

**Chapman University Dale E. Fowler School of Law**

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2010

# The Law Professor as Counterterrorist Tactician

Lawrence Rosenthal



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# CHAPMAN UNIVERSITY SCHOOL OF LAW



## LEGAL STUDIES RESEARCH PAPER SERIES

PAPER NO. 11-23

### *The Law Professor as Counterterrorist Tactician*

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# Texas Law Review

## *See Also*

### Response

#### The Law Professor as Counterterrorist Tactician

Lawrence Rosenthal\*

In his provocative article, Professor Aziz Huq suggests that current counterterrorist doctrine overemphasizes the role of religious speech as a “signal” for incipient terrorist violence and is therefore in need of an overhaul.<sup>1</sup> If the objections to the current regime were legal in nature, one could understand this type of critique coming from a law professor. Professor Huq, however, does not seem to believe that the problems with counterterrorist tactics are primarily legal in character. While he is concerned that First Amendment doctrine may not take adequate account of all of the harms that result when counterterrorism investigations are based on religious speech, Professor Huq does not suggest doctrinal reform. Instead, in the prescriptive portion of his article, he offers not a “legal, doctrinal lens” but “an institutional- and policy-design inquiry.”<sup>2</sup> Professor Huq questions whether counterterrorist tacticians “have lighted on the optimal signal for their aims.”<sup>3</sup> Professor Huq, it seems, has come up with a better way of catching terrorists.

As Professor Huq acknowledges, “[g]overnment officials clearly have a strong incentive to prevent terrorist attacks and a strong fear of being blamed if they fail.”<sup>4</sup> Given these incentives, it would be surprising if government officials have managed to embrace a relatively inefficient and ineffective

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1. See Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEXAS L. REV. 833, 836–37 (2011) (arguing that “the close associations of a suspect” present a better signal than religious speech and that such a change in focus would alleviate concerns over constitutional harms).

2. See *id.* at 867 (shifting in analytical focus from the law to issues of policy and institutions).

3. *Id.*

4. *Id.* at 873.

method for identifying incipient terrorist plots. It would be equally surprising if someone whose training and expertise is primarily legal turned out to be better at catching terrorists than the experts in the field. Professor Huq tells us that there is reason to “counsel for caution” when it comes to the current regime’s reliance on religious speech as an indication of lawbreaking.<sup>5</sup> There may be reasons to counsel for caution as well when assessing Professor Huq’s recipe for reform.

## I. Counterterrorism and First Amendment Doctrine

Let us begin, unfashionably in this era of interdisciplinary legal scholarship, with the law.

The problem of using statements of belief as evidence of a crime is not a new one in First Amendment jurisprudence. As Professor Huq notes, the evidentiary use of such statements imposes a kind of cost on statements of belief.<sup>6</sup> Yet, statements of ideological belief may also provide critical evidence of motive or intent in criminal prosecutions.<sup>7</sup> Moreover, just as “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and [thereby] causing a panic,”<sup>8</sup> it should be unsurprising that “it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”<sup>9</sup> For ideologically motivated crimes in particular, ideological statements may offer powerful and entirely appropriate evidence of motive and intent, even if their evidentiary use also has the potential to chill the exercise of First Amendment rights.

The Supreme Court has grappled with the use of otherwise constitutionally protected statements of belief as evidence of criminal intent. In a series of cases arising from prosecutions of Communists based on their membership in a group advocating the violent overthrow of the government in violation of the Smith Act, the Court held that First Amendment protection for statements of belief is lost only by proof that the speaker has engaged in present advocacy of violent action, specifically intending to produce violence.<sup>10</sup> The Court has hewed to this line in subsequent cases involving a

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5. *Id.* at 867.

6. See *id.* at 852 (noting that using religious speech as such a signal “raises the public cost of using religious speech” by, for example, “increasing the possibility of being targeted for investigation on the basis of that speech”).

7. *E.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 489–90 (1993).

8. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

9. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)) (internal quotation marks omitted).

10. See *Noto v. United States*, 367 U.S. 290, 297–300 (1961) (holding that the evidence “fail[ed] to establish that the Communist Party was an organization which presently advocated violent overthrow of the Government now or in the future”); *Scales v. United States*, 367 U.S. 203,

variety of regulations directed at otherwise protected beliefs or associations.<sup>11</sup> Another type of First Amendment problem involving the use of statements of belief as evidence of a crime is represented by *Holder v. Humanitarian Law Project*.<sup>12</sup> At issue in that case was a statutory prohibition on knowingly providing “material support” to a foreign terrorist organization, as applied to material support offered in the form of speech.<sup>13</sup> Under the statute, speech could fall within the statutory definition of prohibited “material support,” which included “training” and “expert advice or assistance.”<sup>14</sup> The Court acknowledged that the statute did not require the Government to prove that an accused specifically intended to aid the violent objectives of the terrorist organization because the statute prohibited assistance to the terrorist organization rather than support for its unlawful objectives.<sup>15</sup> The Court nevertheless upheld the statute against First Amendment attack, reasoning that any form of material support could enhance the terrorist organization’s ability to pursue violent objectives, while stressing that the statute did not prohibit independent advocacy, which was excluded from the statutory definition of “material support.”<sup>16</sup>

Professor Huq does not seek to reexamine any of this doctrine. He seems to agree that whatever “chilling effect” is created by the evidentiary use of statements of religious belief does not give rise to a constitutional problem.<sup>17</sup> He seems somewhat more concerned, however, by what he regards as a constitutionally protected interest in “epistemic autonomy.”<sup>18</sup>

For example, Professor Huq characterizes a line of cases prohibiting judicial review of the decisions of religious bodies as “caution[ing] against inquiries into the fidelity of one side or another to original church doctrine,”

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229–30 (1961) (noting that “the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute” because “he lacks the requisite specific intent” to overthrow the government); *see also* *Yates v. United States*, 354 U.S. 298, 320–27 (1957) (explaining the “traditional dividing line between advocacy of abstract doctrine,” which is not a criminal offense, and “advocacy of action”).

11. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918–20 (1982) (holding that civil liability cannot be based on statements of belief without adequate proof of a specific intent to produce violence); *Healy v. James*, 408 U.S. 169, 185–87 (1972) (holding, in a noncriminal context, that affiliation with a national organization “associated with disruptive and violent campus activity” was insufficient for a university to deny recognition of a campus organization); *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 599–600 (1967) (invalidating sections of New York’s teacher loyalty laws and regulations under the First Amendment because they could make abstract advocacy a basis to bar individuals from employment).

12. 130 S. Ct. 2705 (2010).

13. *Id.* at 2712–14 (discussing 18 U.S.C. § 2339B (2006)).

14. *Id.* at 2720–21 (citing 18 U.S.C. § 2339A(b)(2)–(3) (2006)).

15. *Id.* at 2717.

16. *Id.* at 2724–30.

17. Huq, *supra* note 1, at 851–53, 864.

18. *See id.* at 853–54 (identifying epistemic autonomy, or the interest of a religious community in determining its beliefs without governmental interference, as “a central battlefield for religious liberty in the American twentieth century”).

thus “creat[ing] a zone of decisional autonomy for ecclesiastical bodies.”<sup>19</sup> He characterizes another line of cases—prohibiting judicial interpretation of religious doctrine—as “commit[ing] exclusively to the highest ecclesiastical tribunals” resolution of “quintessentially religious controversies.”<sup>20</sup> Yet, it is far from clear that either line of cases has much to do with the evidentiary use of a terrorism suspect’s religious speech to establish a criminal motive or intent. The use of religious speech to establish that an accused either specifically intended to pursue a violent objective, or knowingly offered material assistance to a foreign terrorist organization in a manner coordinated with the organization, stops well short of anything protected under either line of cases. A judge or jury need know nothing about official religious doctrine or the proper resolution of religious controversies in order to conclude that a defendant’s religiously motivated speech reflects a specific intent to produce a violent outcome or amounts to material assistance that is coordinated with a foreign terrorist organization. Similarly, it is more than a little difficult to see how such use of religiously motivated speech is likely to inhibit “free development of norms and beliefs independent of state interference,”<sup>21</sup> unless Professor Huq somehow thinks that the First Amendment entitles religious groups to go beyond norms and beliefs and actually pursue violent objectives or render aid to a terrorist organization. Professor Huq, however, makes no claim along those lines.

Instead, Professor Huq is concerned about what he regards as the undue error rate in relying on religious speech as an indication of incipient criminality.<sup>22</sup> This has little to do with epistemic autonomy, though it is legitimately of concern. Still, Professor Huq does not claim that the Government always errs when it relies on religious speech as indicative of criminal intent. Indeed, he acknowledges that “the Government did not err in its interpretation” of Ali al-Timimi’s speech.<sup>23</sup> Al-Timimi urged his followers “to heed the call of Mullah Omar, leader of the Taliban, to participate in the defense of Muslims in Afghanistan and fight against United States troops that were expected to invade in pursuit of Al-Qaeda.”<sup>24</sup> There does not seem to be an especially high risk of error in divining the meaning of this exhortation.

Consider as well a case that Professor Huq mentions in passing—that of Sheikh Omar Abdul-Rahman, in which the Government used “the sheikh’s

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19. *Id.* at 856, 857.

20. *Id.* at 859 (quoting *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 720 (1976)).

21. Huq, *supra* note 1, at 864.

22. *See id.* at 837 (arguing that “[t]he error rate in state interpretations of religious speech will . . . be high” because, institutionally, “government is ill equipped to make judgments about the meaning of religious speech”).

23. *Id.* at 855.

24. *United States v. Khan*, 309 F. Supp. 2d 789, 810 (E.D. Va. 2004), *aff’d in part and remanded in part on other grounds*, 461 F.3d 477 (4th Cir. 2006).

sermons as evidence of his involvement in a terrorist conspiracy.”<sup>25</sup> The evidence in that case went far beyond statements reflecting Abdul-Rahman’s religious beliefs; for example, discussing a plot to kill President Mubarak of Egypt, Abdul-Rahman told one follower that “he should make up with God . . . by turning his rifle’s barrel to President Mubarak’s chest, and kill[ing] him,” told another, “Depend on God. Carry out this operation. It does not require a fatwa. . . . You are ready in training, but do it. Go ahead,” told yet another, when discussing the proposed bombing of the United Nations’ headquarters, “Yes, it’s a must, it’s a duty,” and also urged a follower to “find a plan to destroy or to bomb or to . . . inflict damage to the American Army.”<sup>26</sup> At trial, the Government also introduced many other statements in which Abdul-Rahman merely expressed his beliefs, but in light of the additional evidence reflecting Abdul-Rahman’s specific intent to produce violence, the Second Circuit concluded that the First Amendment did not prevent the use of this evidence “to prove a pertinent fact in a criminal prosecution. The Government was free to demonstrate [Abdul-Rahman’s] resentment and hostility toward the United States in order to show his motive for soliciting and procuring illegal attacks . . . .”<sup>27</sup> Given the evidence of Abdul-Rahman’s specific intent to produce violence, the prosecution’s reliance on statements of Abdul-Rahman’s religious belief does not seem to have introduced much of a risk of error into the proceedings. Instead, the evidence of Abdul-Rahman’s religious beliefs corroborated the evidence that he had instructed his followers to engage in violence. Permitting the Government to use both types of evidence likely reduced the risk of error in assessing Abdul-Rahman’s guilt.

As we have seen, statements of ideological belief may provide valuable evidence of motive or intent in criminal prosecutions. Professor Huq does not dispute this assessment. That is not to say that no risk of error inheres in the use of such evidence; as Professor Huq notes, for example, the Arabic word *jihad* is ambiguous and could be misinterpreted.<sup>28</sup> It seems equally clear, however, that, at least for some, the concept is an unambiguous reference to violence.<sup>29</sup> In any event, the problem of ambiguity is hardly unique to religious speech, as anyone who has ever listened to a recording of drug dealers or mobsters talking on the phone can attest.<sup>30</sup> The most

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25. Huq, *supra* note 1, at 844 (footnote omitted).

26. *United States v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999) (internal quotations and citations omitted).

27. *Id.* at 118.

28. See Huq, *supra* note 1, at 869–70.

29. See, e.g., MARK JUERGENSEMEYER, *TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS VIOLENCE* 82–84 (3d ed. 2003) (detailing the view that jihad sanctions “virtually any means available to achieve a just goal,” including “confrontation and blood”).

30. See, e.g., *United States v. Zapata*, 589 F.3d 475, 480–81 & n.7 (1st Cir. 2009) (describing testimony in which the witness construed certain words in recorded conversations “to be coded references to drug transactions,” including the word *radiator*, which defense counsel argued was “more logically understood to describe a car part”).

sophisticated and surveillance-conscious criminals are probably also those most likely to utilize exquisitely ambiguous forms of communication. Nor is there reason to believe that religious minorities are uniquely vulnerable to misinterpretation of the probative value of their ideological statements. Judges and juries were probably no less prone to misinterpret expressions of ideological sympathy for communism in the Smith Act cases.<sup>31</sup> Thus, it is far from clear that Professor Huq has identified a problem that is unique to religious speech.

The usual approach that the law takes in criminal litigation in the face of the risk of error is to insist that the prosecution prove an accused's guilt beyond reasonable doubt.<sup>32</sup> Accordingly, the risk of error in interpreting potentially ambiguous religious speech falls on the prosecution, not the defense. Beyond this, the Smith Act cases insist on independent judicial review to establish the sufficiency of the evidence of specific intent: "There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'"<sup>33</sup> For his part, while Professor Huq assiduously gathers anecdotal evidence of prosecutorial reliance on potentially ambiguous religious speech,<sup>34</sup> he makes no effort to establish that any individual was wrongfully prosecuted or convicted, much less calculate an error rate that would establish some extraordinary risk of a miscarriage of justice in cases involving religious speech.<sup>35</sup> Nor does he

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31. *Cf.* *Yates v. United States*, 354 U.S. 298, 339 (1957) (Black, J., concurring in part and dissenting in part) ("When the propriety of obnoxious or unorthodox views about government is in reality made the crucial issue, as it must be in cases of this kind, prejudice makes conviction inevitable except in the rarest circumstances.").

32. *See, e.g.,* *Cage v. Louisiana*, 498 U.S. 39, 39–40 (1990) (per curiam) (noting the importance of the reasonable doubt standard); *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (discussing the Court's decisions concerning the reasonable doubt standard and noting that the standard provides substance "to the presumption of innocence, [ensures] against unjust convictions, and [reduces] the risk of factual error in a criminal proceeding"); *Addington v. Texas*, 441 U.S. 418, 423–24 (1979) (stating that, under the reasonable doubt standard, "[i]n the administration of criminal justice, our society imposes almost the entire risk of error upon itself"); *In re Winship*, 397 U.S. 358, 369–72 (1970) (Harlan, J., concurring) (explaining why standards of proof "reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations" and that the reasonable doubt standard rests on the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free").

33. *Scales v. United States*, 367 U.S. 203, 229 (1961) (alterations in original) (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)).

34. *See* Huq, *supra* note 1, at 842–47 (discussing cases in which the prosecution used religious speech as evidence of terrorist threats).

35. The closest Professor Huq comes to identifying what he regards as an erroneous outcome is when, citing only a newspaper article, he claims that in the prosecution of Hamid Hayat, "scant evidence demonstrated his intent to commit a future act of violence, which was an element of the material support offense." *Id.* at 842 (footnote omitted). This sentence stops short of a claim that Hayat was wrongfully convicted. It also inaccurately describes the offense at issue. Hayat was charged with violating a portion of the material support statute that prohibits "provid[ing] material support or resources or conceal[ing] or disguis[ing] the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of" specified terrorism offenses. *See* 18 U.S.C. § 2339A (2006); *United States v. Hayat*, No. 2:05-cr-240-GEB, 2007 WL 1454280, at \*1 (E.D. Cal. May 17, 2007)

contend that the empirical evidence that he has gathered warrants some sort of doctrinal innovation. Thus, the case Professor Huq makes for legal reform appears to be, in a word, nonexistent. Instead, when making his case for reform, Professor Huq tells us that he offers not “a [legal–doctrinal] lens” but an inquiry that “considers whether law enforcement entities . . . have lighted on the optimal signal for their aims.”<sup>36</sup> Let us then turn from law to policy.

## II. Religious Speech and Counterterrorism Tactics

It is sometimes difficult to discern what Professor Huq is proposing. He never argues that courts ought to refuse to consider evidence of religious speech in terrorism prosecutions, presumably with good reason. It is difficult to believe that the trials of Abdul-Rahman or al-Timimi would have been more reliable if the evidence about their religiously motivated hostility to the United States or religiously based justifications for violence had been excluded. Barring the use of such evidence may make it more difficult to convict in terrorist cases, but Professor Huq never claims that making such prosecutions more difficult is in itself an end to be desired.

Nor does Professor Huq advocate a prohibition on the initiation of investigations based on religious speech. To be sure, Professor Huq believes that religious speech is often not a good indication of criminality; he properly notes that there is no reliable relationship between faith and ideologically motivated terrorism.<sup>37</sup> But, as we have seen, the law does not permit conviction based on statements of religious belief alone.<sup>38</sup> Convictions must be based on proof beyond reasonable doubt of a specific intent to produce violence or the knowing provision of material assistance.<sup>39</sup> To be sure, current law generally permits the initiation of an investigation based on

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(describing the charges). As the statute makes plain, it does not require proof that the defendant personally intended to commit an act of violence; indeed, Professor Huq later correctly describes the fact at issue as whether Hayat knew that the material support and resources he provided would be used for an act of terrorism. Huq, *supra* note 1, at 843 n.44 (noting that the Government “describe[d] the necessary *mens rea* as whether ‘the defendant knew or intended that the material support and resources were to be used in preparation for or in carrying out a violation of 18 U.S.C. § 2332b, which prohibits acts of terrorism transcending national boundaries’”) (quoting Government’s Trial Memorandum at 16, *Hayat*, 2007 WL 1454280 (No. S-05-240-GEB), 2006 WL 4764569). As we have seen, the Supreme Court has upheld the material support statute even though it does not require proof of a specific intent to commit a future act of violence. *See supra* text accompanying notes 12–16. Professor Huq does not quarrel with that decision. For its part, the district court believed that there was sufficient evidence to support Hayat’s conviction. *Hayat*, 2007 WL 1454280, at \*10–12.

36. Huq, *supra* note 1, at 867.

37. *See id.* at 876–79 (arguing that “[t]he connection between religious ideology . . . and attitudes to political violence is . . . thin”).

38. *See supra* notes 6–15 and accompanying text.

39. *See supra* text accompanying notes 10 (specific intent to produce violence), 13 (knowing provision of material assistance); *see also* 18 U.S.C. § 2339B(a)(1) (2006) (“Whoever knowingly provides material support or resources to a foreign terrorist organization . . . shall be fined under this title or imprisoned . . .”).

otherwise constitutionally protected speech alone,<sup>40</sup> and there are some costs in terms of a chilling effect on religious exercise when statements of religious belief may be the predicate for a criminal investigation. But, as I have argued elsewhere, those costs are usually modest because an investigation alone involves no direct prohibition or penalty on otherwise protected speech, and if conducted with appropriate discretion and for a legitimate reason, the law enforcement benefits of such investigations likely exceed their costs.<sup>41</sup>

Consider a concrete example. After terrorist suspects who later participated in the attacks of September 11 eluded surveillance in Southeast Asia and slipped into the United States, they attended a mosque in southern California and may have been aided by an imam there, who was widely known for his adherence to a radical Islamic theology.<sup>42</sup> Had agents been surveilling the mosque or its imam, they could well have located the suspects, perhaps preventing the attacks, but such surveillance, however, would have presumably been predicated on the imam's fundamentalist ideology.<sup>43</sup> Whatever costs in terms of liberty might have been imposed by such surveillance could easily be thought justified if they could have prevented the September 11 attacks.

Although Professor Huq is appropriately sensitive to the costs of investigation and prosecution based on religious speech, surely an optimal regime must consider the costs of forgoing such investigations as well. In *Dennis v. United States*,<sup>44</sup> the principal opinion rejected a requirement that speech advocating violence be deemed unprotected only when violence is imminent, concluding that an imminence requirement would be unwarranted by reference to the "Hand formula," which weighs not only the likelihood of violence but the magnitude of the potential harm as well against the liberty interest at stake.<sup>45</sup> This approach has plain application to counterterrorism. Judge Posner, for example, has argued that the enormous potential harm of a terrorist attack justifies recognition of expansive investigative authority despite its potential to chill the exercise of First Amendment rights.<sup>46</sup> Professor Huq grasps this point. He acknowledges the potential costs of terrorism as well as the importance of discovering terrorist plots well before

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40. See Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 33–34, 36–37, 39–40 (2011) (explaining that, despite varying levels of scrutiny in the lower courts, speech can be and has been a trigger for investigations).

41. See *id.* at 41–60 (discussing the doctrinal basis and pragmatic considerations with respect to initiating investigations based on otherwise constitutionally protected speech).

42. *Id.* at 34–35.

43. *Id.* at 35.

44. 341 U.S. 494 (1951).

45. *Id.* at 510–11 (plurality opinion).

46. See RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, at 182–96 (2005) (making a cost–benefit case for vigorous investigative powers despite their tendency to chill the exercise of First Amendment rights).

they come to fruition.<sup>47</sup> Moreover, he does not doubt that at least in some circumstances, religious speech may be a valuable indicator of potential terrorism. Indeed, one recent review of the available evidence concluded that religious belief plays an important role in the psychology of terrorism by enabling terrorist recruits to psychologically transcend death and achieve a sense of symbolic immortality.<sup>48</sup> This argument has a certain intuitive appeal—participating in a suicide terrorist attack is not ordinarily the way one maximizes one’s welfare. Thus, statements reflecting religious beliefs that seem to condone acts of terrorism could well be important signals of incipient terrorism. They are not in themselves constitutionally sufficient to convict the speaker, but they may well warrant further investigation. Professor Huq does not argue otherwise.

Accordingly, initiating investigations when the authorities learn of religious speech that seems to condone or justify terrorism on religious grounds seems to be a plausible law enforcement strategy. If religious speech is at least sometimes an appropriate basis for initiating an investigation, however, it would follow that prohibiting reliance on religious speech might inhibit the detection of terrorist plots. This is hardly an optimal result. Thus, it seems unlikely that any reform that makes it more difficult to detect incipient terrorist plots and punish the perpetrators would be optimal unless the costs to the innocent of the status quo are quite high. Yet, as we have seen, Professor Huq ventures no guess as to the error rate that inheres in current counterterrorist tactics. Moreover, the costs of initiating an investigation based on religious speech may pale when compared to the costs of any reform that decreases the likelihood of detecting terrorist plots.

Professor Huq makes no claim to the contrary. His argument instead seems to be that, by changing the manner in which counterterrorism investigations are initiated and conducted, the cost–benefit ratio can be improved. Professor Huq offers what he regards as a better signal for investigation than religious speech: “[a]ssociation with individuals who in turn are affiliated with terrorism, or are believed to present terrorist risks.”<sup>49</sup> The key question, however, is how to identify the individuals who are affiliated with terrorism or are believed to present terrorist risks. After all, such individuals rarely advertise their presence to the authorities. On this point, Professor Huq tells us to be on the lookout for small, insular groups: “[I]t is the intimate, insular circle of friends that warrants separate study for its incubational function in relation to terrorism.”<sup>50</sup> Yet, he cautions, “it is of

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47. Huq, *supra* note 1, at 839–40.

48. See Kenneth E. Vail III et al., *Dying to Live: Terrorism, War, and Defending One’s Way of Life*, in INTERDISCIPLINARY ANALYSES OF TERRORISM AND POLITICAL AGGRESSION 49, 64–65 (Daniel Antonius et al. eds., 2010) (discussing the martyrdom impulse of terrorists, whose attacks are intended to elicit communal reverence).

49. Huq, *supra* note 1, at 880.

50. *Id.* at 882.

course the case that not all small groups serve as incubators for violence.”<sup>51</sup> How, then, is a counterterrorist tactician to decide which small, insular groups to investigate? Professor Huq tells us of one study of imprisoned terrorists that found they “had developed idiosyncratic views of the world and idioms that would have been hard to develop in more diverse normative and ethical contexts.”<sup>52</sup> Similarly, “studies of terrorists in the Middle East yield evidence that distinctive discourses and idioms are critical to terrorist groups.”<sup>53</sup> He concludes: “[I]t is idiosyncratic and distinctive local discursive contexts, not universally available religious meanings, that enable the transformation of ethical tastes and preferences.”<sup>54</sup>

Thus, we must be on the lookout for those insular groups that have idiosyncratic views of the world or distinctive discourses and idioms indicative of terrorism. One is hard-pressed, however, to grasp how to identify such groups except by reference to the statements of belief of the members of these groups. Counterterrorism agents are not mind readers; they are unlikely to become aware of those who utilize “distinctive discourses and idioms,” whether “local” or “universally available,” except by learning what the members of investigative targets are saying. It is equally hard to understand how counterterrorist tacticians could go about deciding whose speech merits study without considering whether a potential investigative target has articulated religious views that seem to be out of the mainstream. Indeed, if there were some way to identify small groups prone to terrorism by characteristics while disregarding their religious speech, one wonders how great its error rate might be. On this score, Professor Huq offers us no clue. To the contrary, he acknowledges, “To minimize search time and costs, [counterterrorism officials] may have grasped the most readily available and the most obvious signal.”<sup>55</sup> Professor Huq, however, seems not to recognize the implications of this concession. It may be simply too difficult to identify more subtle, nuanced, local discursive contexts that Professor Huq regards as reliable signals of incipient terrorist activity without undue risk of error. Minimizing search time and costs, after all, is not such a bad thing. If the more nuanced and localized signals of concern cannot be identified with an error rate significantly lower than that inhering in the tactics that Professor Huq criticizes, then his own approach—increasing search time and costs without any assurance of a lower error rate—does not look quite so optimal.

Indeed, there is a curious disjunction between Professor Huq’s statement of the problem and his proposals for counterterrorism intelligence-gathering. When it comes to specific investigative tactics, Professor Huq

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51. *Id.* at 883.

52. *Id.* at 888 (footnote omitted).

53. *Id.*

54. *Id.* at 889.

55. *Id.* at 867.

suggests three: “the cultivation of information-sharing networks with religious and ethnic minorities through collaborative means,”<sup>56</sup> “build[ing] a more textured understanding of social contexts in order to more accurately identify complicit surrounds,”<sup>57</sup> and “us[ing] information about associations to condition benefits or privileges in ways that raise the costs of membership in a complicit surround and so sort for aspirant terrorists.”<sup>58</sup> Strikingly, none of these proposals forecloses reliance on religious speech as a means for identifying potential investigative targets.

Thus, despite his concerns about the reliability of religious speech as a predicate for investigation or prosecution, Professor Huq’s real agenda seems to be to promote the use of cooperative investigative tactics that build bridges between counterterrorist investigators and religious communities. Indeed, he warns that the currently widespread use of “invasive and noncooperative tactics” is a “strategy [that] risks considerable harms.”<sup>59</sup> One always hesitates to criticize community-oriented policing techniques,<sup>60</sup> but if those with the most potent political incentives to develop effective investigative tactics have failed to embrace Professor Huq’s ideas, it is worth asking why. I have already suggested one possible explanation—it is optimal for counterterrorism officials to minimize search time and costs, and it may be difficult to discern the highly localized signals of concern to Professor Huq. Beyond that, perhaps counterterrorist investigators fear that if they invest too heavily in cooperative tactics and skimp on coercive or covert techniques, terrorists will learn that they can operate with relative freedom from scrutiny by using insular cells that have little contact with those elements in local religious communities willing to cooperate with the authorities. Professor Huq stresses the insularity of groups prone to terrorism, but this very insularity suggests that such groups might well be unknown to the less insular religious or other community groups most likely to cooperate with the

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56. *Id.* at 895.

57. *Id.* at 896.

58. *Id.* at 897.

59. *Id.* at 894, 895. Professor Huq coauthored one study, based on interviews with Muslim-Americans in New York City, concluding that perceptions of the procedural justice of counterterrorism policy, including transparency in its creation and implementation, have a significant relationship on the willingness of the respondents to cooperate with the authorities. Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 *LAW & SOC’Y REV.* 365, 385–87 (2010). Of course, caution must be exercised with respect to any study based on interviews in which subjects offer abstract opinions under laboratory conditions, but even taking this study and those in a similar vein for all they are worth, they do not purport to evaluate the relative efficacy of various law enforcement strategies but only the extent to which they are likely to promote community cooperation.

60. See, e.g., Lawrence Rosenthal, *Policing and Equal Protection*, 21 *YALE L. & POL’Y REV.* 53, 79–89 (2003) (discussing the drawbacks of conventional policing compared to problem- or community-oriented policing, and noting that “current thinking about the relationship between crime and place suggests that the conventional model of policing is at best a grossly inefficient means of deploying police officers where they are most needed”).

authorities. Thus, it is far from clear that Professor Huq has recommended the optimal counterterrorist program.

### III. Conclusion

There are risks in any counterterrorist strategy. Resources are limited and opportunity costs necessarily attend to every decision involving the allocation of scarce resources. Some approaches also risk unintended consequences, as when the use of covert or coercive investigative techniques alienates individuals who might otherwise be inclined to cooperate with the authorities. Yet, there is a risk of unintended consequences in Professor Huq's approach as well. Professor Huq seems willing to run the risk that insular groups will evade detection if counterterrorist tacticians stress cooperative intelligence-gathering techniques, but in a democracy, surely we should hesitate if this risk is one that politically accountable officials deem imprudent.

Given their scholarly detachment, law professors may be better able to soberly evaluate counterterrorist strategies than those subject to the hydraulic pressures that are inevitably brought to bear on those with political responsibility for counterterrorism policy. Yet, those in the world of politics have one quality in abundance that is rarely seen in the academy—accountability. Perhaps the unwillingness of those who are politically accountable for counterterrorist policy to put all their eggs in Professor Huq's basket of counterterrorism reforms should give us pause.