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# Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique

robert chesney



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## CIVIL LIBERTIES AND THE TERRORISM PREVENTION PARADIGM: THE GUILT BY ASSOCIATION CRITIQUE

*Robert M. Chesney\**

TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY. By *David Cole* and *James X. Dempsey*. New York: The New Press. 2d ed. 2002. Pp. xvii, 231. Paper, \$16.95.

ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM. By *David Cole*. New York: The New Press. 2003. Pp. xiii, 315. Cloth, \$24.95.

*[T]he Department must shift its primary focus from investigating and prosecuting past crimes to identifying threats of future terrorist acts, preventing them from happening, and punishing would-be perpetrators for their plans of terror.*

— Attorney General John Ashcroft, Nov. 8, 2001<sup>1</sup>

*[W]e all know that the way we treat you is the measure of our own liberties.*

— United States District Judge William Young to “shoe bomber” Richard Reid, Jan. 31, 2003<sup>2</sup>

### I. INTRODUCTION

Faysal Galab is a twenty-seven-year-old American citizen of Yemeni descent who was born and raised in Buffalo, New York.<sup>3</sup> He is

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\* Assistant Professor of Law, Wake Forest University School of Law. B.S. 1994, Texas Christian; J.D. 1997, Harvard — Ed. I would like to thank Mike Green, David Logan, Michael Perry, Margaret Taylor, and Ron Wright for their invaluable comments and suggestions. I welcome comments and criticisms at [rchesney@law.wfu.edu](mailto:rchesney@law.wfu.edu).

1. Memorandum from John Ashcroft, Attorney General, to Heads of the Components of the Department of Justice (Nov. 8, 2001) [hereinafter Ashcroft Memorandum], available at <http://www.fas.org/irp/news/2001/11/ag-memo-110801.html>.

2. Tavia Smith, *Shoe Bomber Richard Reid to Serve Life Sentence for Trying to Blow up an Airplane*, NPR MORNING EDITION, Jan. 31, 2003, 2003 WL 4856067.

3. Except as otherwise indicated, the following account derives from *United States v. Goba*, 240 F. Supp. 2d 242 (W.D.N.Y. 2002) (relating substance of Galab’s plea agreement); *United States v. Goba*, 220 F. Supp. 2d 182 (W.D.N.Y. 2002) [hereinafter *Goba I*]; Plea Agreement, *United States v. Mosed*, No. 02-CR-214-S (W.D.N.Y. 2002) [hereinafter *Mosed*].

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married, has three children, and used to run a gas station in the Buffalo suburb of Lackawanna. Perhaps you have heard of him; he will be spending some or all of the next ten years in federal prison because in the spring of 2001 he and six other Lackawanna residents traveled to Afghanistan and trained with Al Qaeda.<sup>4</sup>

Their journey began on April 28, 2001, when Galab and two companions flew from New York to Lahore, Pakistan, purportedly in order to pursue religious studies. But Galab and his companions did not remain in Pakistan, let alone immerse themselves in peaceful religious studies. Instead, they traveled to Quetta, a town near the Afghan border, and from there crossed into Afghanistan. Eventually the men arrived at a camp funded by Osama bin Ladin known as al Farooq,<sup>5</sup> where they commenced training in a variety of weapons and military skills. Among other things, Galab trained with explosives and learned to assemble and operate Kalashnikov assault rifles, 9mm handguns, M16 assault rifles, and rocket-propelled grenade launchers. His curriculum also included a lecture component: at some point in May, bin Ladin himself addressed the trainees regarding the virtues of armed struggle against the United States and Israel. At another point, we are told, bin Ladin asked one of the Lackawanna men whether any Americans might be willing to die in Al Qaeda's service.

In the summer of 2001, the men returned to the United States and resumed their quiet lives in Lackawanna. The FBI, alerted to their activities in Afghanistan, watched and wondered. Were they an Al Qaeda sleeper cell, awaiting orders to carry out unspeakable acts? Or were they merely foolish adventurers whose religious convictions had led them unwittingly and temporarily into Al Qaeda's company? Months passed by, and in the absence of evidence indicating an intent to engage in any specific criminal act, the FBI was left with no option but to watch, wait, and worry.<sup>6</sup> Or so it seemed.

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Plea Agreement]; Plea Agreement, *United States v. Goba*, No. 02-CR-214-S (W.D.N.Y. 2002) [hereinafter *Goba* Plea Agreement]; Matthew Purdy & Lowell Bergman, *Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, at A1; and Tatsha Robertson, *Trip By Buffalo Suspects Billed as Pilgrimage*, BOSTON GLOBE, Sept. 21, 2002, at A3.

4. According to an affidavit from an FBI agent associated with the investigation, an unnamed eighth Lackawanna resident separately attended the Afghanistan training camp. See Affidavit of Special Agent Edward J. Needham at ¶¶ 8, 24, *United States v. Elbaneh*, No. 02-M-111 (W.D.N.Y. Sept. 17, 2002).

5. According to Bruce Hoffman of the Rand Corporation and Rohan Gunaratna of the University of Scotland, al Farooq was a mixed-use training facility at the time. Hoffman estimates that over the years "al Farooq trained some 70,000 persons in basic military skills in connection with the Afghan civil war, and some 7,000 more in 'advanced terrorist training' for other purposes." See Jane Mayer, *Lost in the Jihad*, NEW YORKER, Mar. 10, 2003, at 50, 53.

6. "Almost from the day the [USA PATRIOT Act] was signed in October, these defendants' phone conversations, financial and travel records, and e-mails had been relentlessly and secretly examined by FBI agents, after they had obtained a warrant from the special na-

The approach of the first anniversary of September 11th prompted administration officials to become increasingly concerned about the risk of additional terrorist attacks in the United States, and the administration's attention naturally focused on those individuals — like the men from Lackawanna — who the government knew had trained in bin Ladin's camps.<sup>7</sup> And although the FBI had the men under surveillance, officials were keenly aware that there might be no affirmative sign of their intentions until it was too late to intervene. The September 11th hijackers, after all, had not manifested their illegal intentions until they stood up in the aisle of the doomed planes. Accordingly, top administration officials — possibly including the President himself — directed the FBI to take preventive action.<sup>8</sup> Galab and his companions were promptly arrested,<sup>9</sup> but not on charges of conspiracy to commit a terrorist act; instead they were charged with providing “material support” to a designated foreign terrorist organization (“DFTO”) in violation of 18 U.S.C. § 2339B.<sup>10</sup>

Section 2339B, once little known and rarely employed, has rapidly emerged as a central element of the government's post-9/11 terrorism prevention paradigm.<sup>11</sup> Its popularity flows primarily from the fact that it chokes off the flow of cash, weapons, and other resources to DFTOs, thus hampering their ability to engage in violence. In this

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tional security court.” Steven Brill, *After: How America Confronted the Sept. 12 Era*, NEWSWEEK, Mar. 10, 2003, at 66, 71; see also Scot J. Paltrow, *U.S. Exerts Unusual Pressure On Group of Terror Suspects*, WALL ST. J., Apr. 1, 2003 at A8 (citing a former senior FBI official involved in the investigation for the proposition that “secret surveillance revealed no sign that the men had any hostile intent”).

7. Director of Central Intelligence George Tenet believed at the time that Galab and his fellows were “the most dangerous bunch inside the United States.” Toni Loey & Kevin Johnson, *How U.S. Watches Terrorist Suspects; Lackawanna Case Helped Shape FBI's Strategy of Operation After 9/11: Shortened Investigations, Quick Arrests*, USA TODAY, Feb. 12, 2003, at A1. At least some FBI analysts disputed the CIA's assessment. See Purdy & Bergman, *supra* note 3.

8. Brill, *supra* note 6, at 71 (describing Ashcroft's “frustration” that the only crime with which the Lackawanna men could be charged was § 2339B); Loey & Johnson, *supra* note 7.

9. One of the Lackawanna trainees — Jaber Elbaneh — remains at large. See Purdy & Bergman, *supra* note 3.

10. 18 U.S.C. § 2339B(a)(1) (2000). The material support statute incorporates by reference § 219(a)(1) of the Immigration and Nationality Act, which empowers the Secretary of State to designate any group as a foreign terrorist organization upon finding three criteria satisfied: (1) the organization is foreign; (2) the organization engages in terrorism as defined in various statutes; and (3) such terrorism “threatens the security of United States nationals or the national security of the United States.” 8 U.S.C. § 1189(a)(1) (incorporated by reference in 18 U.S.C. § 2339B(g)(6) (2000)).

11. See Eric Lichtblau, *A Seldom-Used Statute Becomes the Justice Department's Antiterror Weapon of Choice*, N.Y. TIMES, Apr. 6, 2003, at B15. Attorney General Ashcroft has explained that “the central thrust of our campaign against terror must be proactive prevention and disruption, and not primarily reactive investigation and prosecution. We cannot wait for terrorists to strike to begin investigations and make arrests. We must prevent first and prosecute second.” Ashcroft Memorandum, *supra* note 1.

respect, § 2339B functions much like an embargo on foreign terrorist groups. But the material support law turns out to have an additional capacity for prevention, one that raises thorny constitutional issues. A careful review of the manner in which the government interprets the phrase “material support” suggests that the statute could in some circumstances be used to punish membership in a DFTO, regardless of whether the member intends to facilitate, or even knows of, any illegal purpose of the group. Can this be squared with First Amendment protections for freedom of expression and association? Keeping in mind the Lackawanna example and the lessons of September 11th, can we afford a less aggressive approach?

Similar questions have arisen with respect to many aspects of the terrorism prevention paradigm, igniting a passionate debate among scholars and commentators arguing from both the civil liberties and national security perspectives. Into this debate come not one, but two timely and important books by Professor David Cole of Georgetown University Law Center.<sup>12</sup> The earlier of the two is *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (“*Terrorism*”),<sup>13</sup> which Cole coauthored with James X. Dempsey of the Center for Democracy and Technology.<sup>14</sup> *Terrorism and the Constitution* takes aim at the war on terrorism in its early stages, reflecting developments through the end of 2001. Writing alone in the second book, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (“*Enemy Aliens*”), Cole brings these criticisms up to date through the summer of 2003.

In a narrow sense, these books focus on distinct issues. In *Terrorism and the Constitution*, Cole and Dempsey argue that the government was overreacting to the threat of terrorism at the expense of civil liberties even prior to 9/11, and that the subsequent war on terrorism has exacerbated this problem. To illustrate the point, the authors focus primarily on the authority of the FBI to engage in

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12. Cole is a prolific author and advocate with respect to civil liberties and immigration law issues, and in recent months he has emerged as one of the most prominent critics of the legal front in the war on terrorism. See, e.g., David Cole, *Their Liberties, Our Security: Democracy and Double Standards*, BOSTON REV., Oct./Nov. 2002, at 4.

13. The 2002 edition of *Terrorism* supersedes a first edition which appeared in 1999. JAMES X. DEMPSEY & DAVID COLE, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (1st ed. 1999). The events of September 11th, and resulting government actions undertaken in the name of enhanced security, naturally warranted a reexamination of the arguments set forth in the original edition, and although the second edition retains substantially all of the material from the first, it also provides a new chapter and expanded conclusion focusing on the USA PATRIOT Act and related post-9/11 antiterrorism measures.

14. “Since the early 1990s, [Jim Dempsey] has been one of the leading watchdogs of FBI surveillance initiatives, a reasoned and respected civil liberties advocate routinely summoned to the Hill by both political parties to advise lawmakers about technology and privacy issues.” Robert O’Harrow, Jr., *Six Weeks in Autumn*, WASH. POST, Oct. 27, 2002 (Magazine), at 6, 6.

national security investigations and the resulting capacity for political suppression. *Enemy Aliens* has a broader scope, focusing on the impact of the war on terrorism — and prior periods of national security concern — on noncitizens. Cole argues that in times of crisis our society tends to sacrifice the rights of noncitizens in the politically convenient but ultimately futile hope of increasing security for all, and that such deprivations in turn become precedents for extending like treatment to citizens at a later date.<sup>15</sup>

Notwithstanding these differences, the books are united by a common understanding of our society's treatment of civil liberties in past times of national security crisis. Each describes a historical cycle of civil liberties abuse during such periods, but with an important twist on the traditional narrative: repressive measures do not merely resurface from time to time, but rather they evolve to circumvent norms, precedents, and institutional-civil-liberties protections erected after past abuses were recognized and regretted. I term this evolutionary perspective the adaptive-learning model. It provides the lens through which the authors in both books survey and critique many of the antiterrorism laws and policies adopted in recent years.

In Part II below, I locate the adaptive-learning model among various perspectives offered by scholars who have examined the performance of government with respect to civil liberties under crisis or emergency conditions. Against that backdrop, Parts III and IV set forth in broad strokes the specific critiques of antiterrorism law provided in *Terrorism and the Constitution* and *Enemy Aliens*, respectively. Part V then concludes with a close analysis of an argument which plays a significant role in both books and which is representative of the adaptive-learning theme: the claim that the law prohibiting material support to designated foreign terrorist organizations resurrects the unconstitutional principle of guilt by association (*Terrorism*, pp. 121-23; *Enemy Aliens*, pp. 58-64). I conclude that this claim is significantly overstated in most — but not all — circumstances, and that it therefore provides only limited support for the adaptive-learning model.

Ultimately, however, one does not have to accept the adaptive-learning model to appreciate the tremendous contribution Cole and Dempsey make in these books. They draw needed attention to the unique vulnerabilities of noncitizens; they raise difficult questions about a range of antiterrorism measures; and the stories they relate put a human face on the abstract concept of civil liberties. Our national debate can only be improved as a result.

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15. Many of these ideas first appeared, in abbreviated form, in David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) [hereinafter Cole, *Enemy Aliens*], and David Cole, *The New McCarthyism: Repeating History in the War on Terror*, 38 HARV. C. R.-C. L. L. REV. 1 (2003) [hereinafter Cole, *The New McCarthyism*].

## II. THEORETICAL PERSPECTIVES ON CALIBRATION ERRORS

Conventional wisdom holds that during times of crisis the balance between liberty and security shifts in favor of the latter.<sup>16</sup> Although not without its difficulties,<sup>17</sup> this claim is broadly consistent with historical experience,<sup>18</sup> and has some support in recent empirical work.<sup>19</sup> But the naked fact of a change in the balance between liberty and security, without more, tells us nothing about whether society is better or worse off as a result. One cannot assume, after all, that “the legal baseline prior to the emergency . . . already embodies the optimal balance between liberty and security.”<sup>20</sup> It may be the case that the status quo ante delivered too little security, or that in light of changed circumstances the prior balance is no longer appropriate.<sup>21</sup> Accordingly, whether a calibration error has occurred in any particular case — i.e., whether the balance between liberty and security has been struck poorly — requires closer analysis.

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16. See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 YALE L. J. 1011, 1019 (2003) (“Experience shows that when grave national crises are upon us, democratic nations tend to race to the bottom as far as the protection of human rights and civil liberties, indeed of basic and fundamental legal principles, is concerned.”); Rodney A. Smolla, *Terrorism and the Bill of Rights*, 10 WM. & MARY BILL RTS. J. 551, 573-74 (2002); see also Floyd Abrams, *The First Amendment and the War Against Terrorism*, 5 U. PA. J. CONST. L. 1, 10-11 (2002); Thomas E. Baker, *At War with Civil Rights and Civil Liberties*, 34 CASE W. RES. J. INT’L L. 219 (2002); Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353, 1362 (1993) (reviewing MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991)) (stating that “if truth is the first casualty of wartime, then civil liberties is surely the second” (internal citation omitted)); Wendy Kaminer, *False Security*, BOSTON REV., Oct./Nov. 2002, at 20.

17. The notion of a zero-sum balance between liberty and security with respect to a given policy choice falsely assumes a “one-dimensional policy space.” Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. (forthcoming 2003) (manuscript at 6, on file with author). In reality, policy changes may have varying impacts along multiple dimensions, decreasing liberty in some respects and increasing it in others. See *id.* (providing an example with respect to airport security screening). The “interdependence of budgeting choices that affect rights,” moreover, further confounds claims about the impact of a given policy on individual rights. *Id.* (manuscript at 6-7) (pointing out that increased financing for one rights-enhancing policy may entail a decrease for another).

18. See, e.g., ZECHARIA CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (reprint ed., Lawbook Exchange 2001) (1941) (discussing conflicts between liberty and security in American history); MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000) (same); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998) (describing security measures taken at the expense of civil liberties in the context of various crises).

19. See Lee Epstein et al., *The Supreme Silence During War 2* (unpublished manuscript) (finding that “when the country is at war, the probability that the U.S. Supreme Court will vote to uphold a civil rights or civil liberties claim drops by about 15 percent”), available at <http://gking.harvard.edu/files/crisis.pdf> (last visited Oct. 2, 2003).

20. Posner & Vermeule, *supra* note 17 (manuscript at 12).

21. See *id.* (manuscript at 12-13) (noting argument that intelligence agencies were unduly restrained prior to 9/11).

In recent years, a number of scholars have addressed the issue of government policymaking under crisis or emergency conditions in an effort to facilitate that analysis. In this Part, I situate Cole and Dempsey's approach amidst these varying perspectives.

Eric Posner and Adrian Vermeule have recently observed that accounts of decisionmaking in a crisis context often accord a central role to one of two dynamics: the impact of fear, and the impact of past instances in which liberty gave way to security interests.<sup>22</sup> Both traditions exert an influence on *Terrorism and the Constitution* and *Enemy Aliens*, but Cole and Dempsey blend and extrapolate from them in a manner which produces their own unique — and markedly pessimistic — perspective.

Consider fear. The proposition behind the fear dynamic is that fear will tend to distort policymaking under crisis conditions by interfering with judgment and thus increasing the risk of a calibration error with respect to liberty-security tradeoffs.<sup>23</sup> In this account, fear may cause decisionmakers either to overestimate the scope of the security threat,<sup>24</sup> to underestimate the value of the civil liberties at stake,<sup>25</sup> or both.

On the security side of the ledger, the most extreme form of the fear argument involves the sociological concept of moral panic.<sup>26</sup> A moral panic is said to exist when a “condition, episode, person, or group of persons emerges to become defined as a threat to societal values and interests,” and “its nature is presented in a stylized and stereotypical fashion by the mass media and politicians.”<sup>27</sup> As Eliza-

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22. See *id.* (manuscript at 3-4) (identifying these two traditions as the primary arguments supporting the view that the constitution should be strictly rather than flexibly interpreted during emergencies).

23. See *id.* (manuscript at 17-30).

24. See, e.g., Gross, *supra* note 16, at 1038-42 (discussing cognitive limitations and biases relating to fear in the context of national emergency); W. Kip Viscusi & Richard J. Zeckhauser, *Sacrificing Civil Liberties to Reduce Terrorism Risks*, 26 J. RISK & UNCERTAINTY 99, 100 (2003) (assessing emerging empirical evidence that “[t]he extraordinary publicity given to the [9/11] attack and the accompanying losses produced the kind of risk that people are likely to severely misestimate in the future”).

25. See, e.g., Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985) (discussing tendency to underestimate value of civil liberties in emergency context).

26. There have been few claims that 9/11 produced moral panic conditions. See Nicole Rogers & Aidan Ricketts, *Fear of Freedom: Anti-Terrorism Laws and the Challenge to Australian Democracy*, 2002 SING. J. LEGAL STUD. 149, 163 (2002) (arguing that a moral panic has ensued in Australia as a result of the 9/11 attacks, providing “an opportunity for the Government to justify a far reaching attack upon the civil and political liberties of the Australian public”); cf. Daniel M. Filler, *Terrorism, Panic, and Pedophilia*, 10 VA. J. SOC. POL'Y & L. 345, 367-69 (arguing that the initial reaction to 9/11 contained elements of a moral panic directed at Muslims).

27. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 9 (1972); see also ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* (1994).

beth Scott and Laurence Steinberg recently explained in another context, a moral panic includes the following elements: “an intense community concern (often triggered by a publicized incident) that is focused on deviant behavior, an exaggerated perception of the seriousness of the threat and the number of offenders, and collective hostility toward the offenders, who are perceived as outsiders threatening the community.”<sup>28</sup> Because one of the defining elements of a moral panic is overestimation of danger, the label carries with it the conclusion that legal or policy changes driven by moral panic are inherently ill-considered.

Fear need not rise to the level of moral panic, however, to contribute to a calibration error based on faulty assessments of danger.<sup>29</sup> The literature of cognitive bias is relevant here. As Oren Gross has argued, a number of cognitive biases or limitations interfere with risk assessments in the crisis context, particularly where terrorism is involved.<sup>30</sup> The “availability heuristic,” for example, suggests that one’s estimate of the probability of an event may be inflated by one’s “ability to imagine similar events taking place,” a process that since 9/11 can be expected to boost estimates of the likelihood of additional terrorist attacks in America.<sup>31</sup> Similarly, “[p]rospect theory suggests that individuals tend to give excessive weight to low-probability results when the stakes are high enough and the outcomes are particularly bad,” a dynamic which may function with particular force when the feared harm “involves not merely a serious loss, but one that produces particularly strong emotions.”<sup>32</sup> Recent empirical work provides some

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28. Elizabeth Scott & Laurence Steinberg, *Blaming Youth*, 81 TEXAS L. REV. 799, 807 (2003); see also MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX 9-34 (using a moral panic model to discuss concern over immigration in the 1990’s).

29. The fear model assumes that the impact of fear on decisionmaking is, on the whole, negative. That assumption, however, overlooks the complexities of the relationship between fear and cognition. See Posner & Vermeule, *supra* note 17 (manuscript at 19-30) (providing a nuanced account of this relationship in the course of rejecting the view that fear necessarily produces ill-considered policy).

30. See Gross, *supra* note 16, at 1038-42.

31. *Id.* at 1039 (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 11 (Daniel Kahneman et al. eds., 1982); and Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973)); see also Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 121 (2003) [hereinafter Sunstein, *Terrorism and Probability Neglect*] (discussing the impact of the availability heuristic on terrorism-risk assessment).

32. Gross, *supra* note 16, at 1040-41 (citing Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, in CHOICES, VALUES, AND FRAMES 17 (2001); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 66 (2002); and Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1137-44 (2002) (book review)); see also Sunstein, *Terrorism and Probability Neglect*, *supra* note 31, at 121-22 (discussing impact of affect-rich probabilities).

support for these arguments,<sup>33</sup> although there also is reason to be cautious in extrapolating from these points.<sup>34</sup>

On the liberties side of the ledger, Vincent Blasi has argued that crisis conditions can prompt policymakers to systematically undervalue civil liberties — particularly those allowing for political dissent.<sup>35</sup> Blasi describes a “pathology” that takes hold under crisis conditions, a “social phenomenon, characterized by a notable shift in attitudes regarding the tolerance of unorthodox ideas. What makes a period pathological is the existence of certain dynamics that radically increase the likelihood that people who hold unorthodox views will be punished for what they say or believe.”<sup>36</sup> In many if not most instances, a period of pathology is triggered and defined by the perception of a serious security threat, as in the case of communism during the Red Scare and in the McCarthy era. When crafting First Amendment doctrine, Blasi wrote, we should anticipate the rigors our First Amendment values might face during the next pathological cycle.<sup>37</sup> Some commentators have suggested that we are, or at least were, in the midst of a pathological moment in the wake of 9/11.<sup>38</sup>

The concept of fear as a distorting influence on both sides of the ledger is significant throughout both *Terrorism and the Constitution* and *Enemy Aliens*, but Cole and Dempsey make use of the concept in distinctive fashion. In their account, the important factor is not how

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33. See Viscusi & Zeckhauser, *supra* note 24, at 108-16 (discussing biases impacting risk beliefs relating to terrorism); cf. Baruch Fischhoff et al., *Judged Terror Risk and Proximity to the World Trade Center*, 26 J. RISK & UNCERTAINTY 137, 147-48 (2003) (discussing the impact of proximity to the World Trade Center (and of emotional state) on risk estimates relating to the probability of injury in a future terrorist attack).

34. Given the likelihood that many Americans underestimated the probability of a terrorist attack occurring in America prior to 9/11, it is an open question whether the upward impact of 9/11 on estimates of future attacks has functioned as a distortion or, instead, as a corrective. Cf. Posner & Vermeule, *supra* note 17 (manuscript at 21-29) (discussing offsetting benefits of fear, including its ability to spur action from complacency).

35. See Blasi, *supra* note 25.

36. *Id.* at 450. The proposition that episodes of pathology arise periodically in response to perceived emergency conditions raises an important question: Can the government artificially prolong a perceived state of emergency in order to sustain the increased freedom of action it enjoys as a result? See Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 772-82 (2002) (asserting that the government has sustained a perpetual state of emergency with respect to a succession of threats including, most recently, terrorism). *But see* Posner & Vermeule, *supra* note 17 (manuscript at 6-12) (denying the existence of a “statist ratchet” pattern in which successive emergencies produce continuous expansion of government power at the expense of civil liberties).

37. See Blasi, *supra* note 25, at 459. Professor Blasi purposefully wrote with respect to the First Amendment alone, *see id.* at 457, but an argument can be made that his points apply to an extent to other constitutional values such as due process of law and privacy.

38. See Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. (forthcoming 2004) (manuscript at 4, on file with author); Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POLICY 461, 462 (“Civil libertarians agree that the nation finds itself in the midst of pathological times.”).

fear impacts well-intentioned decisionmakers but, instead, how it impacts the public to which government officials might have to answer.<sup>39</sup> Put another way, the main issue in their view is not whether fear will cause well-intentioned officials to make mistakes but instead whether fear will cause the public to tolerate overreaching by the government. And as Cole relates in *Enemy Aliens*, public fear during times of crisis in our history often focuses on outsiders, particularly noncitizens.<sup>40</sup> As a result, Cole contends, government overreaching that impinges largely or primarily on the interests of noncitizens — the “other” — ordinarily is tolerated by citizens (*Enemy Aliens*, pp. 18, 72, 81-82).

The other major tradition influencing Cole and Dempsey’s work is the proposition that past events in the cycle of tension between liberty and security have a lasting impact on the outcome of future events in that cycle. Mark Tushnet, for example, has described a process of “social learning” in which the recognition of past calibration errors tends to reduce the likelihood of comparable errors in the future.<sup>41</sup> “Knowing that government officials in the past have in fact exaggerated threats to national security or have taken actions that were ineffective with respect to the threats that actually were present,” Tushnet argues, “we have become increasingly skeptical about contemporary claims regarding those threats, with the effect that the scope of proposed government responses to threats has decreased.”<sup>42</sup>

This learned skepticism manifests itself in a variety of liberty-protecting forms. Most obviously, there are judicial precedents and institutional safeguards within government itself that function as bulwarks protecting individual rights. Equally if not more important, the social-learning process generates watchdogging behavior by the media and public interest groups. Finally, socialization sensitizes the

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39. ENEMY ALIENS, pp. 7, 48; TERRORISM, p. 113; cf. Sunstein, *Terrorism and Probability Neglect*, *supra* note 31, at 129-31 (discussing political ramifications of public fear based on overestimates of risk).

40. ENEMY ALIENS, pp. 85-87. In this respect Cole’s approach is akin to a relaxed version of the moral panic concept, which similarly emphasizes outsider status. See *supra* notes 26-28 and accompanying text.

41. See Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 283.

42. *Id.* at 283-84; see also Eric Muller, *Inference or Impact? Racial Profiling and the Internment’s True Legacy*, OHIO ST. J. CRIM. L. (forthcoming 2004) (manuscript at 29, 33, on file with author) (discussing “firebreaks” in the “legal landscape” which might operationalize social learning from past mistakes in balancing liberty and security); Eric Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 587, 591, (2002) (arguing, with respect to measures pertaining to race and ethnicity only, that the Administration’s post-9/11 policies reflect “a premise of moderation” that can be attributed in part to a “change in the legitimacy of racial and ethnic assumptions in our policymaking” since the time of the Second World War); Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENTARY 261, 262 (2002) (similar). But see Posner and Vermeule, *supra* note 17 (manuscript at 14) (criticizing the “libertarian ratchet” concept).

public — and especially lawyers — to the potential for calibration errors. The net impact is to increase and entrench restraints on the government's freedom of action. The social-learning model accordingly predicts that the recognition of calibration errors from, say, the Cold War era will prevent repetition of those errors on the same scale during, say, the current wave of concern over terrorism.

Cole and Dempsey accept that our society has a history of committing calibration errors that are recognized as such and regretted after the fact (*Terrorism*, pp. 71-89; *Enemy Aliens*, pp. 88-158). But they do not appear to accept the social-learning model. On the contrary, the primary historical trend emphasized in *Enemy Aliens* is the government's purported tendency to eventually extend to citizens those rights-depriving measures that are established initially with respect to noncitizens (*Enemy Aliens*, pp. 85-87). To the extent that government action is recognized as a mistake, in this view, we can expect to see the government evolve in order to circumvent any entrenched civil liberty protections that are created as a result. As Cole has stated the point elsewhere, the "war on terrorism has already demonstrated our government's remarkable ability to evolve its tactics in ways that allow it simultaneously to repeat history and to insist that it is not repeating history. . . . A historical comparison reveals not so much a *repudiation* as an *evolution* of political repression."<sup>43</sup> In this model, which I refer to as the adaptive-learning model, the social-learning ratchet is ineffective at best and at worst lulls us into a false sense that our civil liberties are not at stake. The adaptive-learning model in this sense lies at the heart of both *Terrorism and the Constitution* and *Enemy Aliens*.

### III. TERRORISM AND THE CONSTITUTION: WATCHING THE WATCHERS

In *Terrorism and the Constitution*, Cole and Dempsey's primary concern is the scope of the FBI's national security investigative authority. In the past, they explain, this authority was the root of grave civil liberties violations as the FBI used muscular and intrusive investigations expressly to disrupt First Amendment activity by politically disfavored groups and individuals. After an interim period of reform, the authors warn, the threat of similar abuse has reemerged recently in a more subtle form due to changes in the law generated by fear of terrorism (*Terrorism*, p. 178).

The argument begins with a survey of historical abuses of the FBI's investigative powers. In this vein, the authors relate not just the familiar stories of the McCarthy and Vietnam eras — this they do with engaging details relating to less-well-known victims of aggressive

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43. Cole, *The New McCarthyism*, *supra* note 15, at 1-2.

investigations, such as Frank Wilkinson — but also the deeper history of the FBI's role as the lead agency for national security and intelligence investigations within the United States (*Terrorism*, pp. 71-89). We may never have had a pure domestic intelligence service along the lines of the United Kingdom's MI5 service,<sup>44</sup> but the responsibilities which would fall to such an agency (counterintelligence, counterespionage, and counterterrorism) nonetheless have been with us for quite some time and have been in the FBI's bailiwick since its inception. Cole and Dempsey shed much light on these early days, emphasizing the efforts by Attorney General Harlan Fiske Stone to confine the Bureau to crime-related investigations and the subsequent reemergence of noncriminal national security investigations in connection with the threats posed by fascism and communism (*Terrorism*, pp. 71-72). We read about J. Edgar Hoover and the subversion investigations, of course, and witness the FBI's use of its investigative powers to disrupt or discredit targets such as Martin Luther King, Jr., and leaders of the Vietnam War protest movement (*Terrorism*, pp. 72-76).

It all came to a head, famously, in the post-Watergate congressional investigation headed by Senator Frank Church (*Terrorism*, p. 76). With public revelations of investigative abuses came public outrage, and with public outrage came political pressure to prevent further abuses. At this crucial juncture, Attorney General Edward Levi stepped in with two sets of new internal guidelines meant to constrain the FBI and thus forestall a legislative effort to do the same.<sup>45</sup>

The first set dealt with the investigation of security threats (including terrorism) of a purely domestic nature, requiring that the FBI have an indication of possible criminal conduct before initiating a preliminary inquiry in such cases.<sup>46</sup> In the event the potential target was a group advocating social or political change, moreover, Levi's domestic guidelines would permit a full-fledged investigation to open only if agents had "specific and articulable facts" indicating that the group planned to achieve its ends through illegal means; mere suspicion was not enough to move beyond a preliminary inquiry.<sup>47</sup> A

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44. We may yet. See, e.g., WILLIAM E. ODOM, *FIXING INTELLIGENCE: FOR A MORE SECURE AMERICA* (2003) (recommending creation of a national counterintelligence service); *A Review of the Relationship Between a Department of Homeland Security and the Intelligence Community: Hearing Before the Senate Comm. on Gov't Aff.*, 107th Cong. 22 (2002) (testimony of Lt. Gen. William Odom, U.S. Army, ret.) (same).

45. See *THE FBI: A COMPREHENSIVE REFERENCE GUIDE* 38 (Athan G. Theoharis et al. eds., 1999).

46. See *THE ATTORNEY GENERAL'S GUIDELINES ON DOMESTIC SECURITY INVESTIGATIONS* (1976), reprinted in *FBI Statutory Charter: Hearings on S. 1612 Before the Senate Comm. on the Judiciary*, 95th Cong. 18-26 (1978).

47. See *THE ATTORNEY GENERAL'S GUIDELINES*, *supra* note 46, at § 1; John T. Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 *CORNELL L. REV.* 785, 798 (1984).

second set, which was classified, dealt with the same issues in the context of security and intelligence investigations concerning the activities of foreign powers.<sup>48</sup>

Developments at the federal level were paralleled, moreover, at the local level. In a series of civil suits, plaintiffs in major cities such as New York, San Francisco, and Chicago challenged the intelligence-gathering activities of local police. These suits resulted in consent decrees or even local ordinances that in various ways prohibited local law enforcement from monitoring or otherwise collecting and maintaining information in the absence of criminal suspicion.<sup>49</sup>

The passage of time dulled the reform spirit while bringing to light new security threats, however, and pressure soon mounted to slacken the restrictions imposed by the Levi guidelines.<sup>50</sup> In 1983 Attorney General William French Smith revised the domestic guidelines somewhat by replacing the “specific and articulable” standard with a “reasonably indicated” test and, equally significantly, by authorizing investigations to be opened based on a target’s statements advocating criminal activity or otherwise indicating the possibility of crime.<sup>51</sup> According to the authors, the Guidelines were further weakened in the aftermath of the 1995 Oklahoma City bombing when the Justice Department circulated an internal memorandum emphasizing that the reasonable-indication standard for opening a full investigation is “substantially lower than probable cause” and that a preliminary investigation could be opened on a lesser showing (*Terrorism*, p. 82).

Cole and Dempsey conclude from this review that the “history of the FBI has been one of an ongoing struggle between control and discretion, between efforts to limit monitoring of political dissent and efforts to preserve or extend FBI powers” (*Terrorism*, p. 89). And to buttress this conclusion, the authors provide a series of lengthy vignettes from more recent years.<sup>52</sup> The vignettes are meant to show

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48. See Athan G. Theoharis, *FBI Surveillance: Past and Present*, 69 CORNELL L. REV. 883, 889 (1984) (citing JOHN T. ELLIFF, *THE REFORM OF FBI INTELLIGENCE OPERATIONS* 133 (1979)).

49. *TERRORISM*, pp. 86-87, 95-98; see, e.g., *Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327, 329-33 (S.D.N.Y. 2003) (describing the history of the consent decree governing police investigation of political activity in New York City).

50. See *THE FBI: A COMPREHENSIVE REFERENCE GUIDE*, *supra* note 45, at 40.

51. *THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND DOMESTIC SECURITY INVESTIGATIONS III.B.4.a* (1983), *reprinted in* Press Release, U.S. Dep’t of Justice (Mar. 7, 1983). Declassified portions of Smith’s foreign counterintelligence guidelines show that the factual predicate for such investigations was not the target’s illegal behavior but, instead, its status as an agent of a foreign power. See *ATTORNEY GENERAL GUIDELINES FOR FBI FOREIGN INTELLIGENCE COLLECTION AND FOREIGN COUNTERINTELLIGENCE INVESTIGATIONS*, available at [www.fas.org/irp/agency/doj/fbi/terrorismintel2.pdf](http://www.fas.org/irp/agency/doj/fbi/terrorismintel2.pdf) (last visited Apr. 25, 2003).

52. Somewhat counterintuitively, the book actually opens with these vignettes and only afterward discusses the earlier history.

that even prior to what might be described as the age of terrorism (beginning with the Oklahoma City bombing in 1995), the FBI was taking advantage of the slackening of restraints to engage in “security” investigations that served primarily to harass or suppress political opponents. In this spirit, we read of the FBI’s vast but fruitless investigation in the 1980s of the Committee in Solidarity with the People of El Salvador (“CISPES”). Ronald Kessler has described the CISPES investigation as “the modern bureau’s most embarrassing case,”<sup>53</sup> and the authors’ detailed account does much to explain why. The investigation began appropriately enough, with a tip from an informant suggesting that CISPES was under the direction and control of a Salvadoran rebel organization, and that its Dallas chapter intended to carry out terrorism in America. The resulting investigation, however, generated no corroboration for the tip. Yet the investigation continued for years and spread nationwide. Most problematically, the investigation consisted largely of monitoring perfectly legal but politically unpopular speech by CISPES members, accompanied by extensive file-keeping. Cole and Dempsey make a strong case that the investigation might have continued further had Congress not begun to ask questions about it in 1985.<sup>54</sup>

We also learn of the so-called “L.A. Eight,” a group of legal aliens and permanent residents who in the 1980s drew the FBI’s attention as a result of their advocacy in support of the Popular Front for the Liberation of Palestine (“PFLP”) (*Terrorism*, pp. 35-44). The procedural history of the case is byzantine, but Cole knows it well, having been counsel to the “Eight” in connection with the government’s numerous efforts to deport them.<sup>55</sup> Their story is a good introduction to the ways in which the immigration laws can be used to take action against noncitizens on the basis of First Amendment activities. In furtherance of this point, the authors emphasize the PFLP’s social and political functions but, surprisingly, the PFLP’s history of terrorist violence gets extremely short shrift (*Terrorism*, pp. 40-41).<sup>56</sup> Nonetheless, the core lesson of the L.A. Eight story remains: the government

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53. RONALD KESSLER, *THE FBI* 140 (1993).

54. *TERRORISM*, pp. 21-33. For another assessment which places the CISPES investigation in context with the First Amendment concerns raised by the FBI’s investigative powers, see PHILIP B. HEYMANN, *TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY* 147-51 (1998).

55. See R. Jeffrey Smith, *Patriot Act Used in 16-year-old Deportation Case; Administration Revives 1987 Effort*, WASH. POST, Sept. 23, 2003, at A3 (describing renewed efforts to deport two of the eight).

56. The PFLP rose to prominence as a result of terrorist attacks it committed in the 1970s. See U.S. DEPT. OF STATE, *PATTERNS OF GLOBAL TERRORISM: 2001*, at 104. It has become more active recently, as indicated by the assassination of an Israeli cabinet minister in 2001. See *id.*; Richard Beeston, *Terrorism Focus on Syria After Assassination*, TIMES (London), Oct. 18, 2001, at 4.

can and does act against noncitizens on the basis of otherwise protected First Amendment activities.<sup>57</sup>

These and other vignettes from the 1980s and early 1990s do tend to cast the FBI's investigative practices in a negative light, but not one at all comparable to the abuses which took place in the prereform era under Hoover. On the other hand, the 1980s and early 1990s were relatively calm periods from the perspective of national security. And today things are different. Beginning in the mid-1990s, and especially since 9/11, the threat of terrorism in America has provided a powerful justification for additional government action to enhance security.

The authors are aware of this, of course, and accordingly devote the final third of the book to an exploration of how civil liberties have fared in the age of terrorism. At this point the book's focus expands considerably, no longer dealing exclusively with the subset of civil liberty concerns raised by the FBI's investigative powers. Instead, Cole and Dempsey provide a sweeping critical survey of antiterrorism laws and policies that have been adopted since the Oklahoma City bombing in 1995 and 9/11.

The first wave of heightened fears about terrorism within the United States produced the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").<sup>58</sup> And of the AEDPA provisions discussed in *Terrorism and the Constitution*, none is more representative of the authors' concerns than the material support law, § 2339B.<sup>59</sup> As noted above, Cole and Dempsey contend that this law subtly resurrects the unconstitutional principle of guilt by association (*Terrorism*, pp. 108-109, 121-123). This is an important argument in terms of assessing the merits of the adaptive-learning model. It is, after all, premised on the claim that the government is seeking to avoid a particular civil liberty protection generated during a prior time of heightened security concerns. For this reason, and also because the argument plays a central role in both *Terrorism and the Constitution* and in *Enemy Aliens*, I discuss the merits of the guilt by association critique in considerable detail in Part V.

Section 2339B is not the only aspect of AEDPA that troubles Cole and Dempsey, however. They are equally concerned about the impact of AEDPA on the immigration laws. The authors emphasize, for example, what they describe as the resurrection of "ideological exclu-

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57. In *Enemy Aliens*, this lesson becomes the premise for a warning — what the government has done to aliens it eventually will attempt to do to citizens.

58. *TERRORISM*, pp. 113-15; see Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of the United States Code).

59. Tying their critique of § 2339B to *Terrorism's* focus on FBI investigative powers, Cole and Dempsey point out that if § 2339B in fact criminalizes First Amendment activity then the FBI is affirmatively authorized thereby to investigate such activity despite past abuses. *TERRORISM*, pp. 122-23.

sion” (*Terrorism*, pp. 123-124). Throughout the Cold War, they explain, the McCarran-Walter Act of 1952 had authorized exclusion of aliens who were members of a communist organization.<sup>60</sup> This anti-membership provision had been repealed in 1990, but AEDPA reinstated it with “terrorist” substituting for “communist.” To Cole and Dempsey, this change — like the adoption of § 2339B — resorts to guilt by association (*Terrorism*, pp. 123-125).

After assessing these and other aspects of AEDPA, Cole and Dempsey move their survey forward to confront the array of antiterrorism measures that have emerged since 9/11.<sup>61</sup> Their critique ranges widely, from the expansion of surveillance and investigative powers under the USA PATRIOT Act,<sup>62</sup> to the immigration sweeps resulting in the detention of hundreds or perhaps thousands of Arab and Muslim noncitizens, to the shroud of secrecy thrown over many of these measures (*Terrorism*, pp. 151-174). The authors pay particular attention to the immigration measures in the USA PATRIOT Act, noting that these provisions expand the use of the material support concept to the deportation context, make advocacy of terrorism or a terrorist organization a basis for exclusion, and provide for detention of aliens pending removal based on the Attorney General’s self-declared reasonable suspicion that an alien may be a terrorist (*Terrorism*, pp. 153-158).<sup>63</sup> Cole and Dempsey also discuss the USA PATRIOT Act’s expansion of the Foreign Intelligence Surveillance Act (“FISA”), contending that by increasing the range of cases in which the FBI may resort to the FISA court for warrants — a procedure requiring probable cause to believe the target is an agent of a foreign power, but not probable cause to believe a crime has been or is

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60. TERRORISM, pp. 123-25; see Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1189).

61. This is significant because, while it would be difficult to make the case that 1996 was a pathological period in which overriding security concerns blinded legislators to traditional commitments to civil liberties, the immediate post-9/11 environment arguably was different.

62. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub.L. No. 107-56, 115 Stat. 272. Dempsey was among a coalition of civil liberties and privacy advocates intimately involved in the lobbying effort against the USA PATRIOT Act, as memorably related by Robert O. Harrow, Jr., *supra* note 14.

63. The detention measure may be superfluous in practice, as officials are able to rely on a combination of existing statutory authority and regulations promulgated after 9/11 to achieve the same end without requiring the Attorney General to certify his suspicion that the alien may be a terrorist. See *Immigration and Nationality Act*, 8 U.S.C. § 1226 (2000); *Review of Custody Determinations*, 66 Fed. Reg. 54,909-02 (proposed Oct. 31, 2001) (to be codified at 8 C.F.R. pt. 3) (authorizing automatic stay of immigration judge’s order of release, pending appeal by the government, in all cases in which the government denied release of the alien pending removal proceedings or where bond was set at \$10,000 or higher); *Interim Rule*, 66 Fed. Reg. 48,334-35 (Sept. 17, 2001) (granting a “reasonable period of time” beyond forty-eight hours to make a detention determination in the event of an emergency).

about to be committed — the law necessarily increased the extent to which FBI investigations may interfere with First Amendment rights.<sup>64</sup>

But there are other post-9/11 measures unrelated to the USA PATRIOT Act that also draw criticism. Chief among them is the arrest and detention of hundreds if not thousands of Arab and Muslim men in the aftermath of the attack. Combined with other measures such as the FBI's attempt to interview some 5000 men from certain Arab and Muslim countries, the authors see a pattern of ethnic and religious profiling which they contend cannot withstand strict scrutiny analysis under the Equal Protection Clause.<sup>65</sup> Cole and Dempsey also contend that civil liberties in general have been degraded in a broad but subtle fashion by the administration's efforts to maintain secrecy with respect to many aspects of its antiterrorism efforts (*Terrorism*, pp. 172-174).

At the conclusion of this survey, the authors shift the focus back to the narrower questions raised by the FBI's national-security investigative powers. Cole and Dempsey explain that in keeping with the historical patterns described earlier in the book, the antiterrorism measures of 1996 and 2001 "adopted a political approach to terrorism" (*Terrorism*, p. 187). The FBI, they conclude, "must get out of the business of monitoring political activity and associations, foreign and domestic, and instead dedicate itself to the urgent task of identifying those planning violent activities" (*Terrorism*, p. 187). The problem, of course, is that there are circumstances in which the task of identifying those planning violent activities would be advanced by monitoring expressive activity. Philip Heymann captured the tension well when he wrote that:

[a] crucial protection for political dissent is the assurance that the government will not monitor private or public meetings of a group sharply criticizing the government. But when such groups urge violence as a response to their criticisms, monitoring their membership and activities may be important to early discovery of extremely dangerous political violence.<sup>66</sup>

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64. *TERRORISM*, pp. 159-61. The assessment is not entirely negative, however. Cole and Dempsey acknowledge, for example, the propriety of the USA PATRIOT Act provision that for the first-time grants the CIA limited access to grand jury information, although they object to the provision's lack of judicial oversight. *TERRORISM*, p. 162; see also Jennifer M. Collins, *And the Walls Came Tumbling Down: Sharing Grand Jury Information With the Intelligence Community Under the USA PATRIOT Act*, 39 AM. CRIM. L. REV. 1261 (2002) (proposing additional record-keeping and ex ante judicial approval requirements).

65. *TERRORISM*, pp. 168-71. For a careful analysis of the profiling issue post-9/11, see Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002).

66. See HEYMANN, *supra* note 54, at 151. Writing prior to 9/11, Heymann concluded that "the limited threat to uninhibited discussion posed by even reasonable efforts to monitor organizations preaching violence is a price worth paying to prevent political violence." *Id.*

In view of this tension, the task of drawing an appropriate line between legitimate and illegitimate investigative activity is an immensely difficult one. But in any event the trend in the months since publication of *Terrorism and the Constitution* is away from rather than toward the adoption of new restraints. In May 2002, Attorney General Ashcroft announced significant revisions to the guidelines regulating FBI investigations of domestic security threats, explaining that “the war against terrorism is the central mission and highest priority of the FBI,” that “terrorism prevention is the key objective under the revised guidelines,” and that “the FBI must draw proactively on all lawful sources of information to identify terrorist threats and activities.”<sup>67</sup> Accordingly, the new guidelines affirmatively authorize agents to “scour public sources for information on future terrorist threats” even in the absence of “specific investigative predicates.”<sup>68</sup> Similarly, “[f]or the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally.”<sup>69</sup> In addition, changes were made to the rules regarding preliminary inquiries to ensure that agents are authorized to collect information about suspected terrorist groups even in the absence of sufficient evidence to open a formal investigation.<sup>70</sup>

The tension between these developments and civil liberties concerns is symptomatic of a broader conflict. As a society, we expect —

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67. Attorney General John Ashcroft, Remarks on the Attorney General’s Guidelines, (May 30, 2002) available at [www.fas.org/irp/news/2002/05/ag053002.html](http://www.fas.org/irp/news/2002/05/ag053002.html) (May 30, 2002).

68. *Id.*

69. *Id.* Writing in another context, Dempsey has pointed out that these changes affect only investigations of purely domestic threats, and that the revisions do not relate to parallel (but much less restrictive) guidelines for terrorism threats posed by foreign entities such as Al Qaeda. See Jerry Berman & James X. Dempsey, Center for Democracy and Technology, CDT’s Guide to the FBI Guidelines: Impact on Civil Liberties and Security — the Need for Congressional Oversight (June 26, 2002), available at <http://www.cdt.org/wiretap/020626guidelines.shtm>.

70. See Fact Sheet, Attorney General’s Guidelines: Detecting and Preventing Terrorist Attacks, at <http://www.usdoj.gov/ag/speeches/2002/53002factsheet.html>. (May 30, 2002). These changes were paralleled at the local level in New York and Chicago, where 1970s reforms had produced, not self-regulation, but consent decrees sharply limiting the ability of police to observe or investigate First Amendment activity. In early 2003, a federal judge agreed to vacate the longstanding consent decree restricting New York City police after the city adopted internal limitations in line with the new FBI Guidelines. See *Handschu v. Special Services Div.*, No. 71 CIV. 2203 (CSH), 2003 WL 1529197 (S.D.N.Y. Mar. 21, 2003); *Handschu v. Special Services Div.*, No. 71 CIV. 2203 (CSH), 2003 WL 302258 (S.D.N.Y. Feb. 13, 2003); see also *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 802 (7th Cir. 2001) (modifying Chicago consent decree so as to permit monitoring of potential terrorists in certain situations). *But cf.* Andrea Dukakis, *Denver Residents Surprised by Police Files Kept on Political Activists*, NPR MORNING EDITION, Feb. 25, 2003, 2003 WL 4856338 (describing Denver police practice of monitoring and maintaining files relating to political activities without connection to criminal suspicion or security threats); Associated Press, *Denver Police Settle Lawsuit Over Secret Files*, ST. LOUIS POST-DISPATCH, Apr. 18, 2003, at A-12 (describing settlement between Denver and the ACLU constraining this practice).

we demand — that the government take effective measures not just to convict those who commit terrorist acts, but also to prevent terrorist acts from occurring in the first place. There is public outcry when the government fails in the latter capacity, demanding to know why the government did not do more.<sup>71</sup> At the same time, we also expect and demand that the government will carry out this responsibility within constitutional boundaries, including restraints preserving freedom of expression and association. These competing demands produce an inherent dilemma, and Cole and Dempsey would resolve it by applying a traditional criminal law enforcement paradigm to antiterrorism investigations.<sup>72</sup> The contrast with the terrorism prevention paradigm actually adopted by the Administration is sharp. Even those who disagree with the authors' recommendations will find that *Terrorism and the Constitution* makes a valuable contribution by marshaling the civil liberties objections to the prevention paradigm and placing them in historical perspective.

#### IV. ENEMY ALIENS: BREAKING THE GOLDEN RULE

Much has happened on the legal front of the war on terrorism since *Terrorism and the Constitution* was published in early 2002, and many of these developments are addressed in *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*. But *Enemy Aliens* is not merely an updated version of *Terrorism and the Constitution*. It also is an elaborate and thought-provoking argument about the manner in which the balance between liberty and security impacts noncitizens.

The heart of Cole's argument is that a double standard pervades our approach to striking the balance between liberty and security. He explains that

[w]hen a democratic society strikes the balance between liberty and security in ways that impose the costs of security measures equally on all, one might be relatively confident that the political process will achieve a proper balance. Since September 11, we have repeatedly done precisely the opposite, sacrificing the rights of a minority group — noncitizens, and especially Arab and Muslim noncitizens — in the name of the majority's security interests. (*Enemy Aliens*, p. 5)

To Cole, this tradeoff is inherently unconstitutional, unethical, and counterproductive. Worse still, he argues, the tradeoff is illusory

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71. See, e.g., John J. Goldman, *9/11 Commission Urged to Find Answers; Those Whose Lives Were Deeply Affected by the Tragedy Testify, Demand Accountability*, L.A. TIMES, Apr. 1, 2003, at A19.

72. "All antiterrorism investigations in the United States, whether of foreign or domestic groups, should be conducted pursuant to criminal rules, with the goal of arresting people planning, supporting, or carrying out violent activities and convicting them in a court of law." TERRORISM, p. 186.

because the deprivations imposed upon noncitizens serve as precedents for the government later to strip the same rights from citizens” (*Enemy Aliens*, pp. 7-9). “Virtually every significant government security initiative implicating civil liberties — including penalizing speech, ethnic profiling, guilt by association, the use of administrative measures to avoid the safeguards of the criminal process, and preventive detention — has originated in a measure targeted at noncitizens” (*Enemy Aliens*, p. 85). In the end, Cole warns, our willingness to violate the Golden Rule leaves us with an expanded national security state, a diminished sphere of private autonomy, and even less security.

Cole builds this critique on historical foundations, providing a survey laden with personal detail in support of his thesis.<sup>73</sup> His discussion of detention without an individualized showing of dangerousness provides a good example. Cole points out that this type of detention — what we might call group detention — originated in 1798 with the Enemy Alien Act.<sup>74</sup> That law, which remains on the books today, authorizes the executive branch during times of declared war to detain or deport at its discretion any citizens of an enemy nation who may happen to be in the United States.<sup>75</sup> The law does not require an individual showing that the detained or deported alien poses a danger; it is enough that the alien is a citizen of our military opponent.<sup>76</sup>

For the next 150 years, group detention remained a security measure available only against noncitizens. But this changed during the Second World War as a result of the notorious decision to imprison wholesale not only Japanese citizens but also Japanese-Americans, without any showing of individual dangerousness.<sup>77</sup> As Cole points out, race served as a bridge to cross the citizen/noncitizen divide in that instance (*Enemy Aliens*, pp. 95-98). And shortly after World War II, the possibility of citizens being subjected to group detention emerged again in connection with a Justice Department program to identify suspected communists whom the government might detain in the event the president declared a national emergency in connection with the communist threat (*Enemy Aliens*, pp. 100-102).

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73. ENEMY ALIENS, pp. 85-179. Some portions of this history will be familiar to readers of *Terrorism and the Constitution* — such as the story of the L.A. 8 — but on the whole there is remarkably little overlap between these two books.

74. ENEMY ALIENS, pp. 91-104; see Act of July 6, 1798, ch. 66, §§ 1-3, 1 Stat. 577 (codified at 50 U.S.C. §§ 21 (2000)).

75. The Enemy Alien Act was used frequently up through the Second World War, but as we no longer formally declare wars its importance has decreased considerably over the past fifty years.

76. See Enemy Alien Act § 1.

77. See *Korematsu v. United States*, 323 U.S. 214 (1944) (affirming conviction for defiance of the military’s exclusion order); PETER IRONS, *JUSTICE AT WAR* (1983); ERIC L. MULLER, *FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II* (2001).

In another example of historical linkages between measures directed at noncitizens and citizens, Cole points to the changes in the immigration laws in 1903 that authorized the exclusion of aliens who advocated or believed in the illegal overthrow of government (*Enemy Aliens*, p. 107). He notes that a proposal to criminalize such advocacy by citizens was rejected at the time, only to resurface successfully during the World War I era in the form of the infamous Sedition Act in 1918, as well as in various state antisindicalism laws (*Enemy Aliens*, pp. 107-08, 112). Similarly, Cole observes that the 1903 exclusion law was amended in 1917 to require exclusion of aliens who were members of organizations promoting the illegal overthrow of government.<sup>78</sup> Describing this as a form of guilt by association, Cole contends that the 1917 immigration law set a precedent that the government would use in later years to punish citizens for their association with communist groups (*Enemy Aliens*, pp. 106-07, 130-32). And in a more recent example, Cole points to the fact that “material support” became a basis for excluding aliens from the United States before it became a criminal act for citizens (*Enemy Aliens*, pp. 60-61).

Not everyone will come away convinced by these observations that it is inherently illegitimate for society to concentrate a security measure on noncitizens, however illegitimate it might be to do so in a particular case. One important objection is that some security threats — Al Qaeda comes to mind — emanate from abroad. In such circumstances, where the threat is posed primarily if not exclusively by noncitizens, crafting a security measure to target such noncitizens may be a reasoned response rather than a mere expedient creating a false impression of enhanced security.<sup>79</sup> Another objection, limited to security measures in the immigration context, derives from the fact that the “Supreme Court has staked out a role of extreme deference to the political branches’ ‘plenary power’ over immigration.”<sup>80</sup> The plenary power doctrine “carves out a unique space in American public law: a realm where the Constitution does not always apply.”<sup>81</sup> On this theory, there are at least some security steps the government may take in the immigration context which cannot also be taken with respect to citi-

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78. *ENEMY ALIENS*, pp. 109-10. This was a major expansion of the government’s exclusionary power given the relative difficulty of showing that an alien had advocated a particular belief, and the relative ease of showing membership in a group to whom such ideas could be attributed.

79. Cole acknowledges this concern, but contends it is outweighed by a quartet of considerations: maintaining a “double standard,” in his view, is undesirable because it cannot be maintained in the long run; will be counterproductive; contributes to government overreaction; and is both illegal and immoral. See *ENEMY ALIENS*, pp. 6-7.

80. Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 *HASTINGS CONST. L.Q.* 1087, 1091 (1995).

81. *Id.* at 1127.

zens.<sup>82</sup> Notwithstanding these objections, Cole clearly succeeds in drawing attention to the inherent political vulnerability of noncitizens and their resulting susceptibility to scapegoating during times of heightened security concerns.

And what of the second stage of Cole's thesis, which contends that deprivations of noncitizens' rights serve as templates for extending the same deprivations to citizens? If correct, this argument is in considerable tension with the social-learning model described above. The template argument implies, after all, that calibration errors do not shrink over time but, on the contrary, spread from the realm of aliens to citizens. There are reasons to hesitate, however, before accepting this proposition.

Some readers will not be persuaded that a causal relationship exists between repressive measures applied to aliens and those later applied to citizens. Consider the purported connection between the Enemy Alien Act and the Japanese internments of the Second World War. As Cole himself observes, the Enemy Alien Act was on the books — and frequently used — for a century and a half before the group-identity concept it embodied was extended to citizens (*Enemy Aliens*, pp. 91-93). This is a long latency period to support a causal connection. And even where the interval is shorter there nonetheless remain questions about the mechanism or dynamic purportedly linking the two instances, as with the adoption of material support as a ground for excluding aliens in 1990 and the criminalization of material support four years later.

Perhaps more significantly, there are counterexamples in which the civil liberties of citizens were sacrificed without a noncitizen precedent, or prior to the extension of a suppressive measure from noncitizens to citizens. Consider the notorious Sedition Act of 1798.<sup>83</sup> Under that infamous law, many citizens were prosecuted during the Adams Administration for political dissent (or less) notwithstanding their First Amendment rights.<sup>84</sup> And extensive repression of dissenting political speech also occurred before the Civil War with respect to

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82. Outside the immigration context, however, the “‘aliens’ rights’ tradition” controls. *Id.* at 1091. This means that “aliens enjoy a full panoply of constitutional rights” in most non-immigration contexts. *Id.* In this vein, Cole devotes considerable text to a discussion of the rights of aliens under both the federal constitution and international law. *ENEMY ALIENS*, pp. 211-27.

83. Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596 (1798) (expired 1801); *see also* CURTIS, *supra* note 18, at 58-79 (describing the background and legislative history of the Sedition Act).

84. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274-76 (1964) (discussing criticism of the Sedition Act and concluding that “the attack upon its validity has carried the day in the court of history”); CURTIS, *supra* note 18, at 80-104 (discussing prosecutions under the Sedition Act).

abolitionists, and during the Civil War with respect to opponents of the war.<sup>85</sup>

But regardless of whether one is persuaded by Cole's description of the historical cycle, his criticisms of post-9/11 antiterrorism measures remain to be addressed. In keeping with his theme Cole begins by arguing that "the government has not asked American citizens to sacrifice their liberty . . . [but instead] has asked those . . . who are not in a position to decline the offer because they have no voice in the democratic process" (*Enemy Aliens*, p. 21). As a consequence, the "war on terrorism has been waged largely through anti-immigrant measures" (*Enemy Aliens*, p. 21).

Chief among these, Cole contends, is the pretextual use of immigration law to implement a system of preventive detention for noncitizens, and in particular for Arab and Muslim noncitizens.<sup>86</sup> According to a report by the Justice Department's Office of the Inspector General, between September 11, 2001 and August 6, 2002, the FBI detained 762 noncitizens for immigration violations in connection with the 9/11 investigation.<sup>87</sup> In each case, the INS was obliged to keep custody of the noncitizen — even those who agreed to voluntary deportation (*Enemy Aliens*, pp. 32-33) — until the FBI was satisfied the individual was not in fact involved in terrorism.<sup>88</sup> This process took eighty days on average.<sup>89</sup> Ultimately, only a handful of these detainees were

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85. See CURTIS, *supra* note 18, at 125-54, 260-63, 289-99 (discussing suppression of abolitionist speech); *id.* at 300-56 (discussing suppression of antiwar speech).

86. ENEMY ALIENS, pp. 24-25:

Because our economy literally depends on illegal immigration, we have long tolerated the presence of literally millions of noncitizens who have violated some immigration rule. This means the attorney general has extremely broad discretion in how and when to enforce immigration obligations; any immigrant community he targets will inevitably include many persons here in violation of their visas. In this sense, the immigration law functions largely as does the traffic law for drug law enforcement; it affords a convenient pretext for targeting millions of individuals. And just as the traffic laws facilitated "driving while black" enforcement, so the immigration law has permitted ethnic profiling.

87. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (April 2003), at 2 [hereinafter INSPECTOR GENERAL'S REPORT]. Cole points out that in addition to those detained in connection with the 9/11 investigation, the Justice Department by January 2003 "had also reportedly detained and deported some 1,100 more foreign nationals under the Absconder Apprehension Initiative, which expressly targets for deportation Arabs and Muslims with outstanding deportation orders, among the more than 300,000 foreign nationals living here with such orders. As of May 2003, another 2,747 noncitizens had been detained in connection with a Special Registration program also directed at Arab and Muslim noncitizens." ENEMY ALIENS, p. 25.

88. INSPECTOR GENERAL'S REPORT, *supra* note 87, at 37-71.

89. *Id.* at 52.

deemed to have any connection with terrorism, prompting Cole to declare the preventive-detention program a “colossal failure.”<sup>90</sup>

Cole also takes aim at the veil of secrecy placed over these immigration proceedings, drawing effectively on his experience as counsel for one such detainee (*Enemy Aliens*, pp. 26-30). He writes that “[p]ublic disclosures not only might have increased objections to the government’s measures, but, given that the widely cast net came up empty, would almost certainly have impaired confidence in the job our government was doing to protect us” (*Enemy Aliens*, p. 30). “The real concern,” he suggests, “may have been not that *Al Qaeda* would find out what was going on, but that the American public would find out” (*Enemy Aliens*, p. 30).

But Cole does not limit himself to those aspects of the war on terrorism which relate to immigration law. He devotes equal attention and criticism to issues such as the government’s use of the material witness statute to detain individuals on grounds Cole views as pretextual (*Enemy Aliens*, pp. 35-39), and the government’s decision to designate as “enemy combatants” American citizens Yaser Hamdi and Jose Padilla.<sup>91</sup> Cole then shifts his attention from detention to detection, dealing first with the vexing issues surrounding racial-, religious-, and national origin-based methods of profiling (*Enemy Aliens*, pp. 47-56). He also discusses the Foreign Intelligence Surveillance Act,<sup>92</sup> criticizing the recent decision by the Foreign Intelligence Surveillance

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90. ENEMY ALIENS, p. 25-26. Consistent with the adaptive-learning model, Cole interprets the 9/11 detentions as confirmation of the government’s recidivist tendencies. He concedes that “Arabs and Muslims have not been interned en masse in the wake of September 11 in the way that the Japanese were during World War II,” but raises the question whether “that is because we have learned our lesson, or [because] the political forces are not sufficient to sustain such a strategy?” ENEMY ALIENS, pp. 103-04. In a similar vein, Cole has compared the 9/11 detentions to the infamous “Palmer Raids” which resulted in the arrest of thousands of noncitizens following a string of anarchist bombings in 1919. See ENEMY ALIENS, pp. 117-28, 179 (describing the Palmer Raids and linking them to current antiterrorism policies); David Cole, *We’ve Aimed, Detained, and Missed Before*, WASH. POST, June 8, 2003, at B1 (“Then, as now, the government went into ‘preventive’ mode, and exploited immigration law to sweep broadly and blindly.”). On the other hand, the very existence of the Inspector General’s Report — and in particular the Department’s apparent acceptance of substantially all of its recommendations — demonstrates the presence of institutional safeguards that did not exist during these earlier periods. See Eric Lichtblau, *U.S. Will Tighten Rules on Holding Terror Suspects*, N.Y. TIMES, June 13, 2003, at A1. In any event, the judgment that the program was a “colossal failure” assumes something we cannot know — that the detentions served no preventive purpose except with respect to the handful of cases positively linked to terrorism.

91. ENEMY ALIENS, pp. 39-46. On June 23, 2003, the Bush Administration designated a third man — Ali Saleh Kahlah Al-Marri, a Qatari in the United States on a student visa — as an enemy combatant. See Josh Meyer, *Suspect Declared an Enemy Combatant*, L.A. TIMES, June 24, 2003, at A1.

92. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811, 1820-1829, 1841-1846, 1861-1863 (2000).

Court of Review upholding the Justice Department's interpretation of that law.<sup>93</sup>

Although Cole's survey of the tools of antiterrorism policy ranges over a wide array of topics, there is a common thread that unites much of the discussion: the tension between national security concerns and freedom of association, and in particular the government's use of guilt by association to achieve security goals. Cole explains that he has devoted much of his career "to defending foreign nationals targeted for their alleged political associations in cases raising national security claims and allegations of terrorist ties" (*Enemy Aliens*, p. 87). This long-standing interest manifests itself throughout both *Enemy Aliens* and *Terrorism and the Constitution*, nowhere more so than in discussions of laws such as § 2339B punishing the provision of material support to designated foreign terrorist organizations (*Enemy Aliens*, pp. 18, 58-64, 75-79, 230; *Terrorism*, pp. 118-125, 140-142, 152-155). These discussions are representative of the arguments in both books, and they shed some light on the relative validity of the adaptive- and social-learning models. Accordingly, I devote the remaining pages to a close examination of Cole's argument that § 2339B surreptitiously resurrects the unconstitutional principle of guilt by association.<sup>94</sup>

## V. GUILT BY ASSOCIATION AND MATERIAL SUPPORT

The guilt by association critique of § 2339B rests on the fact that the statute punishes the provision of material support to designated foreign terrorist organizations ("DFTOs") without regard to whether the supporter specifically intended thereby to further any illegal

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93. ENEMY ALIENS, p. 58-64; see *In re Sealed Case*, 310 F.3d 717 (F.I.S.C.R. 2002) (reversing *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (F.I.S.C. 2002)). Notably, James Dempsey was among the attorneys on one of the amicus briefs supporting the lower court's decision. See Brief on Behalf of Amici Curiae American Civil Liberties Union et al. In Support of Affirmance, *In re Appeal from July 9, 2002 Opinion of the United States Foreign Intelligence Surveillance Court* (No. 02-001), available at [www.fas.org/irp/agency/doj/fisa/091902FISCRbrief.pdf](http://www.fas.org/irp/agency/doj/fisa/091902FISCRbrief.pdf).

94. In Part V, I do not address another significant constitutional objection to § 2339B discussed in both books: whether the material support statutory scheme denies due process either to defendants or to the proscribed organizations in the course of the designation process. Compare *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001) (holding that the designation process denied due process of law to designated organizations), and *United States v. Rahmani*, 209 F. Supp. 2d 1045 (C.D. Cal. 2002) (relying on *National Council of Resistance* to hold that § 2339B prosecution premised on unconstitutional designation cannot proceed) (appeal pending), with *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797 (D.C. Cir. 2002) (foreign entity without property or presence in the U.S. lacks due process rights to challenge designation), and *United States v. Sattar*, 272 F. Supp. 2d 348, 363-68 (S.D.N.Y. 2003) (rejecting the holding in *Rahmani* and denying due process challenge); cf. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002) (rejecting due process challenge to a similar designation process under the International Emergency Economic Powers Act), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003); *Global Relief Found., Inc. v. O'Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002) (same).

conduct; the statute's intent element requires only that the defendant knew that the support was being rendered to the DFTO.<sup>95</sup> Citing this feature, the authors in both books draw an analogy between § 2339B and an array of measures undertaken by the government during the Cold War in an effort to suppress the threat posed by communism (*Terrorism*, pp. 118-119, 154; *Enemy Aliens*, pp. 58-64). Those anticommunist measures similarly lacked an intent requirement, and as a result the Supreme Court in a series of landmark decisions struck them down on the ground that they amounted to punishment on the basis of guilt by association.<sup>96</sup> According to the authors, § 2339B operates "under the guise of cutting off funding for terrorism" precisely in order to avoid this constitutional restraint.<sup>97</sup>

This claim is significantly overstated. The measures which gave rise to the prohibition of guilt by association purposefully suppressed advocacy of communist doctrines and, especially, membership in communist organizations. In contrast, § 2339B in most respects is a content-neutral law which burdens First Amendment rights only incidentally. In this respect, § 2339B is akin to laws authorizing embargoes of hostile foreign states or restricting the export of certain items to them. Such laws may implicate First Amendment considerations, of course, but they do not thereby trigger the same degree of judicial scrutiny as would a measure intentionally targeting expression.

The guilt by association critique is not entirely wide of the mark, however. The array of activities constituting "material support" ranges widely, and includes "personnel." A close examination reveals that the government interprets this term to encompass the act of providing one's *self* as a member of a DFTO, so long as one is subject to the DFTO's direction and control.<sup>98</sup> This status-based prohibition differs saliently from the other, conduct-based aspects of the material support definition. More to the point, this interpretation directly implicates the Cold War precedents upon which the guilt by association critique rests. In those limited instances where the government proceeds under § 2339B on the theory that a defendant provided himself or herself as

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95. See 18 U.S.C. § 2339b (a)(1) (2000) (Whoever . . . "knowingly provides material support or resource to a foreign terrorist organization" violates the statute). By way of example, this knowledge requirement ensures that a person cannot be prosecuted under § 2339B for giving money to a charity that unbeknownst to the donor passes the money to a terrorist group.

96. See *infra* notes 106-118 and accompanying text.

97. *TERRORISM*, p. 153. In keeping with the theme of *Enemy Aliens*, Cole points out that the first material support law was enacted not in the criminal law context but instead in the immigration law context. *ENEMY ALIENS*, 75. The Immigration Act of 1990 provided that an alien could be excluded from the United States if he or she had engaged in conduct which the alien knew or should have known would provide "material support" to a person, group, or government engaged in terrorism. See 8 U.S.C. § 1182(a)(3)(B)(iii) (2000) (as amended by Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990)).

98. See *infra* notes 127-132 and accompanying text.

personnel to a DFTO, therefore, the statute should be interpreted to require proof of the defendant's intent to facilitate illegal conduct.<sup>99</sup>

I explain these conclusions in more detail below. But first I attempt to clarify what it means to argue that a law resurrects "guilt by association," because the phrase turns out to be more complex than expected. For similar reasons, I also look closely at the meaning of "material support." Both clarifications play an important role in the assessment of the authors' argument.

#### A. *The Meaning of Guilt by Association*

"Guilt by association" is an umbrella concept that encompasses two distinct methods of government regulation that concern the relationship of one person to another or to a group. One method could be termed "vicarious punishment." In this sense, guilt by association refers to punishment of A for specific actions committed by B. The second method could be termed "criminalized association." Here, the government punishes A not for any specific conduct by B, but for associating with B.

Conspiracy law provides an illustration of the distinction between the two concepts. The punishment of conspiracy itself is an example of criminalized association; the law seeks to discourage the formation of groups associated for criminal purposes because such associations "make possible the attainment of ends more complex than those which one criminal could accomplish."<sup>100</sup> But separate and apart from the punishment conspirators face for their association with one another, conspirators may also face vicarious punishment for the specific criminal acts of their coconspirators pursuant to the *Pinkerton* doctrine.<sup>101</sup>

Vicarious punishment is not entirely alien to our system, as the existence of the *Pinkerton* doctrine demonstrates.<sup>102</sup> But vicarious

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99. Insofar as a defendant did in fact become a member of a DFTO subject to its direction and control, the burden of this mens rea requirement by no means will preclude prosecution. Evidence of the DFTO's illegal activities and the defendant's awareness of them may be enough for a jury to infer the requisite intent.

100. *Callanan v. United States*, 364 U.S. 587, 593-94 (1961). For a thorough discussion of the rationale behind conspiracy law, see Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003).

101. See *Pinkerton v. United States*, 328 U.S. 640 (1946) (holding that conspirator can be liable for reasonably foreseeable actions of co-conspirator committed in furtherance of their jointly agreed illegal end); see also Katyal, *supra* note 100 at 1372-75. Justice Scalia referred to this form of guilt by association when he wrote recently that "[t]here is no guilt by association . . . enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violation by another State or by most other States, or even by 49 other States." *Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972 (2003) (Scalia, J., dissenting).

102. For an illuminating discussion of the instrumental value of vicarious punishment, see Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. (forthcoming 2003).

punishment nonetheless clashes sharply with our commitments to due process of law and freedom of association.<sup>103</sup> As Justice Stevens wrote in *NAACP v. Claiborne Hardware Co.*, “[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected.”<sup>104</sup>

If § 2339B were a vicarious punishment statute operating on a principle analogous to the *Pinkerton* doctrine, its failure to require proof that the defendant intended to further any illegal conduct would render it unconstitutional. But § 2339B is not a vicarious punishment statute; it does not authorize punishment of one person for the conduct of someone else.<sup>105</sup> If the statute does involve guilt by association, therefore, it must be in the second sense of that phrase — criminalized association.

Attempts to criminalize association were frequent during the struggle with communism, and as a result a well-developed body of First Amendment doctrine formed reflecting a judgment about the acceptable parameters of the concept.<sup>106</sup> The Supreme Court first addressed this issue in *De Jonge v. Oregon*, in which Oregon prosecuted a man under its syndicalism law for helping to organize a public meeting of the Communist Party in 1934.<sup>107</sup> The Supreme Court held

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103. “[W]e have no tradition of imputed guilt in our legal system, and we ordinarily recoil at the notion of guilt by association.” Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 319 (1996); see also *United States v. Johnson*, 886 F.2d 1120, 1124 (9th Cir. 1989) (noting potential due process limitations on the *Pinkerton* doctrine in cases involving attenuated relationships between the conspirator and the substantive crime); Blasi, *supra* note 25, at 496 (“Even when a member actively participates in the affairs of an organization and knows about and shares its illegal objectives, vicarious criminal responsibility for the speeches and writings of others is not warranted.”).

104. 458 U.S. 886, 908 (1982) (holding that individuals and organizations involved in an otherwise legal boycott could not be held liable for the illegal conduct of other participants in the boycott); see also *Scales v. United States*, 367 U.S. 203, 224-25 (1961):

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . , that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

105. As Vincent Blasi has explained,

[c]riminal responsibility should not be considered “vicarious” when it is based on specifically defined conduct by the defendant, including verbal solicitation to illegal advocacy, that is prohibited because of its significant causal connection to harmful consequences. The type of liability that is problematic under the pathological perspective is that which permits persons to be convicted for nothing more than failing to prevent, repudiate, report, or *disassociate* themselves from the illegal advocacy of their political associates.

Blasi, *supra* note 25, at 496 n.162 (emphasis added).

106. For a thorough and thoughtful review of the role that American communism played in developing these principles, see Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1 (1991).

that the prosecution violated De Jonge's assembly and petition rights, observing that

[t]hose who assist in the conduct of [peaceable] meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects.<sup>108</sup>

Notwithstanding *De Jonge*, three years later Congress enacted the Alien Registration Act, also known as the Smith Act.<sup>109</sup> This law, in relevant part, criminalized membership in any organization advocating the forcible and illegal overthrow of government, without regard to the member's intent to further any illegal conduct.<sup>110</sup> After World War II, similar instances of criminalized association became central to a wide array of national, state, and local laws and policies aimed at suppressing the Communist Party. Eventually, in *Scales v. United States*, the Supreme Court weighed in on the constitutional questions raised by the Smith Act's membership prohibition.<sup>111</sup>

The Court in *Scales* did not actually declare the membership provision unconstitutional, but did restrain its scope dramatically in order to confine it to constitutional bounds. The key to the decision was Justice Harlan's distinction between traditional criminal conspiracies and what might be called "hybrid groups" — those with legal and illegal functions.<sup>112</sup> Justice Harlan conceded the government's power

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107. 299 U.S. 353 (1937). The case had elements of both forms of guilt by association. It involved vicarious punishment in that prosecutors put on proof that party members had broken the syndicalism law at other meetings. And it involved criminalized association in that De Jonge was charged with nothing more than "assist[ing] in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party." *De Jonge*, 299 U.S. at 362.

108. *Id.* at 365.

109. Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (codified with some differences in language at 18 U.S.C. § 2385 (2003)).

110. *See id.*, stating in relevant part that:

[w]hoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any . . . government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly or persons, knowing the purposes thereof" shall be subject to a sentence of up to twenty years, a fine of up to \$20,000, and shall remain ineligible for employment by the federal government for five years from the date of conviction. (emphasis added).

111. 367 U.S. 203 (1961).

112. *Scales*, 367 U.S. at 229. An organization may be hybrid despite being predominately legitimate. Consider the boycott of white-owned businesses in Claiborne County, Mississippi, at issue in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Indisputably, the boycotters in large part acted within their rights in pursuit of admirable goals of racial justice and equality, but there were occasional instances of illegal conduct as well. Justice Stevens put it best when he wrote that the boycott "included elements of criminality and elements of majesty." *Id.* at 888.

to criminalize association in the context of an ordinary criminal conspiracy, notwithstanding associational rights.<sup>113</sup> A “blanket prohibition of association with a group having both legal and illegal aims,” on the other hand, would pose “a real danger that legitimate political expression or association would be impaired.”<sup>114</sup>

Justice Harlan’s point was not that the government lacked power to criminalize association with a hybrid group; it was that this power must be narrowly circumscribed in order to avoid undue interference with legitimate expression and association. Thus he concluded that the government could not punish membership in a hybrid group without “clear proof that a defendant ‘specifically intend[s] to accomplish [the aims of the organization] by resort to violence.’”<sup>115</sup> As to

the member for whom the organization is a vehicle for the advancement of legitimate aims and policies[, that individual] does not fall within the ban of the statute: he lacks the requisite specific intent to bring about the overthrow of the government as speedily as circumstances would permit. Such a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal.<sup>116</sup>

Construing the membership provision to contain a specific intent restriction, the Supreme Court upheld the law.<sup>117</sup>

In a string of subsequent decisions addressing measures suppressing membership in communist groups, the Supreme Court repeatedly reaffirmed the *Scales* holding.<sup>118</sup> Taken together these cases establish a constitutional litmus test for laws that criminalize association with a hybrid group. Does the law require proof that the defendant specifically intended to further the illegal ends of the organization? If not, then the law sweeps within its grasp too much innocent association. It

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113. See *Scales*, 367 U.S. at 229.

114. *Id.*

115. *Id.* (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961) (*Noto* was a companion decision issued the same day as *Scales*)).

116. *Id.* at 229-30 (internal quotation marks omitted).

117. *Id.* at 222-24, 229-30.

118. See *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (striking down regulatory scheme in which membership in a “subversive” organization provided grounds for dismissal of any public school employee); *United States v. Robel*, 389 U.S. 260, 265 (1967) (striking down provision of the Subversive Activities Control Act making it illegal for members of a “Communist-action organization” to be employed in defense-related facility in certain circumstances, and observing that the “statute quite literally establishes guilt by association alone, without any need to establish that an individual’s association poses the threat feared by the Government in proscribing it”); *Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966) (striking down law which punished public officials who took oath of office but who knowingly became or remained member of communist group; “[l]aws such as this which are not restricted in scope to those who join with the ‘specific intent’ to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization”); *Aptheker v. Sec’y of State*, 378 U.S. 500, 511 (1964) (striking down statute precluding members of a communist organization from obtaining passports for lack of a specific intent element).

is, in short, a matter of narrow tailoring. But does § 2339B criminalize association in this respect? The question is crucial, because § 2339B purposefully does not require proof of specific intent to further illegal conduct.<sup>119</sup>

### B. *The Meaning of Material Support*

In contrast to the Smith Act membership provision discussed above, § 2339B on its face does not prohibit membership in a DFTO. Instead, it punishes anyone who “knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so.”<sup>120</sup> The phrase “material support or resources” in turn is defined to include any of the following: “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”<sup>121</sup>

For analytical purposes, this list can be divided into several categories. First, material support includes funding (currency, monetary instruments, and financial securities). Second, it includes a wide variety of tangible equipment (false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, and other physical assets). Third, it includes certain services (financial services, lodging, training, expert advice or assistance, and transportation). Finally, it includes “personnel.” The provision of personnel might be taken as another form of service, but for reasons explained below I will treat it as its own category for purposes of assessing its relationship to the First Amendment.

The first year and a half since 9/11 has seen an unprecedented wave of § 2339B prosecutions, accounting for each category of material support described above.<sup>122</sup> Funding is at issue, for example,

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119. Section 2339B requires only that the defendant be aware that the recipient of the support is a DFTO. This approach is intentional. Two years prior to the enactment of § 2339B, Congress enacted a more limited material support law — 18 U.S.C. § 2339A. Section 2339A criminalizes material support only when the defendant knows or intends that the aid will be used by the recipient (which need not be a DFTO) to further specific criminal acts. Critics argued that § 2339A was of little or no use in choking off the flow of aid from the United States to foreign terrorist groups. *See, e.g.*, Todd Gillman, *FBI Looks Into Islamic Fund Raising; Muslim Officials Deny Supporting Terrorism*, DALLAS MORNING NEWS, Nov. 18, 1994, at 29A (citing unnamed diplomatic and law enforcement sources). This criticism, combined with the political imperative created by the Oklahoma City bombing in 1995, produced § 2339B just two years later.

120. 18 U.S.C. § 2339B(a)(1) (2000).

121. 18 U.S.C. § 2339A(b) (incorporated by reference in 18 U.S.C. § 2339B(g)(4)).

122. Section 2339B saw action on only four occasions in its first five years. *See United States v. Rahmani*, 209 F. Supp. 2d 1045 (C.D. Cal. 2002) (describing pending prosecution of seven men for providing funds to Mujaheddin-e Khalq (hereinafter “MEK”)); David E.

in the case against Mohammed Ali Hasan Al-Moayad, a Yemeni cleric whom prosecutors allege has raised millions of dollars for both Al Qaeda and Hamas.<sup>123</sup> In other instances, the § 2339B charge turns on the provision of equipment, as in the indictment of a group of men for attempting to sell hashish and heroin to undercover agents in exchange for “Stinger” anti-aircraft missiles which then would be provided to Al Qaeda.<sup>124</sup> A number of cases include allegations of material support in the form of services, as in the prosecution of Earnest James Ujaama for conspiring to create and operate a training camp and safehouses in the United States on behalf of Al Qaeda.<sup>125</sup> Finally, the § 2339B charges in several instances relate to the provision of

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Kaplan & Monica M. Ekman, *Homegrown Terrorists: How a Hezbollah Cell Made Millions in Sleepy Charlotte, N.C.*, U.S. NEWS & WORLD REP., Mar. 10, 2003 at 30 (describing the prosecution of cigarette smuggling ring using funds to buy equipment for Hezbollah; the prosecution resulted in the first jury convictions under § 2339B); John Mintz & Michael Grunwald, *FBI Terror Probes Focus on U.S. Muslims*, WASH. POST, Oct. 31, 1998, at A1 (describing prosecution of Fawzi Mustapha Assi for providing GPS gear, nightvision goggles, and infrared cameras; Assi absconded before trial); Press Release, United States Attorney’s Office, Central District of California (Oct. 26, 1990) (describing prosecution of Bahram Tabatabai for providing false identification to MEK; Tabatabai pled guilty before trial), available at [www.usdoj.gov/usao/cac/pr/218.htm](http://www.usdoj.gov/usao/cac/pr/218.htm). In the months since 9/11, in contrast, there have been at least ten prosecutions involving thirty defendants. One Justice Department official recently testified, moreover, that the Department is pursuing more than seventy terrorist-financing or material-support investigations and that it has brought “support” charges against sixty-one individuals. See *Hearing Before the Subcommittee on Oversight and Investigations, House Committee on Financial Services*, 108th Cong. 1 (2003) (prepared statement of Alice Fisher, Deputy Assistant Attorney General), available at <http://financialservices.house.gov/media/pdf/031103af.pdf>. The discrepancy between my figure of thirty and her figure of sixty-one may reflect charges under other support-related laws such as § 2339A; the existence of sealed indictments; or pending investigations. See, e.g., Nicholas K. Geranios, *Ex-Gridder Held in Probe of Two Islamic Charities*, SEATTLE TIMES, Mar. 19, 2003, at B4 (describing material support investigations of two Islamic charities).

123. See *United States v. Zayed*, (M-03-0043) (E.D.N.Y. 2003) (detailing similar allegations against Al-Moayad’s assistant); Affidavit in Support of Arrest Warrant, *United States v. Al-Moayad*, M-03-0016 (E.D.N.Y. 2003); see also Indictment, *United States v. Sattar*, No. 02 Cr. 395 (JGK) (S.D.N.Y.) ¶¶ 21(cc)-(gg) (alleging that Ahmed Abdel Sattar and Yassir Al-Sirri arranged the transfer of funds to the Islamic Group, a DFTO).

124. See Indictment, *United States v. Shah*, No. 02 Cr 2912L (S.D. Cal 2002); see also Criminal Complaint, *United States v. Varela*, No. 11-02-1008M (S.D. Tex. 2002) (alleging scheme to purchase a range of weapons and equipment on behalf of the United Self-Defense Forces of Colombia); *United States v. Sattar*, 272 F. Supp. 2d 348, 355 (S.D.N.Y. 2003) (describing allegation that Sattar provided communications equipment, among other things).

125. See Indictment, *United States v. Ujaama* (W.D. Wash.) [hereinafter Ujaama Indictment]; see also Indictment, *United States v. Al-Arian*, No. 8:03-CR-T (M.D. Fla.) (alleging, among other things, provision of accounting services); Indictment, *United States v. Battle*, No. Cr. 02-399 HA (D. Oregon) (alleging that Battel and five others were involved in an attempt to enter Afghanistan in late 2001 in order to provide military services to Al Qaeda); Criminal Complaint, *United States v. Hawash*, No. Cr. 03-M-481 (D. Or.) (same); Indictment, *United States v. Paracha*, No. 03 Cr. 236 (S.D.N.Y.) (alleging provision of financial and other services to Al Qaeda).

personnel to a DFTO, as in the cases against John Walker Lindh and Lynne Stewart.<sup>126</sup>

The personnel charges are of particular interest. In some respects, the meaning of “personnel” is straightforward. According to the United States Attorneys’ Manual:

a person may be prosecuted under § 2339B for providing “personnel” to a designated foreign terrorist organization if and only if that person has knowingly provided the organization with one or more individuals to work under the foreign entity’s direction or control. . . . Only individuals who have subordinated themselves to the [DFTO], i.e., those acting as full-time or part-time employees or otherwise taking orders from the entity, are under its direction or control.<sup>127</sup>

There is, however, a twist: the government interprets “personnel” to include not only the act of recruiting others but, also, the act of providing *yourself* as personnel. And in substance, the reflexive interpretation of personnel criminalizes the status of being a member of a DFTO subject to its direction or control. This position is stated expressly in the United States Attorneys’ Manual, which explains that:

[t]here are two different ways of providing “personnel” to a designated foreign terrorist organization: 1) by working under the direction or control of the organization; or 2) by recruiting another to work under its direction or control. The statute encompasses both methods, so long as the requisite direction or control is present.<sup>128</sup>

It is not clear to what extent the government has relied on the reflexive interpretation of “personnel” in actual § 2339B prosecutions; the indictments and criminal complaints in the § 2339B cases do not specify the aspect of the material support definition in issue. It appears, however, that the reflexive-personnel theory has surfaced in at least three cases. One is the prosecution of John Walker Lindh,

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126. See *United States v. Lindh*, 212 F. Supp. 2d 541, 568 (E.D. Va. 2002); *Sattar*, 272 F. Supp. 2d at 357; see also Ujaama Indictment, *supra* note 125. For detailed discussions of the Steward prosecution, see Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173 (2003) [hereinafter Margulies, *The Virtues of Vices of Solidarity*], and George Packer, *Left Behind*, N.Y. TIMES, Sept. 22, 2002, § 6 (Magazine), at 42.

127. U.S. DEP’T OF JUSTICE, U. S. ATTORNEYS’ MANUAL, § 9-91.100 (June 2001) [hereinafter U. S. ATTORNEYS’ MANUAL], available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/title9/91mcrm.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/title9/91mcrm.htm); see also *Lindh*, 212 F. Supp. 2d at 572 (construing “personnel” to include the direction or control criterion). *But see* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-38 (9th Cir. 2000) (holding in the context of an interlocutory appeal from a preliminary injunction that “personnel” is unconstitutionally vague because it might be thought to encompass independent advocacy on behalf of a DFTO). The district court in *Humanitarian Law Project* subsequently issued a permanent injunction on this ground. See Henry Weinstein, *Judge Strikes Down Parts of 1996 Terrorism Law*, L.A. TIMES, Oct. 5, 2001, at A4. The issue currently is back before the Ninth Circuit, and the Justice Department is considering legislation that would incorporate the “direction or control” criteria into the statutory definition, among other things. See *infra* note 179.

128. See U.S. ATTORNEYS’ MANUAL, *supra* note 127, at § 9-91.100.

which resulted in a plea agreement.<sup>129</sup> As the district judge described the charges, Lindh was “accused of *joining* groups that do not merely advocate terror, violence, and the murder of innocents; these groups actually carry out what they advocate and those who join them, at whatever level, participate in the group’s acts of terror, violence, and murder.”<sup>130</sup> Another case that might involve the self-provision of personnel is the ongoing prosecution of the men from Lackawanna who attended al Farooq.<sup>131</sup> Finally, the government has expressly asserted this theory in connection with the prosecutions of Lynne Stewart and Ahmed Abdel Sattar.<sup>132</sup>

Even without the reflexive interpretation of personnel, § 2339B has tremendous utility for preventing terrorism due to its capacity to cut off the flow of funds, equipment, and services to DFTOs. But interpreting “personnel” reflexively gives § 2339B an additional, more direct capacity for prevention. With this interpretation, the government has grounds to arrest a suspected member of a DFTO without having to wait for evidence that the suspect is acting in furtherance of

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129. For an interesting post-mortem on the Lindh prosecution, see Jane Mayer, *Lost in the Jihad*, NEW YORKER, Mar. 10, 2003, at 50.

130. *Lindh*, 212 F. Supp. 2d at 569 (emphasis added).

131. See *Goba I*, *supra* note 3, 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002) (holding that one can provide material support to a DFTO “by offering one’s services to said organization”). In light of the emphasis on training in the Lackawanna indictments and plea agreements, moreover, the government may in that case be using a reflexive interpretation not only of “personnel” but, also, “training.” See *id.* (holding that “one can be found to have ‘provided material support’ . . . by . . . allowing one’s self to be indoctrinated and trained as a ‘resource’ in that organization’s beliefs and activities”). Such an interpretation of “training” is difficult to square with the statutory text and, notably, the U.S. Attorney’s Manual does not appear to authorize it. See U.S. ATTORNEYS MANUAL, *supra* note 127, at § 9-91.100 (instructing that “a person may be prosecuted under § 2339B for providing ‘training’ to a designated foreign terrorist organization *if and only if* that person has knowingly *provided instruction* to the organization designed to impart one or more specific skills” (emphasis added)). Further constitutional challenges to the application of § 2339B in the Lackawanna case will not be forthcoming, however, in light of the fact that all of the apprehended defendants have entered guilty pleas. See Press Release, U.S. Dep’t of Justice, Seventh Defendant Named in Buffalo Cell Case, Charged with Providing Material Support to Al Qaeda, May 21, 2003 (describing plea agreements and indicating that the remaining Lackawanna suspect remains at large, possibly outside the United States), available at 2003 WL 21197083. On a disturbing note, the Wall Street Journal recently reported that at least some of these plea agreements were reached after prosecutors allegedly “threatened the defendants with ‘enemy combatant’ status.” Paltrow, *supra* note 6; cf. *Mosed* Plea Agreement, *supra* note 3, ¶ 29 (waiving “any right” the government has “to detain the defendant as an enemy combatant”); *Goba* Plea Agreement, *supra* note 3, ¶ 29 (same). A more recent account, however, suggests that government leverage flowed from the prospect of an additional weapons charge. See Purdy & Bergman, *supra* note 3.

132. See Government’s Memorandum of Law in Opposition to Defendant’s Pretrial Motions, United States v. Sattar, No. 02 Cr. 395 (JGK) (S.D.N.Y. Mar. 21, 2003) (arguing that Stewart provided herself as personnel to the Islamic Group when she purposefully assisted Sheik Omar Ahmad Ali Rahman in circumventing Special Administrative Measures designed to keep Rahman from communicating with his followers).

some specific illegal end; the person's membership status alone provides sufficient grounds to act.

### C. *The Constitutional Boundaries of § 2339B*

In the remaining pages I assess Cole and Dempsey's criminalized association critique of § 2339B in light of the particular characteristics of each category of material support described above. I begin with funding, and conclude with the reflexive interpretation of personnel.

#### 1. *Funding*

Financial support can of course implicate First Amendment considerations, because such support can serve as a proxy for speech or as a manifestation of association.<sup>133</sup> For this reason, the aspect of § 2339B that prohibits financial support for DFTOs is subject to some degree of First Amendment scrutiny. It does not follow, however, that § 2339B's funding ban triggers the specific intent requirement set forth in *Scales* and other criminalized association cases from the Cold War era.<sup>134</sup> Those decisions addressed statutes that purposefully targeted membership and advocacy. Section 2339B's ban on funding, in contrast, burdens First Amendment activity only incidentally.

The distinction between purposeful and incidental restrictions on expression — including expressive association — is crucial because the First Amendment demands more from the government when it acts purposefully to interfere with expression.<sup>135</sup> Translated into doctrinal terms, this means that an expression-neutral government action that

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133. See *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960) (holding that a statute requiring disclosure of organizations to which teachers made contributions implicated the "right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society"); see also *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 799 (1985) (holding that a charitable contribution "functions as a general expression of support for the recipient and its views"); *Buckley v. Valeo*, 404 U.S. 1, 21 (1976) (electoral campaign contributions); cf. *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000) (compelled contribution of student activity fees implicates First Amendment interests); *Keller v. State Bar*, 496 U.S. 1 (1990) (compelled contribution of bar association dues); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (compelled contribution of service fee to a union). But see J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976). Monetary exchanges of course do not always implicate the First Amendment. See, e.g., David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J.L. POLITICS 33, 78-79 (1998).

134. See *supra* notes 111-118 and accompanying text.

135. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (2d ed. 1988); Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 782-85 (1985) (observing that the same distinction will not hold true for those who subscribe to what he terms the "positive conception of the first amendment," which deemphasizes intent and motive and focuses instead on impact).

only incidentally impacts expression is not subject to strict scrutiny with its exacting tailoring requirements. Instead, such action is subject to intermediate scrutiny along the lines set forth in *United States v. O'Brien*:<sup>136</sup> the government action must be content-neutral and within the government's constitutional authority; it must serve substantial or important interests; and it must "not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" <sup>137</sup>

First Amendment challenges to economic embargoes of hostile foreign states illustrate this point, as Gerald Neuman and Frederick Schauer have observed.<sup>138</sup> In *Teague v. Regional Commissioner of Customs*, for example, the Second Circuit addressed a First Amendment challenge to the "Foreign Asset Control Regulations" promulgated pursuant to the Trading with the Enemy Act, which at the time prohibited transactions with China, North Korea, or North Vietnam irrespective of one's intent.<sup>139</sup> As the Court explained, the regulations "were designed to limit the flow of currency to specified hostile nations," reflecting the fact that "[h]ard currency is a weapon in the struggle between the free and the communist worlds."<sup>140</sup> The Court acknowledged that the regulations "impinge[d] on first amendment freedoms" by, in this instance, limiting the availability of publications and films from the designated countries.<sup>141</sup> But the Court held that this infringement was incidental to the regulations' purpose, and therefore concluded that the appropriate level of scrutiny for the regulations was that set forth in *O'Brien*.<sup>142</sup> Under that rubric, the Court upheld the regulations.<sup>143</sup>

Perhaps more pertinent is the decision in *Farrakhan v. Reagan*.<sup>144</sup> The Reagan administration had imposed an embargo on Libya in 1986 in response to a variety of terrorist attacks carried out by Libyan

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136. 391 U.S. 367 (1968).

137. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

138. See Gerald L. Neuman, *Terrorism, Selective Deportation, and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 330 (2000); Schauer, *supra* note 135.

139. 404 F.2d 441 (2d Cir. 1968) (citing 50 U.S.C. app. § 5(b)). The Trading With the Enemy Act was supplanted by the International Emergency Economic Powers Act, Pub. L. No. 95-228, 91 Stat. 1625 (codified as amended at 50 U.S.C. § 1701-1706 (2000)).

140. *Teague*, 404 F.2d at 445 (quoting *Sardino v. Fed. Reserve Bank*, 361 F.2d 106, 112 (2d Cir. 1966) (internal quotation marks omitted)).

141. *Id.*

142. *Id.* at 446.

143. *Id.*; see also *Veterans and Reservists for Peace in Vietnam v. Reg'l Comm'r of Customs*, 459 F.2d 676 (3d Cir. 1972) (upholding regulations under Trading With the Enemy Act against prior restraint challenge).

144. 669 F. Supp. 506 (D.C. Cir. 1987).

agents, and the effect was “to halt virtually all economic intercourse with Libya.”<sup>145</sup> Among other things, the embargo prevented the plaintiff mosque from repaying a loan from an agency of the Libyan government. The mosque argued that this prohibition, among other things, violated their free exercise and free speech rights. The Court assumed for the sake of argument that “contributions to Libyan organizations are a form of symbolic speech,” but because the embargo impacted such speech only incidentally to its expression-neutral purpose of suppressing Libyan sponsorship of terrorism, the Court applied intermediate scrutiny pursuant to *O’Brien* and upheld the embargo.<sup>146</sup>

Gerald Neuman has correctly argued that the analogy between the embargo cases and § 2339B’s funding prohibitions is strong.<sup>147</sup> In both instances, the government has in substance prohibited transactions with a foreign entity in furtherance of America’s national security and foreign policy interests, irrespective of whether a person intends to facilitate any harmful conduct by engaging in such transactions.<sup>148</sup> The two scenarios are technically distinct in the sense that embargoes quarantine states, whereas § 2339B quarantines foreign sub-state groups. But this is a distinction without a difference for purposes of First Amendment law (and for many other purposes, in light of the demonstrated capacity of some sub-state entities to inflict harm on a scale previously thought possible only for states).<sup>149</sup>

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145. *Farrakhan*, 669 F. Supp. at 508.

146. *Id.* at 512; *see also* *Walsh v. Brady*, 927 F.2d 1229, 1235 (D.C. Cir. 1991) (applying *O’Brien* in course of upholding Cuban embargo provisions against First Amendment challenge).

147. *See* Neuman, *supra* note 138, at 330 & n.79.

148. *Cf.* *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (refusing to review substance of DFTO decision by the Secretary of State on justiciability grounds in view of the foreign policy considerations involved); Neuman, *supra* note 138, at 331. Neuman observes that:

[f]oreign organizations differ from domestic organizations in the degree to which the federal government has the capacity to control their actions directly. The United States has limited ability to enforce antiterrorist legislation against foreign organizations that are based in countries with which the United States has amicable relations, and even less ability to enforce it against organizations that are based in hostile countries. The federal government therefore has fewer alternatives to burdening associational activities as a means of combating terrorism.

*Id.*

149. *See* Neuman, *supra* note 138, at 331 n.79.

As Professor Cole points out, the fact that foreign organizations engaged in violence are not themselves states provides a potential basis for distinguishing these precedents. Nonstate organizations, however, can pose threats to the lives of U.S. citizens or to U.S. security interests as great as those posed by many states, and their overseas location similarly limits the ability of the U.S. government to counteract those threats. The analogy therefore appears more persuasive than the distinction.

*Id.*; *see also* David Cole, *Damage Control? A Comment on Professor Neuman’s Reading of Reno v. AADC, GEO. IMMIGR. L.J.* 347, 358 (2000).

Like the embargoes discussed above, § 2339B's ban on providing funds to DFTOs implicates the *O'Brien* standard for assessing First Amendment challenges to laws which burden expression incidentally.<sup>150</sup> And again like the embargoes, § 2339B's funding ban comports with that standard.

As a threshold matter, the funding ban is content-neutral.<sup>151</sup> Its purpose is not to suppress expression or association but instead to reduce DFTOs' capacity for political violence, thereby preserving life and property and preventing interference with foreign policy goals.<sup>152</sup> As *Teague* put the point in the embargo context, "restricting the flow of information or ideas is not the purpose of the regulations. The restriction of First Amendment freedoms is only incidental to the proper general purpose of the regulations: restricting the dollar flow to hostile nations."<sup>153</sup> The next consideration — whether the government

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150. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134-35 (9th Cir. 2000) (citing *O'Brien*, inter alia, in the course of rejecting freedom of association challenge to § 2339B); cf. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 58, 81-82 (D.D.C. 2002) (applying *O'Brien*, in context of free expression argument, to uphold order freezing assets of charity for providing financial support to a terrorist group); *Global Relief Found. Inc. v. O'Neill*, 207 F. Supp. 2d 779, 806 (N.D. Ill. 2002) (same); *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1482 (S.D.N.Y. 1988) (applying *O'Brien* analysis to a 1987 law which barred "the receipt and expenditure of funds from the PLO," reasoning that the law's impact on First Amendment interests is incidental); see also Margulies, *The Virtues of Vices of Solidarity*, *supra* note 126, at 202. Notably, the Seventh Circuit has held that the proper doctrinal framework for assessing a First Amendment challenge to § 2339B's funding ban is provided by *Buckley v. Valeo*, 424 U.S. 1 (1976). See *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1025-27 (7th Cir. 2002) (upholding the funding ban in the context of a civil action under 18 U.S.C. § 2333 predicated on a § 2339B violation). But as the Ninth Circuit made clear in *Humanitarian Law Project*, application of the *O'Brien* framework to § 2339B's funding ban is entirely consistent with *Buckley*. See *Humanitarian Law Project*, 205 F.3d at 1134-35; see also *Nixon v. Shrink Mo. Gov. PAC*, 528 U.S. 377, 387-88 (2000) (explaining that "restrictions on contributions require less compelling justification than restrictions on independent spending," that "[i]t has, in any event, been plain ever since *Buckley* that contribution limits would more readily clear the hurdles before them," and that even a contribution limit that caused significant interference with associational rights could survive if the Government could show the regulation was "closely drawn" to achieve a "sufficiently important interest" (internal citations and quotation marks omitted)).

151. See *United States v. Sattar*, 272 F. Supp. 2d 348, 361-62 (S.D.N.Y. 2003) (holding that "§ 2339B's prohibitions are content-neutral and its purpose of deterring and punishing the provision of material support or resources to foreign terrorist organizations — a purpose aimed not at speech but at conduct — is, of course, legitimate").

152. See Neuman, *supra* note 138, at 330:

[T]he statute prohibits the conduct of providing funds to designated organizations, and does so for the purpose of reducing the organizations' capacity to commit violent acts. It is embedded within a statutory scheme that includes other measures for depriving designated organizations of U.S. based assets. Arguably then, the prohibition on providing funds should be viewed as an incidental burden on First Amendment activity, rather than as a targeted regulation of First Amendment activity.

153. *Teague v. Reg'l Comm'r of Customs*, 404 F.2d 441, 445 (2d Cir. 1968); see also *Boim*, 291 F.3d at 1027 (holding that the government's interest in suppressing terrorism pursuant to § 2339B and related statutes is "unrelated to suppressing free expression"); cf. *Walsh v. Brady*, 927 F.2d 1229, 1235 (D.C. Cir. 1991) (observing that "the travel-payment restrictions are aimed at denying hard currency to Cuba, rather than at suppressing the re-

is empowered to enact the law in the first place — is not in serious dispute here. And there is no question that the government's interests in this context are sufficiently important.<sup>154</sup>

The real issue is whether § 2339B is a sufficiently tailored means of achieving the government's purpose. Put another way, the question is whether § 2339B's funding ban burdens substantially more expressive activity than necessary in order to achieve the goal of suppressing political violence.<sup>155</sup>

This question goes to the heart of the authors' critique of § 2339B. That critique begins from the premise that not all donations to a DFTO are intended to be used, or in fact are used, to facilitate terrorist acts; some DFTOs after all are hybrid groups engaged in both legal and illegal activity.<sup>156</sup> A financial contribution to the political/social wing of Hamas, they argue, will not necessarily increase the capacities of its military wing.<sup>157</sup> Cole and Dempsey conclude that the *Scales* spe-

ceipt of information from or about Cuba, and Walsh does not dispute this point"); *Farrakhan v. Reagan*, 669 F. Supp. 506, 510 n. 7 (D.D.C. 1987) (in context of free exercise claim, characterizing the nature of the government's interests as concerning national security and international terrorism).

154. See *Boim*, 291 F.3d at 1027 ("Applying the *Buckley* standard to section 2333 claims founded on conduct that would give rise to criminal liability under section 2339B, we conclude that the government's interest in preventing terrorism is not only important but paramount."); *Holy Land Foundation*, 219 F. Supp. 2d at 82 (holding that "combating terrorism by undermining its financial base" is an "important and substantial government interest"); *Global Relief Foundation*, 207 F. Supp. 2d at 806 (holding that the asset freeze order "promotes an important and substantial government interest — that of preventing terrorist attacks"); *Mendelsohn v. Meese*, 686 F. Supp. 75, 81 (S.D.N.Y. 1988) (noting that it "is beyond argument that the interest of the United States is a compelling one" and that "[t]his interest is unrelated to the prevention of free expression").

155. As noted above, the means chosen need not be the absolutely least restrictive alternative available. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Walsh*, 927 F.2d at 1235. Frederick Schauer has observed that the tailoring requirement of *O'Brien* "seems sometimes not to be applied at all, and sometimes to be applied in different ways," and concludes from a review of the decisions that the standard has relatively little bite except when an additional First Amendment factor — such as a public forum — is involved. Schauer, *supra* note 135, at 786, 788-89.

156. The authors emphasize the example of Hamas. *TERRORISM*, p. 120. Hamas devotes much of its resources to political and social activities, but of course also has a terrorist "wing" or "arm" — the Izz Al-Din Al-Qassem Brigades — which carries out suicide bombings and other forms of political violence. See YONAH ALEXANDER, *PALESTINIAN RELIGIOUS TERRORISM: HAMAS AND ISLAMIC JIHAD* 11-12 (2002). The United States has designated Hamas as a whole to be a terrorist organization. See, e.g., U.S. Dep't of State, *Designated Foreign Terrorist Organizations*, Aug. 9, 2002, available at <http://usinfo.state.gov/topical/pol/terror/designated.htm>.

157. Scholars dispute the meaningfulness of alleged distinctions between terrorist groups' social and military "wings." See, e.g., Matthew Levitt, *Stemming the Flow of Terrorist Financing: Practical and Conceptual Challenges*, 27 *FLETCHER F. WORLD AFF.*, Winter/Spring 2003, at 59, 64-66 ("[d]ebunking the Myth of the 'Wings'"); Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 *UTAH L. REV.* 481, 506-07 (2002) (stating that "an organization cannot hermetically seal off acts of violence against civilians from other aspects of its operations," and noting that humanitarian activities by such groups "serve marketing goals" by "lend[ing] organizations that conduct terrorist activities a veneer of respectability and religious authority"); cf. HEYMANN, *supra*

cific intent requirement therefore is needed to avoid suppressing such “innocent” expressive activity (*Terrorism*, p. 123; *Enemy Aliens*, pp. 59-64).

It is anything but clear, however, that the government’s compelling interest in reducing political violence by cutting off funding to certain foreign organizations could still be achieved if subjected to such a specific intent requirement.<sup>158</sup> The problem is that notwithstanding good intentions, donors of financial support cannot actually control how a DFTO will spend the money. Even if the donor has the most noble of intentions, the money may nonetheless be diverted to violent ends. It is perhaps for this reason that when Congress enacted § 2339B, it expressly found that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”<sup>159</sup>

In this context, imposition of a specific intent requirement would not serve to keep the government from overreaching so much as it would prevent the government from achieving its compelling interest in cutting off financial support that — intentionally or not — facilitates terrorism. Section 2339B’s funding ban therefore does not burden substantially more expression than necessary to achieve its goals, despite its lack of a specific-intent requirement.

## 2. *Equipment and Services*

Section 2339B bans more than financial contributions, of course. As discussed above, it also prohibits the provision of a range of tangible items and services I have grouped under the headings of “equipment” and “services.” Does the ban on providing these forms of support, irrespective of the donor’s intent, implicate First Amendment considerations different in kind than those discussed above in the context of financial support? It is difficult to see how this might be. Even assuming that the provision of equipment or services to a DFTO involves elements of expression or association, the impact of § 2339B on such First Amendment interests again would be incidental, and

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note 54, at 97 (acknowledging hybrid nature of some groups, but observing that “it is not too much to ask of an organization seeking support for its nonviolent activities that it abandon violence as a condition of receiving that support,” nor that would-be supporters “find an organization prepared to further these activities without also using violence”).

158. See *Holy Land Foundation*, 219 F. Supp. 2d at 81 (holding that “imposing a ‘specific intent’ requirement on the Government’s authority to issue blocking orders would substantially undermine the purpose of the economic sanctions programs,” and observing that regardless of its intent Holy Land could not control how Hamas uses its donations). For much the same reason, the First Amendment would not require a showing of specific intent in connection with an embargo of a foreign state.

159. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (1996) (codified in scattered sections of the U.S. Code).

again *O'Brien*-style intermediate scrutiny would provide the relevant analytical framework.

Section 2339B is analogous in this context to laws such as the Export Administration Act<sup>160</sup> and the Arms Export Control Act,<sup>161</sup> which prohibit the export of certain technologies and equipment to designated countries.<sup>162</sup> If the government can bar the shipment of night vision goggles or the provision of instruction in advanced nuclear physics computer technology to North Korea, it would seem it could equally prevent the same with respect to a hostile foreign group such as Hezbollah. In light of the harm that might ensue from such shipments, it matters not at all how the donor or provider intends for the equipment or services to be used.<sup>163</sup> What does matter is that the ban is not enacted in order to interfere with First Amendment activity, but instead to achieve unrelated goals of foreign and national security policy.<sup>164</sup>

### 3. *The Reflexive Interpretation of Personnel*

In the preceding pages I have argued that the guilt by association critique of § 2339B mistakenly collapses the distinction between gov-

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160. See 50 U.S.C. app. §§ 2401-2420 (2000). The export-control regime of the Export Administration Act has been extended by Executive Order pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (2000). See Exec. Order No. 13,222, 66 Fed. Reg. 44,025 (Aug. 17, 2001) as extended by the Notice of August 14, 2002, 67 Fed. Reg. 53,721 (Aug. 14, 2002).

161. See 22 U.S.C. § 2778 (2000).

162. Section 2339B in this respect also parallels 18 U.S.C. § 922(b)(1) (2000), which renders it illegal for a licensed firearm dealer, importer, manufacturer, or collector to provide a firearm to a minor. It is no defense to a violation of this law that the provider did not intend for the minor to use the firearm to commit a crime or otherwise use it in a harmful manner, and no such defense would be available even if a provider had an expressive interest of some sort in this particular conduct.

163. See, e.g., *United States v. Shetterly*, 971 F.2d 67, 73 (7th Cir. 1992) (noting that the Export Administration Act requires only an intent to export proscribed items in violation of the statute); *United States v. Frade*, 709 F.2d 1387, 1391 (11th Cir. 1983) (same).

164. The equipment category does have a flaw, albeit not one related to the criminalized-association argument. The problem is one of drafting, and it follows from the decision to incorporate § 2339A's definition of "material support" into § 2339B. In the context of § 2339A the drafters had every incentive to cast the "material support" net as widely as possible in hopes of encompassing unanticipated forms, because that statute requires proof of the supporter's intent to facilitate a criminal act. Thus the definition includes not just weapons and cash but, also, "other physical assets." Section 2339B incorporates this sweeping term but, as we know, does not cabin it with a corresponding intent requirement. As a result, critics of the law are able to point to absurd but technically possible hypothetical scenarios such as the deportation of an immigrant for sending a "toy train set to a day-care center run by" a DFTO. See *Cole, Enemy Aliens*, *supra* note 15, at 967. While it is quite possible if not likely that a reviewing court would interpret the term "other physical assets" to reach only items which reasonably could be diverted or converted to harmful uses, this approach might in turn raise a question of vagueness. Accordingly, Congress would be well-advised to provide § 2339B with its own definition of "material support," replacing "other physical assets" with more specific descriptions.

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ernment action which purposefully infringes First Amendment rights and action which does so only incidentally. On its face, § 2339B is the latter type of statute. But there is one limited respect in which § 2339B does appear to interfere purposefully with First Amendment activity. The definition of prohibited material support includes the provision of personnel, and as noted above the government has taken the position in litigation and in its own internal guidelines that this includes providing one's self as personnel.

The reflexive interpretation of personnel in substance criminalizes at least some forms of membership in a DFTO. This aspect of § 2339B thus is different in kind from the statute's other prohibitions, none of which purposefully limit expression or association. The ban on providing one's self as personnel thus seems at first blush to fall squarely within the rule of *Scales* and other anticommunist cases dealing with statutes that similarly prohibited association with dangerous groups.

The government, not insensitive to this possibility, takes the position that "personnel" should be understood to reach only the subset of association in which one is not merely a nominal member of a group but a quasi-employee subject to the DFTO's direction or control.<sup>165</sup> Understood this way, § 2339B punishes the conduct of providing a human resource to the DFTO, while leaving ample opportunity for those who wish to do so to express symbolically their support for the group through nominal affiliation or independent advocacy.

This argument has been met with approval by two of the three courts to have confronted it since 9/11.<sup>166</sup> In the prosecution of John Walker Lindh, for example, the district judge held that "the plain meaning of 'personnel' is such that it requires . . . an employment or employment-like relationship between the persons in question and the [DFTO]."<sup>167</sup> This interpretation, the judge explained, did not foreclose membership in a DFTO: "One can become a member of a political party without also becoming a part of its 'personnel.'" <sup>168</sup> Relying on the *Lindh* decision, moreover, the magistrate judge in the Lackawanna case went a step further, holding that "one can be found to have 'provided material support or resources to a foreign terrorist organization' by offering one's self to be indoctrinated and trained as a 'resource' in that organization's beliefs and activities."<sup>169</sup> In contrast, the district court in the Lynne Stewart prosecution refused to consider the gov-

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165. See U.S. ATTORNEYS' MANUAL, *supra* note 127, § 9-91.100; *United States v. Sattar*, 272 F. Supp. 2d 348, 358-59 (S.D.N.Y. 2003); Transcript of Oral Argument, *United States v. Sattar*, No. 02 Cr. 395 (JGK), at 55-56 (June 13, 2003) [hereinafter *Stewart Transcript*], available at <http://www.lynnestewart.org/ReportJune13Hearing.pdf>.

166. *But see* Humanitarian Law Project v. Reno, 205 F. 3d 1130, 1137-38 (9th Cir. 2000).

167. See *United States v. Lindh*, F. Supp. 3d 541, 574 (E.D. Va. 2002).

168. *Id.* at 572.

169. *Goba I*, 220 F. Supp. 2d at 194.

ernment's "direction or control" interpretation on the ground that it was not part of the statute, and accordingly held that the term "personnel" is unconstitutionally vague.<sup>170</sup>

But even assuming it is correct that the direction or control limitation preserves space for nominal membership in a DFTO, the question remains whether the First Amendment tolerates direct suppression of more substantial forms of association absent proof of knowledge or intent. The beginnings of an answer are in *Scales*. One of the threshold issues in that case was whether the statute's membership provision punished mere nominal membership in communist organizations.<sup>171</sup> The Court resolved this question by construing the statute to exclude nominal membership and to reach only "active" members of the organization with knowledge of the group's illegal purposes.<sup>172</sup> But even after thus limiting the statute's scope to the subset of active members, the Court still held that the statute must be construed to contain an intent requirement insofar as it criminalized association.<sup>173</sup>

When a statute premises criminal punishment on membership status alone, then, it does not matter for First Amendment purposes whether that punishment is limited to a subset of the persons associated with that group. Whatever subset is selected, heightened First Amendment concerns arise when the punishment targets association rather than, say, conduct along the lines of providing financial support, equipment, or services to the group. As the Court in *Scales* wrote, there is "a real danger that legitimate political expression or association would be impaired" if the government were permitted to punish acts of pure association without proof of a specific intent to further an organization's illegal goals.<sup>174</sup>

None of this is to say, of course, that the government cannot punish membership in a DFTO under any circumstances.<sup>175</sup> And natu-

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170. *Sattar*, 272 F. Supp. 2d at 359. In so holding, the court followed the pre-9/11 decision by the Ninth Circuit in *Humanitarian Law Project*, 205 F. 3d at 1137-38.

171. See *Scales v. United States*, 367 U.S. 203, 209 (1961).

172. See *id.*

173. See *id.* at 222-30; *supra* notes 112-118 and accompanying text.

174. See *Scales*, 367 U.S. at 229.

175. This is particularly true of DFTOs such as Al Qaeda which have little or no legitimate functions. ENEMY ALIENS, p. 63. In such instances, Cole argues, it should prove relatively easy to establish that one who became a member of the DFTO did so with knowledge of its illicit activities and an intent to further them. ENEMY ALIENS, p. 63. Cole repeats this point in *The New McCarthyism*, *supra* note 15, at 14:

An organization like Al Qaeda may present a special case, for it does not appear to have legal purposes at all. Unlike, say, the Irish Republican Army, the Palestinian Liberation Organization, or the ANC, groups with political agendas that use violent means among many others, Al Qaeda appears to do little more than plot, train for, and conduct terrorism. But if that is the case, we do not need guilt by association. It ought to be relatively simple to estab-

rally a DFTO member who provides services, equipment, or funding to the group will be independently subject to prosecution under § 2339B without respect to that person's membership status. But assuming that as a society we continue to hold with the First Amendment values expressed in *Scales*, prosecutions based solely on a person's status as a member of a DFTO must comport with *Scales's* intent requirement.<sup>176</sup>

Do we as a society continue to hold such values? The pathological perspective suggests that we are fair-weather friends to civil liberties, that we readily abandon them in times of perceived crisis. To the extent we currently are in the midst of such a period, then as Mark Tushnet has predicted, "we can expect courts to uphold [§ 2339B] convictions in the face of claims that the government failed to show that the defendant shared the illegal goals. And, we can expect that several years later, courts will begin to require such a demonstration from the government."<sup>177</sup>

If this prediction comes to pass, then the short duration of § 2339B's flirtation with constitutional boundaries could be interpreted as a testament to the continuing vitality of civil liberty protections entrenched in the Cold War era. That outcome would endorse the social-learning model, particularly if in the process courts further refine our understanding of the permissible limits of criminalized association. If, on the other hand, the reflexive interpretation of personnel survives in its present form<sup>178</sup> — or expands<sup>179</sup> — then some civil liber-

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lish that when an individual affirmatively supports Al Qaeda, he intends to support its terrorist ends, because Al Qaeda has few if any other ends.

176. The government conceded this point, albeit temporarily, in recent litigation. During oral argument on the defendants' motion to dismiss the material support charges in the Lynne Stewart case, the judge questioned prosecutors about the extent to which the "personnel" provision would preclude a DFTO from being able to retain an attorney. Counsel for the government responded that,

[i]t may be, your Honor, that in such instances, the Court needs to apply a heightened level of scienter for certain aspects of the statute like perhaps personnel, in other words, to show an intent on the behalf of the attorney to further the illegal objectives of the terrorist organization.

See Stewart Transcript, *supra* note 165, at 59-60. Subsequently, however, the government submitted a letter to the court withdrawing this concession. See *Sattar*, 272 F. Supp. 2d at 360 (citing letter of the United States dated June 27, 2003, at 3 n.3).

177. Tushnet, *supra* note 41, at 293.

178. Testifying before the House Judiciary Committee in June 2003, Attorney General Ashcroft urged Congress to make clear that "going and joining the operation is providing material support." *The Justice Department and the USA PATRIOT Act: Hearing Before the House Comm. on the Judiciary*, 107th Cong. (2003) (oral testimony of Attorney General John Ashcroft), available at 2003 WL 21291138. It is unclear whether Attorney General Ashcroft meant by these words to advocate criminal liability for membership absent intent, however, given that he also stated that "we need for the law to make it clear that it's just as much a conspiracy to aid and assist the terrorist to go and fight — to join them *for fighting purposes*, as it is to carry them a lunch or to provide them a weapon." *Id.* (oral testimony of Attorney General John Ashcroft) (emphasis added).

ties gains of the past will have been lost in much the same manner as Cole predicts in *Enemy Aliens*. By the same token, the resulting expansion of criminalized association principles would exacerbate the concerns expressed by Cole and Dempsey in *Terrorism and the Constitution* regarding the chilling effect of government investigations on the exercise of First Amendment freedoms; insofar as membership in a DFTO itself is illegal, the extent to which investigations will focus on advocacy as an indicia of membership will grow. It would, on the whole, be an unfortunate fulfillment of the pessimistic predictions of the adaptive-learning model.<sup>180</sup>

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In many respects, the story of § 2339B and the guilt by association critique symbolizes the tensions raised by the post-9/11 adoption of a terrorism prevention paradigm. The material support law is in most respects a sensible tool for achieving prevention, but as discussed above it also has opened a window for a more direct form of prevention, and this raises significant civil liberties concerns. That window is small for now, but it could open wider. Whether that happens, or if instead the courts close it, will speak volumes about the staying power of existing civil liberties protections during times of crisis, and therefore about the relative merits of the social-learning and adaptive-learning models.

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179. The Justice Department may be contemplating an expansion of the range of association captured by the reflexive interpretation of “personnel.” In February 2003, a draft Justice Department proposal for new antiterrorism laws titled the “Domestic Security Enhancement Act of 2003” (“DSEA”) was leaked to the public. Immediately tagged “PATRIOT II,” the draft drew a significant amount of comments and criticisms. But few if any paid attention to § 402 of the DSEA, which if adopted would amend § 2339B to provide that

no person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly provided, attempted to provide, or conspired to provide a terrorist organization with one or more individuals (which may be or include himself) to work *in concert with* the organization or under its direction or control.

Domestic Security Enhancement Act of 2003, § 402 (Draft) (Jan. 9, 2003) (emphasis added), available at <http://www.pbs.org/now/politics/patriot2-hi.pdf>. Adding the phrase “work in concert with” as an alternative predicate to “under its direction or control” would of course capture a larger slice of association than the latter alone.

180. Then again, either result would be equally consistent with the view expressed by Posner and Vermeule to the effect that “there just are no systematic trends in the history of civil liberties, no important ratchet-like mechanisms that cause repeated wars or emergencies to push civil liberties in one direction or another in any sustained fashion.” Posner & Vermeule, *supra* note 17 (manuscript at 16).