

Cleveland State University

From the Selected Works of David Barnhizer

April, 2007

Reverse Colonization: Islam, Honor Cultures and the Confrontation between Divine and Quasi-Secular Natural Law

David Barnhizer



Available at: https://works.bepress.com/david_barnhizer/3/

Reverse Colonization: Islam, Honor Cultures and the Confrontation between Divine and Quasi-Secular Natural Law

David Barnhizer

Abstract

Repression of discourse through direct and indirect governmental power and through measures that appear entirely reasonable when viewed in isolation but that weave a tapestry of intimidation and suppression when looked at as a whole over time are central themes of the article. Along with these themes is consideration of the right of Western cultures to preserve and protect the essential principles of their societies in the face of what I am calling “reverse colonialism.” The concern is that there are fundamental differences between Western societies grounded on post-Enlightenment values comprising a secular natural law and pre-Enlightenment Islamic systems that operate according to an explicit belief in divine natural law.

There are several distinct but related threads that appear throughout the essay. These include the threat of al-Qaeda and similar organizations to the West, particularly in regard to their proclaimed desire to attack with Europe and the United States. Part of the analysis asks how Western nations should deal in their legal systems with the perceived internal threats offered by Islamists. The concern voiced here is that fear of violence and terrorism will cause governments in Europe and America to create repressive legal regimes that are more suitable for “1984-style” dictatorships than Western democracies.

The analysis also considers the extent to which protests by identity groups living in Western nations who claim their beliefs or culture are being insulted should be tolerated when they are grounded on implicit or explicit threats of violence. More specifically, this question also relates to how Western governments should respond to the hypersensitivity

to perceived insult of Muslims living in Western nations. The increasingly frequent “solution” has been to offer such groups the “levers” of sensitivity protection and anti-insult laws. The premise asserted in this essay is that with rare exception such laws are undesirable in that they discourage freedom of expression and undermine the ideal of democratic discourse, including the right to reveal oneself as a fool. This assumes that it is better to surface bigotry and inanity rather than repress it and cause it to fester.

Introduction

Europeans find themselves on a psychological and cultural “new frontier” created by a wave of “reverse colonialism” in which people from areas of the world once occupied by the European colonial powers have thrust themselves and their social and religious cultures into the West. The “new colonists” have demanded rights, respect and the opportunity to participate meaningfully in the Western system. This has created an extremely troubling moral and psychological dilemma for individuals raised in the value systems of Western society.

It is quite difficult to write about these issues because at each stage one finds your inner moral system checking for “illiberal” bias, prejudice, bigotry and racism. A British colleague who teaches law in London read a draft of the essay and remarked that while she agreed with the analysis it made her “uncomfortable” about her own feelings to the extent she felt compelled to examine her values and attitudes.¹ Many in the West,

¹ My colleague, Lisa Webley, teaches at Westminster University School of Law in London. She indicated this feeling was something that took some time to bring to the surface. When she was able to confront it she offered that many Brits are still locked into a feeling of cultural superiority linked in many instances with paternalism, others into concerns about being racist or perceived as racist (although the two are not mutually exclusive). She added: “The more I think about this, the more I think that paternalism is not quite right, although that is the essence. It is a little more complex than that. People on different sides of the multicultural-integrationist-assimilation debate believe that there is a need to protect minority interests, but for different reasons. Some believe that we need to protect cultural minorities because they are less well equipped to protect themselves and that “the British” are culturally more adept at protecting their own interests (even though many who form part of the culturally distinctive groups *are* British). Others believe that protection is necessary for minority groups, simply because majorities tend to impose their will on minorities by virtue of democratic majoritarianism. Others do not trust the average Brit to behave in a way that will tolerate difference, and consider that protection is the only way to reduce or eliminate aspects of institutional racism. Finally, there is guilt in some quarters associated with our colonial heritage and the fact that the English have imposed their culture on the world through the former Empire. When people from former colonies now come to the UK, this group of Brits finds it difficult to impose cultural norms on immigrants because to do so would appear to them to be hypocritical given our relatively recent history. There is also some confusion about what being British actually means in terms of culture, religion and values. Taken together, these four broad rationales may explain why the British have

particularly those committed to liberal views about the necessity of tolerance, fairness, compassion and social justice in society are finding it difficult to sort out the limits of law and state power in the face of the entry into their cultures of immigrants who neither understand, share, nor respect the Western system of values. The process of trying to figure out this situation has involved the same types of self-examination for me as it stimulated for my colleague and will continue to do so.

While it would be far easier and prudent to ignore examining these issues they are far too important to run from. Western society faces a watershed moment in which it either defines its essential identity or is possessed by cultures with radically different values and traditions.² While the societies of Western Europe and North America have many deficiencies I confess there is no other social system I would prefer. Obviously the preference is produced in large part by the fact that I was raised in America according to its values. One's cultural context to a significant extent produces the sense of comfort and values that provide the core of how we see and value things in the world. As I write these words any reader would be likely to agree immediately that I am somewhat locked within the ethos of my "home" system and unable to fully appreciate the special values of others cultures. To some extent they would be correct but in other aspects quite in error.³

felt the need to try to impose tolerance through legislation and to limit attempts to require immigrant assimilation into a "British" culture." Notes from Barnhizer/Webley discussion, March 27, 2007 (on file with author).

² For discussion of some of the most salient issues see, Hugh Fitzgerald, "Bernard Lewis: All That Glitters Is Not Gold," *New English Review*, April 2007; Johann Hari, "Islam in the West," *Dissent*, Winter 2007, review of various books including, Tony Blankley, *The West's Last Chance: Will We Win the Clash of Civilizations?* (Regnery 2005); Ayaan Hirsi Ali, *The Caged Virgin: An Emancipation Proclamation for Women and Islam* (Free Press 2006); Bruce Bawer, *While Europe Slept: How Radical Islam Is Destroying the West from Within* (Free Press 2006); Bat Ye'or, *Eurabia: The Euro-Arab Axis* (Fairleigh Dickinson University Press 2005).

³ I simply want to indicate that I am not inexperienced in other cultures nor do I reject others' beliefs and values. Some of the experiences that have illuminated my views and preferences are based on a wide variety of activities in other cultures. These include: work as a criminal defense and poverty law lawyer; a lawyer in the International Program of the Natural Resources Defense Council (NRDC), General Counsel and Senior Fellow, Earth Summit Watch, Washington, DC; Strategic Consultant, Government of Mongolia, Mongolian Action Programme for the 21st Century (MAP-21), Consultant, UN Development Program, 1997-1998; General Counsel, The Shrimp Sentinel, Executive Director, The Year 2000 Committee, Member of the Steering Committee, ISA Net, (Industrial Shrimp Action Network); Rapporteur, World Bank/FAO Experts' Consultation on Effective Legal and Institutional Arrangements for Shrimp Aquaculture, Brisbane, Australia, Conference Coordinator, "Effective Strategies for Protecting Human Rights: Economic Sanctions, Use of National Courts, the Role of Media, and Coercive Power: A Symposium on Practical Strategies for Human Rights Protection"; Globescope 87 Coordinator, 1985-87, Global Tomorrow Coalition. My international work has involved teaching human rights and international environmental issues in London and St. Petersburg as well as time spent in Mongolia, Malaysia, Bangladesh, Australia, Thailand, China, Europe, Honduras, Ecuador and Colombia. One can appreciate the differences in a culture, respects aspects of that culture and form close relationships with people in that culture without wanting to be part of it. But there should be no question that the immigration into other cultures of large numbers of people with incompatible value systems would have a profound effect on its nature.

In any event, the admission that I am to some degree bound by and created in the image of my culture is a two-edged sword that helps prove the point of the essay. If that is so for me it is reasonable to assume the same conclusion applies to those from other cultures. Certainly I would not “fit” very well in a traditional Islamic culture not only because I do not share religious views that are a vital part of the system but because I believe in individual rights, fair treatment of women in terms consistent with Western society, and am opposed to excessive conformism, theocracy, and the incessant public display of religious piety. I do have religious faith but it is of a personal and informal kind that would be anathema in, for example, a fundamentalist Islamic system or a conservative Christian system.

It is therefore inevitable that we experience what is described as a “clash of civilizations.” The tension we are feeling is over how to preserve the best aspects of a society based on a quasi-secular form of the Rule of Law offering a sense of openness, opportunity, compassion and tolerance in the face of the very rapid entry into the system of large numbers of people from cultures that lack such traditions. It is one thing to attempt to absorb large numbers of people when they endorse their new society as a positive and uplifting culture. It is quite another situation when a substantial proportion of the new participants reject the legitimacy of those Western traditions and values as being incompatible with their view that law and society are governed by an explicit system of divine natural law.

Much of the conflict is being played out in Europe. London is estimated to have as many as one million Muslims in its population of eight million, with the Paris region at six million.⁴ While London is an open and vibrant city it was obvious prior to the July 7,

⁴ Numerous countries are experiencing significant immigration from Muslim countries that fail to provide the opportunities, jobs resources and freedom of Western society. The Pew Global Attitudes Project, , found that the U.S., UK and Canada were more accepting of Muslim immigration than most other countries. Its findings included that: “There also is evidence that these concerns [about Muslim extremism] are associated with opposition to Turkey’s entry into the European Union. Overall, nearly two-thirds of French (66%) and Germans (65%) oppose Turkey’s EU bid, as do a majority of the Dutch (53%). Support for Turkey’s admittance to the EU is most extensive in Spain (68%) and Great Britain (57%). An analysis of the polling finds that opposition to Turkey’s admission is also tied to growing

2005 bombings that there were problems. Hostility simmered barely beneath the surface for a portion of the Muslims living within Britain's borders. This segment considers the West evil and its members are committed to its destruction. This anti-Western attitude exists in a context where many Britons consider Islam to represent a primitive medieval cult and wish its faithful had stayed in their original nations and never come to the UK. This feeling is considerably stronger in rural areas and smaller cities outside London.

When combined with resentment, rage, and cultural rejection on both sides the process of reverse colonization creates a volatile mix. Verbal flashpoints abound.⁵ Unlike the phrase by which I was raised in the U.S. where "sticks and stones can break my bones but words can never hurt me," Europeans are experiencing a world in which the beliefs of many ethnic and religious groups are closely related to pride, honor and shame.⁶ This combines with lurking cultural insecurity and the fear of humiliation and rejection that produces compensatory sensitivity and resentment among members of the minority groups.

concerns about national identity. Negative views about immigration – not only from the Middle East and Africa but from Eastern Europe as well – are even more strongly related to opposition to Turkey's admission to the EU than are concerns over Islamic extremism. Nonetheless, favorable views of Muslims outpace negative views in most countries of North America and Europe. Hostility toward Muslims is much lower in Great Britain, the United States and Canada than in other Western countries surveyed. And while worries about Islamic extremism are substantial in these three English speaking countries, the survey found somewhat less concern about rising Islamic identity among their resident Muslim populations."

⁵ For strongly voiced arguments pro and con, along with an excellent introductory overview of the statutory and policy discrimination that characterized American immigration for over a century, see, Nicolaus Mills, editor, *Arguing Immigration: Are New Immigrants a Wealth of Diversity ... Or a Crushing Burden?* (Touchstone 1994) (includes essays by Toni Morrison, Peggy Noonan, Francis Fukuyama, Robert Kuttner, Linda Chavez, Nathan Glazer and others). Compare this controversy to the positive rhetoric used in John F. Kennedy, *A Nation of Immigrants* (Popular Books 1964). Kennedy writes: "What Alexis de Tocqueville saw in America was a society of immigrants, each of whom had begun life anew, on an equal footing. This was the secret of America: a nation of people with the fresh memory of old traditions who dared to explore new frontiers, people eager to build lives for themselves in a spacious society that did not restrict their freedom of choice and action." He concludes: "Any great social movement leaves its mark, and the massive migration of peoples to the New World was no exception to this rule. The interaction of disparate cultures, the vehemence of the ideals that led the immigrants here, the opportunity offered by a new life, all gave America a flavor and a character that make it as unmistakable and as remarkable to people today as it was to Alexis de Tocqueville in the early part of the nineteenth century." *Id.*, at 17, 18.

⁶ There are "fighting words" limitations on free speech in America and the pre-eminent Supreme Court case on this point is *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1941) where Chaplinsky called a city marshal a "God-damned racketeer" and "a damned fascist" in a public place. He was convicted under a New Hampshire law for the offense of breaching the peace. In deciding whether his verbal utterances were protected under the First Amendment the Court concluded that forms of expression such as obscenity and fighting words are not used to convey ideas and consequently do not fall within the zone of protection accorded by the First Amendment protection. Chaplinsky had uttered fighting words that "inflict injury or tend to incite an immediate breach of the peace."

I admit that my “sticks and stones” assertion is a cultural value rather than a legal position. Of course insults can hurt and what I am saying is that I was raised to at least try to ignore the “fools” who delivered them. Otherwise we are constantly walking on eggshells in knowing what we can and cannot say.⁷ Similarly, allowing people to overemphasize their “sensitivity” makes the situation even worse both by rewarding “thin-skins” and empowering political groups to dictate conditions most useful to them.⁸ The heightened level of sensitivity creates a “chip on the shoulder” psychology where every real slur is magnified and non-existent slights are easily misinterpreted and distorted into insults. Both for reasons of how their culture of origin functions and the insecurity produced by real and perceived discrimination, the line between perceived insult and other forms of actual injury disappears. This triggers the willingness to engage in violence to redress the grievance.

The analysis presented here looks at the collision of Islamic and European cultures in the context not only of the terror threat but the incompatibility of important aspects of traditional Islamic and Western systems grounded on distinct values and conceptions of the Rule of Law based on divine and secular sources. The essay condemns the violent fanatical strand of fundamentalist Islam that is challenging Western (and many Islamic) societies.⁹ But this is only part of the overall problem. It also rejects the idea that

⁷ The “Cartoon Riots” of 2006 offer a glaring example of the wide gap between Western traditions and Islam. The Economist observes in this regard: “In this newspaper’s view, the fewer constraints that are placed on free speech the better. Limits designed to protect people (from libel and murder, for example) are easier to justify than those that aim in some way to control thinking (such as laws on blasphemy, obscenity and Holocaust-denial). Denying the Holocaust should certainly not be outlawed: far better to let those who deny well-documented facts expose themselves to ridicule than pose as martyrs. But the Muhammad cartoons were lawful in all the European countries where they were published. And when western newspapers lawfully publish words or pictures that cause offence—be they ever so unnecessary, insensitive or disrespectful—western governments should think very carefully before denouncing them.” “Cartoon wars: Free speech should override religious sensitivities. And it is not just the property of the West,” *The Economist*, February 11, 2006 at 9.

⁸ I explored such strategies in David Barnhizer, “A Chilling of Discourse,” 50 *St. Louis Univ. L. J.* (2006), and David Barnhizer, “Truth or Consequences in Legal Scholarship?” 33 *Hofstra L. Rev.* (2005).

⁹ Olivier Roy, for example, explains that the new wave of Islamic terrorism is not being led by the desperate in Islamic nations but by second-generation young Muslims in European countries who are becoming radicalized in a fundamentalist strand of jihadist frenzy aimed at both the West and the Muslim world. See, Olivier Roy, “Britain: homegrown terror,” *Le Monde diplomatique*, August 2005, <http://mondediplo.com/2005/08/05terror>, where he argues that: “radical imams such as Abu Hamza, Abu Qatada and Omar Bakri, who specifically address second-generation Muslims and play on their sense of alienation and uprootedness, are in quite a different category [than genuine political refugees concerned with their own homelands]. For such preachers, no existing country is truly Islamic: the *ummah* exists wherever there are Muslims. The uprootedness of young Muslims is seen as an advantage, since it removes them from the influence of the cultural and traditional Islam of their parents and countries of origin. These imams want to radicalize young Muslims in their countries of residence and enlist them in a worldwide jihad.” See also, Olivier Roy, *Globalized Islam: The Search for a New Ummah* (2004).

members of Western societies are, when operating within their own societies, required to avoid offending the sensitivities of practitioners of Islam or any other group. This is not a conclusion that offenses to others' sensitivity are necessarily desirable or in good taste, but that Western democratic systems operating under the secular Rule of Law necessarily offer the freedom to express one's views.¹⁰ This includes the opportunity to make a fool of one's self or be considered as boorish, stupid, bigoted or inane.

Key premises underlying this analysis as to reverse colonization include the belief that societies have finite abilities for absorbing and integrating inflows of people from radically different cultures. It also assumes that individual cultures have the right to take into account the desire to preserve the intrinsic qualities considered to be the core values of their social, legal and political systems.¹¹ While the moral entitlement to do so is presumably not as intense as in the case of unique indigenous cultures the situation is still analogous and supports the right of a nation to invoke reasonable strategies aimed at cultural preservation.¹²

This means not only that it is proper to regulate the rate of inflow of new immigrants into Western societies but that it can be taken into account that different cultures and belief systems are more easily absorbed than others. It is not simply a function of absolute numbers, but involves the rate at which one culture is being asked to accept and absorb others not of their traditions and values, and the source cultures and religious belief

¹⁰ "Freedom of expression, including the freedom to poke fun at religion, is not just a hard-won human right but the defining freedom of liberal societies. When such a freedom comes under threat of violence, the job of governments should be to defend it without reservation." "Cartoon wars," *The Economist*, *supra* n. at 9. Instead the U.S. State Department announced it "was 'unacceptable' to incite religious hatred by publishing such pictures" and "Britain's foreign secretary, called their publication unnecessary, insensitive, disrespectful and wrong." "Cartoon wars," *id.*

¹¹ "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" Draft Declaration on the Rights of Indigenous Peoples, *Article 3*.

¹² Indigenous communities, peoples and nations are defined as:
"[T]hose which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." (Martinez-Cobo, 1984). Study Guide: The Rights of Indigenous Peoples, 2003 University of Minnesota Human Rights Center. <http://www1.umn.edu/humanrts/edumat/studyguides/indigenous.html>. (visited 4/5/2007).

systems of the new immigrants because some cultures and beliefs are more easily integrated than others.

The stricter forms of Islam are and will remain incompatible with the cultures of Western Europe and the United States.¹³ It is not *Islamophobic* to recognize the difference between strict forms of Islam and the Western liberal tradition nor is it racist to prefer the best aspects of one's traditions, beliefs and culture to one that is significantly alien and incompatible with those traditions. It is absurd to allow the nihilism of an extreme form of multiculturalism to paralyze our ability to face reality about fundamental cultural differences and to somehow convert the doctrine into one where the Western intellectual, cultural and legal tradition is something about which we must be ashamed.

The position argued here is that a reasonable degree of assimilation and integration into a new host country is or should be a clear expectation imposed on those who seek to avail themselves of the benefits and opportunities of that country.¹⁴ It is one thing for new

¹³ Part of the process is driven by the element of Islam that has come to be known as salafism or the Neo-Salafist Movement. It is impossible to integrate adherents to this system of belief into Western society because it rejects even moderate Islam as impure. To the extent that young Muslims are becoming salafists it is possible to argue they have no place in Western society. The nature of the Neo-Salafist Movement is described as follows: "Some organizations, such as the Muslim Brotherhood movement, eschewed the Wahhabi appellation and dubbed themselves 'Salafis' -- a reference to the last generation of early Muslims, whom Abdul-Wahhab believed still practiced the "pure faith." Like their predecessors, they rejected classical Islamic theology and jurisprudence. At the same time, they began constructing a new paradigm that drew heavily on modernist ideas of national liberation and Marxian notions of world revolution. Increasingly, these neo-Salafi groups defined themselves in opposition to the West. Their goals, however, remained as much religious as political. They continued the process of 'purifying' Islam begun by their Wahhabi predecessors. In practice, this led to the oppression of women, a growing intolerance for other faiths and, more recently, the sanctioning of terrorist violence -- all things which Islam traditionally forbade, but which the Wahhabi reinterpretation of the religion allowed." Media Guide to Islam, "The Rise of Political Islam: Wahhabism and Neo-Salafism," http://mediaguidetoislam.sfsu.edu/intheworld/04a_therise.htm. [visited 8/21/05]. See also, Barry Rubin, ed., *Revolutionaries and Reformers: Contemporary Islamist Movements in the Middle East* (SUNY 2003); Lawrence Davidson, *Islamic Fundamentalism: An Introduction* (Greenwood 2003); Ali Mohammadi, ed., *Islam Encountering Globalization* (Routledge Curzon 2003); Stephen Schwartz, *The Two Faces of Islam: The House of Sa'ud from Tradition to Terror* (Doubleday 2002); Youssef M. Choueiri, *Islamic Fundamentalism* (Twayne 1990); A. Ezzati, *The Spread of Islam: The Contributing Factors* (Islamic College for Advanced Studies 2002), and Asaf Hussain, *Political Terrorism & the State: In the Middle East* (Mansell 1988).

¹⁴ John Fonte, "Upstream," : "Ten years ago Sidney Hook forcefully restated the liberal-democratic concept of civic assimilation, declaring that "precisely because" American liberal democracy is a "pluralistic, multiethnic, and uncoordinated society" all citizens need a "prolonged schooling in the history of our free society, its martyrology, and its national tradition." Today, the traditional idea of assimilating immigrants into a national identity is officially rejected by the governments of Canada and Australia, and is under constant attack by elites in the United States. The leading organization of American civic educators declares that national assimilation is often "neither democratic nor humane." Suggestions that liberal-democratic regimes should limit immigration to levels consistent with steady civic assimilation are fiercely denounced as both impossible and immoral. Put bluntly, cultural democrats are saying that traditional liberal democracies do not have the moral right to reproduce themselves, either by fostering civic assimilation, by limiting immigration, or by some combination of the two."

entrants into a strange society to cluster together for a time for support and development. It is quite a different phenomenon for the new entrants to reject and condemn the society into which they voluntarily moved and to create identity-based neo-colonies, including on occasion ones committed to undermining the society.

It is an obviously volatile premise that the many people raised in Middle Eastern and North African cultures under variations of Islam are particularly problematic in terms of their isolation, their rejection of the values of faithless Western *infidels*, and maintenance of primary loyalty to their cultures of origin rather than to their new host. This attitude of rejection and reticence holds significant implications for Western nations in terms of immigration policies and expectations and demands relating to those who come to their societies from a background in the cultures of Middle Eastern Islam. The extent and intensity of the gap has increased with the combination of Salafist and Jihadist groups who not only seek to remake the world in the image of their strict and fundamentalist version of Islam but are fully committed to violence as part of achieving their ends. To the members of such groups any strategy can be rationalized as part of a holy duty.

The Cultural Contradiction between Divine and Quasi-Secular Natural Law

While the ideas of multiculturalism and diversity have become a quasi-religious mantra over the past twenty or so years, Western nations have a right to preserve their own cultural heritages, at least to a substantial extent. The rise of identity politics and the emergence of neo-colonial clusters within Western society populated by people who refuse to understand or share the underlying values of their host society is a negative and destructive force rather than an admirable political and social concept.

This essay is not aimed at Islam in itself but considers the consequences of the rapid combining of the Western Rule of Law culture and the Middle Eastern/North African Islamic honor cultures. Although the analysis presented here centers on Islam and the clash it generates between radically different cultures and between colliding systems of

divine and secular natural law, extremism and fanaticism are not restricted to Islam or groups such as al-Qaeda.

Nor is there a single face that can be fairly applied to Islam and the myriad cultures that consider themselves Muslim. Destructive qualities are also found in heinous acts such as that of Eric Rudolph who received a life sentence for his anti-abortion terrorism.¹⁵ It can be discerned in the terrorist bombing in Oklahoma City where several hundred people were murdered and families destroyed in what the perpetrators somehow considered fair retribution for the Waco debacle involving a deadly assault on the Branch Dravidian compound.¹⁶

Each actor in such a situation is a fanatic who has become blind to his emotional illness. Gabriel Marcel warned: “The ... fanatic never sees himself as a fanatic; it is only the non-fanatic who can recognize him as a fanatic; so that when this judgment, or this accusation, is made the fanatic can always say that he is misunderstood and slandered.”¹⁷ Nor will the fanatics hesitate to act in ways that feed their twisted vision even while proclaiming to act in the name of God or Allah.

Hate, violence, and the irrationality of fanatical true believers are human conditions. Unfortunately, the face of Islam in the West has become cast in the image of vile fanatics who have coopted what is claimed to be a “religion of peace” and made it a cult of violence, intolerance and the murder of innocents, both Muslim and other.¹⁸ The fact that some Muslims living in the West have played into the agendas of the fanatics by failing to condemn the actions of the cultists or refusing to become an integrated part of their

¹⁵ Jay Reeves, “Unrepentant Rudolph Gets Life Sentence,” *Associated Press*, 7/18/05. Four weeks later at his final sentencing hearing, Rudolph apologized to the family. *Associated Press*, “Rudolph Apologizes, Sentenced to Life,” August 22, 2005.

¹⁶ In an eerie comparison to the lack of remorse shown by Rudolph and the murderer of Piet Van Gogh, see, Toby Sterling, “‘I killed Van Gogh and I’d do it again’: Accused says religious conviction led him to murder filmmaker,” *The Guardian* [online], Wednesday, July 13, 2005.

¹⁷ Gabriel Marcel, *Man Against Mass Society* 136, 137 (1969).

¹⁸ One of the cartoons that resulted in the riots depicted Muhammad with a bomb, presumably equating Islam with terrorism. Enraged that Islam would be shown as violent mobs attacked embassies, burned businesses and murdered an innocent Catholic nun.

new cultures has heightened the conflict and negative perception of Islam among non-Muslims.

Although I am using the concepts of honor cultures and liberal Rule of Law cultures as a shorthand way to describe the situation, the context is obviously not that simple. In addition to the striking cultural differences there is a deeper problem that is almost impossible to overcome. That concern revolves around the fact that the Western Rule of Law system and the Islamic system are both definable as a form of belief in the Rule of Law and as a variety of natural law. But the commonality of general labels belies the underlying differences of what are competing systems of political order.

The Western system is a largely secular and rationalistic system with the residues of religious belief.¹⁹ It can be loosely described as a quasi-secular natural law methodology in which its adherents reject the existence of their own deeper assumptions and values even while applying them to the creation and interpretation of laws. This is an internal contradiction of the Western system in which deep beliefs founded on religious tenets and Aristotelian principles are masked by the language of positivism and popular democracy, neither of which is a strong enough force to generate social binding. The inchoate system of secular natural law is now competing with a pre-Enlightenment, divinity-based, natural law system in which the grounding rules are provided by Allah.

From an historical perspective the difference is not unique to Islam. The Enlightenment's conscious break with political theocracy in Europe and the emergence of science and the Industrial Revolution took Western culture in a direction inconsistent with the Islamic culture of the past half-millennium. I use that time frame because there was a time when Islam was supportive of science, supported intellectually curious scholars, and was tolerant of other cultures. Islam seems to have reversed the pattern of the West and

¹⁹ Vilfredo Pareto, in *Trattato di sociologia generale* (1916) described his theory that humans made decisions not on economic rationality but based on what he called "residues." The residues are not rational but are sentiments derived from basic desires and drives. At a minimum religious attitudes provide residues and deep structures for decision making even if we do not consciously consider ourselves religiously active. Given that these residues have penetrated our ideals, concepts of governmental and individual responsibility, and many of the precepts on which education and philosophy are grounded even self-proclaimed atheists are likely to be operating on residues derived from faith-based systems.

regressed from a lengthy period in which it appeared to offer greater openness to one of closure and intolerance of a kind that once characterized Europe.

Prior to the Enlightenment's conscious marginalization of religion Thomas Aquinas constructed a hierarchy of law in which we no longer believe consciously but that nonetheless provides intuitive grounding for many of our interpretations. He described human law as part of a structure in which divine or eternal law was at the pinnacle, and natural law beneath that form. Human law was an effort to use the power of Reason to make the choices needed to implement the divine compulsion to follow God in society.²⁰

While the Western Rule of Law never fully extricated itself from such beliefs it gradually submerged the fact that its deepest values are based in Judeo-Christian and Greek sources. These sources remain inextricable parts of how we perceive the world, our conceptual structures and value systems, as well as the justifications for our political and legal choices. The simple fact is that we must have a system of values on which to base decisions and those values derive from deep-seated assumptions. While there are conflicts over which values are most important there is a relatively limited "menu" of options from which we order the elements of our Western political system. We may argue about details and degree of emphasis given to particular principles but by and large at this point we are creatures of the Enlightenment, the quasi-secular concept of natural law that we think of as the Rule of Law, and the Judeo-Christian tradition.

The conflict between quasi-secular and divine forms of natural law is one that is producing dangerous stresses for Western society. While I am raising this issue in the context of the West and Islam, America is also experiencing the clash between the contradictory forms of natural law in controversial areas such as abortion and conflicts over whether to legalize gay marriage. I find myself frequently thinking about Thomas Hobbes's warning about the destructive social tension generated by factors that he considered capable of undermining a political community of the kind that existed in

²⁰ Thomas Aquinas, *Summa Theologica*,

England.²¹ Three of Hobbes' factors have particular relevance to the clash of cultures we are now experiencing. These factors include:

- The belief that every private man is Judge of Good and Evil actions.
- The belief that whatever a man does against his conscience, is sin.
- The belief that Faith and Sanctity, are not to be attained by Study and Reason, but by Supernatural Inspiration or Infusion.²²

Consider briefly Hobbes's point concerning the problems that arise for a society when individuals hold the "belief that every private man is judge of Good and Evil actions." This simple statement requires several assumptions. One is that we are dealing with an individual's belief rather than evidence-based knowledge. But from where does the belief emerge? On what is it grounded? To what extent is there supporting evidence and what constitutes acceptable evidence?

Another difficulty emerges from Hobbes's concern about the idea of the "private man." Hobbes offered the concept of the person in a savage state of nature who possesses the unfettered opportunity to do or believe anything he wants while being subject to the chance of becoming the victim of any other "private man" operating according to the same terms. Such complete individualism is surrendered when an individual joins a political community whose function is to provide security. The issue is the extent to which individuals in community give up their power to act as if they are still in the state of nature. A third concern is the idea that the individual rather than the collective will of the community can be the "judge" of Good and Evil. This relates to the matters about which an individual believes he is entitled to judge, including the determination of what actions and policies are Good and what are Evil actions, not only for self but for the community.

²¹ Thomas Hobbes, *The Leviathan*, Part I, Ch. 13, at 185.

²² Thomas Hobbes, *The Leviathan*, *supra* n. , Part I, Ch. 13, at 185. The final three of Hobbes' six factors are: "The belief that he who has the Sovereign Power is subject to the Civil laws. The belief that every private man has an absolute propriety in his goods: such as excluded the Right of the Sovereign. The belief that the sovereign power may be divided."

The same concerns exist for Hobbes's second and third points. These are "that whatever a man does against his conscience, is sin" and "that Faith and Sanctity, are not to be attained by Study and Reason, but by Supernatural Inspiration or Infusion." Conscience requires a moral code and sin needs "something" to be sinned against. A system that requires the sharing of verifiable information as the basis for social decision-making has great difficulty coping with those whose beliefs are outside the realm of evidence. The juxtaposition between faith and sanctity, and study and reason plays out in the dynamic of "supernatural Inspiration or Infusion." This relates not only to the validity of particular methodologies but the effects of the acceptance of "non-methods" in which the professed beliefs are impossible to disprove.

Hobbes argued that revealed truths had the potential to weaken or even destroy the fabric of a society because compromise and respect for the decisions of the sovereign were essential for the ongoing integrity of the social order. This required all members of society to accept the obligation to obey law even if its dictates were personally disagreeable. Society is weakened if people refused to acknowledge their obligation to follow the law.

The problem is that with both religious and other forms of revealed belief there is unshakable agreement among the believers that their propositions are true. There is no way to rebut the believers' assertions because the principle at issue has been *received* from a "higher" source located beyond the limits of human reason. It is impossible to know through the operation of Reason or evidence whether a divine truth is actually valid because they lie outside the limits of empirical methods. Instead we rely on scripture, the Word of God, prayer, anointed intermediaries, divinely inspired visions or events we perceive as miraculous.

As Hobbes warns, it is almost impossible to negotiate conflicts between revealed truths or between a revealed truth and other forms of truth. This is due to the holder's non-rebuttable presumption of the ultimate authority of the source of the revelation. This

inability to respect and compromise applies to ideological beliefs as well as religious ones. Each, after all, is a belief system rather than an evidential one.

At extreme levels those who depend on revealed truths bow their heads to no human system. There is no room for debate, discourse or compromise of the kind required in a democracy. The conflicts are on several fronts in the American system. They include abortion, gay rights and gay marriage, and the role of faith and religious belief in education. They also include immigration and diversity, as well as cultural values and priorities and whether a “core” culture has the right to defend its identity through law.

Intimidation of Free Speech through Criminalization

Edmund Burke suggested that Americans: “snuff the approach of tyranny in every tainted breeze.”²³ When it comes to protecting freedom of thought and expression the American “nose” has become much less sensitive while the European proboscis has never been particularly discriminating in encouraging or defending free speech. On the governmental level, the understandable desire for security—one of the most basic human drives—is resulting in the subordination of freedom to the crisis-driven clamor for greater power to fight against terrorism or to avoid giving offense to interest groups, many of which have demonstrated a fanatical level of intolerance.²⁴

It is useful to examine European reactions to sensitive communications as an early warning signal about noxious conditions of repression that we can otherwise not perceive until it is too late to take protective action. While there are historical and prudential differences between the United States and Western Europe concerning freedom of expression the increasing tendency in Europe to use state power to suppress expression

²³ From Burke’s March 22, 1775 “Speech on Conciliation with America,” quoted in William A. Galston, “Taking Liberty: Liberals ignore and conservatives misunderstand America’s guiding value: freedom,” *Washington Monthly*, April 2005.

²⁴ As to the kinds of government reaction being experienced in Europe following the July 7, 2005 bombings in London, see, John Hooper, Gwladys Fouca, Jon Henley, Ian Traynor, Kryisia Diver, Giles Tremlett and Nicholas Watt, “Fearful Europe steps up security: Vulnerable countries act quickly to bring in new powers,” *The Guardian* [online], 7/28/05; and Louise Christian, “Stay calm, the government says, in a mad panic itself: Proposed new anti-terrorist laws will be counterproductive,” *The Guardian* [online] 7/30/05.

along with indirect governmental empowerment of private actors to use law to intimidate discourse represents a pattern that is being replicated in America.²⁵

This includes perspectives on speech, freedom of information, the desirability of surveillance, data monitoring, privacy, identity politics and the like.²⁶ It is by looking at Western Europe that we can tell our own future.²⁷ Western Europe is the “canary in the mine” on issues of free speech and the use of governmental power to suppress discourse and comment about critical concerns because the expression predictably offends a particular interest group.

My foundational principle is simple to state. No one and no institution should be insulated from political criticism in a democratic society. A free speech advocate remarked in admittedly crude terms that, “no one is [or should be] immune from being called an [expletive deleted].”²⁸ The principle of allowing and encouraging free, open

²⁵ The debate over John Ashcroft’s proposed Terrorism Information and Assessment System (TIPS) reveals the inexorable tendency of government to use whatever technologies are available to achieve its ends and to unflinchingly overreach for what seem to be the best of reasons. See, e.g., Jane Black, “Some TIPS for John Ashcroft: Mr. Attorney General, forget your plan for a system to promote Americans spying on Americans. It won’t work -- and is un-American,” *BusinessWeek Online*, July 25, 2002. http://www.businessweek.com/bwdaily/dnflash/jul2002/nf20020725_8083.htm [visited 8/1/05]. The TIPS program was intended to be initiated in ten cities as a pilot program and to enlist 1 million “informers” to report on others’ activities. It was abandoned before it started but the capability remains. Admiral John Poindexter was initially authorized to create the Information Awareness Office in the Pentagon that mirrored much of what Ashcroft sought. The Guardian reports that: “the IAO has begun work on a global computer surveillance network which will allow unfettered access to personal details currently held in government and commercial databases around the world.

Contracts worth millions of dollars have been awarded to companies to develop technology which will enable the Pentagon to store billions of pieces of electronic personal information - from records of internet use to travel documentation, lending library records and bank transactions - and then access this information without a search warrant. The system would also use video technology to identify people at a distance. ‘Total Information Awareness,’ or TIA, was proposed to the Pentagon by Admiral John Poindexter after the terrorist attacks of September 2001. A former official in the Reagan administration who was convicted for his leading role in the Iran-Contra scandal, Poindexter was appointed head of the IAO in February.” Lawrence Donegan, “Pentagon creates a Big Brother so Uncle Sam can keep his eye on us,” Sunday, November 17, 2002, *The Observer* [online] (visited 8/1/05). <http://observer.guardian.co.uk/international/story/0,6903,841731,00.html>.

²⁶ In the UK there have been continual expansions of governmental power over the past six years. These can be found on the British Home Office website. These obviously increased following July 7, 2005. The UK’s Home Office website at <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/>, contains links to the “Terrorism Act 2006”; “The Prevention of Terrorism Act 2005”; “Anti-Terrorism, Crime and Security Act 2001”; and the “Terrorism Act 2000.” It also links the reader to “Checks on terrorism laws” based on the admission that: “Terrorism laws must strike a delicate balance between providing effective tools to investigate and prevent terrorism, while ensuring that our civil liberties are not unnecessarily infringed.” (visited 4/5/07).

²⁷ The expansion of monitoring capacity reached a new high with the recent introduction in the UK of CCTV cameras that talk to offenders. The UK has installed thousands of CCTV cameras in public areas but has now pioneered ones through which a monitoring officer can talk in real time to people engaging in anti-social behavior. See, *BBC News*, “‘Talking’ CCTV scolds offenders,” 4/4/2007.

²⁸ This statement was made by Harvey Silverglate and reported by Seth Stevenson, in “The Thought Police,” January 2003, www.bostonmagazine.com, Archives. See, Alan Charles Kors and Harvey A. Silverglate, *The Shadow*

and even insensitive communication is nothing new in a democratic society where the constitutionally guaranteed freedoms of speech, association and religion are core values instilled in the structure of our law and deepest beliefs.

We are confronted by groups who are using the carefully developed terms of the Rule of Law against societies committed to those principles even while not believing in that more liberal system. They demand tolerance, respect and even deference while not according those attitudes to others. This includes rejection of Western culture, suppression and subordination of speech for fear of offending identity groups, and the appeasement of identity collectives who threaten violence if they are “insulted.”²⁹

While adaptations are obviously required to deal with the challenges posed by international terrorism and the increased diversity of cultures within Western nations, there is great risk that countries such as Great Britain and the United States will go far beyond what is needed.³⁰ The risk is that we will create a culture in which we become uncertain and apprehensive about what we are allowed to say and with whom we think it is safe to associate. The cultural ethos then becomes subtly and powerfully repressive because we are uncertain about what is allowed. Such uncertainty and apprehension is not appropriate for a democratic system.

University: The Betrayal of Liberty on America's Campuses (1998).

²⁹ For several examples, and there are far too many available, see, Richard Wolin, “Veiled Intolerance,” *The Nation*, April 9, 2007. These include death threats to “a woman delegate to the German Bundestag” for “suggesting that Muslim immigrants remove their head scarves”, and death threats to a French high school philosophy teacher for writing an article in *Le Figaro* comparing Islam unfavorably with Christianity. On this particular controversy, see, Christian Delacampagne, The Redeker Affair, *Commentarymagazine.com*, January 2007 Issue. France is having a difficult time with its clash of cultures. See, Sarkozy backs Charlie Hebdo, *The Guardian*, 2/7/07—“If we no longer have the right to laugh at terrorists, what arms are citizens left with?” “How is making fun of those who commit terrorist acts throwing oil on the fire?” See also, Henryk M. Broder, Threaten One, Intimidate a Million, *Spiegel Online*, 2/1/06, (visited 2/21/07).

³⁰ The National Security Agency (NSA) works through a global surveillance system called Echelon. It has incredible power. When Echelon was first created Senator Frank Church warned that it posed a fundamental threat to America's democratic system and the relationship between citizens and governmental control. See, remarks of Senator Frank Church, quoted in: [ECHELON: America's Secret Global Surveillance Network](#). “[T]hat capability at any time could be turned around on the American people and no American would have any privacy left, such [is] the capability to monitor everything: telephone conversations, telegrams, it doesn't matter. There would be no place to hide. If this government ever became a tyranny, if a dictator ever took charge in this country, the technological capacity that the intelligence community has given the government could enable it to impose total tyranny, and there would be no way to fight back, because the most careful effort to combine together in resistance to the government, no matter how privately it was done, is within the reach of the government to know. Such is the capability of this technology...” “I don't want to see this country ever go across the bridge. I know the capacity that is there to make tyranny total in America, and we must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss. That is the abyss from which there is no return.” Cryptosystem ME5, “The NSA's ECHELON System,” <http://www.hermetic.ch/crypto/echelon/echelon.htm> (visited 8/11/05).

Direct governmental intimidation of speech is only one side of the equation. Intimidation is also occurring on the non-governmental level. This is reflected in the fact that communication in American culture has become characterized by deceit, propaganda, “shout-downs” and intolerant argumentation rather than actual rational and fact-based discourse.³¹ It is on this level where concerted private interests bring pressure on targeted persons or interests and impose consequences on anyone voicing a disfavored opinion. At a minimum we must confront the extent to which we have suppressed free speech in the name of admirable causes. We must recapture the willingness to be insulted and to “call a fool a fool” or even to be one.

The point is that Western societies must not give in to the tendency among courteous people to not want to offend others in areas of cultural and religious sensitivity. We should also be absolutely unforgiving when faced with interest groups threatening the use of violence if something offends them.³² Surrendering to such pressures undermines the very fabric of the Western political invention. Government’s power must not be used to support the demands of cultural and religious bigots who insist that they must not be offended. While it is indeed “bad form” to deliberately insult another, that possibility is part of participation in a democracy. Those who are unwilling to accept such a basic condition of democracy should either live in a culture whose members share their restrictive view or at a minimum not have resort to the power of government to suppress others.

An example of how government power is being abused is found in the troubling cases of Brigitte Bardot and Oriana Fallaci. After authoring a book titled *Un Cri dans le Silence* (*A Cry in the Silence*) in which she criticized the *Islamization* of Europe, Bardot found

³¹ For analysis of the shift see, Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue* (Random House, 1998).

³² I share Salman Rushdie’s disbelief at the closing of a play in the UK due to threats of violence by Sikhs who considered the play an insult to their religion. See, Lee Glendinning, “Rushdie attacks closure of Sikh play,” *The Guardian*, Monday, December 27 2004. Rushdie went into hiding for years after Ayatollah Khomeini issued a fatwa calling for his death for writing *The Satanic Verses*, criticized the British government for failing to protect freedom of expression. “It’s been horrifying to see the response,” he said. “It is pretty terrible to hear government ministers expressing approval of the ban and failing to condemn the violence when they should be supporting freedom of expression,” ...”

herself prosecuted by French authorities for her critical remarks, convicted, and fined.³³ Bardot's "crime" was based on her criticism of Muslims in France and the suggestion that they might not be the best of her country's recent imports.³⁴

Nor is Bardot alone. Following the 9/11 tragedy Italian writer Oriana Fallaci authored several books relating to the collision between the Islamic and Western worlds. The widespread popularity of these books, reflected by sales of over a million copies, indicates a substantial degree of public interest in the issues she addressed. In *The Force of Reason* Fallaci criticized Europeans for surrendering their culture to the "sons of Allah."³⁵ She was then indicted under the Italian penal code for the crime of "vilifying" religion.³⁶ Oddly enough, her main accuser--a Muslim--was himself indicted for calling

³³ For a balanced analysis of the situation regarding Bardot's "silly book" see David Orland, "Brigitte Bardot's Cry in the Silence," VDare.com, http://www.vdare.com/misc/orland_silence.htm (September 2, 2003, visited 7/28/05). Orland concludes: "Brigitte Bardot has written a fairly silly book. But it deserves to be remaindered, not prosecuted. Contemporary French political discourse being what it is, Bardot instead found herself on the best-seller list—and facing criminal prosecution. She was right about one thing: when it comes to the question of contemporary immigration, 'human cowardice knows no limits.'"

³⁴ Staff and agencies, "Bardot weeps over racism charges," Friday, May 7, 2004, *The Guardian* [online]. The report indicates: "The French actor Brigitte Bardot yesterday broke into tears after defending herself against racism charges in a Paris courtroom. The ageing icon is charged with inciting racial hatred in her best-selling book, *Un cri dans le silence* (*A Cry in the Silence*). The book, which topped French non-fiction best-seller lists last year, contains inflammatory rhetoric on immigration, homosexuality, the role of women in politics and unemployment. . . . Bardot has written that she opposes the "Islamisation of France" - referring to the five million Muslims resident in the country. This is not the first time she has faced legal proceedings for her controversial views - she accrued two fines for outspoken opinions and for making comments about "sheep-slaughtering Muslims" in the 90s." [She was found guilty of a criminal offense and fined]. See also, Polly Toynbee, "Get off your knees: Afraid of being labelled Islamophobic, the left has fallen into an embarrassed silence on religion. We must speak up," Friday, June 11, 2004, *The Guardian* [online]. Jon Henley, "Jail sentence for sexist insults under new French law," Thursday, June 24, 2004, *The Guardian* [online].

³⁵ Among her comments deemed offensive were: "Europe is no longer Europe, it is 'Eurabia,' a colony of Islam, where the Islamic invasion does not proceed only in a physical sense, but also in a mental and cultural sense. Servility to the invaders has poisoned democracy, with obvious consequences for the freedom of thought, and for the concept itself of liberty." . . . "You cannot survive if you do not know the past. We know why all the other civilizations have collapsed--from an excess of welfare, of richness, and from lack of morality, of spirituality." . . . "The moment you give up your principles, and your values . . . the moment you laugh at those principles, and those values, you are dead, your culture is dead, your civilization is dead. Period." <http://www.worldmagblog.com/blog/archives/015541.html>

June 23, 2005/ visited 7/11/05. "How civilizations die," Posted by Veith at June 23, 2005 02:04 PM.

³⁶ Serge Trifkovic writes that: "Twenty years ago, there were voices in the West – even eminently enlightened, anti-racist, post-nationalist, liberal voices – raising concerns and wondering what sense is there in respecting those [conservative Muslims] who don't respect us, what sense is there in defending their culture when they scorn ours. The reaction back then was the same as today. When Italian writer Oriana Fallaci declared 'I want to defend ours and I am informing you that I prefer Dante to Omar Khayam,' the sky came crashing down. They crucified her: 'Racist! Racist!' And she was a color-blind, ultra-tolerant, diversity-conscious Leftist! Lesser brave souls naturally preferred to remain silent." Trifkovic, "Islam's Immigrant Invasion of Europe," *FrontPageMagazine.com*, January 6, 2003, <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=5239> (visited 9/7/05).

the Roman Catholic Church a “criminal organization” and also sought to have crucifixes removed from Italian hospital rooms because it was an offense to Islam.³⁷

The persecution of Brigitte Bardot and Oriana Fallaci is symptomatic of an epidemic of political repression sweeping through the West. Much of it is being generated by the combination of violent Islamist jihadism and the incompatibility of important elements of Muslim culture and the Western idea of the Rule of Law.³⁸ The prosecutions of these two women violate their basic human rights of free expression.³⁹ Their attempt to bring into the light of public discourse the profound transformation of European societies caused by the influx of large numbers of new residents and citizens from radically different cultures and belief systems is an act of political courage.

³⁷ See Tunku Varadarajan, “Prophet of Decline: An interview with Oriana Fallaci,” *WSJ.com Opinion Journal*, 6/23/05, <http://www.opinionjournal.com/forms>, visited 6/23/05. See also, John Hooper, “Anti-Islamic Italian author in new legal fight: Long-running battle over post-9/11 books pits freedom of speech against respect for religious belief,” *The Guardian* [online] Wednesday July 13, 2005. A contrary view voiced shortly after the publication of one of Fallaci’s most recent tracts is offered in, Sophie Arie, “Anti-Islamic books’ success fuel fears of racism in Italy,” *The Guardian* [online], Saturday, August 7, 2004. Arie writes: “Human rights groups warned yesterday that racism was becoming increasingly tolerated in Italy after the country’s biggest-selling newspaper published a book by a veteran journalist which warns of an Arab invasion of Europe. The 126-page tract by Oriana Fallaci appeared on newsstands with the *Corriere della Sera* newspaper. In the book Fallaci makes sweeping criticisms of authorities for failing to stop Europe becoming “Eurabia” and “a colony of Islam”, in a stealthy process she describes as the “burning of Troy”. ‘This kind of argument does a lot of damage,’ said Luciano Scagliotti, head of the Italian branch of the European Network Against Racism. ‘We are very worried. Fallaci and others like her are using their popularity to create hatred. She is effectively telling thousands of people they must chase the Arabs out of Europe. [continuing] ‘It’s a kind of racism that was unacceptable in Europe until a few years ago. Now, with this kind of publication, it is becoming acceptable. The more these books are published the more people even feel urged, encouraged and justified in wanting to chase the ‘enemy’ out of Europe. [adding] ‘It’s exactly the same thing we saw in Italy when the laws were brought in against the Jews in 1938.’ ”

³⁸ This includes the UK. See, Press Association, “Religious hatred bill unveiled today,” *The Guardian* [online], Thursday, June 9, 2005. It reports: “The home secretary, Charles Clarke, will today publish a controversial bill banning incitement to hatred on the basis of religious belief, which opponents believe will outlaw religious jokes and curtail free speech. The racial and religious hatred bill will extend current offences on incitement to racial hatred under the 1986 Public Order Act to cover the stirring up of hatred against people of any religious faith. The offence will carry a maximum seven-year jail sentence. The government argues the present law is unsatisfactory because it covers followers of some faiths, such as Jews and Sikhs who are also considered as racial groups, while giving no protection to Muslims, who come from many racial backgrounds. The proposal has come under attack from critics, including the comedian Rowan Atkinson, who argue it will undermine free speech by inhibiting discussion of religion. They cite recent furores over BBC2’s televising of Jerry Springer - The Opera and Sikh protests against the play *Behzti* as indications that religious groups have taken the government proposals as a green light to try to stamp out critical or irreverent commentary on their faith. Mr Clarke insists that the legislation will penalise only the incitement of hatred, and that satire, criticism and jokes will still be allowed. Although the legislation has won support from many religious groups, not all faith representatives back it. A spokesman for the Evangelical Alliance has warned that it could ‘damage community relations and usher in a new climate of illiberalism and repression’ ”.

³⁹ The *Universal Declaration of Human Rights* (UDHR) provides for freedom of belief and expression in Articles 18 and 19. Article 18 states: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” Article 19 provides: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

In American legal terms, Bardot and Fallaci are the victims of governmental variations on the tactic referred to as “Strategic Lawsuits Against Public Participation”.⁴⁰ SLAPP suits are bad-faith, preemptive lawsuits—in the case of Bardot and Fallaci criminal prosecutions--used to silence critics by imposing significant costs and raising the possibility of draconian consequences unless those critics abandon their positions. In a SLAPP suit the initiating litigant essentially says, “if you do not do what I want you will experience great stress and pain, and it will cost you a great deal of money to defend yourself.”

The intended result of the SLAPP strategy is silence and intimidation. It is a silence caused by the risk of civil liability or, as with Bardot and Fallaci, by the criminalization of their attempt to discuss fundamental social issues. The prosecutions of Bardot and Fallaci are a gross misuse of the power of government. The unsettling effect for a democratic society is that the result is not only the silencing of specific speakers such as Bardot and Fallaci but the preemptive repression or “chilling” of others’ speech.⁴¹

The use of criminal prosecutions against Bardot and Fallaci is unfortunately not even close to being the most intimidating strategy currently in use. Others range from the “Cartoon Riots” in which an entirely innocent Catholic nun was murdered in the name of Allah and embassies set on fire to threats, boycotts, lawsuits and public accusations of *Islamophobia* and bigotry.⁴² Islam may well be a “religion of peace” as is claimed by

⁴⁰ In describing the process, one website states: “Generally, a ‘SLAPP’ is a (1) civil complaint or counterclaim; (2) filed against individuals or organizations; (3) arising from their communications to government or speech on an issue of public interest or concern. SLAPPs are often brought by corporations, real estate developers, government officials and others against individuals and community groups who oppose them on issues of public concern. SLAPP filers frequently use lawsuits based on ordinary civil claims such as defamation, conspiracy, malicious prosecution, nuisance, interference with contract and/or economic advantage, as a means of transforming public debate into lawsuits. Ultimately, most SLAPPs are not legally successful. Nevertheless, while most SLAPPs do not succeed in court, they ‘succeed’ in the public arena. This is because defending a SLAPP, even when the legal defense is strong, requires a substantial investment of money, time, and resources. The resulting effect “chills” public participation in, and open debate on, important public issues. This chilling effect is not limited to the SLAPP defendants -- other people refrain from speaking out on issues of public concern because they fear being sued for what they say.” California Anti-SLAPP Project, “Survival Guide for SLAPP Victims,” <http://www.casp.net/survival.html#what> (visited 7/28/05).

⁴¹ “[John Stuart] Mill was a pioneer in seeing, with the growth of social egalitarianism and mass culture, the shadow of “an oppressive yoke of uniformity in opinion and practice.” Max Lerner ed., *Essential Works of John Stuart Mill* 250 (Bantam 1961). Compare this with Jung’s point that: “[T]he gift of reason and critical reflection is not one of man’s outstanding peculiarities, and even where it exists it proves to be wavering and inconstant, the more so, as a rule, the bigger the political groups are. The mass crushes out the insight and reflection that are still possible with the individual, and this necessarily leads to doctrinaire and authoritarian tyranny....” *The Undiscovered Self*, *supra*, n. .

⁴² See, Amelia Hill and Anushka Asthana, “Nigeria cartoon riots kill 16: Churches burned in widespread

many of its leaders. But it is undeniable that, as with Christianity over many centuries, it is not always practiced in a way consistent with that professed intent.

The challenge European societies face is compounded by the fact that their new residents are possessed of varying degrees of allegiance to the European enterprise. This difficulty is intensified because many of the new residents, as well as a disturbing number of younger second-generation Muslims who are being radicalized into militant Islam, are rejecting the responsibility to seek assimilation into their new host cultures.

It is an odd thing that even to raise the issues and to question the implications of this social transformation brings an impassioned reaction. The reaction is not characterized by informed discussion. Instead we see a firestorm of criticism indicting voices such as Bardot and Fallaci as bigots, racists, fascists and the like. Such accusations are common coin. Pym Fortuyn, for example, concerned with cultural transformation in the Netherlands and with Islam's highly questionable treatment of gays and women—he was himself gay--was painted as a right wing lunatic.⁴³ Fortuyn was murdered by an Islamic fanatic.⁴⁴ At the risk of being clichéd, what is missing in this picture—other than honesty and the increasing social inability to conduct truth-based public discourse rather than propaganda, character assassination and violence?

violence as Danish cartoonist defends publication,” *The Observer*, 2/19/06.

⁴³ Kelly Cogswell, “Mourning Pym Fortuyn,” the Gully.com, http://www.thegully.com/essays/gaymundo/020513_pim_fortuyn_holland.html (visited 9/6/05); and Kirsty Lang, Pym Fortuyn: Maverick Dutch rightwinger poised for electoral success,” Tuesday, May 7, 2002, *The Guardian* [online], (obituary). Fortuyn's concern was not whether the Dutch could accept Islam but with Islam's inability to accept the Dutch way of life. Lang reports: “Fortuyn's open gayness was fundamental to understanding his politics. His belief was that Muslim immigration undermined the society he cherished. For him, Muslims were people who hated gays, and thought women were second-class citizens. He told me: ‘I have gay friends who have been beaten up by young Moroccans in Rotterdam. We need to integrate these people; they need to accept that, in Holland, gender equality and tolerance of different lifestyle is very, very important to us.’”

⁴⁴ It is not a radical or extremist position within Islam to consider that gays should be killed. See, Nick Cohen, “Mandarins in a mess: The Foreign Office's policy on Muslim extremists is dangerous and misguided,” Sunday, September 4, 2005, *The Observer* [online]. Cohen reports on a controversy over possible admission into the UK of an influential Muslim cleric. He states: “A few weeks ago, Emma Lewis, a PR for Ken Livingstone, demanded that the gay pressure group Outrage! correct a piece on its website. The offending article had nothing to do with the capital's government or citizens. Outrage! had merely linked to a report from al-Jazeera which stated that Sheikh Yusuf al-Qaradawi, foremost theologian of the Muslim Brotherhood, had ruled that the an Arab princeling should be stoned to death if claims that he was gay were true.” The problem with the criticism is that if we are to rely on al-Qaradawi's statements on the issue it is true. Cohen notes: “The cleric has been clear and consistent about the punishment homosexuality deserves. The death penalty only seems cruel, he argues, until we understand that it is necessary ‘to keep [Islamic society] clean of perverted elements.’”

Europe, the United States, and Differing Attitudes Regarding Freedom of Expression

The United States' Constitution declares in its First Amendment that: "Congress shall make no law respecting an 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."⁴⁵

It would be naïve and inaccurate to suppose that simply because we tend to use the concept of "Western" culture, values and society, that Europe is culturally and politically homogenous or that Europe and America are identical in context, values and experiences.

The European history of speech inhibition differs from the American experience. The monarchical systems that characterized the European nations through the early twentieth century produced a legal environment in which it was dangerous and potentially fatal to criticize government. *Leviathan* brooks little or no dissent and doctrines such as seditious libel and constructive treason were fashioned to inhibit criticism.⁴⁶ Criticizing government in England was in fact considered even more problematic if the criticisms

⁴⁵ Amendment I to the U.S. Constitution reads: "Congress shall make no law respecting an 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." It has been said of the right to freedom of speech that: "[some scholars] recur to the writings of Milton and Mill and argue that protecting speech, even speech in error, is necessary to the eventual ascertainment of the truth, through conflict of ideas in the marketplace, a view skeptical of our ability to ever know the truth. A broader-grounded view is variously expounded by scholars who argue that freedom of expression is necessary to promote individual self-fulfillment, such as the concept that when speech is freely chosen by the speaker to persuade others it defines and expresses the 'self,' promotes his liberty, or the concept of 'self- realization,' the belief that free speech enables the individual to develop his powers and abilities and to make and influence decisions regarding his destiny." [footnotes omitted] *Findlaw: U.S. Constitution: First Amendment: Annotations* pg. 7 of 21. <http://caselaw.lp.findlaw.com/data/constitution/amendment01/07.html#1> (visited 8/1/05).

⁴⁶ *See, De Libellis Famosis* [(1606) 5 Co. Rep. 125a.] in which seditious libel against the King or a powerful private person could be punished because the person might seek revenge for the insult resulting in a breach of the peace and if against a governmental official could undermine the relationship between citizen and government. *See, "Consultation Paper on the Crime of Libel,"* The Law Reform Commission, Dublin, Ireland 1991, http://www.lawreform.ie/publications/data/volume10/lrc_65.html (8/24/05). It was said: "The rules in the Star Chamber developed differently from those in the common law courts. For example, it was sufficient if the libel were published to the victim only; neither did it matter whether the victim was alive or dead. Of extreme importance is the rule that truth was not a defence; indeed the contrary principle was expressed in the well-known phrase—"The greater the truth, the greater the libel." The often-cited example given to explain this is provided by Hudson—"for, as the woman said, she would never grieve to have been told of her red nose if she had not one indeed."¹¹ A true libel was therefore a "greater" one because of its greater potential to provoke a breach of the peace. This merely reinforces the obvious fact that the developing criminal offence of libel had little to do with reputation and much more to do with maintenance of the public peace."

were true than if false for the simple reason that true criticisms could not be effectively disputed and the integrity of government (or the Crown) was therefore undermined.⁴⁷ Although the rules have changed, European discourse still labors under this history of restrictions and punishment of speech.⁴⁸

These different political forms have produced a distinct psychological outlook for Americans compared with most Europeans. This is reflected in the approaches to speech and the degree of respect for governmental authority.⁴⁹ Despite some limited exceptions, free speech principles inform the American psyche to an extent beyond simple positive law.⁵⁰ Our Constitutional system generally is “felt” more as a divinely inspired quasi-religion of beliefs than law and its deep principles are more religious canon than positive

⁴⁷ It is fascinating that the doctrines relating to speech suppression and punishment have to deal with technology. The system of the Star Chamber was created independent of the Common Law courts apparently in response to the heightened capability of mass printing and the ability to spread criticism more widely than by simple rumor and word of mouth. See, “Consultation Paper on the Crime of Libel,” The Law Reform Commission, Dublin, Ireland 1991, http://www.lawreform.ie/publications/data/volume10/lrc_65.html (8/24/05), where it is stated that: “In 1476, Caxton set up the first printing press at Westminster and in 1488, the Star Chamber was set up in order to monitor and suppress criticism of Church and State, which were at that time closely interwoven. The primary libels with which it was concerned were therefore libels of a seditious or blasphemous nature. However, the Star Chamber also wished to suppress duelling, which was the fashionable means of vindicating attacks upon honour or reputation, and to this end it also punished defamatory libels i.e. libels which impugned the integrity a private individual. In 1606, the Star Chamber held in the celebrated case of *De Libellis Famosis* [(1606) 5 Co. Rep. 125a.] that it was an offence to defame the deceased Archbishop of Canterbury. The nature of the tasks of the Star Chamber and common law courts were therefore altogether different; while the Star Chamber was attempting to discourage matter which either threatened state security or might cause a breach of the peace, the common law courts were concerned with rectification of damage done to the reputation of an individual.”

⁴⁸ Constructive treason involved the offense of criticizing the Crown, speaking in favor of the King’s death or aiding his enemies. Nor should we conclude the doctrine of seditious libel has been abandoned. See, e.g., the opinions of Taschereau, J. and other jurists in *Boucher v. R.*, (Supreme Court of Canada), [1951] S.C.R. 265, where on appeal Taschereau, J. observed: “At the first hearing of this appeal, the Court did not agree as to the ingredients that are necessary to constitute the offence of seditious libel. Upon application, a new hearing was granted and heard by the full Court, and in view of the opinions now expressed by the majority, it is settled I think that generally speaking, the writings complained of must, in addition to being calculated to promote feelings of ill-will and hostility between different classes of His Majesty’s subjects, be intended to produce disturbance of or resistance to the lawfully constituted authority. “ [Taschereau continued] “But as pointed out by my brother Cartwright, there is another definition of seditious intention which I think, must be accepted. I agree with him that an intention to bring the administration of justice into hatred or contempt or to excite disaffection against it, is a seditious intention. In the present case, there is I think sufficient evidence upon which a properly instructed jury could find that there was a seditious intention.”

⁴⁹ The rightness of the protests by the collective interests and their goals of fair treatment, opportunity and non-discrimination should not mask the fact that the language used by each collective movement (and counter-movement) has been language of attack, protest and opposition—not reasoned discourse. It is language used as weapons to gain or defend power. It also includes the ability to inhibit others’ use of language. See, e.g., the controversies and strategies reflected in such situations as academic speech codes, criminalization of social discourse critical of groups with apparently heightened “sensitivities.” On such themes, see, Max Lerner, *Ideas Are Weapons: The History and Uses of Ideas* (Transition, 1991).

⁵⁰ Daniel Boorstin, *The Decline of Radicalism* (1969). Boorstin concludes: “The discovery, or even the belief that man could make his own laws, was burdensome [N]early every man knew in his own heart the vagueness of his own knowledge and the uncertainty of his own wisdom about his society. Scrupulous men were troubled to think that their society was governed by a wisdom no greater than their own.” Daniel Boorstin, *The Decline of Radicalism* 74 (1963).

law.⁵¹ In fact it is not much of a reach to perceive the nine justices of the Supreme Court as high priests of our political system. Their “bible” is the Constitution and its various canons.

The fact that Western Europe has emerged as the epicenter of efforts to suppress independent thought and criticism is consistent with the fact that American and European history and political structure create substantially different conditions and justifications for limitations on speech. From an American cultural and legal perspective, Europe’s criminalization of speech that we would consider offensive but clearly protected seems stunning.⁵² On the other hand America is moving more quickly toward the European state of thought control than we might like. The combination of explicit and implicit use of government power and private pressure to sanction those who voice unpopular positions has become a powerful force for suppressing free expression in the United States.⁵³

The conflicts produced by the tensions of free speech doctrines that promote the introduction of controversial positions in the face of dominant or quasi-fanatical interests

⁵¹ How long this will endure is open to question. “Activists have ... exploited exceptions to the First Amendment to silence voices counter to their ideology. And they have persuaded universities to impose drastic speech codes on students and faculty, turning institutions that were supposed to be bastions of free speech into enclaves of repressed speech. For example, the harassment policy of New York’s Bard College forbids conduct that ‘causes embarrassment, discomfort, or injury to other individuals or the community.’ In essence, the contrived right not to be offended is trumping the expressed right to free speech, the crown jewel of the Constitution. Instead of being places where even the most obnoxious ideas are dissected and debated, college campuses now are cloaked in self-imposed silence.” *Detroit News*, Tuesday, November 18, 2003, “Losing Liberty: *First Amendment*: Rules Stifling Free Speech Damage Democracy,” <http://www.detnews.com/2003/editorial/0311/18/a10-328173.htm>.

⁵² In *Brandenburg v. Ohio*, a Ku Klux Klan leader was convicted under a state statute for advocating “the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform...” The Supreme Court reversed the conviction. Admitting that *Whitney* was no longer controlling, the Court stated that subsequent decisions such as *Dennis* stand for the principle that: “the constitutional guarantees of free speech ... 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.” [Citing *Noto v. United States*, 367 U.S. 290, 297, 298 (1961)] the Court stated: “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.” A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.”

⁵³ See, e.g., Linda Rein, “Dixie Chicks Blacklisting: First Amendment Under Attack,” <http://www.onlisareinsradar.com/archives/001033.php> (visited 7/28/05). See, Editors of Rock and Rap Confidential, “Victims of a Republican Plot: The Dixie Chicks Cross the Road,” May 17, 2003, <http://www.counterpunch.org/dixie05172003.html> (visited 7/28/05). The authors cite a report that: “According to a story from [americannewsreel.com](http://www.americannewsreel.com) sent to RRC by former Reprise president Howie Klein, “Phone calls originating from Republican Party headquarters in Washington went out to country stations, urging them to remove the Chicks from their playlists.”

are supposedly designed into our political system.⁵⁴ James Madison captured this in his description of the inevitability of factions in America's democracy.⁵⁵ The idea is that free speech serves to protect and enrich the social community. This presumably occurs through the education of participants, and the venting of potentially explosive internal hostilities.

The concern underlying this assumption is that if conflicted discourse is repressed it builds up into unresolved conflicts that weaken the spirit of the democratic system. This is an unproven assumption about the benefits that will result if speech is allowed broadly, and an assumption that fits into a particular cultural context and philosophical worldview. The assumption, in fact, may be disputed both as to benefits and to how close we come to honoring the professed ideal, although I admit I prefer it to more dismal articulations in which the individual is submerged in the mass.

Governments in Europe and America are justifying their intrusive measures as necessary responses to an unending "global war against terror" or a permanent struggle against violent extremism.⁵⁶ Other actions are justified as prevention of insult or offense in order

⁵⁴ The assumption that reasoned discourse can be achieved in regard to any issue of intense social concern may unfortunately represent an impossible dream. Jung warns: "Rational argument can be conducted with some prospect of success only so long as the emotionality of a given situation does not exceed a certain critical degree. If the affective temperature rises above this level, the possibility of reason's having any effect ceases and its place is taken by slogans and chimerical wish-fantasies." C.G. Jung, *The Undiscovered Self* 12, 13, translated from the German by R.F.C. Hull (Mentor 1957).

⁵⁵ James Madison recognized the need to balance competing interests in his analysis of factious groups. In *Federalist No. 10*, Madison sets out the idea of faction in the following words. "By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Federalist # 10* (November 22, 1787) *The Federalist*, Edited and introduced by Jacob E. Cooke (1961), at 56. Madison goes on to describe two "cures" for faction. One is to "destroy the liberty" that allows it to bloom, the other is to give "to every citizen the same opinions, the same passions, and the same interests." *Federalist # 10, id.*, at 58.

⁵⁶ The words of Robert LaFollette voiced on the floor of the United States Senate in 1917 state my position as well as any. Under savage public criticism for being one of six Senators voting against going to war he confronted the dominant mood of the day, offering the following words: "I think all men recognize that in time of war the citizen must surrender some rights for the common good which he is entitled to enjoy in time of peace. But, sir, the right to control their own Government according to constitutional forms is not one of the rights that the citizens of this country are called upon to surrender in time of war. Rather, in time of war, the citizen must be more alert to the preservation of his right to control his Government. He must be most watchful of the encroachment of the military upon the civil power. He must beware of those precedents in support of arbitrary action by administration officials which, excused on the pleas of necessity in war time, become the fixed rule when the necessity has passed and normal conditions have been restored. More than all, the citizen and his representative in Congress in time of war must maintain his right of free speech." Robert M. La Follette, "Free Speech in Wartime (Abridged)," delivered October 6, 1917. This version taken from Ronald F. Reid, *American Rhetorical Discourse* second edition, published in 1995 (Waveland Press: Prospect Heights, IL) 702-705.

to preserve the harmony or tranquility of the social order. In such a cultural climate it is easy to accept the proffered justifications for the need for controlling speech, avoidance of troubling associations, and the need for enhanced governmental monitoring not to interfere with citizens' lives but to protect them.⁵⁷ Security, after all, can be argued to be the first obligation of government.⁵⁸

Part of the "rational discourse as the core of democracy" argument is obviously flawed. It is impossible to have fully rational discourse in a complex community. Emotions, ignorance, bias and self-interest all erect barriers to discourse and they are barriers we seldom if ever transcend in any matter of consequence. It may be impossible to have real discourse relating to issues of core social behavior and belief because the deep value systems upon which our individual systems of ultimate truths are grounded are not rational or even necessarily consistent with other clusters of belief containing potentially competing deep-values.

The inability to have truly productive discourse on most of the issues that matter stems from the fact that we hold our value systems in independent clusters that operate according to their own rules and assumptions. While we might prefer to think we are fully rational beings the reality is quite different. Our conceptual structure is not an integrated and seamless whole but a patchwork of tradition, assumptions and biases depending on the particular issue involved. This allows the holding of incompatible beliefs because each "cluster" tends to operate according to its own rules and imperatives. Rather than full rationality based on good evidence this allows an individual core belief system to resist being "infected" by fact and evidence of a kind not compatible with its

⁵⁷ A surprisingly honest admission that incursions into civil liberties are nonetheless likely was made by the head of Britain's MI5. Richard Norton-Taylor, "MI5 head warns of liberties trade-off to fight terror," Saturday, September 10, 2005, *The Guardian* [online]. The report states: "Dame Eliza Manningham-Buller, has publicly warned that civil liberties may have to be eroded to prevent future terrorist attacks in Britain.... Dame Eliza said she recognised rights had been hard fought for. 'But the world has changed and there needs to be a debate on whether some erosion of what we all value may be necessary to improve the chances of our citizens not being blown apart as they go about their daily lives.' Dame Eliza described what she calls a 'central dilemma - how to protect our citizens within the rule of law when intelligence does not amount to clear-cut evidence and when it is fragile'. It is in this context that she warned of the potential erosion of civil liberties."

⁵⁸ The UK's Home Office website at <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/>, contains links to the "Terrorism Act 2006"; "The Prevention of Terrorism Act 2005"; "AntiTerrorism, Crime and Security Act 2001"; and the "Terrorism Act 2000." It also links the reader to "Checks on terrorism laws" based on the admission that: "Terrorism laws must strike a delicate balance between providing effective tools to investigate and prevent terrorism, while ensuring that our civil liberties are not unnecessarily infringed." (visited 4/5/07).

terms.⁵⁹ One of the hardest and most troubling questions we should try to answer is, if full and honest discourse is no longer possible do we fight to keep that ideal or restructure the doctrines of the community to reflect the new reality of group politics?⁶⁰

The ideal of free speech is also intended to provide benefits at the level of the individual through the facilitation of individual development. The presumed social benefits are indirect, i.e., that a society comprised of “developed” humans is a qualitatively richer society. This advances the idea represented by Aristotle’s idea of *eudaimonia*, or human flourishing, in which a primary function of the State was to create conditions conducive to the maximum qualitative development of individual humans. The understanding was that a community of the most progressive individuals seeking to attain their maximized potential as humans would automatically be the best community.⁶¹ This principle is reflected in the words of Justice Brandeis, concurring in *Whitney v. California*:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the

⁵⁹ Thomas Green, *The Activities of Teaching* 43 (1971).

⁶⁰ See also Thurman W. Arnold, *The Folklore of Capitalism* 9-10 (1967);

The creeds of these countries [the United States, Germany, Russia, and Italy], of course, do not describe or explain the events taking place there. . . . The lessons of history are used in the same way. Men do not actually search history to avoid the mistakes of the past. They seek convenient analogies to show the dangers in failing to adopt the creed which they advocate. The legal or economic prophet of today sincerely believes that he is using a process of analysis and reason to help the thinking man in a voluntary choice of a political or economic creed.

But how do men actually choose these creeds? The answer is that they do not choose them. Men become bound by loyalties and enthusiasms to existing organizations. If they are successful in obtaining prestige and security from these organizations, they come to regard them as the ultimate in spiritual and moral perfection. This attitude is necessary for the morale of these institutions.

⁶¹ See, Aristotle, *Nicomachean Ethics*, c. VII, Bk. I, for his description of *eudaimonia* or human flourishing. One scholar sums it up as: “Aristotle teaches that each man’s life has a purpose and that the function of one’s life is to attain that purpose. He explains that the purpose of life is earthly happiness or flourishing that can be achieved via reason and the acquisition of virtue. Articulating an explicit and clear understanding of the end toward which a person’s life aims, Aristotle states that each human being should use his abilities to their fullest potential and should obtain happiness and enjoyment through the exercise of his realized capacities. He contends that human achievements are animated by purpose and autonomy and that people should take pride in being excellent at what they do. According to Aristotle, human beings have a natural desire and capacity to know and understand the truth, to pursue moral excellence, and to instantiate their ideals in the world through action.” See, Edward W. Younkings, “Aristotle: Ayn Rand’s Acknowledged Teacher,” *The Autonomist*, <http://usabig.com/autonomist/articles/aristotle.html>. 8/24/05.

discovery and spread of political truth; that without free speech and assembly discussion would be futile....⁶²

Justice Brandeis's words compel us to confront the core of our dilemma. Ours is now, and perhaps if we are honest we should admit it always has been to some degree, a culture in which positions are too often taken and held regardless of evidence. Critics of the favored positions are attacked with contempt and propaganda.⁶³ This occurs in many venues. We have always had a wide variety of techniques by which we repress speech in America. But, even if the ideal of honest discourse has often been honored in the breach, the intensity and scale of speech repression has grown.⁶⁴

The Right to “*Call a Fool a Fool*”

Guardian columnist Polly Toynbee has argued for the importance of preserving our “right to offend a fool.” I agree with her viewpoint but would add that it is equally important to not restrict the right to be a “fool” in one’s speech and to allow ignorant and stupid remarks as well. There are of course limits to speech and the most obvious are the classic ban against falsely “shouting fire in a crowded theater,” the incitement to violence, overt sexual harassment, libel, protection of government secrets, or the plotting of criminal conspiracies. These restrictions clearly generate some kind of “chilling effect” on what we say and the sanctions that attend their violation are intended. I argue that those categories are as far as we ought to go in the arena of inhibiting political speech. Other limits are simply too susceptible to abuse, create divisiveness, and produce an undesirable expansion of governmental power.

⁶² *Whitney v. California*, 274 U.S. 357 (1927).

⁶³ Consider, for example, the unfortunate episode involving Harvard President Lawrence Summers' comments on possible differences in scientific ability. For weeks afterward there were numerous and well-organized calls for his firing. It is only fair to review the entire presentation before lynching Summers. He subsequently apologized if he offended anyone. See, “Remarks at NBER Conference on Diversifying the Science & Engineering Workforce,” Lawrence H. Summers, Cambridge, Mass., January 14, 2005. A telling critique of such criticisms is found in Charles Murray, “The Inequality Taboo,” *Commentary*, September 2005, http://www.commentarymagazine.com/article.asp?aid=12002015_1 (visited 9/5/05). See also, Harvey Mansfield, “Fear and Intimidation at Harvard: What do academic women want?”, *The Weekly Standard*, March 7, 2005, v. 10, Issue 23.

⁶⁴ On this theme see, Diane Ravitch, *The Language Police: How Pressure Groups Restrict What Students Learn* (New York, Alfred A. Knopf 2003); and David E. Bernstein, *You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws* (Washington, Cato Institute 2003). See also, Dawn C. Nunziato, “The Death of the Public Forum in Cyberspace,” 20 *Berkeley Technology L. J.* 1115 (2005).

It is a dangerous time for Western society because our traditional rules are no longer entirely applicable. But the assumptions ought to be in favor of allowing speech and the burden of proof whenever speech is sought to be restricted must be a strong one borne by those who seek to restrict free expression. This does not mean that people who engage in contemptible speech behavior are not appropriately thought of as boors, bigots, racists and the like. But it does mean that “speech crimes” or an expansion in civil suits backed by governmental authority are not the way the ends of tolerance should be pursued.

Conspiracies and other attempts to incite to violence are appropriate targets but they are a special category. Except in very specific circumstances the criminalization of criticism and grant of litigation rights to supposedly offended parties—even if that criticism is ignorant, mean spirited or foolish—is likely to produce more divisiveness and ignorance than without such laws.

Laws become weapons and those against whom they are originally directed learn quickly how to turn them on their opponents. The law of unintended consequences came into play following the recent *Islamic Council of Victoria v. Catch the Fire Ministries* decision in Australia.⁶⁵ Amir Butler, the executive director of the Australian Muslim Public Affairs Committee (AMPAC) and one of the original supporters of the anti-vilification law applied in the decision, soon wrote that he had come to agree with its critics that it was a “bad law.” I offer Mr. Butler’s comments at length because it is important to understand the destructive effects suppression of speech has on society and the extent to which such laws expand government power in ways that are dangerous for the health of democratic systems.

Mr. Butler explains the reasoning behind his conversion:

As someone who once supported their introduction and is a member of one of the minority groups they purport to protect, I can

⁶⁵ See, *Islamic Council of Victoria v. Catch The Fire Ministries Inc.*, Victorian Civil and Administrative Tribunal (VCAT), 2005 VCAT 1159, VCAT Reference No. A392/2002; applying Racial and Religious Tolerance Act 2001 (Vic.).

say with some confidence that these laws have served only to undermine the very religious freedoms they intended to protect. At every major Islamic lecture I have attended since litigation began against Catch the Fire Ministries, there have been small groups of evangelical Christians - armed with notepads and pens - jotting down any comment that might later be used as evidence in the present case or presumably future cases.⁶⁶

Butler laments:

The organisations being targeted by these evangelical Christians are neither involved in nor supported the legal action by the Islamic Council, and yet must now suffer the consequences of having their publications and public utterances subjected to a ridiculous level of scrutiny and analysis. The hope being, I assume, that some elements of the Christian community might exact revenge on the Muslim community by way of their own vexatious legal actions.⁶⁷

An epiphany was apparently achieved by Mr. Butler when he recognized “as long as religions articulate a sense of what is right, they cannot avoid also defining - whether explicitly or implicitly - what is wrong.”⁶⁸ Yet this also indicates the problem. Each religion possesses a system of right and wrong. But that does not mean it has the privilege of imposing its beliefs on others or that its belief system is not subject to criticism by those who do not share it. The values in the West rely on the necessity for tolerance of others’ views and acceptance of others’ right to hold their views.

It is a serious problem that many people confuse the idea of tolerance in a democratic system with respect for behavior, creed or religious belief. Respect for the substance of the views is quite a different matter from being willing to tolerate another’s beliefs. I am quite happy to tolerate expressions of religious piety whether Christian, Jewish or Islamic but have very little respect for collective religious actions or external expressions of faith. Taken much beyond a minimalist display I see such things as posturing and weakness or

⁶⁶ “Why I’ve Changed My Mind On Victoria’s Anti-Vilification Laws,” Amir Butler <http://www.onlineopinion.com.au/view.asp?article=2274>, visited 7/11/05.
http://www.moriel.org/articles/discernment/islam/changed_my_mind_on_anti_vilification_laws.htm.

⁶⁷ “Why I’ve Changed My Mind On Victoria’s Anti-Vilification Laws,” Amir Butler, *id.*

⁶⁸ “Why I’ve Changed My Mind On Victoria’s Anti-Vilification Laws,” Amir Butler, *id.*

reflection of psychological inadequacy rather than as admirable behavior. I understand why many people need such systems and trappings as well as the feeling of membership in a collective community of believers from which they obtain a sense of identity. I understand that it is behavior that is to be tolerated in a democracy. But tolerance is far different from respect.

The problem is that some collective cultures are driven by the compulsion of the evangelical true believer. This requires them to attempt to impose their systems of belief on others unfortunate enough to be subject to their direct control. Three easy examples are provided by the Taliban, the Iranian Theocracy and the Wahhabist version of Islam mandated by the Saudi government. Their behavior is a function of political power and the successful imposition of orthodoxies without adequate countervailing pressures. When this occurs those in control are psychologically unable to resist expanding their dominance into all phases of the culture. They view this expansion as serving “God’s will” while others understand it to be the inevitable corruption of power.

This behavior not only represents the abuse of power but the preservation of power. Those in a rigid orthodoxy intuitively understand that alternative views and behaviors can create cracks in the façade of their system to the point of eventual fracture. In cultures where such orthodoxies dominate, such as Iran and Saudi Arabia, we see ministries of thought and behavioral control. They engage in this suppression of individual thought and behavior because the preferred system could not withstand the “virus” of freedom of thought and individuality of the kind that served as the Western ideal.

In cultures where the true believers are only a fragment, such as the UK, the Netherlands and France, we do not have to tolerate complete control by religious fascists of the kind they implement in the theocratic systems but face increasing demands not to be “insulted” even if the potential forms of insult are strange and amorphous and directed against behavior of a kind taken for granted in the host culture. This is a strategy of control applied to a different context in which the new society is “shaped” into a form more comfortable for the true believers. What began as a somewhat paternalistic effort

of the Western nations to act mature and civilized by trying to not be rude to new members of their societies changed character dramatically after 9/11 as the surprisingly numerous immigrant groups found their voice and began to insist they be “respected.” One reaction has been a wave of legislation aimed at regulating and suppressing speech and conduct of a kind virtually any group with political clout considers insulting.⁶⁹

The *Catch the Fire* situation is far from isolated.⁷⁰ The French cabinet proposed to the legislature a new “gay insult” law that would impose heavy fines and criminal penalties for words that an American would consider tasteless but never think of as actionable.⁷¹ Dominique Perben, the Justice Minister, asserts: “This law puts the fight against homophobia and sexism on the same footing, legally speaking, as the fight against racism and anti-semitism.”⁷² Uttering an anti-gay insult in public - including any remark “of a

⁶⁹ Professor Webley observes in trying to understand why the situation has developed as it has in the UK: “The paternalistic attitude implies cultural superiority allied with a duty to protect those who do not form part of the group deemed to be superior. This may stem from former colonial power that has given rise to inherent feelings of superiority rather than any process of reflection of why the culture may be superior. I am not sure that many would consider the matter further, i.e. balance their own behaviours against those of others and come to a decision on superiority. Maybe obvious cultural differences help to reinforce it, but I do not think they are the starting point for a decision on superiority. Political correctness is considered to be a particularly important tool in the fight against prejudice, and there are those who argue that the reason we need to legislate to protect minorities is because our culture is racist and intolerant or because we believe that it should be tolerant but we are not sure of the extent that we can trust all sections of the population be tolerant. Both sides of the debate thus see the need to regulate society so as to protect minorities. The irony is that the application of the law is perceived by some sections of the British public and the mainstream media to be often applied in a one sided fashion against white Britons’ interests, and if this feeling were to become widespread it may provoke an increase rather than a decrease in racism and religious intolerance, and thus be counterproductive. At present, there is a lively debate about whether regulation stems from political correctness or paternalism, and whether regulation is the answer. Equally the arguments for and against assimilation, integration, or multi-culturalism persist. Indeed, it may be that the concern that many of us share – the worry that the British may not be sufficiently tolerant of difference, is disproved by Britain’s explicit endorsement of multi-culturalism and the legislative protection of minority interests.” Barnhizer/Webley Notes, *supra*, n.

⁷⁰ Something analogous is transpiring in California where Governor Arnold Schwarzenegger just vetoed a legislative enactment that would have made it illegal to comment negatively on gays or lesbians during political campaigns. The veto was not based on any opposition to gays and lesbians but to Governor’s assessment of the need for free speech and his belief that the appropriate methods of dealing with such comments, if any were made, were the reaction of voters at the ballot box or through the courts in the application of the state constitution. The report notes: “Gov. Arnold Schwarzenegger has vetoed a bill that would have required candidates who sign a code of fair campaign practices to refrain from using negative references to a person’s sexual orientation or gender identity. Assemblyman Leland Yee, D-San Francisco, said his bill was needed to discourage political campaigns that create fear and intimidation and could lead to violence.” Schwarzenegger stated: ‘I trust the people to be the best judge of conduct of a campaign when they exercise their franchise to vote,’ he said in a veto message. ‘I am confident that they will reject candidates that use appeals to negative prejudices against any group of people.’ ” See, Associated Press, “Governor vetoes anti gay-bashing measure,” September 7, 2005, <http://www.freerepublic.com/focus/f-news/1479528/posts>.

⁷¹ Jon Henley “Jail sentence for sexist insults under new French law,” Thursday, June 24, 2004, *The Guardian* [online].

⁷² Henly, *id.*

more general nature tending to denigrate homosexuals as a whole” could result in a fine of up to euro 22,500 and six months in jail.⁷³

While the use of law to intimidate us is on the rise, bowing our heads to private violence is a constant problem. The threat is real and the danger is significant. This includes the brutal murders of Piet Van Gogh and Pym Fortuyn in Holland and the use of threats of violence to close plays in Amsterdam and London.⁷⁴ Van Gogh made the mistake of criticizing Islam’s treatment of women, while Fortuyn urged that Holland place limits on Muslim immigration.⁷⁵ Fortuyn’s point was that Islam’s condemnation of gays was a dangerous and unacceptable form of intolerance and also questioned the treatment of women in some forms of Islam.⁷⁶ He also sought to have immigrants educated in the

⁷³ Henly, *id.* France and Italy not the only countries where anti-vilification laws are being used to punish critics. See, e.g., *Islamic Council of Victoria [Australia] v. Catch the Fire Ministries*, where two *Catch the Fire* ministers were convicted under the newly amended law and ordered to publicly apologize for their statements. Danny Nalliah, one of the convicted pastors, stated publicly that he would not obey the court order, stating: “Right from the inception we had stated that this law is a foul law. This law is not a law, which brings unity - it causes disunity. And as far as we are concerned, right from the beginning we have stated we will not apologise. We will go to prison for standing for the truth.” Ben Knight, “Pastors refuse to apologise for vilification,” Australian Broadcasting Corporation, broadcast 6/22/05, <http://www.abc.net.au/lateline/content/2005/s1398445.htm>. visited 7/11/05.

⁷⁴ The problem for those who seek free speech is that violence works. See, e.g., Nicholas Watt, “Murdered director’s film shelved,” *The Guardian* [online], Tuesday February 01, 2005. “The screening of a film by Theo van Gogh, the Dutch filmmaker murdered by an alleged Islamist extremist last November, has been called off amid fears of violence. Organisers of the Rotterdam Film Festival had hoped to screen the film *Submission*, which criticises Islam’s treatment of women, over the weekend. But they decided not to go ahead on the advice of the police after receiving threats. ‘The decision not to show *Submission* was made on the basis of security concerns,’ the film rights holder, Column Productions, said in a statement. Written by Ayaan Hirsi Ali, a member of the Dutch parliament who is under armed guard, the film uses words of the Koran written on women’s bodies to denounce the oppression of women. The film brought protests when it was shown on television last August. Other filmmakers were angered by the cancellation of the screening. ‘Theo van Gogh was murdered by a Muslim extremist because he directed a short film,’ said a statement printed by inter national filmmakers at the festival. ‘Freedom of expression is under threat.’ The cancellation of the screening came amid reports that a Moroccan-Dutch painter has gone into hiding after an exhibition of his work opened on January 15 in Amsterdam. Rachid Ben Ali reportedly received death threats from groups who were angered by his work, which satirised Islamist militants.”

⁷⁵ See, Andy Armitage, “Flame and Fortuyn,” *Gay and Lesbian Humanist*, Summer 2002, <http://www.galha.org/glh/214/fortuyn.html> (visited 9/6/05).

⁷⁶ Jay Reeves, “Unrepentant Rudolph Gets Life Sentence,” *Associated Press*, 7/18/05. Nor is Van Gogh’s murderer the least remorseful. See, Toby Sterling, “‘I killed Van Gogh and I’d do it again’: Accused says religious conviction led him to murder film-maker,” *The Guardian* [online], Wednesday July 13, 2005. In court and turning to speak to Van Gogh’s mother, Anneke van Gogh, he announced: ‘I don’t feel your pain,’ he said. ‘I have to admit I don’t have any sympathy for you. I can’t feel for you because I think you’re a non-believer.’” Pakistan’s response to a report on the murder shows the incredible gap between the West and Islamic “republics.” See, Associated Press, “Pakistan bans Newsweek issue reporting Dutch killing,” *The Guardian* [online], Saturday, November 27, 2004. It was reported that: “Pakistani authorities have banned the latest issue of Newsweek magazine for publishing material they said was offensive to Islam... A government official in Islamabad had ordered the ‘forfeiture of all copies of the weekly Newsweek of November 22’, the state-run agency Associated Press of Pakistan reported. It did not name the official. The edition published ‘objectionable remarks which [were] tantamount to desecration of the Qur’an’, Islam’s holy book, the agency said. The report said authorities were considering legal action against the magazine but gave no details.” “Under Pakistan’s blasphemy law, anyone convicted of insulting Islam, its prophet Muhammad or the Qur’an can be sentenced to death. The News said the article was ‘blasphemous and highly provocative.’” Perhaps truth is no defense to blasphemy.

democratic values of Western nations, ironically a strategy that has subsequently been adopted by France as part of the civic and language training of Muslim clerics who preach in that country.⁷⁷

It has become a culture whose intelligentsia and political leaders are driven by a value of “don’t offend anyone” on the one hand, and “don’t you dare say anything I don’t like!” or “you’ll be sorry” on the other. We have gone too far in allowing identity groups to be “thin skinned” and creating authoritative mechanisms by which their “sensitivities” can be protected. I argue that people do not have the right in a democratic system to be free from insult, and that allowing legal sanctions against insult kill the spirit of democracy.⁷⁸

The idea that it is courteous to avoid hurting others’ sensitivities is something most of us would agree is the strongly preferred way to behave on a person-to-person basis in a civilized society. In political discourse, however, through which we form our decisions about desired courses of action for the society, fools should be called to account and offended whenever possible. This is one of the few ways we have to break through the murk of spin and counterproductive “politeness” that dominates our communication.

⁷⁷ Leader, “Nationalising Islam,” *The Guardian* [online], Friday December 10, 2004. “This week’s call by the French government for imams to undergo university training in civil law, history, language and culture is an important moment for Europe’s faltering attempts to try to engage with its Muslim citizens. The country with the continent’s largest Muslim population, whose secular state is a hallowed principle - and which imposed the controversial ban on wearing the hijab in schools - has decided it must try harder.” See also: Jon Henley, “Imams to be taught French way of life: Minister wants to build ‘western Islam’ through education,” *The Guardian* [online], Wednesday, December 08, 2004. “Muslim prayer leaders in France are to be offered university training in French law, civics, history and culture from next autumn as part of a bid to build a moderate ‘French Islam’ that respects human rights and the Republican code, the interior minister said yesterday. The courses, available initially at two university campuses in Paris will be accompanied by intensive French language lessons if necessary. Both current and future imams will be encouraged to enrol, Dominique de Villepin said in a newspaper interview. ‘Today, of the 1,200 imams who practise in our country, 75% are not French and one-third do not even speak our language,’ Mr de Villepin told the daily *Le Parisien*. ‘This is not acceptable. In France we should have French imams, speaking French.’” See also, Leader, “Towards a British Islam,” *The Guardian* [online], Thursday, April 1, 2004.

⁷⁸ See, e.g., Polly Toynbee, “My right to offend a fool: Race and religion are different - which is why Islamophobia is a nonsense and religious hatred must not be outlawed,” *The Guardian* [online], Friday June 10, 2005. One of my favorite columnists, she captures the consequences of such restrictive laws: “Laws change cultural climates: it’s what they are for. Religion will become out of bounds in many spheres. Schools, universities, the arts, broadcasting, will feel social pressures that induce self-censorship. A small example: if you wonder why there have been no penetrating exposes of cults like Scientology in recent years, it is because they have sued so often that the media caved in - fear of litigation outweighs the story. That is how the law cast its shadow.” In words that echo Amir Butler’s recanting of his faith in the Australian anti-vilification law following the *Catch the Fire* decision, Toynbee suggests: “The irony is that those spending most time in the courts will be the religious themselves. A similar law in Australia brought a burst of litigation and demands for arrests from one bunch of fundamentalists against another. Hate-filled evangelicals were creeping into mosques to take notes on imams’ hate sermons. So extreme Jews, Muslims, Hindus, papists and Paisleyites will all challenge each other’s fiery thought crimes while the Bible and the Qur’an incite enough religious hatred to be banned outright.”

This may be personally hurtful to the people shamed, but it is not divisive to the society to shame someone due to their own refusal to do the hard work necessary to reach the conclusions and interpretations they unhesitatingly offer as truth. Shame, understood as the manifestation of guilt over the violation of right behavior, is important for managing society.⁷⁹ But transforming a principle of basic courtesy into a strong legal rule in which sanctions flow from violating the new *legally imposed courtesy* is unwise, intolerant and repressive. It is unfortunately a deliberate strategy of the extremists who dominate the Right and the Left in America and Europe.

If we allow a culture of either hard or soft repression working through strategies ranging from law to private violence to emerge in which independent thinking and honest critical discourse between peoples of different identity groups seeking to advance competing agendas is undermined, then we have sabotaged the basis of democratic society.⁸⁰ Everything then becomes a product of power. Of course, there is some speech that is just plain silly and some is nasty. No one should be foolish enough to think that from a substantive point of view all speech is valuable. But the process of allowing and

⁷⁹ On such matters see, Roger Kimball, "Does Shame Have a Future?" *The New Criterion*, <http://www.newcriterion.com/archive/23/sept04/shame.htm> (visited 9/4/05), criticizing Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law*, and Martha C. Nussbaum, "Danger to Human Dignity: The Revival of Disgust and Shame in the Law," *Chronicle of Higher Education*, 8/6/04, <http://chronicle.com/free/v50/i48/48b00601.htm> (vis. 9/4/05). Nussbaum takes the position that shame and disgust are inappropriate in a liberal society while Kimball's rather tongue in cheek response warns: "Professor Nussbaum doesn't confine herself to mere pragmatic issues, such as whether a given policy in fact reduces crime. Her objection is more fundamental. 'Shaming penalties,' she notes, 'encourage the stigmatization of offenders, asking us to view them as shameful.' Er, yes: they would have that effect, wouldn't they? *Hiding from Humanity* is full of such near tautologies. You do something bad, something, in fact, that is shameful. The legal punishment calls attention to your bad, your shameful, action, partly in order to encourage you to reflect on your fault, partly to alert others to it. Is that a bad thing?" Kimball scathingly concludes: "*Hiding from Humanity* is not only a polemic against the emotions of shame and disgust. It is also a political position paper. Professor Nussbaum is such a ferocious opponent of shame and disgust because she is such a passionate proponent of many things that shame and disgust recoil from. It is ironic that in a book which is partly an attack on "the grandiose" Professor Nussbaum should harbor such a grandiose agenda for social change. From public nudity to poverty, the global AIDS crisis, and homosexual marriage, Professor Nussbaum has embraced the entire menu of politically correct causes." See also, Dennis H. Wrong, *The Problem of Order: What Unites and Divides Society* (Free Press 1994), and Anne Hendershott, *The Politics of Deviance* (Encounter 2002).

⁸⁰ On this theme see, Will Hutton, "A gagging order too far: If it becomes illegal to criticise religious belief, we will lose a precious freedom. And that will not help Muslims," Sunday June 19, 2005, *The Observer* [online]. Hutton reports in a well-reasoned essay that: "the Racial and Religious Hatred Bill has been reintroduced, a seemingly more than justified response to what is actually happening on our streets [increasing reports of abuses directed toward Muslims]. Inciting hatred over someone's religion is to have the same status as inciting hatred for their race, a provision expressly formulated to deal with the Muslim issue. [He adds] It all sounds extremely reasonable, but it isn't. It has crossed another line that is no less dangerous in a liberal society. To incite or express hatred for someone because of the colour of their skin is plainly unacceptable, but to put the expression of views about religion in the same off-limits territory, even if only in tightly drawn circumstances where they incite hatred, is wrong. By protecting belief systems from criticism, it challenges the very heart of why and what we are."

encouraging the free flow of political speech is essential.⁸¹ Unfortunately the system is “out of whack.” An imbalance has developed in which there are virtually no constraints on what might be said by anyone advocating a politically favored position while laws and policies are being created that punish anyone who dares to question the new orthodoxies.

A consequence is that a great deal of absurd speech comprised of banal and even false assertions is tolerated or even taken as a form of gospel if it is consistent with the dominant ideology or a favored special interest group. Under this system, silly, irrational and even violent ideologues are accorded more respect than thoughtful analysts. The primary criterion for valuation is the allegiance of the speaker rather than the substance or wisdom of the person’s speech. Substantive, critical speech that contradicts the “silliness” may be inappropriately sanctioned through formal and informal means.

A driving force behind the increased use of law and the growing political power of identity collectives to silence critics is that we are no longer satisfied to look at the boors and bigots, judge them deficient and then go on with our lives.⁸² Unfortunately even this is understandable because we have lost real standards for critique and now judge nearly everything on the basis of associational endorsements or opposition. Another serious difficulty, however, is that the power of a general community to influence and control behavior has dissipated. As our societies have become mixed, diverse, disconnected and anonymous the connecting links and shared values have eroded. Most people in the West no longer limit their conduct according to some generally shared moral norms that are enforced by the overall community where the violation of which will result in shaming responses by a reference group valued by the actor.

⁸¹ Although I understand the motivation, one of the first organized non-governmental strategies for sanctioning speech that a group of activists considered inappropriate is the Anti-Defamation League. Consider this description of its mission. “The immediate object of the League is to stop, by appeals to reason and conscience and, if necessary, by appeals to law, the defamation of the Jewish people. Its ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens.” ADL Charter October 1913. http://www.adl.org/main_about_adl.asp.

⁸² The First Amendment Center offers the position that: “An offended person’s decision not to speak is hardly a reason to suppress the speech of others. Those who find an idea, epithet, literary work or other form of expression offensive can oppose, counteract and perhaps refute it with further speech — not by banning the speech deemed to be offensive. As Justice Louis Brandeis said in a famous quote, ‘If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.’ ” <http://www.firstamendmentcenter.org/Speech/pubcollege/faqs.aspx?faq=all>.

As the overall sense of community has fragmented special interest collectives that can be best described as factions, tribes, clans or even cults, have rushed to fill the vacuum. They do this by erecting legally enforceable norms and a system of informal sanctions to advance their agendas. The strategy includes the far too casual use of powerful accusatory devices. These include newly invented *phobias* that operate as “clubs” whose content is determined by each interest group in service of its particular agenda. Nor is the use of this strategy a trivial matter. Accusations of being “phobic” are not disprovable and produce responses as if the targeted persons were hydrocephalic dogs that ought to be “put down” or have communicable diseases that assign them to perpetual quarantine. They are used to sanction anyone who questions the motives or arguments of the special interest group. Or the accused may simply be perceived as in the way of the accusers’ path to power. “All’s fair in love or war,” and many of the interest groups see the struggles within modern society as a sort of guerrilla war.

One of our difficulties is that our understanding of common traditions and values has become attenuated. Shared cultural norms are weaker in a banal, commercialized, and almost nomadic culture.⁸³ The ties that connected us in a collaborative community in simpler times in a more homogenous and non-mobile culture are largely severed. It is impossible to maintain a sense of closely linked community in a culture of radically diverse and disconnected parts. If there is agreement it is only at the most general or superficial level and cannot stand up to real scrutiny or to allocation decisions regarding social goods in a zero-sum system.

In this vacuum of shared values many are attempting to impose their own preferred norms on our culture. They are doing this through use of law and other sanctions, as should be expected in societies governed by the Rule of Law. In such societies law is a primary means of attaining and consolidating power in a system without shared norms.

⁸³ See, e.g. Francis Fukuyama, *The Great Disruption: Human Nature and the Reconstitution of Social Order* 5 (1999). Fukuyama concludes the perceived social decay is not simply classic intergenerational myopia. He warns: “Although conservatives ... are often attacked for harping on the theme of moral decline, they are essentially correct: the breakdown of social order is not a matter of nostalgia, poor memory or ignorance about the hypocrisies of earlier ages. The decline is readily measurable in statistics on crime, fatherless children, reduced educational outcomes and opportunities, broken trust, and the like.” Fukuyama, *The Great Disruption*, *id.*

Those law-based strategies involving normative imposition seek to offer surrogates for what has been lost in the processes of our disintegrating community. The contest over whose norms dominate the culture, and thus dictate the terms of allowable communication, involves political struggles to embed preferred terms into the structure of legally allowed discourse. It also involves the ability to marginalize or extinguish the power base of those advocating for competing norms. This makes it all the more vital that we protect freedom of expression and resist its formal and informal suppression.

Interest groups are using the suppression of discourse through law as part of their power-directed strategy to *re-engineer* the new man or woman. Of course actual re-engineering is neither easy nor often even possible on any grand scale. More commonly what “we” are seeking to do is create mechanisms for thought control. This is not through successfully re-engineering people to not be racist, sexist, religionist, etc. because that is most likely impossible. Vilification laws of the kind used against Bardot, Fallaci, the *Catch the Fire* speakers and the increased invention of self-interested phobias are exacerbating the social strife.⁸⁴

A result of the phobic orientation is that, as in Orwell’s *1984*, everyone is a psychological criminal for having deviant thoughts and is subject to prosecution or other forms of persecution depending on the whim of the prosecutors and those in power. This strategy intimidates dissonant individuals into silence and conformity. This is achieved through the sticks, whips and stocks of the legal order, and by the tools of economic opprobrium and boycott.⁸⁵

⁸⁴ “The speech code movement in academia owes its theoretical scaffolding to the critical race scholars. From its onset, critical race theory has singled out the First Amendment for particular scorn: free speech, the theory argues, is nothing more than a tool of the powerful to oppress the weak. The marketplace of ideas will never correct racist views, the theorists claim, because racism silences its victims. Therefore, censorship is needed. “We should not let a spurious motto that speech be ‘everywhere free’ stand in the way of outlawing speech that is demonstrably harmful,” argue Richard Delgado and Jean Stefancic of the Colorado Law School. “Overextending the [First Amendment] provokes the anger of oppressed groups.” Heather Mac Donald, “Law School Humbug,” *City Journal*, Autumn 1995, Vol. 5, No. 4; http://www.city-journal.org/html/5_4_a2.html, visited 6/24/04.

⁸⁵ In discussing his theme of how intellectuals must act in transforming transitional societies Mill suggests the need to implement strategies that almost invisibly undermine a dominant orthodoxy over a substantial period, rather than to attempt a direct attack that will be easily recognized and defended against with the full power of the orthodoxy. See, Mill, *On Liberty*, in Max Lerner, ed., *Essential Works of John Stuart Mill* 255 (Bantam, NY 1961); and Mill, *Theism*, in *Three Essays on Religion* (Prometheus, Amherst, NY 1998). Joseph Hamburger, *John Stuart Mill On Liberty and Control* (Princeton, 1999) says of Mill that his mission was to cause a restructuring of society and human from the ground up. See Ch. 2, “Cultural Reform.”

Europe May Already be a “Crowded Theater”

Even in America there are limitations on speech that is reckless or malicious in terms of the situation in which it is uttered, or aimed at inciting to violence or criminal activity. The common way of expressing this limit is the sanctioning of “crying fire” in a crowded theater where the predictable outcome is mass panic. Given its physical proximity to sensitive Islamic cultures, the significant presence of Muslim immigrants from North Africa and the Middle East, and the relative porosity of its borders Europe is already a “crowded theater” in which giving offense to groups willing to engage in violent reactions against the offenders or whoever else from the offending culture can be reached predictably results in violence and the threats of terrorist reprisals.

Europe faces a challenge considerably greater than does America in protecting speech, ensuring security and not sliding down the “slippery slope” to “soft totalitarian” states that somehow manage to creep up on their societies because there really are relatively convincing rationalizations for many of the expansions in government power and suppression of open discourse when taken individually. The problem is in the sum over time of the individual rational acts of social control. Unless they are confronted as comprising a system rather than being dealt with as if they are independent tactics the societies will become increasingly repressive—all in the name of security, social courtesy and general welfare.

How European countries should respond and what is justified both in terms of imposing restraints on speech likely to incite hyper sensitive groups and in taking action against those who threaten violence against their new host society represents a wrenching social dilemma. Islam has never been much understood or respected in Western civilization. For various reasons there has been a barely hidden contempt for Islam. This has generated a sense of anger, outrage and “thin skinned” inferiority and sensitivity among many Muslims. As members of Muslim cultures moved into the West they were

confronted by the obvious fact that they were not held in high regard and in many instances were thought of as little more than barbarians.

Although the First Amendment language stating that “Congress shall make no law abridging” free speech appears straightforward, the Supreme Court has never considered the right to be absolute.⁸⁶ Government can limit speech in appropriate circumstances but the assumption of the right to speak freely strongly favors the speaker and imposes substantial burdens on the government to justify restrictions.⁸⁷ The U.S. Supreme Court has permitted limitations on speech in cases involving incitement to violence and creation of high risk to others as in the falsely “shouting fire in a crowded theater” where the verbal act has predictable consequences that endanger others or violate state law.⁸⁸ [But Europe may be the crowded theater and given the cultural shift to tightly knit interest groups any “insulting” expression may be a verbal act and not simply speech]

The U.S. Supreme Court has made numerous attempts to clarify the dimensions of the free speech rights. *Schenck v. U.S.*, and *Abrams v. U.S.*, articulated the “clear and present danger” test that relates to issues such as the example of a person falsely shouting fire in a crowded theater.⁸⁹ The question is whether words are uttered in a context that creates a

⁸⁶ Justice Hugo Black, the Court’s most pre-eminent strict constructionist, of course took the view that the language of the First Amendment was entirely clear. See, Hugo Black, “The Bill of Rights,” 35 *N.Y.U. L. Rev.* 865 (1960). William Peters, *A More Perfect Union: The Making of the United States Constitution*, (Crown 1987) informs us that: “Thomas Jefferson, writing to Madison from Paris after receiving a copy of the Constitution, listed first the things he liked about it. ‘I will now add what I do not like,’ he wrote. ‘First the omission of a bill of rights ... 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, or rest on inference.’” Peters continues: “Madison, who had been skeptical of the need for a bill of rights, was eventually persuaded, as he put it, that ‘the political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.’ Jefferson, whose arguments had been most effective in changing Madison’s mind, suggested an additional reason for a bill of rights: ‘the legal check which it puts in the hands of the judiciary,’ to protect individual rights.” *Id.*, at 202.

⁸⁷ An example is found in *New York Times Co. v. United States* 403 U.S. 713 (1971) [the Pentagon Papers case]. Even though a Department of Defense employee, Daniel Ellsberg, illegally leaked the so-called Pentagon Papers to the media, the Supreme Court ruled that the New York Times could publish the material without risk of censure or legal action. Justice Black, consistent with his position that there should be no restrictions on free speech or press stated [with Justice Douglas concurring] that: “I adhere to the view that the Government’s case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe [403 U.S. 713, 715] that every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.”

⁸⁸ For a rich and comprehensive source of free speech cases and “speech as conduct” analysis, see, Eugene Volokh, “Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones,” 90 *Cornell L. Rev.* 1277 (2005).

⁸⁹ *Schenck v. U.S.*, 249 U.S. 47 (1919); *Abrams v. U.S.*, 250 U.S. 616 (1919). Justice Brennan, in *New York*

clear and present danger that is likely to bring about harmful consequences? The Court has, however, never adequately formulated clear standards on what is clear and what the danger must be other than to add language in *Dennis* about the ad-hoc and contextual nature of the inquiry.⁹⁰

Not long after *Schenck* and *Abrams* the Court decided *Gitlow v. New York*, and *Whitney v. California*, and in doing so imposed a more restrictive test on free speech, the “bad tendency test” in which it was said that restrictions could be imposed on speech at a point earlier than the “crowded theater” context because real danger may exist to public interests even if it is not immediately obvious.⁹¹ The comparison is that of the preparatory phases of a conspiracy that can create a threat to public order.

In 1951 the Supreme Court decided *Dennis v. U.S.*, in which it concluded that there are so many possible threats and remote events to consider that the clear and present danger test must be applied on an ad hoc basis to the specific facts of the situation. This obviously provides little guidance to the speaker.⁹² One of the most important subsequent decisions is *Brandenburg v. Ohio*.⁹³ The Brandenburg test departed from the *Gitlow*, *Whitney* and *Dennis* standards, distinguishing repugnant or offensive speech from speech that caused actual, visible harm.

Merely teaching or advocating unpopular ideas must be distinguished from teaching or advocating the duty, necessity, or

Times v. United States, *supra*, n. , supporting the majority opinion in favor of the Times’ publication of the Pentagon Papers concluded: “The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government’s claim throughout these cases has been that publication of the material sought to be enjoined “could,” or “might,” or “may” prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences [403 U.S. 713, 726] may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment’s ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation “is at war,” *Schenck v. United States*, 249 U.S. 47, 52 (1919), during which times “[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.” *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature.”

⁹⁰ *Dennis v. U.S.*, 341 U.S. 494 (1951).

⁹¹ *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927).

⁹² *Dennis v. U.S.*, *supra*, n. 93.

⁹³ *Brandenburg v. Ohio*, 95 U.S. 444 (1969).

propriety of acting on those beliefs. The right to speak or organize cannot be abridged no matter if the group's message and purpose are repugnant to American values. In order for government to intervene, the speaker must subjectively intend incitement (imminent evil), use words which are likely to produce action (imminent action), and openly encourage or urge incitement (suggesting, for example, it's a duty to commit a crime.)⁹⁴

This outlines a basis for regulating speech by “religious” figures that incites to *jihad* because there is a sense of duty claimed to be grounded in the words of Allah in which it is a sacred obligation to act violently against infidels. This is not simply free speech but recruitment and incitement to violence based on a perception of sacred duty.⁹⁵

It is a relatively recent phenomenon that significant numbers of people are emigrating to Europe without the desire to integrate into their new host culture. This has occurred to the extent that the new members reject the values of their adopted country even while eager to receive the largesse and opportunities they would never be able to obtain in their country of origin.⁹⁶ Too many people feel entitled to receive the benefits of Western society without any sense of a corresponding duty.

⁹⁴ *Brandenburg v. Ohio, id.*

⁹⁵ The Terrorism Act 2006 “specifically aims to make it more difficult for extremists to abuse the freedoms we cherish, in order encourage others to commit terrorist acts.” It is claimed to do so by creating: “a number of new offences. Once it is brought into force, it will be a criminal offence to commit: **Acts Preparatory to Terrorism** This aims to capture those planning serious acts of terrorism. **Encouragement to Terrorism** This makes it a criminal offence to directly or indirectly incite or encourage others to commit acts of terrorism. This will include the glorification of terrorism, where this may be understood as encouraging the emulation of terrorism. **Dissemination of Terrorist Publications** This will cover the sale, loan, or other dissemination of terrorist publications. This will include those publications that encourage terrorism, and those that provide assistance to terrorists. **Terrorist training offences** This makes sure that anyone who gives or receives training in terrorist techniques can be prosecuted. The Act also criminalises attendance at a place of terrorist training. The Act also makes amendments to existing legislation, including:

- Introducing warrants to enable the police to search any property owned or controlled by a terrorist suspect
- Extending terrorism stop and search powers to cover bays and estuaries
- Extending police powers to detain suspects after arrest for up to 28 days (though periods of more than two days must be approved by a judicial authority)
- Improved search powers at ports
- Increased flexibility of the proscription regime, including the power to proscribe groups that glorify terrorism.

<http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act-2006/?view=Standard> (visited 4/5/07).

⁹⁶ See, e.g., William Brannigan, “Immigrants shunning idea of assimilation,” *WashingtonPost.com*, Monday, May 25, 1998, A1, <http://www.washingtonpost.com/wp-srv/national/longterm/meltingpot/meltingpot.htm> (visited 9/6/05). Brannigan relates: “[I]n the current immigration wave, something markedly different is happening here in the middle of the great American ‘melting pot.’ Not only are the demographics of the United States changing in profound and unprecedented ways, but so too are the very notions of assimilation and the melting pot that have been articles of faith in the American self-image for generations. *E Pluribus Unum* (From Many, One) remains the national motto, but

For too many second-generation young Muslims in Britain the cultural rejection is intensified because the ease of travel and communication allow frequent visits to the countries from which their parents emigrated. The lax immigration and asylum rules in the UK and Western Europe have also facilitated the entry into those nations of rabid religious fanatics who are intent on radicalizing and recruiting young Muslims into the cause of jihad against the West. This can produce an exposure to radical elements at a vulnerable point in their lives when many see the European society's numerous flaws while being indoctrinated into a system that preaches that Western society is evil and an enemy of Islam.

Although the warning has been sounded for several generations most people raised within Western European and American culture can't understand how morally corrosive their societies are.⁹⁷ When they hear their cultures described as corrupt, sinful or as the Great Satan the reaction is that the ones making those claims are ignorant barbarians. And some of the critics *are* ignorant and barbarous. But there is a disease at the heart of Western society that has stolen the souls of many of its inhabitants. Western society is simultaneously noble, corrosive and corrupt. It mixes its virtues and sins in such a way that nearly anyone who comes in prolonged contact succumbs to its seductive power.

This power explains why strict religious fundamentalists of any faith necessarily reject and condemn such a system. It also explains why those seeking to gain benefits from the society while holding onto the "purity" of their own faith are under enormous pressure to sequester themselves with others holding the same beliefs in an effort to resist the incursions. Such people find themselves in the psychological dilemma of living in Sodom and Gomorrah while rejecting the degradation they see all around them. The

there no longer seems to be a consensus about what that should mean. There is a sense that, especially as immigrant populations reach a critical mass in many communities, it is no longer the melting pot that is transforming them, but they who are transforming American society."

⁹⁷ Rollo May, *Power and Innocence: A Search for the Sources of Violence* (W.W. Norton, NY 1972), explains our dilemma. "We experience the despair of being unable to communicate to others what we feel and what we think, and the even greater despair of being unable to distinguish for ourselves what we feel and are. Underlying this loss of identity is the loss of cogency of the symbols and myths upon which identity and language are based." 68

stresses of such an environment, including the temptations that must be denied daily, are surely enormous.

One consequence for Westerners of living in a society without coherent grounding values is a search of a kind Erich Fromm described in commenting on our search for identity in a faceless state. But this search can take several directions. For some it can be the pursuit of a strong individual identity. For most, however, it is a drift toward collective identity and allegiance because the alternative is too frightening or difficult. In relation to this latter path Fromm remarks: “the individual ceases to be himself; he adopts entirely the kind of personality offered to him by cultural patterns; and he therefore becomes exactly as all others are and as they expect him to be. The discrepancy between “I” and the world disappears and with it the conscious fear of aloneness and powerlessness.” He continues: “The person who gives up his individual self and becomes an automaton, identical with millions of other automatons around him, need not feel alone and anxious any more. But the price he pays, however, is high; it is the loss of his self.”⁹⁸

If the loss of identity and submergence in a collective to obtain a sort of surrogate meaning is a problem in the cultures of Europe and Western Europe it is no challenge at all for people who have been raised as part of a controlling religious identity collective. Non-assimilative Muslim immigrants have their belief systems intact to the extent in many instances it is as if the immigrants never left their original homelands.⁹⁹ The result is the establishment of *reverse colonies* within the European states.

⁹⁸ Fromm, *The Sane Society*, *supra* n. , at 208, 209.

⁹⁹ Lisa Webley suggests that: “In the UK there is another important aspect of the parent/child relationship relating to immigrants. When the families came to the UK the children (who became the parents) were often the driving force behind the decision to come to the UK, whereas their parents (now grandparents) may not have been so keen, or may have come over at a later date once their children were established. For those grandparents who did want to come to the UK, there were more hurdles to being accepted than for their children, not least they often did not have the same level of English language ability, it was more difficult for them to get into a work environment due to their age, and age itself was not accorded the same level of respect as in some other cultures. Many of the parents of the first British born generation sought to preserve the extended family and also wanted to assimilate into the British system. The grandparents may have had less of an incentive or found it more difficult to assimilate as they were often not part of the work force, and in many families it was the grandparents’ generation who were the ones who essentially raised the children because the parents were working. That is one explanation given for assimilation difficulties. A second is the problem of people with advanced education coming to the UK and being forced to work menial jobs, even though they have the skills and the knowledge required to work in the professions. Those who created businesses often found they had a lesser status here because they were merchants, reflecting the traditional social hierarchy in England. Thirdly, it has been argued that British society has not made assimilation easy, nor necessarily desirable, nor has it provided a strong obvious set of values that young people can hold on to.” Barnhizer/Webley Notes, *supra* n. .

One could argue there is a form of justice in this process given the colonial history of the European powers, but that is an argument for someone else to make. This reverse colonization is contrary to past in-migrations of diverse cultures into Britain and the United States where assimilation into the values of their new country was a goal—what in America is referred to as the “melting pot.” This is not a claim that the “melting pot” worked particularly well but that the commitment of new members to assimilation was a core principle. Nor is the idea of the melting pot identical with a sort of flat homogeneity.

Very recently the combination of Western liberalism, the political enshrinement of ideas such as multiculturalism and diversity, and acts that the West considers vile terrorism while many Muslims think of them as legitimate acts of holy war against the foes of Islam, have created a cultural context in which the tables have been turned on those who consider Islam and Muslims to be inferior.¹⁰⁰ This combination taken with real-time information systems and easy travel have allowed an instant communication network to focus on perceived insults and facilitated organization and protests against anyone considered an enemy.

The U.S. has fought wars and suffered significant losses but with the exception of the Civil War those conflicts have been external to North America. Europe has suffered

¹⁰⁰ We may have been “hoisted on our own paternalism.” Webley observes: “The new challenge is that since 9/11, 7/7 and the emergence of the al-Qaeda network some of the paternalists have come to view all culturally distinctive groups as a threat rather than as a benign charming multicultural difference. The tenor of their discussion suggests that those who apparently reject British norms are more like “unruly teenagers” that are rebelling against the authority of the parent culture rather than like children who will eventually learn to take on the ways of the parent (while teaching the parent some valuable lessons in the process). Interestingly, this shift in perception was noted amongst some sections of the paternalists in Britain in respect of women, prior to women being granted suffrage. Even though we are speaking of a numerically very small minority of Muslims who are willing to take direct action against the West, the perception has now shifted from there being no threat to the British way of life to a real and present threat. These paternalists now question whether cultural protection is positive after all, unless that protection seeks to guarantee “British values”. Adherents to multiculturalism, on the other hand, see the Muslim population in particular, and all minority groups in general, as in greater need of protection. The multiculturalists point to the mainstream media and some sections of the public, who they believe are turning against difference and tolerance, rather than focusing attention on the criminality of those very small few who seek to take direct violent terrorist action. They point to the fact that discussions about assimilation did not occur during the main period of Irish terrorism. They also assert that while some of the assimilation discussions are genuine attempts to consider appropriate political policy and to offer solutions against social exclusion, others are barely veiled racist attacks. Some of those who are supporters of multiculturalism are genuine cultural relativists, whereas others see it as a mainstay of a genuinely tolerant liberal, pluralistic society.” Barnhizer/Webley Notes, *id.*

through numerous bloody wars over centuries and those conflicts have been fought on European soil. Many of the conflicts were religiously driven or at least the products of the ambitions of competing religious/political systems. Europeans can thus be expected to appreciate somewhat better than Americans the power of perceived insults to produce violent reactions. If Europe's bloody history has taught it lessons about sectarian conflict and religious violence not learned in America, those lessons understandably give Europeans pause concerning their vulnerability and the dangers of dealing with militant Islam.

Europeans have not only been fighting amongst themselves. They have been on the front lines of the conflict between Islam and the West for over 1000 years.¹⁰¹ It borders on the absurd to deny the millennium of conflicted history that exists between the cultures of Western Europe and Middle Eastern Islam. This history includes numerous invasions and occupations on both sides. Islam, like Christianity was for centuries, has been an evangelical force that never hesitated to spread its message through military power when that option was available.

There is plenty of blame to spread around to both Muslims and Christians when it comes to the eagerness to go to war against each other for political, religious and territorial reasons. While it is popular in the Islamic world to become incensed over the various Crusades aimed at reclaiming Jerusalem and the Holy Land, this condemnation conveniently leaves out the fact that Muslim armies captured Jerusalem, conquered Constantinople, and advanced to the gates of Vienna as recently as the sixteenth and

¹⁰¹ Philippe Contamine, *War in the Middle Ages*, translated by Michael Jones (Basil Blackwell 1984) (originally published in French 1980). See, "The Peace and Truce of God, the Chivalric Ethic and the Crusade," 270-280, describing the motivation behind the various crusades and the invention of the idea of the holy or just war. It was not until the eleventh century that the Saracen invasions of Europe had been thrown back. *Id.*, at 30. Contamine explains: "Christendom saw itself as a fortress encompassed on all sides, with the result that expeditions emanating from it were comparable to sorties undertaken by defenders, and that, on the other, the Holy Land was par excellence the kingdom of Christ whose capital, Jerusalem, should not only be taken but retaken and recovered by the faithful of the Cross. [fn. omitted] This war, moreover, did not arise simply from the initiative of men who had rationally debated whether it was legitimate or not, but from the direct will of God – hence the cry 'God wills it' (*Dieu le veut*) – which had inspired the souls of Christians." *Id.*, at 279. Even this was not the end of the conflicts. The Ottoman penetration deep into Europe occurred on several occasions, reaching as far as Vienna. An Ottoman army of 100,000 troops lay siege to Vienna for nearly a month in 1529 before withdrawing. This was repeated a century and a half later when a force of 140,000 again attacked the city. The length and costs of this war sapped the strength of the Ottoman Empire and may have contributed to the decline of Muslim power and progress.

seventeenth centuries. Islam also occupied much of Spain until the Moors surrendered their last occupied province to Ferdinand and Isabella in 1492.¹⁰²

The Ottoman penetration deep into Europe occurred on several occasions, reaching as far as Vienna. An Ottoman army of 100,000 troops besieged Vienna for nearly a month in 1529 before withdrawing. This was repeated a century and a half later when a force of 140,000 again attacked the city. The length and costs of this war sapped the strength of the Ottoman Empire and may have contributed to the decline of Muslim power and progress.¹⁰³

A result of this history and of the accelerated in-migration of North African and Middle Eastern Muslims into Europe is that the cultures of Western Europe and the UK are already close to being the “crowded theater.” The tinder of cultural sensitivity is piled high and awaiting almost any spark. While everything in my being fights against the implications of the conclusion, Europeans may need to exercise greater control over provocative speech than is required in America because the “temperature” at which something is judged to be provocative may be different and the willingness to engage in violence far more prevalent.

There have been responses by European governments. The UK has changed its immigration and asylum policies and begun to apply hate speech laws to Islamic clerics and others who seek to convince others to engage in violent jihad against the West.¹⁰⁴ The UK recently prosecuted members of the British National Party for speeches the government claimed were insulting to Muslims.¹⁰⁵ The prosecution failed to obtain a

¹⁰² Contamine, *War in the Middle Ages*, *supra*, n. 118. George F. Nafziger and Mark W. Walton, *Islam at War: A History* (Praeger 2003).

¹⁰³ Kenneth Clark, *Civilisation: A Personal View*, (Harper & Row 1969). “Civilisation might have drifted downstream for a long time, but in the middle of the seventh century there appeared a new force, with faith, energy, a will to conquer and an alternative culture: Islam. The strength of Islam was its simplicity. The early Christian Church had dissipated its strength by theological controversies, carried on for three centuries with incredible violence and ingenuity. But Mahomet, the prophet of Islam, preached the simplest doctrine that has ever gained acceptance; and it gave to his followers the invincible solidarity that had once directed the Roman legions. In a miraculously short time – about fifty years – the classical world was overrun.” *Id.*, at 7.

¹⁰⁴ See Anti-Terror Laws, *supra* n. . Jonathan Freedland, “In the grip of panic: Global conflict has inflamed the problems of British Muslims,” *The Guardian*, Saturday, January 22, 2005.

¹⁰⁵ Alex Duval Smith, “Fading liberal dream tears Dutch apart: Immigration has polarised the Netherlands as never before but, as Alex Duval Smith reports, its traditional values of tolerance have found some unlikely defenders,”

conviction from the jury.¹⁰⁶ The UK has also received a court decision allowing it to deport Muslim cleric Abu Qatada based on statements praising the bombers of 9/11 and 7/7 in the U.S. and London respectively. Pakistan announced it will deport or deny visas to foreigners who want to study in that country's *madrassa* schools where hate of the West and the duty to join militant jihad are often core parts of the message.¹⁰⁷

European nations are caught within the desire to act "liberally" in dealing with other cultures, the powerful vestiges of post-colonial guilt, the popular reactions to large scale legal and illegal immigration, and the need to deal with the threat of Jihadist Islam. The situation about what the nations of Western Europe should do is confused because some Muslims who would themselves never commit terrorist acts nonetheless facilitate or enable the terrorists. This support includes spiritual approval of terrorist acts, financial contributions and concealment of terrorist conspiracies.¹⁰⁸ This problem is compounded because violence has become a core element of the type of Islam advanced by militant fundamentalists. British Prime Minister Tony Blair attempted to respond by creating an offense of "glorifying terrorism."¹⁰⁹ This was challenged for suppressing free speech and for being overbroad and ambiguous.¹¹⁰

The Observer, Sunday, February 13, 2005.

¹⁰⁶ There are responses building all over Europe. Tom Happold, "Tory leader condemns Islamophobia," *The Guardian*, Friday November 26 2004; Ian Traynor, "Dutch liberalism stares into a troubled future as anti-Muslim backlash grows: Dozens of arson attacks after Van Gogh's murder," *The Guardian*, Saturday November 13 2004; Jon Henley, "Attacks on Jews and Muslims soar in France," *The Guardian*, Tuesday, March 22, 2005; Ian Traynor and John Hooper, "Europe's theo-cons rally their forces: As secularists dominate public life, experts expect backlash," *The Guardian*, Friday December 03, 2004; Ian Traynor, "Europe's far-right parties hold coalition talks," *The Guardian*, Friday, December 10, 2004; Reuters, "Italy breaks up vigilante group that hunted down Islamists," *The Guardian*, Saturday, July 02, 2005.

¹⁰⁷ See, Declan Walsh, "Pakistan to expel foreign students in crackdown," Saturday, July 30, 2005, *The Guardian* [online]. But Pakistan is also a problem in terms of its views of the West. See, e.g., Associated Press, "Pakistan bans Newsweek issue reporting Dutch killing," *The Guardian*, Saturday, November 27 2004.

¹⁰⁸ See, e.g., Jason Burke, "The violence that lies in every ideology: Like most beliefs, Islam is a religion of peace that has to accept it can also breed terror," *The Observer* [online], Sunday, July 17, 05; Patrick Barkham, "Journey through Britain's Muslim divide: On the bombers' route between London and Leeds, Patrick Barkham finds communities riven by a generation gap," *Guardian*, July 16, 05; Vikram Dodd, "Crackdown on elusive extremists: Even with new measures, it will not be easy to root out those who back terrorism," *Guardian*, July 15, 05; James Brandon, "A defiant Islam rises among young Britons," *Christian Science Monitor*, July 28, 05; Anthony King, "One in four Muslims sympathises with motives of terrorists," *News.telegraph*, July 28, 05; Ziauddin Sardar, "The struggle for Islam's soul: While most Muslims abhor violence, some terrorists are a product of a specific mindset with deep roots in Islamic history. If Muslims everywhere refuse to confront this, we will all be prey to more terror," *Toronto Star* (Star.com) July 22, 05; Mundher al-Adhami, "Not hate, vengeance," *Guardian*, July 16, 05; Salma Yaqoob, "Our leaders must speak up: Failure to oppose the official line creates extremists," *Guardian*, July 15, 05; Dan Murphy, "Can Islam's leaders reach its radicals?" *Christian Science Monitor*, July 14, 05.

¹⁰⁹ Anti-Terror Laws, *supra* n.

¹¹⁰ Anti-Terror Laws, *supra* n.

While figures such as Bin Laden glorify death and jihadist sacrifice aimed at causing the deaths of others, it is claimed by some Islamic scholars that terrorists such as are found in al-Qaeda have corrupted the idea of jihad.¹¹¹ These scholars identify jihad as a personal commitment to the “struggle for righteousness within and without” rather than engaging in violent “holy war.”¹¹² Even the concept of a violent jihad against the enemies of Islam has been said to require an attack against Muslims before being justified.¹¹³ In any event, even in that situation the deliberate targeting of civilians is not allowed.¹¹⁴

Some Muslim scholars argue that the terrorists have corrupted the idea of jihad or holy war by converting it into a justification for violence and the murder of innocents.¹¹⁵ This is causing great difficulty for many Muslims and other people of Middle Eastern origins who feel that Muslims have been unfairly oppressed and share the indignation of the terrorists without sharing the willingness to engage in violence. Muslims living in Europe suffer whenever an act of violence involving someone of their religion occurs. Rightly or wrongly, they feel they are at the center of intense resentment and suspicion due to their ethnic and religious identity.

I do not want to get into contorted discussions about the definition of terrorism.¹¹⁶ As far as I am concerned the deliberate targeting of civilians rather than military objectives is all the definition needed. The other possible motives or the underlying “rightness” of a movement’s cause are irrelevant. All claims to the moral high ground are lost when innocents are deliberately targeted. Nor does it remedy the situation to declare war or issue a Bin Ladenesque *fatwa* proclaiming that all people of a country or interest group, such as Americans wherever they are found, are legitimate targets.¹¹⁷

¹¹¹ See, J. Harold Ellens, ed., *The Destructive Power of Religion: Violence in Judaism, Christianity, and Islam*, vol. 3, “Religion, Psychology, and Violence” 51 (2004).

¹¹² *The Destructive Power of Religion: Violence in Judaism, Christianity, and Islam*, vol. 3, “Religion, Psychology, and Violence” 51, id.

¹¹³

¹¹⁴ It is of course convenient to avoid this dictate by defining all non-Muslims as enemies.

¹¹⁵

¹¹⁶ For a useful description of the various positions taken on the nature of terrorism, see, Jack Clark, “Definition of ‘Terrorism’: Let’s Have Some Clarity,” *The Rational Radical*, October 5, 2001, <http://www.therationalradical.com/dsep/other/terrorism-definition.htm> (visited 9/6/05).

¹¹⁷

The definition I am using for terrorism results in some harsh interpretations. Historically, for example, unless it can be demonstrated that there were significant military and industrial targets to be destroyed, the use of nuclear weapons against Hiroshima and Nagasaki was an undeniable act of terrorism to the extent it was intended as a demonstration of destructive power. One is compelled to ask: “why couldn’t the Japanese government have been advised that a demonstration of an incredibly powerful weapon would be held a few miles offshore and if they did not surrender it would lead to complete destruction?”

The calculated incendiary bombing by Allied forces of Dresden toward the end of WW II killed over 60,000 people and destroyed the city in a frighteningly intense firestorm. Other than retribution, there seems to have been little point to the bombing at that point in the war. In the Israeli/Palestinian conflict there is a distinction between the use of violent action, including suicide bombers, against Israeli military targets and the targeting of civilians in cafes, buses and the like with the aim of terrorizing the civilian population or empowering an increasingly pathetic and self-destructive Palestinian faction. The same is said for the recent killing of four Israeli Arabs on a bus by an Israeli terrorist.¹¹⁸ Attacking military targets is war, concentrating on civilians is terrorist murder.

The Clash between Honor/Shame Cultures and the Secular Rule of Law

In some dimensions the clash may be less one of religion than of culture although it is likely more accurate to say that culture and religion are intertwined and interactive. The Western Rule of Law culture is quite different from the honor/shame cultures that characterize the Middle East. While those Middle Eastern cultures represent various forms of Islam, there is less of a conflict between the Islamic aspects of the cultures than

¹¹⁸ The Israeli Defense Ministry has drawn a distinction that serves its interest but is highly questionable. Chris McGreal, “Jewish gunman was no terrorist, Israel rules,” Thursday, September 1, 2005, *The Guardian* [online]. McGreal reports: “Four Arab Israelis shot dead by a soldier opposed to the closure of the Gaza Strip settlements are not victims of ‘terror’ because their killer was Jewish, Israel’s defence ministry has ruled, and so their families are not entitled to the usual compensation for life. The ministry concluded that the law only recognises terrorism as committed by ‘organisations hostile to Israel’ even though the prime minister, Ariel Sharon, described the killings by Private Eden Nathan Zaada, 19, as ‘a despicable act by a bloodthirsty terrorist.’ He shot dead four people on a bus in the Arab Israeli town of Shfaram on August 4 and was then lynched by a mob. Arab Israeli leaders have condemned the decision. Mohammed Barakeh, an Arab member of the Israeli parliament who lives in Shfaram, said: ‘The decision raises a strong scent of racism, which distinguishes between a Jewish terrorist and an Arab terrorist.’ ”

is caused by the honor/shame, clan and family, paternalistic and authoritarian aspects. When the collectivist aspect of the Middle East and Islam is considered in contrast to the individualist bent in Western political philosophy the conflict becomes substantial.

How far these differences take us along the path of Europeans accepting greater suppression of free speech and political criticism against ultrasensitive groups who take offense at what they consider insults to their honor, culture and religion is unclear. The murders of Pym Fortuyn and Piet Van Gogh, along with the death threats to Ayaan Hirsa Ali in the Netherlands have radically altered that nation's openness and willingness to tolerate behavior that until recently it considered allowable.¹¹⁹ France, beset with its own Islamic problems, has decided to expel radical Islamic clerics.¹²⁰

There is not and need not be an automatic disconnection between Western democracies operating under the Rule of Law and those of the Muslim faith. Many Muslims living in America and Western Europe have become "Americanized" and "Europeanized" and are fully integrated in those cultures. I want to be clear that there is no necessary conflict between some forms of Islam and the ability to be fully participating parts of Western democratic societies.¹²¹ I have seen the proof of this in my Muslim students in America and the UK as well as my friends, students and environmental and community activist associates in many other countries and contexts.

¹¹⁹ Leader, "Towards a British Islam," *The Guardian*, Thursday, April 01, 2004; Jon Henley, "Imams to be taught French way of life: Minister wants to build 'western Islam' through education," *The Guardian*, Wednesday, December 08, 2004. The proposal is that: "Muslim prayer leaders in France are to be offered university training in French law, civics, history and culture from next autumn as part of a bid to build a moderate "French Islam" that respects human rights and the Republican code, the interior minister said yesterday." See also, Leader, "Nationalising Islam," *The Guardian*, Friday, December 10, 2004. "This week's call by the French government for imams to undergo university training in civil law, history, language and culture is an important moment for Europe's faltering attempts to try to engage with its Muslim citizens."

¹²⁰ Jon Henley, "France prepares to expel radical Islamist leaders," *The Guardian* [online], 8/2/05. Jon Henley, "France says it will outlaw all neo-Nazi groups," *The Guardian*, Thursday, February 03, 2005; Jon Henley, "Le Monde editor 'defamed Jews'," *The Guardian*, Saturday, June 04, 2005. Henley reports: "A French appeal court has found the editor-in-chief of Le Monde and the authors of an opinion piece in the paper guilty of "racial defamation" against Israel and the Jewish people. In a ruling greeted with applause by Jewish groups and some alarm by media lawyers, the court ordered Jean-Marie Colombani and the three writers to pay a symbolic one euro in damages to the France-Israel Association and to Lawyers Without Borders. The two groups had alleged that the June 2002 article, headed Israel-Palestine: the Cancer, contained comments that "targeted a whole nation, or a religious group in its quasi-globality", and constituted racial defamation. The offence was exacerbated, the groups said, by a "semantic slip" from the phrase "the Jews of Israel" to "Jews in general"; in other words, it referred to "the Jews" when it meant "certain Israelis"."

¹²¹ See, e.g., Noah Feldman, *After Jihad: America and the Struggle for Islamic Democracy* (Farrar, Straus and Giroux 2003); Asma Gull Hasan, *American Muslims: The New Generation* (Continuum 2001); Barry Rubin, ed., *Revolutionaries and Reformers: Contemporary Islamist Movements in the Middle East* (SUNY 2003).

But having made this disclaimer, in far too many instances in Western Europe there is an incompatibility between the large influx of new residents with entirely different values, beliefs and practices and the long-time residents of those countries. There has also been a failure of subsequent generations of radicalized young Muslim males in Europe even when their parents feel adapted to the culture.

I believe a major cause of the disconnection is the rapidity and scale of the in-migration. This statement is not an attack on mainstream Islam but recognizes the limited ability of Western cultures to absorb entirely different cultures and systems of belief and behavior in large numbers, at a time of crisis, and with great speed. The entry into European societies of large numbers of dramatically different people has imposed significant pressures that may be beyond the absorptive capacity of the host cultures.¹²² This conflict is heightened by the failure on the part of many within the immigrant communities to seek assimilation and is intensified by cultural barriers to integration that prevent the assimilation of people who seem alien.¹²³

Many of the new immigrants do not come from cultures where basic values of dispute resolution were grounded in the political philosophy of the Rule of Law as it is understood in the West.¹²⁴ As was manifested by the *Code Duello* 250 years ago where a

¹²² William Pfaff, "A monster of our own making: These British bombers are a consequence of a misguided and catastrophic pursuit of multiculturalism," Sunday, August 21, 2005, *The Observer* [online]. Pfaff's assessment of what we face concludes with this dire observation: "A half-century of a well-intentioned but catastrophically mistaken policy of multiculturalism, indifferent or even hostile to social and cultural integration, has produced in Britain and much of Europe a technologically educated but culturally and morally unassimilated immigrant demi-intelligentsia. Like the anarchists of the 19th and early 20th centuries, these people have no realisable goals and make no meaningful political demands, only Utopian ones. Thus, like the anarchists, they must be called nihilists. For that reason, they present a profound problem to governments accustomed to dealing with rationally manageable threats, enemies and demands. Reason has no answer to nihilism."

¹²³ The United States has passed some questionable laws and altered policies since 9/11 that affect immigrants. For a useful overview and critique in the form of a book review, see Raquel Aldana & Sylvia R. Lazos Vargas, "'Aliens' in Our Midst Post-9/11: Legislating Outsiderness within the Borders," 38 *U. C. Davis L. Rev.* 1683 (2005).

¹²⁴ If, as Hobbes warns, the belief that God sets a pattern of divine laws to guide our behavior and regulate political community creates a difficulty for society, the "death of God" trumpeted by the Enlightenment creates an equivalent dilemma. A fully secular conception of society in which laws are based solely on the power of humans to make choices of law without some strong source of external or divine authority such as natural law or divine inspiration has resulted in a system in which humans lack deep principles of a kind sufficient to guide their judgments. Daniel Boorstin concludes: "The discovery, or even the belief that man could make his own laws, was burdensome [N]early every man knew in his own heart the vagueness of his own knowledge and the uncertainty of his own wisdom about his society. Scrupulous men were troubled to think that their society was governed by a wisdom no greater than

formal system of rules was drawn up in Ireland and Europe to govern behavior in one-to-one duels between offended gentlemen, prideful cultures who take what in the West seems like an excessive commitment to “honor” as their core principle consider insult a severe matter. The only acceptable recourse to protect honor is violence or one is branded a coward.¹²⁵

To a modern Westerner such cultures often seem so “prickly” that they make “mountains out of molehills.” But the point is that they do act in that manner. This is made even worse in the context of Islam because the perceived insult is taken as against the entire religion. It is a collective culture, not one in which people were raised on the core values of individualism and individual rights. This means everything is against the entire group and the group responds as if it were attacked.

Members of honor cultures also tend not to commit to national allegiances. Their loyalty is to clan, family or tribal arrangements.¹²⁶ A result is that they may never become part of

their own.” Daniel Boorstin, *The Decline of Radicalism* 74 (1963).

¹²⁵ “Honor and shame are correlate goals in an honor society. Honor, which is a claim to worth along with the social acknowledgement of worth, is the highest goal. Shame, the trait that people wish to avoid at all costs, is bestowed on someone when honor is lost in a challenge-response exchange or is passively acquired when a person is born into a low social class, when a person’s family is shamed, or when a notable person bestows it.” http://www.religion.emory.edu/faculty/robbins/SRI/defns/h_defns.html (visited 7/31/05). One too frequent result is “honor killings” of women who have “shamed” their families. See, e.g., Declan Walsh, “‘We feel no shame’ – the brothers who killed their sister for honour,” *The Guardian*, 2/7/07 (Pakistan); Mary Riddell, “Where death is the penalty for going bare-headed,” *The Observer*, 10/29/06; Riazat Butt, “‘You’re not my mother any more,’ shouted Samaira. Then her family killed her,” Saturday, July 15, 2006, *The Guardian*. The report indicates: “Samaira Nazir knew well that her parents would disapprove. She wanted to marry her Afghan boyfriend, rather than someone from the family circle, and she was prepared to fight for him too. So were they. Yesterday, Ms Nazir’s brother was jailed for at least 20 years for her murder and her cousin, who is 17, will serve 10 years for his role in her death last April. The ‘honour killing’, which took place at home in front of her parents, was carried out with four knives, as she was pinned down, and left her with 18 stab wounds and three separate cuts to her throat. The Old Bailey heard the method was ‘barbaric’.”

¹²⁶ A close reading of Wikipedia’s definitions regarding the causes and effects of honour cultures contrasted with a Rule of Law culture suggests the serious nature of our dilemma. The on-line encyclopedia offers: “One can contrast cultures of honour with cultures of law. From the viewpoint of anthropology, cultures of honour typically appear among nomadic peoples and herdsmen who carry their most valuable property with them and risk having it stolen, without having recourse to law enforcement or government. In this situation, inspiring fear forms a better strategy than promoting friendship; and cultivating a reputation for swift and disproportionate revenge increases the safety of your person and property. Thinkers ranging from Montesquieu to Steven Pinker have remarked upon the mindset needed for a culture of honour. Cultures of honour therefore appear amongst Bedouins, Scottish and English herdsmen of the Border country, and many similar peoples, who have little allegiance to a national government; among cowboys, frontiersmen, and ranchers of the American West, where official law-enforcement often remained out of reach, as famously celebrated in Western movies; among the plantation culture of the American South, and among aristocrats, who enjoy hereditary privileges that put them beyond the reach of general laws. Cultures of honour also flourish in criminal underworlds and gangs, whose members carry large amounts of cash and contraband and cannot complain to the law if it is stolen. Once a culture of honour exists, it is difficult for its members to make the transition to a culture of law; this requires that people become willing to back down and refuse to immediately retaliate, and from the viewpoint of the culture of honour this appears as a weak and unwise act. Conceptions of honour vary widely

the Rule of Law system. Even if the religious cultures of the Middle East were not in conflict with an increasingly secular West or Islamic terrorism not a reality, there has been a substantial influx of people from cultures with no grounding in the secular Rule of Law. In many of these cultures there is no history of understanding or respect for the role of secular law or for the due process of law evenly applied. When I first taught law in St. Petersburg, Russia in 1998, it soon became obvious that while the formal trappings of law existed it was a system where individual influence, personal power and connections dominated. I found the situation the same in Mongolia, Bangladesh, and Latin America.

In many other countries there is not even a pretense that secular law is important, rather than individual or dominant group power. The dilemma this creates for European nations is profound and unanticipated. An increasingly frequent reaction is seen in demands that immigrants to the UK should be expected to seek assimilation into the nation's values and beliefs rather than reproducing a part of their original country inside their new host nation.¹²⁷

Many Muslims in Europe are raging at discrimination against people of Middle Eastern origins, about a lack of knowledge about or respect for the Islamic religion, about American and British support for Israel and America's perceived resistance to Palestinian concerns. Added to this is anger at the West's invasion of Afghanistan and Iraq, and at America's support for non-democratic Middle East regimes. Even this is largely propaganda operating under the heading of "we will find some ground to attack what you do no matter what."¹²⁸

Based on their past history the residents of the Middle East have never seemed to be terribly concerned about the absence of democratic regimes. One Muslim analyst argues

between cultures; in some cultures, honour killings of (usually female) members of one's own family are considered justified if they have "defiled the family's honour" by marrying against one's wishes, or even by being the victims of rape. These honour killings are generally seen in the West as a way of men using the culture of honour to control female sexuality." <http://en.wikipedia.org/wiki/Honor> (visited 7/31/05).

¹²⁷ Mathew Tempest, "Davis calls for rethink on multiculturalism," *The Guardian* [online] 8/3/05; David Davis, "Why cultural tolerance cuts both ways," *opinion.telegraph (London Daily Telegraph)* 8/3/05; George Jones, "Multicultural Britain is not working, says Tory chief," *news.telegraph (London Daily Telegraph)* 8/3/05; "Obsessive correctness betrays all of us," *opinion.telegraph (London Daily Telegraph)* 8/3/05.

¹²⁸ On the issue of global anti-Americanism, see, Paul Hollander, *Anti-Americanism: Critiques at Home and Abroad 1965-1990* (Oxford 1992).

that the problem with such enraged Muslim youth is that the cultures of Islam have been forced to deal with the changes required to participate in the modern world over a very compressed time frame, moving from a culture of mud huts in Riyadh only thirty five years ago to a fast-paced secular system that shows contempt for Middle Eastern cultures and Islam.¹²⁹ This has led to great insecurity, resentment, confusion and rage.¹³⁰

Coming together with others in the same state of mind in an effort to cope gives a sense of belonging, mission and identity to vulnerable and impressionistic young Muslims. One problem is that the internal critique by such groups is non-existent, while the external one has no difficulty assigning all blame to America, the West, godless infidels and so forth. While there is blame to be shared there is no internal critique of Islam or their own cultures among the fanatics who are blinded to their own responsibility.

There is no necessary logic to the intense anger voiced by many European Muslims because few of the people spent any time worrying about abuses by the Taliban in Afghanistan or the murders of hundreds of thousands of Muslims by Saddam Hussein in Iraq. In the face of the desire of a majority of Afghans and Iraqis to be allowed to govern themselves and vote in a free election such criticisms are increasingly tainted. It seems too often as if the only time when many Muslims become angered is when harm is caused to a Muslim by non-Muslims. This is a form of hypocrisy and bigotry. There is a disturbing tolerance of Muslims killing Muslims or Muslims killing non-Muslims.

Only when you understand the deep-seated feelings of inferiority and helplessness among many Middle Eastern and European Muslims, as well as the pride originally generated by the Afghans' resistance to the Soviets and the apparent strength of Saddam Hussein and his supposedly powerful army that was once considered the world's third most potent military force can you begin to understand why there is such resentment and rage directed at America. We brushed aside the military might of the Muslim Taliban and the Muslim Iraqi army in the blink of an eye. Syria, Egypt, Jordan and Iraq experienced the same

¹²⁹ Murad, "Poverty of Fanaticism," *supra*, n. .

¹³⁰ Murad, "Poverty of Fanaticism," *id.*

when they confronted tiny Israel after having sworn to use their massed power to destroy that nation.

The problem is not mainly the perceived “alienness” of practicing Muslims. Many cultures have codes and lifestyles that differ from the Western nations’ mainstream. Much of the problem is the increasing separateness, the refusal to integrate, and the dislike and rejection of their host culture on the part of a substantial segment of Muslims. The methods of dealing with the conflict and the movement into their societies of large numbers of people with very different cultural beliefs and values are of great import for democratic societies.¹³¹

Recent European immigration policy has been based on a sense that diversity is highly desirable; that the nations of Europe have no right to claim any special status, and that there is nothing of a culturally unique character in Western societies worth protecting. There is a substantial “guilt and atonement complex” operating among Europe’s liberal/left intelligentsia for its history of colonial rule and the exploitations, enslavements and extreme cultural arrogance that characterized that colonial history.

In the UK, the intelligentsia scorns anyone who might dare claim there was an inherently “British” culture or that people coming into their country should be expected to move toward “Britishness.” In an age that glorifies multiculturalism and diversity such a

¹³¹ See, e.g., Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1998). In a 1993 article presenting the themes of his later book, Huntington argues: “With the end of the Cold War, international politics moves out of its Western phase, and its centerpiece becomes the interaction between the West and non-Western civilizations and among non-Western civilizations. In the politics of civilizations, the peoples and governments of non-Western civilizations no longer remain the objects of history as targets of Western colonialism but join the West as movers and shapers of history.” *Foreign Affairs*, Summer 1993 (Council on Foreign Relations). Huntington recently produced *Who Are We? The Challenges to America’s National Identity* (2004) where he voiced his concerns about the loss of American culture due to massive immigration, including great emphasis on Mexican immigrants. Alan Wolfe, in praising the integrity and clarity of Huntington’s earlier work, nonetheless is less than sanguine in reviewing this book, noting that: “Who Are We? Is riddled with the same kind of moralistic passion – at times bordering on hysteria – that Huntington finds so troubling in American politics.” Alan Wolfe, “Native Son: Samuel Huntington Defends the Homeland,” *Foreign Affairs*, May/June 2004. Rather than agreeing with Huntington on the issue of culture, Wolfe finds some common ground in the need for new immigrants to be committed to assimilation over time and to what Wolfe calls the American creed, arguing: “Fortunately, it is not necessary to defend anything like a core culture to insist on the importance of assimilation; a core creed will suffice. A national culture is a way of life defined by one ethnic group or race, which demands that everyone else adapt to it. But a national creed is simply a set of ideas about what the United States should be – and is thus open to all, regardless of faith, ethnicity, or race. Creedal identity has been central to the greatness of the United States, allowing it to recharge its batteries by incorporating new immigrant groups at those times when Anglo-Protestant cultural elites were turning reactionary and defensive.” *Id.*

requirement is seen as a form of bigotry and racism. The paradox is that the belief appears to be that all other cultures have a unique legitimacy that is worthy of respect while one's own culture has nothing worthy at its core.

Some consider it to be committing the *sin* of privileging one nation's value system over another to prefer your country. In this system, the suggestion that others seeking to live permanently in the nation and receive its benefits should commit to a reasonable level of cultural assimilation became a tainted proposition. This is a fundamental error in judgment. As with many situations where a proposition is positive in one context but capable of negative consequences if applied beyond its limits, there is a danger in the extremes. Beyond their limits, diversity and multiculturalism are a grave mistake in social policy. It is America's belief that strength is achieved through a mongrelizing of the members of society by which the qualities that are best become shared more widely and that rigid enclaves or neo-colonies of self-centered identity are not preferred. Knowing how to locate where the limits lie is of course a quite different matter.

Even if one agrees that diverse and multicultural inflows and shared experiences are desirable (and I do), a key question involves the rate of absorptive capacity of the cultures into which the "immigrant stream" is flowing.¹³² Even raising such a question can lead to an accusation of bigotry. This is what led to the prosecutions of Bardot and Fallaci, and to the murders of Pim Fortuyn and Piet Van Gogh. There is an intolerant unfairness in critiques of nations such as Britain and France in regard to whether they possess a cultural identity they are entitled to protect. If the reverse occurred, such as the migration of the non-Muslim population of London into Saudi Arabia or Iran over a ten or fifteen year period where the new residents insisted on seeking the right to maintain their own practices, forms of worship and so forth, one suspects the leaders and general population of those nations might be a little concerned about the changes.

¹³² For a discussion of how extreme the transition has been, see, Melanie Phillips, "After the Rushdie affair, Islam in Britain became fused with an agenda of murder": Our capital is now 'Londonistan', the hub of Islamist extremism," *The Observer*, 5/28/06.

In fact our history tells us that such behavior did occur. We decried it as European colonialism. We have no difficulty realizing today that it was a form of illegitimate exploitation of militarily inferior cultures. Now we have a different form of reverse colonialism that many people are unwilling or unable to evaluate for its positive and negative consequences due to the burden of historical guilt. Some regard the reversal of fortunes to be a sort of payback for European colonization and interference with other cultures. In any event, there is little ability to assess the situation in a balanced fashion due to the guilt and moral aspects of the social equation.

The irony is that even as we accuse Western nations of intolerance we are fully aware that few other nations would ever allow such an in-migration to occur. This is precisely because they would not be willing to accept the changes in their own way of life and belief. Nor would they accept the conflict between cultures that would ensue as a matter of course. Saudi Arabia does not permit Christian churches to be established in the Kingdom even while it funds the expansion of mosques in Western nations. In a number of Muslim countries it is a serious crime for an evangelical Christian to try to convert a Muslim. Only after significant international pressure did Afghanistan release an Afghan who was sentenced to death after committing the “crime” of converting to Christianity.¹³³

We need to deal with political and human reality rather than hypothetical situations. The reality is that European nations have engaged in a massive social experiment over the past twenty or thirty years that other systems would never accept. The U.S. is struggling with a very rapid increase in legal and illegal immigrants from Latin America. The prosperous democracies offer relatively open systems and access to social benefits and employment not afforded in their countries of origin. Many of the immigrants come seeking to be part of their new country. Many others do not.

Europe and America now must figure out how to deal with the cultural environment their morally admirable but politically questionable politics of openness and compassion

¹³³ Daniel Cooney, “Christian convert faces death penalty in Afghanistan,” *The Guardian*, 3/20/06.
Mary Riddell, Where death is the penalty for going bare-headed, *Observer*, 10/29/06.

created. One result of the open diversity and multicultural policies is that European societies are home to millions of permanent residents and new citizens from the Middle East and other Muslim nations. Some of the new residents—including second-generation citizens—are fodder for the fanatical jihadists of militant Islam.¹³⁴ This in itself is not surprising because the lost souls found among the young of any culture, including the followers of Islam, are vulnerable to “wise” and powerful voices that offer them an unquestionable system of structured belief at the point they are experiencing the adolescent existential despair that afflicts many of us while growing up.¹³⁵

Like Europe, America has an immigration “problem” that will alter the culture over time. But America’s “problem” is capable of healthy change and adaptation. Europe’s immigration problem is different because of what Olivier Roy describes as the combination of Salafist and jihadist Islam. America’s immigrants seek to belong. The Salafists seek to reject, transform and even destroy.

In the same way, troubled young males who have been convicted of crime have proved vulnerable to “finding God” while in prison. As a former criminal defense lawyer I admit that many of the miraculous conversions to religious faith are ploys aimed at impressing parole boards. A number of inmates, however, such as the infamous “Shoe-Bomber” Richard Reid, do experience a radicalized conversion while in prison. They also make contacts that allow them to be part of a network once released.¹³⁶

¹³⁴ Olivier Roy, *supra*, n. , argues that: “The Islam with which such young people [the London bombers and radicalized second-generation young Muslim residents] identify is not the cultural Islam of their parents or home countries. It is both Salafist and jihadist. Salafists seek to purge Islam of all outside influences, starting with the cultures and traditions of Muslim societies, and restore it to the letter of the Qur’an and the tradition of the Prophet. Salafism is fundamentally opposed to all cultural or national forms of Islam.”

¹³⁵ Susan S. Lang, *Extremist Groups in America* (Franklin Watts 1990), discusses racism, the Ku Klux Klan, the “Identity Movement,” the Far Right religious groups, Neo-Nazis and Skinheads, Lewis Farrakhan and the Far Left. It is revealing to compare the enraged Muslim youth of Britain with Lang’s description of the UK’s skinheads in the 1980s. “Like many adolescents, skins are bored kids who feel estranged from their parents and school. Feeling downtrodden, picked on, and misunderstood, they hang around waiting for something to do, somewhere to belong. Hungry for an identity to cling to and desperate for peer approval, they defiantly join a gang of tough kids, and thus teenage hatemongers are born. As they learn to be meaner and tougher, they start to feel important. According to the *Detroit Free Press* (November 19, 1987): “It gives them a target for their anger: Jews, blacks and other minorities, who they believe have robbed them of their rightful, dominant place in the world. It pumps them up with a sense of power they lack. They are transformed from cast-offs into heroes, ready to defend the country from ‘intruders.’” *Id.*, at 92, 93. See also, Finn-Aage Esdbensen, Stephen G. Tibbetts, Larry Gaines, *American Youth Gangs at the Millenium* (Waveland 2004), and Kayleen Hazlehurst and Cameron Hazlehurst, eds., *Gangs and Youth Subcultures: International Explorations* (Transaction 1998).

¹³⁶ Jeremiah Marquez, “Latest U.S. threat: homegrown militants,” *The Plain Dealer*, Saturday, September 3,

The newly spiritualized “secular” Muslim who becomes a true believer and the inmate who is converted to Islam while in prison are like many other new converts to a powerful system of belief. The passion of being “brought to the light” coupled with unquestioning acceptance of the tenets given them by the demagogues they see as the true voice of god is all-consuming.¹³⁷ If their new prophets preach peace and light they will strive to emulate that ideal. If the message is one of death and hate the converts will succumb to that dark message. They become willing instruments of their new masters who offer structure, purpose and “truth” for what may be the first time in their lives. Thus, in some instances, is a terrorist born.

The Rejection of Liberal Democracy

Diversity and multiculturalism represent important political tools. They have been used to justify the reversal of intolerable and immoral abuses against disfavored groups such as African Americans and women in the U.S. This is a vital role because diversity and multiculturalism are tools that have helped to open up a reprehensible discriminatory system. These diversity and multicultural tools have very different consequences,

2005, A6. This Associated Press report relates the federal criminal charges against four suspects, one a Pakistani but the other three (Levar Washington, Gregory Patterson and Kevin James) converts to Islam while in prison. Their targets are alleged to include military sites, synagogues, the Israeli Consulate and the LAX El Al counter. To the extent a pattern of such conversions can be identified it calls into question how Islam is dealt with in prisons, something that obviously is a volatile issue given the recent Supreme Court decision insisting on a wide range of religious practices that must not be disallowed by prison authorities and the kinds of proof required to interfere with religion. Prisons are a seeding ground for disaffected people willing to devote themselves to a “faith” that justifies their own failures and identifies the “system” responsible for their own inadequacy. Once again the refusal of a majority of Justices to understand what goes on in prison reflects the gap between reality and the awareness of the people who manage to politic themselves onto the Supreme Court.

¹³⁷ An exceptional analysis is found at Abdal-Hakim Murad, “The Poverty of Fanaticism,” *Islam Today*, September 4, 2005; <http://www.islamfortoday.com/murad02.htm> (visited 9/6/05). The author indicates he is a British convert to Islam and describes his various experiences. He argues: “There was a time, not long ago, when the ‘ultras’ were few, forming only a tiny wart on the face of the worldwide attempt to revivify Islam. Sadly, we can no longer enjoy the luxury of ignoring them. The extreme has broadened, and the middle ground, giving way, is everywhere dislocated and confused. And this enfeeblement of the middle ground, was what was enjoined by the Prophetic example, is in turn accelerated by the opprobrium which the extremists bring not simply upon themselves, but upon committed Muslims everywhere.” Murad then warns: “If these things go on, the Islamic movement will cease to form an authentic summons to cultural and spiritual renewal, and will exist as little more than a splintered array of maniacal factions. The prospect of such an appalling and humiliating end to the story of a religion which once surpassed all others in its capacity for tolerating debate and dissent is now a real possibility. The entire experience of Islamic work over the past fifteen years has been one of increasing radicalization, driven by the perceived failure of the traditional Islamic institutions and the older Muslim movements to lead the Muslim peoples into the worthy but so far chimerical promised land of the ‘Islamic State.’ ”

however, when offered as a substantive moral system in which everything is of equal weight and no one element is better than another.

Used in this way, the ethic of diversity and multiculturalism becomes a nihilistic doctrine. By denying value to the cultures that are the only ones that permit such norms to operate, they destroy the internal coherence of cultures and societies. They do this because there is nothing substantive at the core of their assertions. Taken outside their appropriate context the doctrines of multiculturalism and diversity are at root nothing other than post modernist strategies to destroy what is while contributing nothing to what should be. When this is not understood the effects are like an acid that when applied carefully creates beautiful etchings or engravings, but when applied indiscriminately or excessively eats away the good as well as the bad.

Tony Blair's proposal for law and policy reform in the UK is based in part on the idea that there are core values that can be understood as "Britishness."¹³⁸ He argues that someone seeking to come into the country as a permanent resident or citizen or remain in the UK must commit to or lose their right to stay. This is a dramatic shift from the

¹³⁸ The *London Daily Telegraph* published in July 2005 a description of what it labeled "[Ten Core Values of the British Identity](#)." These were:

I. **The rule of law.** Our society is based on the idea that we all abide by the same rules, whatever our wealth or status. No one is above the law - not even the government.

II. **The sovereignty of the Crown in Parliament.** The Lords, the Commons and the monarch constitute the supreme authority in the land. There is no appeal to any higher jurisdiction, spiritual or temporal.

III. **The pluralist state.** Equality before the law implies that no one should be treated differently on the basis of belonging to a particular group. Conversely, all parties, sects, faiths and ideologies must tolerate the existence of their rivals.

IV. **Personal freedom.** There should be a presumption, always and everywhere, against state coercion. We should tolerate eccentricity in others, almost to the point of lunacy, provided no one else is harmed.

V. **Private property.** Freedom must include the freedom to buy and sell without fear of confiscation, to transfer ownership, to sign contracts and have them enforced. Britain was quicker than most countries to recognise this and became, in consequence, one of the happiest and most prosperous nations on Earth.

VI. **Institutions.** British freedom and British character are immanent in British institutions. These are not, mostly, statutory bodies, but spring from the way free individuals regulate each other's conduct, and provide for their needs, without recourse to coercion.

VII. **The family.** Civic society depends on values being passed from generation to generation. Stable families are the essential ingredient of a stable society.

VIII. **History.** British children inherit a political culture, a set of specific legal rights and obligations, and a stupendous series of national achievements. They should be taught about these things.

IX. **The English-speaking world.** The atrocities of September 11, 2001, were not simply an attack on a foreign nation; they were an attack on the anglosphere - on all of us who believe in freedom, justice and the rule of law.

X. **The British character.** Shaped by and in turn shaping our national institutions is our character as a people: stubborn, stoical, indignant at injustice. "The Saxon," wrote Kipling, "never means anything seriously till he talks about justice and right."

diversity and multicultural system that has dominated liberal belief in the West for the past twenty years or so. The argument underlying the diversity and multicultural movement is that it is virtuous to accept anyone's beliefs or values as being not subject to criticism because—the claim is made--no one has the moral right to judge themselves as “better” or another's practices as “worse.”¹³⁹ Of course, this was always a one-way “principle” because it was a period in which it was *de rigueur* among activists and intellectuals to denounce the culture of the West with great vitriol.

There is, of course, real danger in the idea that people should be required to adhere to a specific code of values or beliefs. This is ironically demonstrated in the speech control coding often referred to as political correctness. This easily becomes a tool of bigotry and repression. Clarity is needed to understand the limits of such requirements and the reasonable right of a nation to take actions to protect its own cultural integrity. Perhaps it is useful to talk in terms of a continuum of values that ranges from abhorrence all the way to approval and incorporation. The full continuum might look something like this—*abhorrence-dislike-disapproval-endure-tolerate-accept-respect-approve-incorporate and instill*. I offer this range simply to clarify that there are dangers in collapsing peoples' beliefs and behaviors into an overly simplistic model.

The valuation continuum set out above represents distinct kinds and weights. Tolerance is, for example, a very different thing than respect. It is one thing to say that we should tolerate behaviors and cultures different from our own, or from ones we personally

¹³⁹ The debate over the desirability of multiculturalism as the core value of modern democracies is raging in the UK after the bombings of July 2005. For a taste of the controversy see: Jonathan Freedland, “The identity vacuum: Britain should follow the US approach to citizenship, which emphasizes not only diversity but the ties that bind,” *Guardian*, 8/3/05; Mathew Tempest, “Davis calls for rethink on multiculturalism,” *Guardian*, 8/3/05; David Davis, “Why cultural tolerance cuts both ways,” *opinion.telegraph (London Telegraph)*, 8/3/05; George Jones, “Multicultural Britain is not working, says Tory chief,” *news.telegraph (London Telegraph)*, 8/3/05; “Obsessive correctness betrays all of us,” *opinion.telegraph (London Telegraph)*, 8/3/05; Pew Forum on Religion & Public Life, “Views of Muslim-Americans Hold Steady After London Bombings: Fewer Say Islam Encourages Violence,” 7/26/05; Anthony King, “One in four Muslims sympathises with motives of terrorists,” *News.telegraph (London Telegraph)*, 7/28/05; Munder al-Adhami, “Not hate, vengeance,” *The Guardian* [online], 7/16/05; George Monbiot, “The new chauvinism: I'm not ashamed of my nationality, but I have no idea why I should love this country more than any other,” *The Guardian* [online], August 09, 2005; Roy Hattersley, “End this chorus of intolerance: It is uncivilised to demand that Muslims abandon their way of life,” *The Guardian* [online], August 12, 2005; Ziauddin Sardar, “The struggle for Islam's soul: While most Muslims abhor violence, some terrorists are a product of a specific mindset with deep roots in Islamic history. If Muslims everywhere refuse to confront this, we will all be prey to more terror,” *Toronto Star (Star.com)* 7/22/05.

prefer, because that is appropriate behavior in a diverse and multicultural system. It is another claim entirely that because a wide range of beliefs and behaviors are entitled to tolerance in a democratic system that the tolerance actually stands for respect or gives rise to the right to be respected as opposed to tolerated because we accept that as a necessary element of democracy.

The point is that tolerance is important but so is an understanding of the other terms on the valuational continuum. This includes their limits and gradations of meaning. For something to be banned as offensive to the full traditional political community it should be something quite well along the way to abhorrence. For me such things as slavery, justification of the murder of innocents as a deliberate act of terrorism, and the repression of women and historically disenfranchised minorities denied a fair opportunity to participate in society fit into the realm of things I abhor.¹⁴⁰

Beyond these areas of non-negotiable absolutes, there are many behaviors I consider unwise, sleazy, undesirable and morally questionable. But in the democratic system in which I was raised it is not my right to ban most of those behaviors. Nor do I feel entitled to impose my moral preferences on others. I am, however, entitled to my beliefs and principles, and to question and judge behavior in terms of my own estimation of the conduct. But that is basically as far as it goes. The idea that others must believe and act as I do is anathema.

This brings us to the question of whether a nation has the right to protect its sense of what comprises its national culture. If so, is it proper to take actions to inculcate the tenets of that cultural system and even decide to deny admission to people who reject those values? The proposal made by Blair and his insistence that immigrants understand the conditions of “Britishness” as part of the compact they enter when living in Great Britain reflect that belief. This approach offers an intriguing perspective on what might be done. Blair was asserting the UK does have the right to ask citizens and permanent residents to

¹⁴⁰ An attempt to counter the traditional treatment of women in Islam is found in Asghar Ali Engineer, *The Rights of Women in Islam*, second edition (New Dawn 2004). The author seeks to demonstrate how the Qur’an and other doctrinal sources allow equal rights and treatment of women within the system of Islamic belief.

accept *British* values.¹⁴¹ Of course such a listing of core values is subject to abuse, exclusion and misapplication. But I remember such value statements as permeating the culture when I was growing up and accept that the mixture of lore, history, myth and principles other recitals help form a system of belief that is unique to one's own culture.

It may sound strange in this cynical age but I can identify a set of stories, statements, codes of belief and action, and so forth that shaped my value system to the point I can neither escape them nor want to. The list includes the Pledge of Allegiance, the Preamble to the Declaration of Independence and the Gettysburg Address. It contains the stories of Horatio at the Bridge, the Three Hundred Spartans, the Chanson de Roland and the bravery, sacrifice and betrayal of Joan of Arc. It includes the Boy Scout Oath, and the stories of Abraham Lincoln walking miles as a boy to return an overpayment to a storekeeper and George Washington telling the truth about chopping down the cherry tree.

To this, I admit somewhat hesitantly in this culture, can be added a little boy's understanding of the medieval Code of Chivalry as the proper way a woman should be treated by a gentleman (I apologize to my feminist friends for the rampant chauvinism of my youth), and the Athenian creed of "a perfect mind in a perfect body" (neither of which I have managed to achieve). Of course, there was more and much it the lessons involved subconscious and implicit messages. Nathan Hale's statement when he was to be hanged that "I regret I have only one life to give to my country," along with Vermont's beautiful motto, "Don't Tread on Me" are parts of the experience. From all these sources I took almost intuitive lessons involving the values of truth, integrity, loyalty, duty, racial and gender equality, love of country and much more.

My point is that values of the kind we are considering as core to Britain or France or the United States are not something that can be delivered on a fixed template or simply through reading words. Such belief systems are constructed of an unpredictable diversity of experience within the culture itself and are not reproducible at will or fully achievable

¹⁴¹ See "Ten Core Values," *supra*, n. .

through formal educational processes. The call for the articulation of such core values is understandable and important for nations to confront in a time where it is being claimed that no one has the right to prefer one's culture.

But, if we are honest, we must understand that it is difficult or impossible to know how to instill such principles within people who have not actually "lived" the culture. Historically, in a nation such as the United States, that didn't matter because everyone who came to the country as a free person by their own choice was striving to learn the values and to become a part of the system. It does matter, however, when the values become attenuated and diffuse within a fragmented culture in which the desire and duty to assimilate is rejected. The UK has begun an effort to teach "Britishness" although it was predictably criticized.¹⁴²

The call for core cultural values can easily become an exclusionary mechanism that justifies denial of entry into our society to people from cultures lacking such traditions. While I am obviously saying that nations—even in the West—have the right to require and expect those admitted into their specific Social Contract to respect and adhere to the core values and terms of that implicit agreement, I won't pretend that I know how to do this in a diverse world. Certainly, given that the July 7 and 21 UK bombers in London in the summer of 2005 were "homegrown" and at least in theory might therefore be expected to have received an infusion of the *Ten Core Values* then we understand that the task of instilling such value systems is daunting.

Personally I think Tony Blair has it right to the extent that his strategy is aimed at identifying the hatemongers and organizers who have been providing young British Muslims with a set of values entirely contrary to any we might think positive.¹⁴³ It is a

¹⁴² See, "Schools 'must teach Britishness': Schools in England should teach "core British values" alongside cultural diversity, a report says," *BBC News*, Thursday, 25 January 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/education/6294643.stm; Gary Eason, "Britishness lessons 'fuel racism'" *BBC News*, Saturday, 7 April 2007.

¹⁴³ The new rules of the game are radically different. See, "The prime minister's statement on anti-terror measures," Friday, August 05, 2005, *The Guardian* [online]. The Prime Minister remarked: "Let no one be in any doubt. The rules of the game are changing...." He also recognized that other changes are likely to be needed, including

major step to remove these cancers from British society. The French are quietly following the same strategy, and the Dutch are rethinking their approach to an open society following the murders of Fortuyn and Van Gogh.

The idea of excluding the hatemongers and their supporters is similar to one any good trial attorney understands is a critical part of selecting a jury. In that context the lawyer may not be able to select people who will decide in her client's favor because of the subtlety of human experience and decision-making. But a strategic goal is to eliminate potential jurors who can be predicted will function as a negative or destructive force within the jury process based on their answers to *voir dire* questioning. Britain and other countries in Western Europe have to this point given free rein to a core of "poisoners" with an inordinate degree of influence over vulnerable young Muslim males. The young converts to fanaticism may have been generally "Islamic" to begin with in that most of them were raised in that cultural tradition even if not originally devout practitioners. But they were not fanatics until struck by the "lightning" of hate filled madmen such as Abu Hamza, Abu Qatada and Omar Bakri.

the relationship between the UK and European human rights laws, concluding: "Should legal obstacles arise, we will legislate further, including, if necessary amending the Human Rights Act, in respect of the interpretation of the ECHR." The Prime Minister proposed the following changes.

1. Deportation is a decision taken by the home secretary under statute. The new grounds will include fostering hatred, advocating violence to further a person's beliefs or justifying or validating such violence.... Once the new grounds take effect, there will be a list drawn up of specific extremist websites, bookshops, centres, networks and particular organisations of concern. Active engagement with any of these will be a trigger for the home secretary to consider the deportation of any foreign national."2. [T]here will be new anti-terrorism legislation in the autumn. This will include an offence of condoning or glorifying terrorism. The sort of remarks made in recent days [approving or justifying the London bombings] should be covered by such laws. But this will also be applied to justifying or glorifying terrorism anywhere, not just in the UK.
3. Anyone who has participated in terrorism or has anything to do with it anywhere will automatically be refused asylum.
4. We have already powers to strip citizenship from those individuals with British or dual nationality who act in a way that is contrary to the interests of this country. We will now consult on extending these powers, applying them to naturalised citizens engaged in extremism and making the procedures simpler and more effective.
5. Cases such as Rashid Ramda wanted for the Paris metro bombing 10 years ago and who is still in the UK whilst France seeks extradition, are completely unacceptable. We will begin consultation, on setting a maximum time limit for all future extradition cases involving terrorism.
6. We are already examining a new court procedure which would allow a pre-trial process. We will also examine whether the necessary procedure can be brought about to give us a way of meeting the police and security service request that detention pre-charge of terrorist suspects be significantly extended.
7. For those who are British nationals and who cannot be deported, we will extend the use of control orders. Any breach can mean imprisonment.

Home Secretary Charles Clarke, in seeking to develop policies relating to the Prime Minister's direction created a list of activities that apply to both deportation and the denial of entry to the UK in the first instance. Mr. Clarke stated in what must be a politician's tongue-in-cheek manner that: "These powers are not intended to stifle free speech or legitimate debate about religions or other issues. Britain is rightly proud of its openness and diversity and we must not allow those driven by extremism of any sort to destroy that tradition."¹⁴⁴

This tradition of free speech will be rather difficult to maintain given that Clarke's criteria: "will cover any foreign-born national 'writing, producing, publishing or distributing material, public speaking including preaching, running a website; or using a position of responsibility such as teacher, community or youth leader to express views which foment, justify or glorify terrorist violence in furtherance of particular beliefs; seek to provoke others to terrorist acts; foment other serious criminal activity or seek to provoke others to serious criminal acts; or foster hatred which might lead to inter-community violence in the UK.'"¹⁴⁵

As part of the identification of individuals who have offended these restrictions a database will be created identifying those who have violated the above "good behavior" restrictions *anywhere in the world at anytime*. A list of 100 radicals has already been drawn up by British embassies around the world.¹⁴⁶ The actual implementation of the full range of the proposals will not be easy or automatic given the shifting tides of politics and public opinion. Shortly after the initial London bombings there was a broad

¹⁴⁴ Matthew Tempest, "Clarke reveals terror deportation rules," *The Guardian* [online], Wednesday, August 24, 2005.

¹⁴⁵ Tempest, "Clarke reveals terror deportation rules," *id.* Mr. Clarke's claims give pause, however, when viewed in light of his rather odd "methinks the Home Secretary doth protest too much," statement made several days later that: "I don't like liberals." He continued: "I am not soft. I am neither woolly or liberal or a woolly liberal. I have never been liberal in my life. I don't like liberal with a capital L or a small l." This was said in response to a rumor that the Prime Minister thought he was too soft on crime and was contemplating his replacement in the next several months. See, Matthew Tempest, "I'm no liberal, says Charles Clarke," Friday, September 2, 2005, *The Guardian* [online].

¹⁴⁶ See, Press Association, "UK embassies draw up list of radicals," Thursday, September 8, 2005, *The Guardian* [online].

spectrum of cross-party support.¹⁴⁷ But this consensus was followed by disputes and conflict.¹⁴⁸

At least Mr. Clarke appears to be applying the exclusionary policy evenhandedly. Clarke banned from entry into the UK Steven Best, professor of philosophy at the University of Texas at El Paso. The report indicates: “In July Dr Best spoke at an international animal rights conference in England. At that conference, he was quoted by the Daily Telegraph as saying: ‘We are not terrorists, but we are a threat. We are a threat both economically and philosophically. Our power is not in the right to vote but the power to stop production. We will break the law and destroy property until we win.’”¹⁴⁹ He allegedly stated in his July presentation that his mission was not to: “‘reform’ vivisectionists but to ‘wipe them off the face of the earth’.” The Home Office cited these words in a letter to Dr Best last week banning him from entering the UK. Dr Best, who claims his words have been taken out of context, said he was not surprised by the ban. ‘It was only a matter of time, especially after July 7. The climate in Britain is totally unbelievable. It’s very fascist. It’s becoming a police state’.”¹⁵⁰

The United States appears on the same track or, perhaps more accurately, Britain is on the American path. The INS recently denied a visa to a Muslim professor who was scheduled to teach at Notre Dame, based on his statements and writings over the years.¹⁵¹ Although Tariq Ramadan was barred under a section dealing with the denial of admission into the U.S. of terrorists and those who support terrorism, Slevin’s report indicates the State Department refused to indicate any actual reasons.¹⁵²

¹⁴⁷ See, e.g., Alan Travis, “Parties back Clarke on anti-terror laws,” *The Guardian* [online], Tuesday, July 19, 2005.

¹⁴⁸ See, Michael White, “Tories row over Muslim ‘loyalty’,” *The Guardian* [online], Thursday, August 4, 2005; Matthew Tempest, “Consensus fails as Clarke outlines terror bill,” *The Guardian* [online], Thursday, September 15, 2005.

¹⁴⁹ See, e.g., Donald MacLeod, “Britain uses hate law to ban animal rights campaigner,” Wednesday, August 31, 2005, *The Guardian* [online].

¹⁵⁰ See, e.g., Donald MacLeod, “Britain uses hate law to ban animal rights campaigner,” Wednesday, August 31, 2005, *The Guardian* [online].

¹⁵¹ Peter Slevin, “Lacking Visa, Islamic Scholar Resigns Post at Notre Dame,” *Washington Post*, Wednesday, December 15, 2004, A6.

¹⁵² Slevin, *id.*, reports: “Ramadan has said he called on Muslims after Sept. 11, 2001, to condemn the terrorist attack and declare it a betrayal of the Islamic message. He has often denounced anti-Semitism and has called for a ‘spiritual reformation that will lead to an Islamic feminism.’ Ramadan has accused the Saudi government of human rights violations. He has also criticized Bush administration policies in the Middle East, calling them ‘misguided and

The recently banned cleric Omar Bakri Muhammad proved a bad “house guest” and has already fallen to the new policies. After being provided governmental financial support and allowed to remain in Britain for twenty years in the face of potential charges in the Middle East, he thanked his UK benefactors by proclaiming that the four July 7 bombers who murdered more than fifty people were heroes and the 9/11 murderers in America the “Magnificent 19.” The hardest question is not whether Clarke had the right to ban Bakri, but what perverted notion of “tolerance” caused the Brits to allow him to remain in the UK until now? ¹⁵³

This highlights the free speech dilemma being faced by Western nations, particularly Britain and America that possess greater traditions of allowing political speech than many other European countries. Under the umbrella of tolerance, human rights and free speech, Britain not only provided a safe haven for people such as Abu Hamza and Omar Bakri, but provided these individuals with financial support and the opportunity to convert British youth into the cult of fanatical jihadist Islam.¹⁵⁴ The fair question is why it took the British so long to appreciate the dangers of the policy under which they facilitated the process we are describing. ¹⁵⁵

counterproductive’ in a New York Times op-ed in September. He said that ‘sponsoring a few Arabic TV and radio channels will not lead to real changes in Muslims’ perceptions.’ His critics contend that Ramadan delivers a more extremist message in Arabic than in French or English and may have ties to al Qaeda members, although the U.S. government has not made public allegations against him. Ramadan, whose grandfather, Hassan Banna, was a founder of the militant Muslim Brotherhood, said the ‘State Department’s reasoning remains a mystery.’”

¹⁵³ Trifkovic, “Islamic Immigrants,” *supra*, n. , relates that Syrian-born Sheikh Omar bin Bakri has proclaimed: “‘We will remodel this country in an Islamic image,’ [noting that Bakri] belongs to The International Islamic Front for Jihad against Jews and Crusaders, founded by Bin Laden, and boasts: ‘We collect funds to be able to carry on the struggle; we recruit militiamen; and sometimes we take care of these groups’ propaganda requirements in Europe.’ When the Afghan war started in October 2001, Bakri declared: ‘We will replace the Bible with the Koran... Christians have to learn that they cannot do this to Islam. We will not allow our brothers to be colonised. If they try it, Britain will turn into Bosnia.’ Remarkably, this same Mr. Bakri ... was expelled from Saudi Arabia in 1985 as a dangerous agitator for creating Al-Muhajirun, a branch of the Islamic Revolutionary Party. He has lived in London since 1986, drawing \$500 a week in welfare, and calling on young Muslims to take up arms against the ‘opponents of Islam’ – ultimately meaning everyone who is not Muslim, or who does not subscribe to his vision of Islam. While living in Britain at its taxpayers’ expense he denounces it as ‘the spearhead of blasphemy that seeks to overthrow Muslims and the Islamic caliphate.’”

¹⁵⁴ As pointed out previously, jihad has varied meanings, a number of which are admirable efforts aimed at creating an harmonious and just society. An excellent discussion of the concept, including its corruption in the cause of terror is found in Charles T. Davis III, Chapter 11, “The Qur’an, Muhammad, and Jihad in Context,” J. Harold Ellens, ed., *The Destructive Power of Religion: Violence in Judaism, Christianity, and Islam*, volume 1, *Sacred Scriptures, Ideology, and Violence* at 233 (Praeger 2004).

¹⁵⁵ See, Mark Oliver and agencies, “Radical cleric banned from Britain,” Friday, August 12 2005, *The Guardian* [online]; Alan Travis, Duncan Campbell, and Audrey Gillan, “Clarke uses ‘personal power’ to ban Bakri from UK,” Saturday August 13, 2005, *The Guardian* [online]. What might Bakri have said that violated the Blair

The new standards and processes have not escaped challenge. Within a day after the Home Secretary announced the new policy the United Nations Human Rights Commission's Special Investigator on Torture stated that the return of radical Islamic preachers to their countries of origin "reflects a tendency in Europe to circumvent the international obligation not to deport anybody if there is a serious risk that he or she might be subjected to torture."¹⁵⁶ In his counter-critique, Clarke lamented: "I wish the UN would look at human rights in the round, rather than simply focusing all the time on the terrorist."¹⁵⁷

Criticisms also came from internal UK sources. Although their criticisms were surprisingly non-specific, a small number of British political figures denounced the proposed measures. The Member of Parliament from Tooting, South London, Mr. Khan, remarked, for example, that the bipartisan breadth of the statement's thirty signatories reflected the "widespread concern" over some aspects of Blair's response to the July 7 bombings.¹⁵⁸ In words that demonstrate why there has been a long running refusal of

policies? A 2004 news report indicates, for example, that Bakri "would support hostage-taking at British schools if carried out by terrorists with a just cause. Omar Bakri Mohammed, the spiritual leader of the extremist sect al-Muhajiroun, said that holding women and children hostage would be a reasonable course of action for a Muslim who has suffered under British rule." He also stated after the July 7 bombings that there no longer would be a zone of security in Britain and that there would be more bombings. See, Rajeev Syal, "Cleric supports targeting children," News.telegraph (*London Daily Telegraph*) Sept. 5, 2004. The Timesonline (*London Times*) collected several public statements made by Bakri. They include: "The 9/11 hijackers: "The magnificent 19"; Osama bin Laden: "Why I condemn Osama bin Laden for? I condemn Tony Blair, I condemn George Bush. I would never condemn Osama bin Laden or any Muslims"; Law and Order: "The way to earn the heart of the British youth is by the divine text, to say God say it and Mohammed say it, 'Do not attack the people you live among.' Not to tell them, 'Tony Blair say it, the law say it, don't do so'"; The London bombings: "I blame the British Government and I blame the British people. They are the ones who should be blamed"; Suicide bombings: "We call it self sacrifice. You must fight for the way of Allah - to kill first and be killed. If somebody decided to land an aeroplane over 10 Downing Street, for example - this is a form of self sacrifice"" <http://www.timesonline.co.uk/article/0,,22989-1702695.00.html>. [8/21/05].

¹⁵⁶ Ewen MacAskill, Julian Glover and Vikram Dodd, "Expulsions illegal, UN tells Clarke," Thursday, August 25, 2005, *The Guardian* [online].

¹⁵⁷ Ewen MacAskill, Julian Glover and Vikram Dodd, "Expulsions illegal, UN tells Clarke," Thursday, August 25, 2005, *The Guardian* [online].

¹⁵⁸ Matthew Tempest, "Critics raise alarm over 'exclusive' new terror laws," Friday, August 26, 2005, *The Guardian* [online]. See also, Jonathan Freedland, "The pitfalls of legislation pushed through in panic," *The Guardian* [online], Saturday, September 17, 2005; Leader, "Blows to democracy," *The Guardian* [online], Saturday, September 17, 2005, where the argument is made that there are: "three ways fundamental democratic principles are being quite unnecessarily damaged by this week's moves. First, free speech. Under the proposed law anyone who "glorifies, exalts or celebrates" any terrorist act committed over the past 20 years could face a sentence of up to five years. Rarely, even within notorious conspiracy legislation, has there been such a broadly drafted clause. What makes it even more unnecessary is that the bill already tightens up the incitement to terrorism offence. If the test has to be overt endorsement of terrorism - as officials suggested this week - why not prosecute them under the direct incitement clause? More absurd still, the home secretary will be empowered to go even further and draw up a list of historical terrorist acts which if "glorified" could mean a criminal act had been committed. Consider the huge distractions such a list would generate, when all efforts ought to be concentrated on effective moves to pre-empt terrorism."

such bodies as the UN to come to grips with global terrorism, Mr. Khan lamented: “There is a real danger that hastily drafted legislation could end up stifling the ability of Britons to stand up for those living under oppression abroad.”¹⁵⁹ He continued: “Who decides if someone is a terrorist or freedom fighter?”¹⁶⁰

I suggest Mr. Khan’s dilemma is much simpler in some ways than many admit. The test of terrorism lies far less in the “cause” than in the tactics. When someone deliberately targets innocent people for the real or alleged “sins” of others then it *is* murder and it *is* terrorism. The bombings of July 7 and 21 are terrorist acts regardless of the rightness or wrongness of Britain’s participation in the Iraq War. So were the Madrid bombings. The targets were entirely non-military. For all the London bombers knew, they murdered people who marched in Hyde Park in the spring of 2003 to protest against the impending invasion of Iraq.

Nor were the London bombers even Iraqis who might arguably have some greater right to take direct action against the military or leaders of a nation that had invaded their own. The murderers were global war Islamists who prate about worldwide Islam and the protection of Muslims but have repeatedly demonstrated their willingness to murder other innocent Muslims. The lunatic rationalizations of such actors should not be mistaken for the legitimate acts of “freedom fighters” directed toward their specific oppressors. It is to the great discredit of the United Nations that it refuses to admit that the deliberate killing of innocents is murder.

Of course we can try to alter the idea of “innocence” simply by redefining everyone of a particular kind to be a target. We saw this approach in Bin Laden’s 1998 *fatwa* in which he urged deadly attacks on all Americans wherever found because no American was “innocent” by virtue of the fact they were Americans.¹⁶¹ Zarqawi in Iraq announced that

¹⁵⁹ Tempest, “Critics raise alarm over ‘exclusive’ new terror laws,” *id.* Obviously I agree there is a danger to Europe and the U.S. over reacting to terrorist threats in ways that go too far and undermine the core integrity of their national cultures and damage the values of the Rule of Law. At this general level I share Mr. Khan’s concern. But the UN has hidden behind the political interests of many of its members in refusing to be honest about terrorism and the need to come down forcefully with its proponents and perpetrators.

¹⁶⁰ Tempest, “Critics raise alarm over ‘exclusive’ new terror laws,” *id.*

¹⁶¹

he will target all Shiites.¹⁶² Or the same vileness is reflected in the justification of Palestinian attacks on cafes and buses inside Israel because no Israeli could be innocent. Of course the perpetrators of attacks on civilian targets will say that their tactics are necessary because it is the only way to fight a militarily superior opponent. A perceived necessity becomes a moral imperative.

In part, of course, the mistake is found throughout the European Union where an extreme form of tolerance and respect for human rights caused nations to be blinded to the threat. In trying to be compassionate and to atone for past colonial sins, the nations of “Old Europe” naively let the fox run free in the henhouse. Now they must trap and deal with the predatory intruders. Breaking the link between Jihadist cult leaders and the young Muslims of Europe is an important step to the period of deprogramming that now must occur. One analyst has suggested we look at Jihadist terror perpetrators in the same way the world reacted to the threat of piracy, convincing all nations and regimes to legally define the terrorists as “enemies of the human race.”¹⁶³ Statements of such beliefs have been issued by various national leaders on several occasions but they have been empty words without much action.

Conclusion

The commitment to informed discourse that we automatically assume lies at the center of the democratic ideal may be a delusion. Aristotle warned: “There is a limit to the size of a city just as there is to everything else.... For if any one of these is either too small or too large in size, it will not have the power that belongs to it but will sometimes wholly forfeit its nature and sometimes be in a base condition.”¹⁶⁴ Full and honest discourse *might* have been possible in the small city state of Athens where the rights of citizenship

¹⁶² This was never clearer than in the taped message released in January 2005 prior to the initial elections in Iraq in a tape attributed to Abu Musab al-Zarqawi that declared: “‘We have declared a bitter war against democracy and all those who seek to enact it,’ said the speaker in the 35-minute message. ‘Democracy is also based on the right to choose your religion,’ he said, and that is ‘against the rule of God.’” CNN.com, Sunday, January 23, 2005. <http://www.cnn.com/2005/WORLD/meast/01/23/iraq.main/> (visited 9/6/05).

¹⁶³ Douglass R. Burgess, Jr., “The Dread Pirate Bin Laden: How thinking of terrorists as pirates can help win the war on terror,” *Legal Affairs*, 8/22/05.

¹⁶⁴ *The Politics*, Bk. 4, c. 4, 1326a35, at 123.

were limited to Athenian males while foreigners, women and slaves were excluded.¹⁶⁵ Even if this questionable proposition were true for ancient Athens it bears no relationship to the political system that now masquerades behind the rhetoric of democracy.¹⁶⁶

The arguments I am offering here admittedly seem to come from both sides and it has been a struggle to sort them out. On the one hand I am arguing that suppression of speech such as occurred in the case of Bardot and Fallaci is wrong. The same point was made for repression of speech in cases like *Catch the Fire Ministries*, and for the criminalization of criticism of gay rights. To me, these mixtures of formal and informal repression are examples of unwise abuse of either governmental power directed at non-violent individual, or a too-great empowerment of particular groups clustered around socially conflicted issues where one group's position and agenda has been elevated to the status of a protected orthodoxy. While it is vital that a constitutional democracy protect the positions and rights of minority interests it is equally true that tolerance is intended to protect dissent and the differences of the majority as well as the minority.

That is why is it possible to argue it is acceptable to impose stringent limits and sanctions on the speech of Muslim clerics and figures that seek to foment violent action against others. First of all, I hope it is clear that my position is not opposition to Islam itself but to the cult of violence and death that, while adopting an Islamic façade, nonetheless produces the terrorism we now face. The speech we are examining is more militaristic than political. To the extent it *is* political, it is only political in the sense of being deliberately destructive propaganda advocating the violent overthrow of Western societies—not only America the *Great Satan*, but all of Western society.¹⁶⁷ It is a form of seditious libel aimed at undermining and even destroying the existing social order.¹⁶⁸

¹⁶⁵ See, Aristotle, *The Politics*, Bk. II, c. 8, *supra* n. .

¹⁶⁶ I developed these ideas in greater detail in David Barnhizer, "The Virtue of Ordered Conflict: A Defense of the Adversary System," 79 *Nebraska Law Review* 657 (2000).

¹⁶⁷ This was never clearer than in the taped message released in January 2005 prior to the initial elections in Iraq in a tape attributed to Abu Musab al-Zarqawi that declared: "We have declared a bitter war against democracy and all those who seek to enact it," said the speaker in the 35-minute message. 'Democracy is also based on the right to choose your religion,' he said, and that is 'against the rule of God.'" CNN.com, Sunday, January 23, 2005. <http://www.cnn.com/2005/WORLD/meast/01/23/iraq.main/> (visited 9/6/05).

¹⁶⁸ See the discussion of seditious libel at *supra*, n. .

Just as the *Old Man of the Mountain* sat back in his lair and sent assassins out to kill, modern throwbacks to the *Hashishin* plot attacks in loosely coordinated cells against their perceived enemies.¹⁶⁹ They represent only a fragment of Islam although it is a strand that has been present in Islam for much of its history. The actions of al-Qaeda and its supporters are no more legitimate than those characterized by the *auto-da-fe* of the Spanish Inquisition. Evil done in the name of God remains evil in the eyes of God.¹⁷⁰

The fact that there is a commitment to terror by militant jihadists justifies emergency measures aimed at identifying, isolating and eliminating those who are direct actors and those who are facilitators, enablers and co-conspirators. The question is how far can we go in implementing measures to destroy the practitioners of violence before we corrupt a flawed but still noble experiment in governance represented by the Rule of Law? There is a need to pursue the instigators of violence whatever they claim as their justification. But the challenge is how to do this while avoiding harmful spillover effects into the general social system and without permanently empowering our own governments to spy on us and use the vast powers of government to intimidate.

¹⁶⁹ See, "Assassins," *Encyclopedia of the Orient*, <http://i-cias.com/e.o/assassins.htm> (visited 9/7/05). The report explains that the modern corruption of the idea of religious duty as a form of violence is not quite as recent as some argue, stating: "From the original sources, we learn that the Assassins changed the original Isma'ili doctrine, so that terrorism became a religious duty."

¹⁷⁰ I offer this incisive description of the *Old Man of the Mountain*. Some may see parallels with our current situation. See, Rick Davis, *Philosophy Today*, 2005 (online) <http://www.philosophynow.org/archive/articles/00lewis.htm>, 8/16/05.

"The legend of Hassan-ibn-Sabbah

The legendary Old Man of the Mountain was Hassan-ibn-Sabbah, the founder and grand master of a radical Islamic sect in the 11th century. His followers were viewed as heretics by other Muslims; according to the hostile reports of their contemporaries, they ate pork and held all their women in common.

Hassan's devoted followers were prepared to follow his orders unquestioningly, even when this would result in their own certain deaths. He frequently sent them on missions to kill hostile princes, the generals of armies sent to oppose him, and anyone else of whom he disapproved. His fanatical, highly-trained and highly-disciplined killers would blend with the enemy population disguised [sic] as merchants or soldiers, awaiting their opportunity. They would then sneak into their target's encampment or palace, and dispatch him with their long daggers. They were known as *Hashishin* from their habit of smoking hashish, either to generate visions of paradise or to give themselves courage before their (usually fatal) missions. This is the origin of the English word "assassin".

After earning the undying enmity of most of the rulers of central Asia, Hassan-ibn-Sabbah was forced to retreat with his followers to the inaccessible mountain fortress of Alamout, which was reputed to be impregnable. There he lived to the enormous age of ninety, dying in 1124.

Hassan was succeeded by other grand masters who, like him, used assassination as a political weapon in an attempt to impose their ideas upon Islam. In the 13th century they made the mistake of tangling with Genghis Khan, who in 1255 sent a vast army to capture Alamout, finally stamping out the sect of the Assassins."

There are consequences of communicating unpopular views. The desire to avoid offending those who have the power to harm us causes most of us to choose silence over speech. It is easiest to “keep your head down,” “go along with the crowd,” or accept our “thirty pieces of silver” than to risk opprobrium. Nor is this simply a phenomenon of the *hoi polloi*. Those whose responsibility it is to “speak truth to power” have far too often become cowards, opportunists and sycophants.

Russell Jacoby cited Voltaire for the proposition that if you write odes to those in power: “you will be well received. Enlighten men, and you will be crushed.”¹⁷¹ We must bring critical issues out of “the silence” and into public discourse. Citizens of democratic systems must be allowed and even encouraged to give voice to fundamental concerns.

¹⁷¹ Russell Jacoby, *The End of Utopia: Politics and Culture in an Age of Apathy* 105 (1999). We have developed numerous forms of specialized incantations expressed in symbolic political language that are dividing us into increasingly fragmented units of interest. In this “mode” of discourse we are both unwilling to communicate because it is interest group politics rather than intellectual discourse and we are unable to communicate because we lack the shared language and values that are essential to the enterprise.