the District Court to modify the Handschu Guidelines also falls into that category.¹⁹¹

Should the NYPD's surveillance of the New York region's Muslim communities be brought to the attention of the judiciary, there would likely be the potential for bringing a strong claim that this practice violates the equal protection clauses of both the U.S. Constitution and the N.Y. Constitution.¹⁹² The essence of this claim is that religion alone drives the NYPD's anti-terrorist surveillance of the New York region's Muslim communities. And the effect is "religious gerrymander[ing]" by the NYPD in New York City and in the New York City region.¹⁹³ Despite police claims to the contrary, their response is essentially always the same. "Leads" take them to Muslim communities. But these leads, defined as the "possibility of unlawful conduct,"¹⁹⁴ are grounded in the NYPD's determination that finding "unremarkable" Muslims who may become jihadists is the best way to prevent terrorism.¹⁹⁵ That may be true, but the identifier "unremarkable" leaves the police with religion as the only traceable marker. Such intentional use of religion as an identifying characteristic, as evidenced by the above-described language and conduct of the NYPD, makes the NYPD intentionally discriminatory.¹⁹⁶

190. Abrams, 250 U.S. at 617 (stating that the charges against the defendants occurred at a time when the United States was at war with the Imperial German Government); *Korematsu*, 323 U.S. at 223 (stating that *Korematsu* was excluded from the Military Area because the United States was at war with the Japanese Empire and feared an invasion from the West Coast).

191. *Handschu IV*, 273 F. Supp. 2d 327, 333 (S.D.N.Y. 2003) (stating that the Handschu Guidelines would need to be reconsidered in light of the events of 9/11 and the emergence of terrorism).

192. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Article 1, Section 11 of the New York State Constitution provides that:

[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

N.Y. CONST. art. 1, § 11. Since the Equal Protection Clause of the N.Y. Constitution does not seem to afford any greater protections than that of the U.S. Constitution, analysis of the NYPD's surveillance is the same under both the state and federal equal protection clauses. See *Dorsey v. Stuyvesant Town Corp.*, 87 N.E.2d 541, 542, 548 (N.Y. 1949) (holding that Stuyvesant Town Corporation's practice of excluding blacks as tenants received the same analysis under both the N.Y. and federal constitutions).

193. See *Walz v. Tax Comm'n. of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

194. *Handschu VI*, 288 F. Supp. 2d 411, 422 (S.D.N.Y. 2003).

195. SILBER & BHATT, *supra* note 22, at 6.

196. Federal Equal Protection jurisprudence requires intentional discrimination, evidenced by expressly discriminatory language, neutral language and intentionally discriminatory conduct, or

The instant facts are unlike those presented in the problematic case of *Brown v. City of Oneonta*,¹⁹⁷ in which police questioned all black men who attended the State University of New York College at Oneonta and nearly all of the black male residents of Oneonta.¹⁹⁸ In *Brown*, an elderly woman was attacked and identified her attacker as a young black male with a cut on his arm.¹⁹⁹ In its decision dismissing the various civil rights claims, the circuit court held that the use of race as a defining characteristic did not violate the Equal Protection Clause because the police were seeking out a specific individual known to have committed a crime and their questioning of all black men was based on a description of the alleged perpetrator.²⁰⁰ This is in sharp contrast to the NYPD's practice of surveilling all Muslims—not a particular individual—with religion as the sole distinguishing characteristic, regardless of whether a crime has been committed.

Is the NYPD's surveillance strategy for Muslim communities and its implementation "immediately suspect?" The Supreme Court noted in *Korematsu* that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," but has not yet spoken directly to the question of whether the highest standard protects a single religion from state discrimination.²⁰¹ It is hard to imagine that the answer would not be the same, although a particular religion, unlike for example a particular race, is not a human characteristic.

For example, in *United States v. Armstrong*,²⁰² involving an unsuccessful challenge to prosecutorial discretion, the Court did conjoin "race" and "religion," warning that the exercise of such discretion on the basis of either may be an "unjustifiable standard."²⁰³ The Court has further explained that, "[a] defendant may demonstrate that the administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law."²⁰⁴

neutral language adopted for discriminatory reasons that have a discriminatory effect. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (rejecting disproportionate impact as tantamount to discriminatory intent); *Brown v. Bd. of Educ.*, 347 U.S. 483, 487-88, 495 (1954) (rejecting a facially discriminatory policy); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (rejecting a facially neutral policy with discriminatory intent).

197. 221 F.3d 329 (2d Cir. 2000).

198. *Id.* at 334.

199. *Id.*

200. *Id.* at 333-34.

201. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

202. 517 U.S. 456 (1996).

203. *Id.* at 464, 470.

204. *Id.* at 464-65 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)).

Establishment clause jurisprudence supports the same conclusion. In *Hobbie v. Unemployment Appeals Commission*,²⁰⁵ the Court held that a state's "infringements must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest."²⁰⁶ Defending a law that denied unemployment benefits as a result of the plaintiff's Sabbath required a state to satisfy the highest level of scrutiny, not just "the barest level of minimal scrutiny that the Equal Protection Clause already provides."²⁰⁷

Despite this helpful language, the claim here needs to be broader than one brought under the Establishment Clause, at least to the extent that this jurisprudence can reach only interference with the actual practice of religion rather than interference in the life of a particular religious group.

Assuming a classification based on religion triggers strict scrutiny, the state can still argue that its surveillance policy serves a substantial governmental interest,²⁰⁸ or, as in *Korematsu*, a "[p]ressing public necessity,"²⁰⁹ and that this policy is the least restrictive means of achieving that interest.²¹⁰ Again, using the arguments of racial discrimination, that interest cannot be religious antagonism. In *Korematsu*, the "pressing public necessity" that justified the disputed racially disparate treatment was the falsely stated "apprehension by the proper military authorities of the gravest imminent danger to the public safety."²¹¹

In the instant case, it appears clear that the NYPD surveillance strategy is based on the religious beliefs of the watched communities, thereby triggering strict scrutiny review. That said, it would be difficult to argue that the protection of the public from acts of terrorism in post-9/11 New York City is not a "pressing public necessity," leaving open the question of whether the strategy itself is narrowly tailored.²¹² That

205. 480 U.S. 136 (1987).

206. *Id.* at 141.

207. *See id.* at 138-39, 141-42 (quoting *Bowen v. Roy*, 476 U.S. 693, 727 (1986) (O'Connor, J. dissenting)) (internal quotation marks omitted).

208. *See SILBER & BHATT, supra* note 22, at 10.

209. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

210. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Korematsu*, 323 U.S. at 216); *Shelton v. Tucker*, 364 U.S. 479, 488, 490 (1960).

211. *Korematsu*, 323 U.S. at 218.

212. *See Grutter v. Bollinger*, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part) ("[T]he lesson of *Korematsu* is that national security constitutes a 'pressing public necessity,' though the government's use of race to advance that objective must be narrowly tailored."); *see also Hirabayashi v. United States*, 320 U.S. 81, 94-95, 104-105 (1943) (upholding a curfew for people of Japanese ancestry because the Court found that "the danger of espionage and sabotage to our military resources was imminent, and . . . the curfew order was an appropriate

strategy, to repeat, is to watch Muslims in what the NYPD characterizes as public spaces; to search for “unremarkable” Muslims before a crime is committed.²¹³ This would seem impossibly broad and constitutionally unjustifiable.²¹⁴ As demonstrated by the police practices themselves, alternatives do exist. Take for example the case of Jose Pimentel, arrested on November 19, 2011.²¹⁵ The NYPD had been tracking him for nearly two years, but only *after* he was known to have an interest in jihad.²¹⁶ This knowledge was the result of a notification from a Schenectady-area police department.²¹⁷ Schenectady police knew of Pimentel because of his arrest for stealing credit card information, reports of domestic violence in 2008, and three outstanding warrants for unpaid alimony.²¹⁸ Pimentel’s “fascination with Islam” was known to the local police because he was very upfront about his “radical views” and maintained a Web page detailing his beliefs and bomb-making methods.²¹⁹ Even before Pimentel relocated to Manhattan, Schenectady police notified the NYPD of Pimentel.²²⁰ Once Pimentel was living in Manhattan, he was subject to surveillance and a police informant.²²¹

Pimentel’s arrest does not justify the NYPD surveillance practices, however. Instead, it emphasizes the argument of this Article: tracking an identified individual Muslim, such as Pimentel, for a legitimate reason is within the ambit of constitutional policing, but surveilling all Muslims based solely on their religious beliefs is a violation of their constitutional rights.

measure to meet it”).

213. See *supra* text accompanying notes 194-96.

214. Cf. *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 309-10 (1964) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)) (finding that the freedom of association is protected from “governmental interference” (internal quotation marks omitted)); *Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp.*, 345 F.3d 964, 972-74 (8th Cir. 2003) (holding that the Disadvantaged Business Enterprises program was narrowly tailored because “race-neutral means” were used to the greatest extent possible and because race was relevant, but was “not a determinative factor”).

215. Joseph Goldstein & William K. Rashbaum, *City Bomb Plot Suspect Is Called Fan of Qaeda Cleric*, N.Y. TIMES, Nov. 21, 2011, at A1.

216. Michael Mukasey, *NYPD True: Michael Mukasey on Why New York’s Secret Terror Fighters Deserve Our Praise*, N.Y. DAILY NEWS (Dec. 11, 2011, 6:00 AM), <http://www.nydailynews.com/opinion/nypd-true-michael-mukasey-york-secret-terror-fighters-deserve-praise-article-1.989430>.

217. John Mueller, *Case 48: Pimentel’s Pipe Bomb*, in *TERRORISM SINCE 9/11: THE AMERICAN CASES 1, 2* (John Mueller ed., 2012) [hereinafter *PIMENTEL CASE STUDY*], available at <http://psweb.sbs.ohio-state.edu/faculty/jmueller/SINCE.pdf>.

218. *Id.* at 1.

219. *Id.* at 1-2; Goldstein & Rashbaum, *supra* note 215.

220. *PIMENTEL CASE STUDY*, *supra* note 217, at 2.

221. *Id.*

A major hurdle to any equal protection suit is standing.²²² A plaintiff must establish that he or she has been “‘personally denied equal treatment’ by the challenged discriminatory conduct.”²²³ The injury claimed may be a stigma imposed by the discriminatory conduct.²²⁴ Under existing law, though, when claiming an injury of stigma, the stigma alone is insufficient; there must be “stigma-plus.”²²⁵ The stigma, or taint to one’s name or reputation, must be accompanied by an injury to a tangible interest or legal right.²²⁶ In the past, examples of such an injury have been the “loss of employment or the foreclosure of future employment opportunities.”²²⁷

The type of injuries that Muslims generally have suffered is to their religious identity.²²⁸ Reportedly, the stigmatization that is a consequence of continuous police surveillance has had harmful emotional and psychological effects on many Muslim individuals.²²⁹ And the “terrorist stereotype” imposed by the NYPD’s surveillance has led some Muslims to denounce their religion and culture.²³⁰ These individuals have also felt increased anxiety because of concern for their civil liberties and fear of the police, the very people intended to serve and protect.²³¹ These psychological effects are in addition to the physical violence that has plagued many Arab Americans since 9/11.²³² It would seem that such claims individually particularized could be the basis for standing.

Additionally, take as an example of economic harm the case of Mousa Ahmad, whose story was detailed by the AP.²³³ Ahmad was forced to close his café in a Moroccan community because a stigma imposed by an alleged surveillance operation caused business to decline.²³⁴ Neighbors met with the local police commander in Ahmad’s restaurant to complain about a man who sat on a nearby park bench for hours each day.²³⁵ The commander did not confirm the existence of a

222. See *Allen v. Wright*, 468 U.S. 737, 755 (1984).

223. *Id.* (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)).

224. *Id.* at 754.

225. See *Paul v. Davis*, 424 U.S. 693, 699, 701 (1976).

226. See *id.* at 701.

227. See *In re Lee TT v. Dowling*, 664 N.E.2d 1243, 1249 (N.Y. 1996).

228. See *Amer*, *supra* note 173, at 48, 60.

229. *Amer & Hovey*, *supra* note 174, at 415; Chris Hawley, *Law May Not Be on Muslims’ Side in NYPD Intel Case*, ASSOCIATED PRESS, Nov. 8, 2011, available at <http://www.ap.org/Content/AP-In-The-News/2011/Law-may-not-be-on-Muslims-side-in-NYPD-intel-case>.

230. See *Amer*, *supra* note 173, at 48.

231. HENDERSON ET AL., *supra* note 141, at 10.

232. See FBI 2010 STATISTICS, *supra* note 169.

233. Hawley, *supra* note 229.

234. *Id.*

235. *Id.*

surveillance investigation, but the inference of surveillance and the ensuing taint to Ahmad's café was enough to drive business away.²³⁶

VI. CONCLUSION

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.

– *Learned Hand*²³⁷

As New Yorkers enter the 2013 election cycle for City officials, the surveillance of New York's Muslims will continue despite revelations of its breadth and depth. Pending legislation for an NYPD inspector general with the power to end or limit such surveillance will not pass if such authority is vested in an individual outside of the NYPD's control. And any law suit challenging surveillance authority will indubitably stumble. This would have been James Madison's prediction and history has shown the prescience of his thinking. The surveillance of New York's Muslim communities by the NYPD is not surprising. The public is rightly concerned about terrorism and the NYPD has offered a narrative for its protection: homegrown terrorism is a real threat; it starts with unremarkable Muslims; we must watch them. Through this approach the NYPD believes that it is doing everything it can to prevent another attack and escape criticism if one occurs. And there is no challenge to this view. Significant numbers of elected officials accept the NYPD's story because it is what their constituents believe, it is easier in cases such as this to follow rather than lead, and because they, like the public, are civically uneducated.²³⁸ Only the far outnumbered Muslims, their elected officials, and several good government groups complain. Only reduced public anxiety and education (or a growing Muslim population) will change this formula. Or perhaps a reduction of national insecurity over the war on terrorism will allow the U.S. Attorney General to assert some authority over the NYPD's surveillance strategy. In any event in an age of an ongoing war against terrorism (and declining civic education) it is clear that the security concerns of the many will outweigh the freedom concerns of the few. That is Madison's message to Jefferson and to us.

236. *Id.*

237. Learned Hand, *The Spirit of Liberty* (1944), in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 190, 190 (Irving Dilliard ed., 3d ed. 1963).

238. See Eric Lane & Meg Barnette, *A Report Card on New York's Civic Literacy*, BRENNAN CTR. FOR JUSTICE, at 1, 21 (2011), http://brennan.3cdn.net/e9502c45a124420af3_r1m6beqp3.pdf.