

Surveillance of Houses of Worship: Are There Limits, or Total Freedom?

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In April 2009 I met with law enforcement officials in a major American city, and I used the opportunity to address the limits of freedom of speech society is willing to grant houses of worship.¹ The background for the talk involved media reports regarding the increasing extremism of mosques in Minneapolis, Minnesota, particularly the disturbing radicalization of Somali² youth in the Twin Cities.³ The question I posed to the audience goes to the heart of the freedom of religion guaranteed by the U.S. Constitution:⁴ Is religion to be granted immunity from law enforcement scrutiny?

The tensions are palpable, for the issue cuts to the core of whether limits should be imposed on the actual conduct of religion. While a democratic society cannot control religious beliefs, conduct—even religious conduct—can be regulated.⁵ In addressing the question of conduct regulation, one of the fundamental questions is whether religious conduct is inherently different from other conduct. That is, does the fact that religion involves—in its essence—the relationship between man⁶ and a divine⁷ suggest that society must tolerate otherwise intolerable conduct?⁸

The ultimate aim of this article is to suggest concrete recommendations regarding an unusually complicated dilemma that is, in many ways, “lose-lose.” However, society cannot afford to hide behind a shield of “we don’t talk about religion”; the dangers posed by religious extremism are too serious. That said, surveillance of a house of worship raises enormously complicated ethical dilemmas.

A government’s fundamental responsibility is to protect the community at large; what protections must be extended to particular communities within the larger community is a critical question in the “limits of freedom” discussion. Those protections are not absolute; no rights can be absolute. The social contract as articulated by Rousseau is predicated on an understanding that the rights of an

individual are not absolute. In essence, the individual “trades” rights (such as freedom) for protection (as part of the larger community). In so doing, the individual both implicitly and explicitly recognizes that individual rights are not absolute.

The obvious challenge to individual—and to society—is in defining the limits the latter may impose on the former. However, the equation is not binary, for there is an additional, critical variable that must be factored: members of society potentially injured by the individual’s actions. That is, while the individual seeks protection by joining society—and therefore voluntarily agreeing to limitations on his otherwise absolute rights—other members of society must be similarly protected from that individual.

In the context of otherwise guaranteed religious freedoms, society’s obligation to protect both itself and its individual members requires imposing limits on specific religious-based conduct. That is not to gainsay the centrality of religion for individuals; it is, however, to clearly state that those rights, even if predicated on religious belief, are not absolute. While this may appear to be an obvious truism, the more complicated issue is precisely which rights are to be limited even though potential conflict with divinely ordained conduct is inevitable.

Government, in protecting society, must define threats and assess the dangers they pose. In doing so, it is essential to weigh the costs of action and inaction alike in response to those threats. Obviously, this is not a scientific exercise, as threats cannot be empirically determined; however, the potential harm posed must be carefully analyzed, albeit without numerical certainty. That said, prioritization is required: Justice Louis D. Brandeis’s wise words that “the constable cannot be on every street corner” are appropriate for any threat response discussion.

However, the constable (to continue in Brandeis’s adage) *can* be in certain places; the question is where, when, and subject to what circumstances and conditions. To answer requires defining the threat,⁹ and, more specifically, how the state gathers information regarding faith-predicated threats spoken in a house of worship.¹⁰ The Constitution protects the individual from the state; as an example, the Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, sup-

ported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹¹

Which brings us to the question at the heart of this article: Can law enforcement¹² conduct surveillance¹³ of/at a house of worship, which people of faith are attending for the purpose of prayer and dialogue with their God?

Given religion's unique position in society, the decision to conduct surveillance of¹⁴ a house of worship raises questions extending beyond a traditional legal focus to include ethical dilemmas. To facilitate a discussion regarding the legal and ethical dilemmas, this article is divided into the following sections: **section 2:** reasonable expectation of privacy in public places; **section 3:** chilling effect of government intrusion on faith (the relationship between the individual and God/benefits of surveillance); **section 4:** freedom to practice religion and the "cost" of government intrusion on the conduct of religion/profiling; **section 5:**¹⁵ whether religious extremism is to be granted immunity from (justified) government intrusion; **section 6:** probable cause standards for surveillance; **section 7:** ethical concerns in conducting surveillance; and **section 8:** recommendations for resolving the tension between justified surveillance from a law enforcement perspective and the cost from an ethical perspective.

We begin with the facts: During the past year more than twenty young Somali Americans¹⁶ living in Minneapolis have disappeared; according to the FBI, "some of them went to Somalia to fight with the Islamic extremist group, al-Shabab."¹⁷ Of particular concern, the FBI believes that one man, Shirwa Ahmed, "was the prime suspect in an October 2008 suicide bombing in Somalia."¹⁸ Shirwa is the first known U.S. citizen suicide bomber. According to officials, one of the principal concerns regarding the "lost boys" is "that some of the men may be destined to return to the US after they receive terrorist training."¹⁹ The term "missing boys" has been ascribed to men in their twenties who literally disappear from their homes and shortly thereafter telephone their families from Somalia but provide little additional information.²⁰ What has been referred to as the Somali-Minneapolis Terrorist Axis²¹ is facilitated by a combination of social isolationism (in schools) and radicalization (outside the home). Furthermore, and perhaps more importantly, family members²² blame the Abubakar As-Saddique Islamic Center in Minneapolis for the boys' decision to travel to Somalia and join militant Islamic groups. The FBI has focused its efforts on the center, since it provides the

common link between the boys.²³ As FBI director Robert Mueller succinctly stated, "It appears that this individual [reference is to the suicide bomber, Ahmed. ANG] was radicalized in his hometown in Minnesota."²⁴ Mueller's assessment has led the FBI to engage in surveillance of the mosque, "a measure that, while criticized by CAIR,²⁵ has been met with support by some family members of the 'lost boys.'"²⁶

While religion enjoys deference in our society, the state surely must be allowed to conduct surveillance of houses of worship when the lives of innocent citizens are literally at risk. Thus the question is how to balance ethical concerns associated with conducting surveillance within houses of worship with the state's interest and obligation regarding protection of innocent citizens.

Reasonable Expectation of Privacy in Public Places

The first question in balancing the ethical considerations of conducting surveillance in houses of worship and the safety of citizens is, what privacy can individuals expect in their houses of worship?

In *Katz v. United States* (1967),²⁷ the U.S. Supreme Court held that an individual has a reasonable expectation of privacy and therefore is guaranteed Fourth Amendment protections regarding unreasonable search and seizure. The thrust of the Court's decision was that the government's eavesdropping violated the privacy upon which the petitioner justifiably relied while using a telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.²⁸ In *Katz*, the government argued (unsuccessfully) "that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause."²⁹ In rejecting the government's argument, the Court held that "wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored 'the procedure of antecedent justification . . . that is central to the Fourth Amendment.'"³⁰

Justice John Marshall Harlan II's concurrence in *Katz* established a two-part test, later adopted by the Court, to determine in what instances the Fourth Amendment limits a government search. Fourth Amendment protection requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"³¹

However, congregations cannot receive Fourth Amendment protection from government surveillance in houses of worship unless somehow “the placing of a government informant into the midst of a religious gathering is construed as a search; (only then) will constitutional security attach.”³² Michael McCarthy argues that the placement of a government agent in a house of worship should be viewed as a Fourth Amendment search subject to protection.³³ However, the Supreme Court has consistently looked at “the voluntary nature of one’s disclosure . . . as the paramount issue in the analysis.”³⁴ In short, the nature of the house of worship may help determine the degree of privacy individual members can expect. If the house of worship is open to the public, members should not expect the same level of privacy as would be found in member-driven houses of worship with strict entry requirements.

Certainly, in houses of worship open to the public there is not as great an expectation of privacy, since it is a public forum. If, however, the house of worship is not open to the general public, such as an LDS temple,³⁵ do the members have a different expectation of privacy that would affect how surveillance is conducted? Regardless of the religious institution, if there is specific evidence of a threat, surveillance is justified. Because the goal of surveillance is to protect the community at large—including innocent members of faith—I would suggest that law enforcement should act on all credible information to protect the public, regardless of the public or private nature of the house of worship.

Chilling Effect of Government Intrusion on Faith

Conducting surveillance in houses of worship has the potential to chill participation in religion. Not only may potential members hesitate to join, but preachers, rabbis, imams, and other religious leaders may not feel free to fully express their messages.

The Supreme Court examined this chilling effect in *NAACP v. State of Alabama* (1958), and held that the State of Alabama’s interests in obtaining the NAACP’s membership list were superseded by the constitutional rights of the members. The Court held that “immunity from state scrutiny of petitioner’s membership lists is here so related to the right of petitioner’s members to pursue their lawful private interests privately and to associate freely with others in doing so as to come within the protection of the Fourteenth Amendment.”³⁶ The state’s interest in obtaining the records did not

outweigh the enormous potential of revealing individual members' names to chill association.

However, the potential to chill membership does not supersede all considerations. Certainly, if there is specific evidence of an imminent threat, the government is justified in conducting surveillance, even at the cost of inhibiting religion by potentially chilling participation. The question thus becomes where to draw the line between permissible government surveillance and impermissible surveillance. Professor Michael McConnell suggested the following test:

[I]f the plaintiff can show that a law or governmental practice inhibits the exercise of his religious beliefs, the burden shifts to the government to demonstrate that the law or practice is necessary to the accomplishment of some important (or "compelling") secular objective and that it is the least restrictive means of achieving that objective. If the plaintiff meets his burden and the government does not, the plaintiff is entitled to exemption from the law or practice at issue.³⁷

Protecting the general population is a compelling government objective; the question is whether monitoring houses of worship is the least restrictive means available for achieving this legitimate objective.

Freedom to Practice Religion and the "Cost" of Government Intrusion on the Conduct of Religion

Does acting in the name of God justify violating the rights of others? The answer is clearly no. However, exercise of religion is critical to a person of faith. Exercising one's religion includes peaceful manifestations such as attending religious services, wearing symbols associated with religion,³⁸ conducting oneself in accordance with religious guidelines,³⁹ and decorating one's house in accordance with one's faith.⁴⁰ Yet action in the name of religion is not boundless.⁴¹

Under the current legal structure in the United States, religious *beliefs* are absolutely protected, but *conduct* in furtherance of those beliefs may be regulated. For example, a state may prohibit certain illegal conduct⁴² and may require other types of conduct contrary to religious beliefs, including paying taxes, despite claims generated by the free exercise clause.⁴³ However, such regulations may not be religiously motivated; the state cannot create a law specifically designed to target a particular religion.⁴⁴ The courts determine whether the law presents a purposeful interference with religious exercise. If

it does, the law must pass a strict scrutiny test;⁴⁵ if the law merely presents an incidental burden on exercise of religion, the law must pass a balancing test similar to the rational basis standard.⁴⁶ These standards and tests are in place precisely because regulating religious conduct presents danger of governmental overreach. We need only examine other countries to see the potential for this overreach.

In some countries the debate surrounding the wearing of headscarves by Muslim women has become the prominent question of the day regarding the free exercise of religion. This debate provides an example of the danger both of government overreach and regulation of religious conduct, for it directly addresses how the state accommodates (or fails to accommodate) how faith is practiced. Muslim women wear the headscarf; for reasons that I would suggest are unclear, some nations, including France and Turkey, feel threatened. In a nutshell, the banning of the scarf represents governmental overreach and is an unnecessary infringement on a fundamental right; the scarf does not represent a real or imminent threat.

How faith is expressed is inherent to how it is practiced. This means that if modesty is important to the tenets of a particular faith, “A,” then how that modesty is conveyed and implemented is critical to the person of faith “A.” Whether the state chooses to accommodate that belief in “A” and allow conduct in furtherance of that belief depends on a variety of circumstances and considerations, including perceived public and individual safety, discrimination against a particular faith, cultural relativism, and the limits of tolerance.

While the courts have set standards for specific state interest in promotion of state law, our question is whether—and when—the exercise of religion threatens state security. While the law *must* allow the state the right to limit conduct that threatens security—despite the fact that it is performed as “free” exercise of religion—the fundamental question is what constitutes a threat, and when. Overreach represents illegality and policy ineffectiveness; the banning of the scarf manifests both.

Whether Religious Extremism Should Be Granted Immunity from (Justified) Government Intrusion

When religious words or actions threaten the safety of individuals, the state has an overwhelming duty to step in. In balancing between the right to religious practice and the right to be free from extreme

religious belief, the issue is one of line drawing. Martha Minow writes:

[T]olerance seems so much better than its opposite. Intolerance, the dictionary tells us, entails the "unwillingness or refusal to tolerate or respect contrary opinions or beliefs, persons of different races or backgrounds." To be intolerant is to be bigoted, which, in one of those unhelpfully circular dictionary definitions, means being "so obstinately attached to a creed, opinion or practice as to be illiberal or intolerant." Intolerance is scolding and degrading; it plants seeds for harassment and even violence. In this difficult first decade of a new century, intolerance of immigrants, headscarves, and political dissenters is palpable in politics, in the media, and even in classrooms. Abortion clinics are sites of intolerance and, at times, violent protest; right-to-life protesters can also name their own ample encounters with intolerance. Growing rights for gays, lesbians, and other sexual minorities meet with overt expressions of hatred and intolerance.

Some theorists place tolerance as the precondition for equality, freedom and justice. Then intolerance deserves the most serious response. But we soon hit the dilemma: the most serious response to intolerance is to stop it, to refuse to endure it, to object, scorn, to become intolerant. Tolerance was supposed to endure the objectionable and establish peaceful co-existence with disagreeable others. How can the tolerant be intolerant of intolerance? But how can the tolerant tolerate intolerance?⁴⁷

The question is ultimately one of balancing. What endangers society—limiting freedoms of a particular group (religious extremists) or protecting the larger public? In the tolerance/intolerance debate—in the context of the danger posed by religious extremism to the larger community—perhaps we should err on the side of caution. In that sense, the appropriate response to Minow is greater intolerance with respect to intolerance. However, that approach immediately raises deep—and highly justified—concerns regarding the essence of liberal democracies. How does our democracy resolve the fundamental tension between the free exercise clause and the establishment clause and what is the price of that resolution with respect to both freedom to and freedom for religion?

While problematic, a balance is achievable. A good example is the case of David Pierce, a prominent Arkansas minister arrested for sexual indecency with a minor after church members reported him.⁴⁸ Although he was a minister for twenty-nine years, and a prominent member of the community, his religious association did

not—and should not have—provide him with immunity predicated on religion from government action.⁴⁹ A more prominent example is Warren Jeffs, leader of the Fundamentalist Church of Jesus Christ of Latter-Day Saints, charged in 2005 with sexual assault of a minor and with conspiracy to commit sexual misconduct with a minor for arranging a marriage between a fourteen-year-old girl and her nineteen-year-old first cousin. In late 2005 Jeffs was placed on the FBI's most-wanted list;⁵⁰ he was charged in Utah with rape as an accomplice and in Arizona with two counts of sexual conduct with a minor, one count of conspiracy to commit sexual conduct with a minor, and unlawful flight to avoid prosecution.⁵¹ While a fugitive, Jeffs nevertheless continued to perform marriages between underage girls and adult males. In August 2006 Jeffs was captured in Nevada during a traffic stop,⁵² and in September 2007 convicted in Utah on the accomplice to rape charge.⁵³ While Jeffs argued that his conduct was in the name of religion, the state had a clear obligation to intervene to protect those otherwise unprotected. Both Jeffs and Pierce harmed members of their respective internal communities; while each articulated his conduct as predicated on religious beliefs, the state nevertheless prosecuted both in fulfillment of its fundamental obligation to protect individuals from harm.⁵⁴

Probable Cause Standards for Surveillance

Because of the ethical concerns associated with conducting surveillance in houses of worship, appropriate probable cause standards must be determined relevant to churches, mosques, temples, and synagogues. Probable cause is based on the Fourth Amendment, which states that

the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon *probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.⁵⁵

While stereotypes such as “Muslims are dangerous” are clearly insufficient, the Supreme Court held in *Illinois v. Gates* (1983) that “probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.”⁵⁶ Thus, while the government cannot rely on stereotypes, once there's a probability of criminal activity law enforcement is justified in conducting

surveillance. However, because of the danger of a chilling effect on the practice of religion, monitoring houses of worship must require a heightened probable cause. That is, the traditional probable cause standard is, I suggest, insufficient for monitoring houses of worship because of the inevitable impact on the free exercise clause. However, because of the danger posed by religious extremism—in particular, incitement occurring in houses of worship—it is necessary to enable law enforcement to monitor and conduct surveillance. While granting immunity to religion poses a clear danger to society, the Constitution cannot be used as a buttress to forbid the state to fulfill its fundamental obligation. A heightened probable cause standard would resolve this tension.

Ethical Concerns in Conducting Surveillance

While it is clearly legal to conduct surveillance in houses of worship, concerns regarding stifling religious speech and religious worship require that significant attention be focused on how the surveillance is conducted. Deception is important to law enforcement in gathering information; the tension is between conducting surveillance openly, at the risk of gathering less information, versus disguising law enforcement agents as worshipers who may be able to gather more information, but in a deceptive manner.

Christopher Slobogin argues that law enforcement should not be able “to practice deceit in their official capacity, during interrogation or otherwise, unless (1) there is probable cause to believe the person to whom they are lying is a criminal; (2) the lying is necessary to obtain incriminating information; and (3) the lying does not have an illegitimately coercive effect.”⁵⁷ If Slobogin’s standards are followed, the profound question is whether using deception in houses of worship is legitimate. Slobogin admits that this first limitation “would curtail a significant amount of undercover work, pretextual seizures and searches, and lies aimed at witnesses and mere suspects. But it would also permit trickery during interrogation that follows an arrest, limited by the second and third requirement.”⁵⁸ While interrogation is certainly important, undercover work is equally important and necessary for effective law enforcement. The second element, deception, is necessary to obtain incriminating information; without it, talk regarding criminal activity would almost never occur in the presence of law enforcement.

Thus, the real question is whether it is ethical for law enforcement to deceive a group as a whole when only *certain* members are involved in the suspected criminal activity. As discussed below, I suggest that deceptive law enforcement in monitoring a house of worship is ethical; however, in order to minimize the inevitable chilling effect, a balance must be struck between protecting society and protecting individual religious beliefs.

Recommendations for Resolving the Tension between Justified Surveillance from a Law Enforcement Perspective and the Cost from an Ethical Perspective

While resolving the tension between justified surveillance and the cost associated with such surveillance is a difficult issue, it is essential to adequately protecting the community. To that end, I recommend the following:

- Enhanced cooperation between law enforcement and clergy
- Adoption of a heightened probable cause standard regarding monitoring of houses of worship
- Articulation of clear guidelines for how monitoring is to be conducted
- Articulation and enforcement of limits of free speech with respect to religious extremism

Enhanced cooperation between law enforcement and clergy would enable the former to warn the latter regarding suspected criminal conduct of individual congregants. Furthermore, where particular clergy are engaging in speech deemed capable of inciting, open channels of communication would facilitate law enforcement's ability to minimize a potential chilling effect by warning faith leaders of the potential criminal nature of their particular speech. This proactive discussion—warning faith leaders of speech that is possibly incitement—would negate the need for future monitoring.

A heightened probable cause standard would enable monitoring of houses of worship while minimizing the chilling effect on people of faith. Determining whether previous speech justifies surveillance in accordance with a heightened probable cause standard would serve to narrow the instances of surveillance, ensuring that surveillance would occur only when and where truly required. This approach would significantly contribute to a more balanced and nuanced

approach, for it would facilitate law enforcement while protecting the freedom of religion. Rearticulated, a heightened probable cause standard would facilitate respect for the free exercise clause while ensuring that government fulfills its primary obligation of protecting the public.

As previously mentioned, Slobogin argues that it is deceptive for the FBI to conduct surveillance operations using undercover agents. However, there is a cost with respect to the chilling effect if agents sit in church dressed in a manner different from parishioners, holding “pen and pencil” while writing the words spoken by the faith leader. A faith leader with whom I spoke indicated that were his church under surveillance, he would prefer FBI agents remain undercover to reduce the chilling effect. While arguably this is “less honest,” it both leads to better information and minimizes free exercise violations. Were the FBI’s surveillance efforts aimed at a particular parishioner, the enhanced cooperation referenced above would be particularly important.

Finally, we must rearticulate the limits of speech as they relate to clergymen. How often do clergy need to incite before law enforcement moves in? What words justify monitoring? In *Brandenburg v. Ohio* (1969), the Court held that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁵⁹ The court went on to say, “The mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”⁶⁰ The authority and power of an extremist religious cleric is potentially extraordinary. Therefore, when we examine the three prongs of the *Brandenburg* test—imminence, likelihood, and intent—the first two are almost certainly met in the case of an extremist religious authority determined to encourage his congregation to act. Sermons regularly addressing various dangers and evils will ultimately reach a “critical mass” and the listener’s act will become imminent. A listener is likely to obey the words of an individual he or she views as an ultimate authority on spiritual matters.

The final question is that of determining the speaker’s intent. As illustrated by the example of former Israeli prime minister Yitzhak Rabin and Rabbi Abraham Hecht, this can be a difficult task. In an interview with *New York Magazine* prior to Rabin’s assassina-

tion, Hecht stated that Jewish law “says very clearly, if a man kills [someone who endangers Jewish lives or land], he has done a good deed.”⁶¹ To one reader, it is obvious that Hecht was instructing followers to kill Rabin; to others, the statement remains a mere theory. While Hecht has insisted his intent was never to provoke violence, the hatred directed toward Rabin in the aftermath of the Oslo Peace Accords was palpable in Israel. Right-wing rabbis were extraordinarily clear in articulating the danger they believed Rabin posed to the Jewish settlements in the West Bank. In defining Rabin as a traitor to the Jewish people, the rabbis were clearly identifying Rabin as a legitimate target. When Yigal Amir assassinated Rabin on November 4, 1995, he was clearly acting in accordance with the religious extremist speech consistently spoken by rabbis. While Hecht, as an example, may not have intended his words to serve as justification for the assassination, the critical question is how those words were interpreted by congregants. That is both the crucial question and the justification for monitoring and conducting surveillance of houses of worship were it known that clergy were engaged in religious extremist speech with the potential to incite violence.

Therefore, it would be prudent to consider whether the third element of the *Brandenburg* test should be relaxed when the speaker in question is a figure of religious authority. Such figures should be on constructive notice that their followers are even more likely to act on their directives, and that such an action is more imminent because it has been heard repeatedly. It is reasonable to demand that such speakers make absolutely clear their intent when speaking on matters that could result in violence to others and not speak in couched terms and subtext to muddle analysis of intent. In effect, speakers in position of religious authority are already on constructive notice that their words are taken seriously, if not totally literally, by their listeners. After all, the trust and confidence given to religious leaders was illustrated in a poll in the United States: 85 percent of Americans trust clergymen, while only 44 percent trust TV newscasters.⁶²

A Final Word

When told my comments recommending the FBI monitor the mosque in Minneapolis where the “lost boys” pray were viewed as controversial, I was frankly surprised. My recommendation then—as now—is that subject to heightened probable cause, monitoring houses of worship where incitement predicated on religious extremism is occurring

fulfills the state's obligation. That said, respect for freedom of religion and an understanding of the danger of a chilling effect must serve as "guides" for how to conduct the surveillance. When monitoring is justified, it must be conducted both legally and morally. While immunity for religion ill serves the state, respect for religion is the essence of civil democratic society. To answer the question of whether monitoring houses of worship is necessary, one must carefully examine the faith leaders' speech and conduct of parishioners. While turning a blind eye to religious extremism is an unaffordable luxury, chilling the practice of religion must be conducted with extreme care. Adoption of a heightened probable cause standard represents a legal and ethical solution to this most pressing issue.

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Notes

1. "House of worship" is defined as any building devoted to religious worship, including churches, mosques, synagogues, temples, chapels, etc.
2. More than twenty U.S. citizens of Somali descent are suspected of joining an extremist movement affiliated with al-Qaeda in Somalia. The boys disappear from the Twin Cities area and travel to Somalia, where they become involved in terrorist activities, resulting mostly in their deaths. This is particularly troublesome because "homegrown" terrorism may now be a problem in the United States, when before it was only a problem in European countries. Andrea Elliott, "A Call to Jihad, Answered in America," *New York Times*, July 11, 2009, http://www.nytimes.com/2009/07/12/us/12somalis.html?pagewanted=1&_r=1&hp (accessed October 31, 2009).
3. See the First Amendment to the U.S. Constitution: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
4. Free exercise clause of the First Amendment.
5. See *Reynolds v. U.S.*, 98 U.S. 145 (1878). The Supreme Court held that while the government cannot regulate religious beliefs it can regulate

against actions. Justice Waite concluded that to permit illegal practices, such as polygamy, in the name of religion would be “to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”

See also *Employment Division v. Smith*, 494 U.S. 872 (1990), where the Supreme Court held that the state, consistent with the free exercise clause, could prohibit sacramental peyote use, thereby not granting religious actors an exemption with respect to the requirements of the law.

See also *U.S. v. Lee*, 455 U.S. 252 (1982), rejecting the challenge by Amish individuals who claimed that the law requiring that they obtain social security numbers and pay social security taxes violated their religious beliefs; and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where the Supreme Court reviewed Wisconsin’s compulsory school-attendance law requiring all children to attend public or private school until age sixteen. Wisconsin criminally prosecuted members of the Amish religion who refused to send their children to public or private school after the eighth grade, based on their religious beliefs. The Court held that conviction for this action would violate the free exercise of religion rights of the Amish parents.

6. The term is used generically without reference to gender.

7. While “divine” suggests monotheism, the term is used generically to include all faiths, independent of how the divine is defined, perceived, and worshipped.

8. The theme was developed by Professor (now Dean) Martha Minow in her article “Tolerance in an Age of Terror,” *Southern California Interdisciplinary Law Journal* 16, no. 3 (2007): 453.

9. See Amos N. Guiora, *Fundamentals of Counterterrorism* (Austin, TX: WoltersKluwer, 2008).

10. Rob Hotakainen, “Atheists Sue to Keep ‘In God We Trust’ off Capitol Visitor Center (District of Columbia),” Yahoo News, July 18, 2009, <http://pluralism.org/news/article.php?id=22512> (accessed October 31, 2009); Linda Fisher, “Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups,” *Arizona Law Review* 46 (2004), http://papers.ssrn.com/s013/papers.cfm?abstract_id=771629 (accessed October 31, 2009); “Ashcroft Allow FBI to Do Surveillance at Houses of Worship,” *Church & State*, July/August 2002, http://findarticles.com/p/articles/mi_qa3944/is_200207/ai_n9101233/ (accessed October 31, 2009); Richard Cimino, “USA: Report of Mosque Surveillance Stirs Wide Concerns among Muslims,” *Religoscope*, July 9, 2008, http://religion.info/english/articles/article_385.shtml (accessed October 31, 2009); “D.C. News & Views: Senate Hearing Expresses Concern over Disappearance of Somali American Youth,” Muslim Public Affairs Council, March 20, 2009, <http://www.mpac.org/article.php?id=799> (accessed October 31, 2009); Paul Sperry, “FBI Watching Somali Muslims in D.C.,” *WorldNetDaily*, May 23, 2009, <http://www.bartamaha.com/?p=3179> (accessed October 31,

2009); and Sasha Aslanian, "Senate Hearing Explores Minneapolis-Somalia Connection," Minnesota Public Radio, March 11, 2009, http://minnesota.publicradio.org/display/web/2009/03/11/somalihearing_folo/ (accessed October 31, 2009).

11. U.S. Constitution, Fourth Amendment, <http://caselaw.lp.findlaw.com/data/constitution/amendment04/> (accessed October 31, 2009).

12. Reference is primarily to the FBI.

13. *Black's Law Dictionary* (8th ed., 2004) defines "surveillance" as "close observation or listening of a person or place in the hope of gathering evidence."

14. "Of" includes "at" and "in" a house of worship.

15. Much of this section is based on Amos Guiora, *Freedom from Religion: Rights and National Security* (New York: Oxford University Press, 2008).

16. Elliott, "A Call to Jihad, Answered in America."

17. "FBI Searching for Missing Somali Men from Minnesota," Voice of America, March 27, 2009, <http://www.voanews.com/english/archive/2009-03/2009-03-27-voa43.cfm?CFID=256129143&CFTOKEN=57091416&jsessionid=663015a2bd228a5e3567537e66d163c201d3> (accessed October 31, 2009).

18. Ibid. At least thirty people were killed in this attack. "FBI Chief: Suicide Bomber Indoctrinated in Minnesota," *Minneapolis Star-Tribune*, February 24, 2009, <http://www.startribune.com/local/40202352.html?elr=KArksUUUU> (accessed October 31, 2009).

19. Daveed Gartenstein-Ross, "Jihad Recruiting Effort May Explain Missing Somalis in Minneapolis Area," Fox News, December 4, 2008, http://www.defenddemocracy.org/index.php?option=com_content&task=view&id=11783918&Itemid=347 (accessed October 31, 2009).

20. <http://i.abcnews.com/US/WireStory?id=6344443&page=2> (accessed October 31, 2009). One individual, Burhan Hassan, was killed in Somalia. According to his family, he had decided to return to the United States but was killed because he could not identify who had recruited him. Dina Temple-Raston, "Family Mourns after Somali-American Found Dead," National Public Radio, June 18, 2009, <http://www.npr.org/templates/story/story.php?storyId=105572589&ft=1&f=1001> (accessed October 31, 2009).

21. Temple-Raston, "Family Mourns."

22. "FBI Investigates Somalis in Minneapolis," MSNBC.com, March 10, 2009, <http://www.msnbc.msn.com/id/29620604/> (accessed October 31, 2009).

23. "Somali Leader Stunned to Learn He's on No-Fly List," WCCO-Minneapolis, April 28, 2009, <http://wcco.com/local/mosque.leaders.n0.2.996582.html> (accessed October 31, 2009).

24. "FBI Watching Somali Muslims in Minneapolis," Islam in Action, March 3, 2009, <http://islaminaction08.blogspot.com/2009/03/fbi-watching-somali-muslims-in.html> (accessed October 31, 2009).

25. Council on American-Islamic Relations.

26. Amy Forliti, "Somalis in Minnesota Fall under FBI Suspicion," Fox News, March 10, 2009, <http://www.foxnews.com/wires/2009Mar10/0,4670,TwinCitiesSomalis,00.html> (accessed October 31, 2009).

27. *Katz v. United States*, 389 U.S. 347 (1967).

28. *Katz v. United States*, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=389&invol=347> (last visited October 31, 2009).

29. *Ibid.* at 359.

30. *Ibid.*

31. *Ibid.* at 361.

32. Michael McCarthy, "Expanded Fourth Amendment Coverage: Protection from Government Infiltration of Churches," *Georgetown Immigration Law Journal* 3 (1989): 163, 176.

33. *Ibid.*, 177.

34. *Ibid.*

35. To enter an LDS temple a person must have a temple recommend, which shows he or she is in good standing or a worthy member of the church.

36. *NAACP v. Alabama*, 357 U.S. 449, 466 (1958).

37. Michael McConnell, "The Origins and Understanding of Free Exercise of Religion," *Harvard Law Review* 103 (1990): 1409, 1416.

38. A cross, Star of David, and headscarf are prime examples; as a teenager I wore a Star of David as a symbol of Jewish identity but not as a symbol of religious belief, which raises a legitimate question whether Islamic women who wear headscarves are doing so for cultural-religious reasons or for reasons of religious belief. It is my understanding that Jewish women who wear headscarves do so exclusively because of religious-dictated modesty and not "cultural identity" reasons.

39. Examples would range from observing dietary restrictions (fasting during Ramadan, abstaining from meat during Lent, not eating pork) to not driving on the Sabbath to making the pilgrimage to Mecca (*ha'j*).

40. Decorating a Christmas tree or lighting a Hanukah menorah are prime examples though *not* all who do either do so for religious reasons; see the comment above in note 38.

41. See, e.g., *Employment Division v. Smith*, 494 U.S. 872 (1990), upholding the law prohibiting the peyote during religious ceremonies.

42. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878), upholding a law forbidding polygamy despite the claim that it was required for religion.

43. See, e.g., *United States v. Lee*, 455 U.S. 252 (1982), rejecting the challenge by Amish individuals who claimed that the law requiring that

they obtain social security numbers and pay social security taxes violated their religious beliefs.

44. See, e.g., *Church of the Lukumi Babalu v. Hialeah*, 508 U.S. 520 (1993), holding that if the law's purpose is specifically to infringe on religious practice, it must pass a strict scrutiny test; an ordinance designed to ban only a particular kind of animal sacrifice targeted one religion and did not pass strict scrutiny.

45. Ibid.

46. See *Employment Division v. Smith*, 494 U.S. 872 (1990), upholding the law prohibiting peyote use during religious ceremonies.

47. Minow, "Tolerance in an Age of Terror," 460.

48. "Prominent Ark. Music Minister Arrested for Indecency with a Minor," Associated Baptist Press, April 27, 2009, http://www.abpnews.com/index.php?option=com_content&task=view&id=4027&Itemid=53 (accessed October 31, 2009).

49. Ibid.

50. "Have You Seen This Man? FBI Announces New Top Tenner," Federal Bureau of Investigation, May 6, 2006, <http://www.fbi.gov/page2/may06/jeffs050606.htm> (accessed October 31, 2009).

51. Ibid.

52. Brooke Adams, "Polygamist Sect Leader Warren Jeffs Arrested in Las Vegas," August 30, 2009, *Salt Lake Tribune*, http://www.sltrib.com/polygamy/ci_4254653 (accessed October 31, 2009).

53. John Dougherty, "Sect Leader Is Convicted as an Accomplice to Rape," *New York Times*, September 26, 2007, http://www.nytimes.com/2007/09/26/us/26jeffs.html?_r=1 (accessed October 31, 2009).

54. In *Freedom from Religion: Rights and National Security*, I argue that the state must be both more proactive and more aggressive in protecting underage brides.

55. U.S. Constitution, Fourth Amendment, emphasis added.

56. *Illinois v. Gates*, 462 U.S. 213, 245 (1983).

57. Christopher Slobogin, "Lying and Confessing," 39 *Texas Tech Law Review* 39 (2007): 1275.

58. Ibid.

59. *Brandenberg v. Ohio*, 395 U.S. 444, 447 (1969).

60. Ibid. at 448.

61. R. I. Freidman, "The Rabbi Who Sentenced Yitzak Rabin to Death," *New York Magazine*, October 9, 1995, 24.

62. See Humphrey Taylor, "Who Do We Trust the Most to Tell the Truth? Who Do We Trust the Least?" Harris Poll #62, November 11, 1998, http://www.harrisinteractive.com/harris_poll/index.asp?PID=145 (accessed October 31, 2009): More than 85 percent of people say they trust clergymen and priests.

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