Questioning Law Enforcement

THE FIRST AMENDMENT AND COUNTERTERRORISM INTERVIEWS

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INTRODUCTION

Law enforcement interviews are sometimes viewed as one of the least intrusive and least objectionable investigative techniques in the government's counterterrorism arsenal.[1] In theory, a law enforcement agent's voluntary request for information from an individual for a counterterrorism investigation, or a border agent's questioning of a person returning to the United States after traveling abroad, only minimally impinges on privacy and individual rights. Federal Bureau of Investigation (FBI) and Customs and Border Protection (CBP) interviews do not involve extreme interrogation methods, the imposition of criminal sanctions for speech, or the use of covert investigative tools hidden from public view—all policies that have attracted considerable public and scholarly attention.

Yet law enforcement interviews of U.S. Muslims in the terrorism context[2] involve greater coercion and stigma than

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[1] *See infra* note 16.

[2] Throughout this piece, I focus on law enforcement interviews in the U.S. Muslim community, given the particular focus of U.S. counterterrorism efforts on Islamic extremist violence. Where I discuss a study, policy, or legal case that focuses on an ethnic community that substantially overlaps with U.S. Muslims (such as "Arab Americans" or "South Asians"), I make the distinction clear. Otherwise, I use the term *U.S. Muslims* with the understanding that much of the analysis would also apply to overlapping ethnic communities. In addition, in referring to "counterterrorism" interviews or interviews in the "terrorism context," I refer not just to interviews within

prevailing accounts recognize. Interviews are startlingly common: some estimates suggest that the FBI, for instance, has questioned hundreds of thousands of U.S. Muslims.[3] FBI and CBP interviews alike have elicited widespread concern among U.S. Muslims as a result of the coercion involved, the content of the questioning, and the basis for interviewee selection. As personal, direct encounters between individuals in the U.S. Muslim community and the U.S. government, interviews are especially likely to inform targeted individuals' and communities' sense of "belonging" and inclusion as ethnic and religious minorities in the United States.

Where law enforcement agents select individuals for questioning primarily on the basis of their speech, associations, or other expressive activities protected by the First Amendment, interviews raise special concern. For instance, according to recent congressional testimony from a Muslim civil rights organization, the FBI questioned a computer programmer after he posted "political articles from mainstream news sources on his Facebook page"—approaching him at his workplace in front of colleagues and supervisors and potentially jeopardizing his job.[4] The FBI contacted another man for questioning after a local newspaper published his nonviolent comments about the political situation in Pakistan.[5]

Tabbaa v. Chertoff was a rare case of such targeting to actually reach the courts. In *Tabbaa*, the CBP questioned, fingerprinted, photographed, and searched dozens of individuals returning to the United States after attending an Islamic conference in Toronto, applying the extra screening procedures "normally reserved for suspected terrorists."[6] The government had no individualized suspicion regarding any of the plaintiffs, all U.S. citizens, but carried out these procedures on those travelers who told border officials that they had attended the Toronto gathering.[7] The conference drew over thirteen thousand participants and featured prominent Islamic speakers, musical

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an explicit terrorism investigation, but to interviews conducted for, or justified by, the general purpose of gathering information on potential terrorist threats.

[3] *See infra* note 20 and accompanying text.

[4] *Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 67 (2010) (statement of Farhana Khera, President and Executive Director, Muslim Advocates).

[5] *Id.*

[6] Tabbaa v. Chertoff, 509 F.3d 89, 92 (2d Cir. 2007).

[7] *Id.* at 92, 94.

performances, spiritual reflection, and communal prayer.[8] Border agents questioned plaintiffs about their activities at the conference, the content of the lectures, and the reasons they attended, and the detentions lasted between four and six hours.[9]

The CBP defended itself in *Tabbaa* by asserting that it acted based on information that individuals associated with terrorist activities would attend the conference and that the event might serve as a "meeting point" to plan terrorist activities or "exchange ideas and documents."[10] The agency had ordered border agents to ascertain the identities of conference participants, check their status on watch lists, and search luggage to find any evidence of terrorist plans, documents, or weapons.[11] The Second Circuit Court of Appeals held that the measures significantly burdened plaintiffs' freedom of association but ruled that the government's security interests justified the intrusion.[12]

Tabbaa was wrongly decided: the court failed to question the notion that it was rational—and fair—to stop *every* person returning from a diverse gathering of thirteen thousand people on the possibility that she may have met a terrorist, and perfunctorily dismissed alternative methods of investigation.[13] But it appropriately recognized the stigmatic harm from the screening measures and applied heightened scrutiny to the practice—engaging in a form of review other courts have declined to apply in First Amendment challenges to law enforcement investigations and surveillance.[14]

This article argues for heightened scrutiny of law enforcement interviews triggered by protected speech and association, which impose a substantial burden on those rights. Not all interviews based on First Amendment expression are wrong; speech or association may at times be a relevant basis for law enforcement inquiry. But the harms from such interviews call for careful scrutiny to determine whether a sufficient nexus exists between the First Amendment trigger for the scrutiny and an actual threat. Interviews based on First Amendment expression send a message to affected individuals and communities that *their* expressions of identity and participation in the public sphere are devalued, imposing stigma and chilling

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[8] *Id.* at 94.
[9] *Id.* at 94, 98, 100.
[10] *Id.* at 93.
[11] *Id.* at 94.
[12] *Id.* at 102-03.
[13] *Id.* at 104.
[14] *Id.* at 102.

expression. And there are historical reasons to question law enforcement interviews focused on First Amendment activities: in an earlier period of heightened fear over domestic and foreign threats, the FBI deliberately used interviews to suppress political speech and association by creating the impression that "there is an FBI agent behind every mailbox."[15]

There is now a growing literature on the effects of terrorism investigations on expression and association,[16] yet the scholarship on First Amendment freedom of speech and association doctrine related to investigations remains scant. Several scholars briefly cite doctrinal obstacles to Free Speech Clause challenges to surveillance or investigations before turning their attention elsewhere.[17] Moreover, the literature on law enforcement *interviews* in the terrorism context is almost nonexistent.[18] Interviews are rarely the subject of new legislation, public announcements, or court challenges that attract public and scholarly notice. Even scholars arguing for greater protection of civil liberties often mention interviews only

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[15] *See* Socialist Workers Party v. Att'y Gen., 642 F. Supp. 1357, 1389 (S.D.N.Y. 1986) (quoting internal FBI memo from 1970).

[16] For examples of post-9/11 scholarship on the First Amendment implications of counterterrorism investigations, see Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621 (2004); David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. REV. L. & SOC. CHANGE 123 (2010); Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833 (2011); Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201 (2004); Scott Michelman, *Who Can Sue over Government Surveillance?*, 57 UCLA L. REV. 71 (2009); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1 (2011); Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 375 (2007); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112 (2007); Patrick P. Garlinger, Note, *Privacy, Free Speech, and the Patriot Act: First and Fourth Amendment Limits on National Security Letters*, 84 N.Y.U. L. REV. 1105 (2009); Gayle Horn, Note, *Online Searches and Offline Challenges: The Chilling Effect, Anonymity and the New FBI Guidelines*, 60 N.Y.U. ANN. SURV. AM. L. 735 (2005); Murad Hussain, Note, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920 (2008).

[17] *See, e.g.*, Harris, *supra* note 16, at 153-54; Lininger, *supra* note 16, at 1266; Hussain, *supra* note 16, at 946-48.

[18] The primary law review article found focusing on FBI or CBP interviews, though not from a First Amendment perspective, is Tracey Maclin, *"Voluntary" Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror*, 73 MISS. L.J. 471 (2003); *see also* Hussain, *supra* note 16, at 927-32 (addressing *Tabbaa* in presenting a free exercise theory for claims against targeting of religious expression).

to contrast them with more intrusive methods, thereby casting interviews as a relatively harmless investigative practice.[19]

This article addresses these gaps in the literature. Part I contextualizes FBI and CBP interviews of U.S. Muslims and describes three concerns they raise: the coercion of FBI and CBP encounters, the content of questioning, and the discriminatory basis for selection of interviewees. This part further argues that neither Fourth Amendment law nor internal regulations provides meaningful restrictions on interviews. Part II contends that law enforcement interviews that involve *First Amendment profiling*—the selection of an individual for law enforcement attention because of political, religious, or cultural expression or association—impose particularly grave stigmatic costs and chilling effects on individuals and communities. This part also maps out two separate normative concerns that the practice raises: a *suppression* concern about deliberate government attempts to suppress speech through an investigation and an *overbreadth* concern about the scope of an investigation triggered by expression, even where there is not an apparent illegitimate purpose. I argue that even without a suppression purpose, an investigation based on First Amendment profiling raises concern both because of the greater risk that hostility to expression influenced the scope of the investigation and because of the serious harms to individuals and communities.

Part III argues that courts ought to apply heightened scrutiny to interviews based on First Amendment profiling, and that existing First Amendment doctrine on free speech and association, while inconclusive, offers the potential for courts to do so. Some plaintiffs challenging FBI and CBP interviews should be able to surmount standing barriers that courts have erected in First Amendment cases, and further demonstrate, on the merits, substantial harm from investigations. Furthermore, lower courts have split as to whether heightened scrutiny is appropriate for reviewing First Amendment challenges to law enforcement investigations, and I counter the objection that narrow-tailoring requirements would impede critical law enforcement interests. Plaintiffs are most likely to succeed in challenges to First Amendment profiling where they can demonstrate tangible harm,

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[19] *See* Solove, *supra* note 16, at 175-76 (advocating a warrant requirement for government information-gathering implicating First Amendment values, but not in voluntary interviews); Fisher, *supra* note 16, at 673 (contrasting voluntary interviews with infiltration of organizations).

such as detention, reputational injuries, or economic costs, in addition to stigma and chilling effects.

A few words about the limited nature of my claims are in order. I do not contend that the "average" interview based on First Amendment profiling will trigger judicial scrutiny or establish a violation of the law. It is also beyond question that any challenge to law enforcement terrorism investigations will need to overcome judicial concerns about second-guessing the factual determinations of law enforcement agencies regarding the appropriateness of particular investigative measures. Yet in the terrorism context, any legal challenge to an investigative practice will face significant obstacles. But precisely because legal challenges in this area are difficult, any avenue for judicial review not foreclosed becomes significant. While I do not argue that plaintiffs will usually prevail in challenging First Amendment profiling, I do contend that ostensibly nonintrusive and unobjectionable law enforcement questioning can impose substantial harm on individuals and communities, and that the First Amendment's guarantees of free speech and association offer the potential to contest these harms in an important segment of cases.

I. LAW ENFORCEMENT INTERVIEWS

Law enforcement agents question individuals for national-security purposes in a wide variety of contexts: immigration officials interview noncitizens applying for citizenship or permanent residency, local police question motorists stopped in traffic whose names trigger a watch-list match, prosecutors question witnesses before grand juries, and investigators interrogate suspects arrested for terrorism offenses. This article focuses on two of the most common forms of interviews in the counterterrorism context affecting immigrants and U.S. citizens alike—FBI interviews of individuals approached at home, work, or in their communities, and CBP interviews of individuals seeking to reenter the United States at airports or land borders after traveling abroad. The prevailing view in much of the legal doctrine and commentary, sometimes explicit but often unstated, is that interviews in either context inflict little harm, at least relative to other investigative methods, because they are minimally intrusive, overt, and involve "mere questioning." This part argues that while FBI and CBP interviews serve an important national-security function, in practice, these interviews raise

serious concerns related to their coercion, the content of questioning, and the basis for selection of interviewees, and that existing Fourth Amendment doctrine and internal agency guidelines provide insufficient constraints.

A. *FBI and CBP Interviews: Context and Concerns*

Some scholars and officials have estimated that the FBI has conducted as many as two hundred thousand or half a million interviews of Muslims in the United States[20]—staggering numbers, if accurate, given estimates that adult Muslims in the United States number fewer than two million.[21] In the first three years following the September 11 attacks, the FBI carried out at least four well-publicized national rounds of interviews of Muslims and Arabs. These rounds included two interview campaigns of thousands of Arab male noncitizens based on demographic information suggesting "similarit[ies]" with al Qaeda terrorists;[22] interviews of nearly ten thousand Iraqi immigrants, including U.S. citizens, before the invasion of Iraq;[23] and interviews of Muslims in the months before the 2004 presidential election.[24] But beyond these announced interview campaigns, the FBI continues to interview U.S. Muslims, in waves and individually, in order to investigate specific terrorist threats,[25] gather general intelligence about communities,[26]

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[20] LOUISE A. CAINKAR, HOMELAND INSECURITY: THE ARAB AMERICAN AND MUSLIM EXPERIENCE AFTER 9/11 113, 125 (2009) (citing statements in 2005 by a retired FBI counterterrorism official and the director of the MIT Center for International Studies). It is not clear what data these estimates relied on, and the FBI official's reference to "half a million interviews" may have been intended as a rhetorical statement of the large number of interviews rather than an actual estimate.

[21] A recent national study by the Pew Research Center estimated that there are 1.4 million adult Muslims in the United States, although estimates of the community's size vary considerably. PEW RESEARCH CTR., MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 9-10 (2007).

[22] U.S. GEN. ACCOUNTING OFFICE, GAO-03-459, HOMELAND SECURITY: JUSTICE DEPARTMENT'S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001, at 7-8 (2003) [hereinafter GAO, PROJECT TO INTERVIEW ALIENS].

[23] *See, e.g.*, Tom Brune, *Defending Iraqi Interviews*, NEWSDAY (N.Y.), Apr. 18, 2003, at A28; Frank James, *FBI Questions Rankle Some U.S. Iraqis*, CHI. TRIB., Apr. 13, 2003, at C14.

[24] *See, e.g.*, Brian Haynes, *Extra Scrutiny Chafes Muslims*, LAS VEGAS REV.-J., Oct. 4, 2004, at 1A; Richard B. Schmitt & Donna Horowitz, *FBI Starts to Question Muslims in U.S. About Possible Attacks*, L.A. TIMES, July 18, 2004, at A17; Dennis Wagner, *FBI's Queries of Muslims Spurs Anxiety*, ARIZ. REPUBLIC, Oct. 11, 2004, at 1B.

[25] *See, e.g.*, Jake Armstrong, *FBI in Lodi: Abusive or Just Assertive?*, LODI NEWS-SENTINEL, July 23, 2005 (describing questioning and surveillance of Muslims in Lodi, California after arrest of several residents on terrorism and/or immigration charges); Nathaniel Hoffman, *Muslims Endure FBI Persistence in Lodi*, CONTRA COSTA TIMES, June 11, 2005, at A01 (same).

follow up on tips of suspicious activity called in from the public,[27] or solicit people to act as undercover informants.[28]

At U.S. international airports and land borders, the CBP questions returning travelers, including U.S. citizens, to intercept terrorists, weapons, and physical contraband[29] as well as to collect intelligence for law enforcement agencies' broader use.[30] Reports of actual interviews make clear that the intelligence collected is not limited to activities with a specific nexus to the border (such as a person's legal status in the United States or suspicious international travels), but includes information gathering on U.S. mosques and organizations within the United States.[31] Thus, the agency uses its authority to search and question travelers at U.S. borders to acquire a range of information that law enforcement could not easily compel within the United States.

All travelers at U.S. borders can expect some scrutiny at the point of entry, including a review of identification and travel documents, and sometimes immigration-status questioning or luggage inspection.[32] For most U.S. citizens, these encounters are brief, but the CBP pulls aside some individuals—including citizens—for protracted questioning or more intrusive searches.

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[26] *See, e.g.*, Carrie Johnson & Robin Shulman, *Probes Test Trust that Authorities Strove to Win from U.S. Muslims*, WASH. POST, Oct. 5, 2009, at A03 (quoting retired FBI special agent describing agents' role as to "know everything that's going on" in a mosque or community); *see also* Alex Ransom, *Muslims Feel Targeted by FBI*, MERCURY (Dall.), Apr. 11, 2010, at 1.

[27] *See, e.g.*, Eric Bailey, *FBI Questions High School Student over "PLO" Doodle*, L.A. TIMES, Dec. 16, 2005, at B4 (describing questioning of 16-year-old based on allegation that student had doodled the initials "PLO" on a binder and stored pictures of suicide bombers on his cell phone).

[28] *See, e.g.*, Peter Waldman, *A Muslim's Choice: Turn U.S. Informant or Risk Losing Visa*, WALL ST. J., July 11, 2006, at A1.

[29] U.S. Customs & Border Prot., *Protecting Our Borders—This Is CBP*, CBP.GOV (June 7, 2010), www.cbp.gov/xp/cgov/about/mission/cbp.xml.

[30] U.S. CUSTOMS & BORDER PROT., CBP DIRECTIVE NO. 3340-049, BORDER SEARCH OF ELECTRONIC DEVICES CONTAINING INFORMATION 7 (2009), *available at* http://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf (describing sharing of terrorism information with other federal agencies); *see also* ANALYSIS OF EXCERPTS FROM ASIAN LAW CAUCUS—ELECTRONIC FRONTIER FOUNDATION 2008 FOIA RELEASE 4 (2008), *available at* http://www.eff.org/files/filenode/alc/bordersearch_analysis.pdf (describing email from CBP New York field office stating that CBP's data collection capabilities had attracted wide interest from other law enforcement agencies); Ellen Nakashima, *Expanded Powers to Search Travelers at Border Detailed*, WASH. POST, Sept. 23, 2008, at A02 (describing FBI interview of individual based on information obtained from CBP search).

[31] *See infra* notes 65-75 and accompanying text.

[32] U.S. CUSTOMS & BORDER PROT., KNOW BEFORE YOU GO: REGULATIONS FOR INTERNATIONAL TRAVEL BY U.S. RESIDENTS 3, 5 (2009), *available at* http://www.cbp.gov/linkhandler/cgov/travel/vacation/kbyg/kbyg_regulations.ctt/kbyg_regulations.pdf [hereinafter KNOW BEFORE YOU GO].

These selections may occur either at "random"[33] or as a result of factors like travel to particular countries,[34] presence on a watch list,[35] or undisclosed "risk factors" flagged by an automated program.[36] These selection decisions do not require individualized suspicion.[37]

Both FBI and CBP interviews serve indisputably important purposes. Following the September 11 attacks, the FBI shifted its focus from traditional law enforcement to intelligence gathering to detect and interrupt potential threats.[38] With tens of thousands of threats and suspicious activities identified each year,[39] interviews allow the FBI to gather information directly from individuals believed to have some information about a possible threat. In many cases, as the agency has argued, interviews allow the FBI to quickly rule out individuals who do not pose a real threat—preventing further scrutiny of innocent people and focusing scarce investigative resources on actual concerns.[40]

The same need for efficient screening applies at the border. The CBP states that nearly 1.2 million travelers attempt to cross into the United States each day, and the agency intercepts about five hundred people a year out of terrorism or national-security concerns.[41] According to the agency, border screening interviews have enabled it to prevent actual terrorists

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[33] U.S. Customs & Border Prot., *If You Experience Problems with Your Arrival in the U.S.*, CBP.GOV (Apr. 30, 2010), http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/travel/usarrivals_problems.xml.

[34] SHIRIN SINNAR ET AL., ASIAN LAW CAUCUS, RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION'S DOORSTEP 31-32 (2009), *available at* http://www.asianlawcaucus.org/alc/publications/us-border-report-returning-home/ [hereinafter ASIAN LAW CAUCUS].

[35] *Id.* at 33-35.

[36] *Id.* at 28-29; *see also* U.S. Customs & Border Prot., *supra* note 29.

[37] *See, e.g.*, Tabbaa v. Chertoff, 509 F.3d 89, 92 (2d Cir. 1997).

[38] *See* DEP'T OF JUSTICE, THE ATTORNEY GENERAL GUIDELINES FOR DOMESTIC FBI OPERATIONS 5-6, 9, 17 (2008) [hereinafter MUKASEY GUIDELINES]; Scott Shane & Lowell Bergman, *FBI Struggling to Reinvent Itself to Fight Terror*, N.Y. TIMES, Oct. 10, 2006, at A1.

[39] *See* AUDIT DIV., U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT 09-02, THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST THREAT AND SUSPICIOUS INCIDENT TRACKING SYSTEM ii (2008) (reporting 108,000 threats and suspicious incidents recorded in FBI database between July 2004 and November 2007).

[40] *"Are You Part of a Revolution Trying to Overthrow the Government of the United States?,"* PITTSBURGH CITY PAPER, Jan. 15, 2003, at 22 (quoting FBI explanation that interviewing donors to Muslim charities suspected of links to terrorists allows law enforcement to rule out those who innocently gave donations).

[41] U.S. CUSTOMS & BORDER PROT., CBP: SECURING AMERICA'S BORDERS 1 (2006), *available at* http://www.cbp.gov/linkhandler/cgov/newsroom/publications/mission/cbp_securing_borders.ctt/cbp_securing_borders.pdf [hereinafter SECURING AMERICA'S BORDERS].

from entering; for example, based on suspicions raised in an interview, it denied entry to a Jordanian national who later killed 132 people in a suicide bombing abroad.[42]

Despite the clear necessity for FBI and CBP interviews, the way in which these interviews are conducted raises three concerns. One concern relates to the coercion and intimidation interviewees face. Although FBI interviews are nominally voluntary, the tactics the FBI used in some interviews reported by the press or community organizations virtually compelled compliance.[43] According to these accounts, FBI agents often approached people at work, where they could not refuse to cooperate without eliciting suspicion and fear of reprisal from employers already wary of Muslims; some individuals reportedly lost their jobs after workplace visits.[44] FBI agents reportedly pressured some individuals to submit to questioning immediately, despite their stated desire to obtain a lawyer first.[45] At other times, agents knocked on people's doors late in the evening or at night, which heightened the interviewees' perception of intimidation.[46] In some cases, FBI agents misrepresented the purpose of an interview: agents told a person that they were investigating potential hate crimes against Muslims or conducting general community outreach while asking questions that focused on who the person knew and whether the interviewee presented a threat.[47] And agents

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[42] *Id.* at 4.

[43] To be sure, this was not true as a universal matter: FBI agents sometimes told interviewees that the questioning was voluntary. *See, e.g.*, James, *supra* note 23. In addition, some individuals declined interview requests. *See, e.g.*, Armstrong, *supra* note 25 (reporting that several Muslims refused to appear for interviews). But the only quantitative evidence of individuals declining interview requests, from the government's initial post-9/11 interview program, suggests the numbers are miniscule. *See* Memorandum on Final Report on Interview Project from Kenneth L. Wainstein, Dir., Exec. Office for U.S. Att'ys, Dep't of Justice, to the Att'y Gen. (Feb. 15, 2002) [hereinafter Final Report on Interview Project] (reporting that only 1 in 69 individuals in Oregon, 1 in 59 in Minnesota, and 8 of 313 in Eastern Michigan declined).

[44] *See, e.g.*, Barbara Carmen, *FBI Agents Stir Old Fears Among Iraqi-Americans*, COLUMBUS DISPATCH, Apr. 4, 2003, at 01C (quoting Ohio Muslim leader stating that some people lost their jobs after FBI workplace visits); Tim Townsend, *FBI Interviews Prompt Muslim Rights Project*, ST. LOUIS POST-DISPATCH, Apr. 1, 2010, at A1 (noting workplace interviews); *ACLU Sues, Says FBI Spying on Muslims*, CHI. TRIB., Dec. 3, 2004, at 10 (same); CAINKAR, *supra* note 20, at 170 (same).

[45] Josh Richman, *ACLU Sues Over Muslim Interviews*, ALAMEDA TIMES-STAR, Oct. 23, 2004.

[46] *See, e.g.*, *ACLU Sues, Says FBI Spying on Muslims*, *supra* note 44; *"Are You Part of a Revolution,"* *supra* note 40.

[47] *"Are You Part of a Revolution,"* *supra* note 40; COUNCIL ON AM.-ISLAMIC RELATIONS, GREATER L.A. AREA CHAPTER, THE FBI'S USE OF INFORMANTS, RECRUITMENT AND INTIMIDATION WITHIN MUSLIM COMMUNITIES 6 (2009) [hereinafter CAIR CALIFORNIA] (on file with author).

reportedly told others that if they refused to submit to an interview, the agents would arrest them.[48]

In an indeterminate number of cases, the FBI engaged in even more overt intimidation to compel people to agree to ostensibly voluntary interviews. For instance, after the arrests of a Lodi, California, father and son on terrorism charges,[49] the FBI aggressively sought information from other Pakistani Muslims: agents stationed their cars in front of homes, followed people for days, circled a mosque hosting a "know your rights" presentation where individuals they sought to interview had gathered, called individuals as many as ten times a day, and warned people that they would be "bad mouthed" at work if they did not cooperate.[50] These measures conveyed a broader impression that the FBI would ratchet up pressure on those who declined an interview request.

At U.S. borders, by contrast, the compulsion is explicit: individuals cannot enter (or return to) the United States without satisfying border agents' demands. Although U.S. citizens have an absolute right to enter the country,[51] legally preventing the CBP from denying entry altogether to citizens who decline to answer questions,[52] the CBP sometimes prolongs the detention of individuals who refuse to answer questions or subjects them to more intense searches as a result.[53] Agents have not only used their power to delay admission to enforce

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[48] Carmen, *supra* note 44; CAIR CALIFORNIA, *supra* note 47, at 6.

[49] Linda Goldston & Lisa Fernandez, *FBI Expanding Terror Probe Tied to Lodi Father, Son*, SAN JOSE MERCURY NEWS, June 10, 2005, at A1. The government initially suggested that others in Lodi, beyond those detained, might be linked to al Qaeda, but no other arrests followed. Many observers questioned the initial charges, including a retired FBI agent who sought to testify in defense of the accused. Shane & Bergman, *supra* note 38, at A1; Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. TIMES, May 28, 2006, at I16; John Simerman & Jessica Guynn, *Arrests Illuminate Terror Probe*, CONTRA COSTA TIMES, June 9, 2005, at A01.

[50] Armstrong, *supra* note 25; Hoffman, *supra* note 25, at A01; Letter from ACLU of N. Cal. & Lawyers' Comm. for Civil Rights of the S.F. Bay Area to FBI and Other Agencies Requesting Information Under Freedom of Information Act 2-3 (June 16, 2005), *available at* https://www.aclu.org/FilesPDFs/aclu%20-%20nc%20foia%20request%20for%20lodi.pdf (describing complaints of Muslim community members related to Lodi terrorism investigation).

[51] *See* Nguyen v. INS, 533 U.S. 53, 67 (2001) (indicating that U.S. citizenship confers an "absolute right to enter [the nation's] borders").

[52] In several cases, the U.S. government is alleged to have prevented U.S. citizens on the "no-fly list" from boarding flights returning to the United States, sometimes for extended periods, though it eventually permitted them to return. *See* Peter Finn, *Detained Va. Teen Set to Return to U.S.*, WASH. POST, Jan. 21, 2011, at B01.

[53] *See* ASIAN LAW CAUCUS, *supra* note 34, at 12 & n.4.

cooperation with questioning[54] but have also, at times, engaged in more overt intimidation.

For instance, Zakariya Reed—a U.S. citizen, Muslim convert, and National Guard veteran—experienced several intimidating encounters at the U.S.-Canada border.[55] Reed perceived one occasion as deliberately intimidating: a border agent asked Reed about a letter to the editor that Reed wrote, which was critical of U.S. support for Israel and the war in Iraq; in the same interview, another agent conspicuously removed and reloaded the clip of his gun in front of Reed.[56] On a separate occasion, five CBP agents stopped and surrounded Reed's car, frisked him, and held him for several hours; during the interview, a CBP agent asked Reed why he had adopted a Muslim name and converted to Islam.[57] Other interviews of U.S. Muslims have involved handcuffing or displays of physical force[58] or statements that at "the border, . . . you have no rights."[59]

Protracted questioning at the border has often taken place in conjunction with detailed searches of travelers' electronic media and reading materials. CBP officers conducted detailed searches of Muslims' laptop computers, cell phones, and other electronic media,[60] asking the travelers to identify family members appearing in pictures stored on a digital camera,[61] questioning them about websites they visited,[62] or examining websites individuals flagged as "favorites."[63] Border agents perused travelers' books, lecture notes, and personal

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[54] *See, e.g.*, Tabbaa v. Chertoff, 509 F.3d 89, 99-100 (2d Cir. 2007) (stating that U.S. citizens were threatened with continued detention unless they cooperated with CBP inspections); MUSLIM ADVOCATES, UNREASONABLE INTRUSIONS: INVESTIGATING THE POLITICS, FAITH, & FINANCES OF AMERICANS RETURNING HOME 21-22 (2009) [hereinafter MUSLIM ADVOCATES] (reporting that CBP told U.S. citizen reluctant to answer questions that the detention would end sooner if he complied).

[55] Matthew Rothschild, *Muslim American Grilled at Border over Religion*, PROGRESSIVE (May 9, 2007), http://www.progressive.org/mag_mc050907.

[56] *Id.*

[57] *Id.*; MUSLIM ADVOCATES, *supra* note 54, at 28.

[58] *See, e.g.*, MUSLIM ADVOCATES, *supra* note 54, at 22, 28, 29; ASIAN LAW CAUCUS, *supra* note 34, at 36; Press Release, Council on Am.-Islamic Relations, DHS to Probe CAIR-MI Complaints on Border Questioning of Muslims (May 4, 2011), *available at* http://www.cairmichigan.org/news/press_releases/cair_mi_welcomes_dhs_civil_rights_investigation_/.

[59] ASIAN LAW CAUCUS, *supra* note 34, at 11.

[60] Janet I. Tu, *Privacy vs. Border Security: Critics Say Laptop Searches Cross the Line*, SEATTLE TIMES, July 23, 2008, at A1.

[61] ASIAN LAW CAUCUS, *supra* note 34, at 16.

[62] *Id.* at 19.

[63] *Id.* at 34.

papers, and sometimes photocopied the documents or asked questions about the travelers' views on the material.[64]

Beyond the coercion involved in FBI and CBP interviews, a second concern relates to the content of the questions asked. FBI and CBP officers questioned numerous Muslims, including U.S. citizens, about their religious and political beliefs and activities—subjects that U.S. citizens do not ordinarily expect government officers to probe. For example, CBP agents spent three hours questioning one Ph.D. student returning to the United States from a U.S. government-sponsored trip to Yemen on his local mosques, how long he had been Muslim, and the Islamic organizations in which he participated; when the student questioned the relevance of the religious inquiries, the agents told him that the detention "would end sooner if he simply answered the questions."[65] CBP agents asked other returning U.S. citizens about their views on foreign policies and politics,[66] the mosques they attended,[67] their charitable activities,[68] membership in religious organizations,[69] attendance at community events,[70] participation in political demonstrations,[71] support for lawful organizations,[72] the religious sect to which they belonged,[73] and prayer habits.[74] Similar questions were asked in FBI interviews.[75]

Such questioning, even without coercion or intimidation, can convey powerful messages about the government's respect for communities, neutrality towards religions, and overall

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[64] *See, e.g., id.* at 16-18, 21; Ellen Nakashima, *Expanded Powers to Search Travelers at Border Detailed*, WASH. POST, Sept. 23, 2008, at A02; Ellen Nakashima, *Collecting of Details on Travelers Documented*, WASH. POST, Sept. 22, 2007, at A01.

[65] MUSLIM ADVOCATES, *supra* note 54, at 21-22.

[66] *Id.* at 33, 40; ASIAN LAW CAUCUS, *supra* note 34, at 34; Jack Chang, *Men Say Customs Bureau Asked About Faith, Politics*, CONTRA COSTA TIMES, May 29, 2003, at A01.

[67] MUSLIM ADVOCATES, *supra* note 54, at 20, 36, 38.

[68] *Id.* at 20.

[69] *Id.* at 22.

[70] *Id.* at 30.

[71] *Id.* at 39.

[72] *Id.* at 30.

[73] Matthai Chakko Kuruvila, *Muslims Resent Customs Queries: Group Collects Complaints on Faith Questions*, SAN JOSE MERCURY NEWS, May 29, 2003, at 1B.

[74] MUSLIM ADVOCATES, *supra* note 54, at 34.

[75] *See* Pedro Ruz Gutierrez & Henry Pierson Curtis, *FBI Plans Interviews with Arab Americans*, ORLANDO SENTINEL, Oct. 8, 2004, at A1; Wayne Parry, *Muslims Offered Free Legal Help for Voluntary FBI Interviews*, PHILA. INQUIRER, Aug. 12, 2004, at B05; Richard B. Schmitt & Donna Horowitz, *FBI Starts to Question Muslims in U.S. About Possible Attacks*, L.A. TIMES, July 18, 2004, at A17; NICOLE J. HENDERSON ET AL., VERA INSTITUTE OF JUSTICE, LAW ENFORCEMENT & ARAB AMERICAN COMMUNITY RELATIONS AFTER SEPTEMBER 11, 2001: TECHNICAL REPORT 84 (2006) [hereinafter VERA INSTITUTE STUDY]; *"Are You Part of a Revolution," supra* note 40; James, *supra* note 23.

fairness. Unlike covert investigative methods such as electronic surveillance, an interview is a highly personal encounter between an individual and a law enforcement officer who embodies the full force of the law—the power to arrest and imprison, to detain and deport, or to exclude altogether from the country. In that encounter, even a relatively low-level officer represents the authority of the United States. Thus, the exchange that occurs in an interview signals the U.S. government's beliefs as to what, or whom, it considers threatening.

When an FBI agent asks an Iraqi-American, selected without individualized suspicion, whether he practices Islam—following questions on knowledge of terrorism or weapons of mass destruction—it sends the message that the government considers the practice of Islam itself to be a threat.[76] Similarly, when a CBP agent asks a U.S. resident at the border his views on the war in Iraq,[77] it signals that the government considers one's position on U.S. foreign policy relevant to his belonging in the United States. As a uniquely expressive investigative method, interviews carry a particular risk of conveying messages, intended or not.

A third concern relates to the basis for interviewee selection—specifically, the concern that either ethnic or religious profiling, or First Amendment activities, led to that selection. While some FBI and CBP interviews are occasioned by specific threat information or the inclusion of a person on a watch list,[78] ethnic criteria or First Amendment activities supply the explicit basis for other interviews. For instance, the FBI openly relied on national origin in interviewing thousands of U.S. Arabs in the months after the September 11 attacks[79] and in the period preceding the invasion of Iraq; the latter interview campaign included U.S. citizens.[80] At other times, an ethnic basis for interview selection was unannounced but strongly indicated by the demographics of those interviewed.[81]

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[76] *See* James, *supra* note 23.

[77] MUSLIM ADVOCATES, *supra* note 54, at 41.

[78] In fact, inclusion in the Customs and Border Protection watch list raises separate concerns related to the inadequate review process for watch list additions and the insufficient mechanisms for redress. *See* ASIAN LAW CAUCUS, *supra* note 34, at 33-40.

[79] The government selected interviewees because of demographic and visa similarities to al Qaeda terrorists. *See* GAO, PROJECT TO INTERVIEW ALIENS, *supra* note 22, at 7-8.

[80] *See, e.g.*, Brune, *supra* note 23; James, *supra* note 20.

[81] *See, e.g.*, Phillip O'Connor, *Tactics with Somali Cabdrivers Stir Criticism of FBI*, ST. LOUIS POST-DISPATCH, Feb. 3, 2011, at A1 (describing interviews of twenty-five to fifty Somali cabdrivers after the arrest of one for material support to terrorism).

On other occasions still, the FBI's focus on particular groups resulted from its response to suspicious activity reports called in by the public, even where the reports clearly suggested ethnic or religious biases.[82]

The CBP has also based targeting decisions explicitly on national origin, even for U.S. citizens. For instance, past CBP intelligence directives have called for particular scrutiny of naturalized U.S. citizens of Pakistani origin.[83] In addition, CBP officers told some travelers that despite their U.S. citizenship, they were targeted because of where they were born;[84] officers told others that even if they acquired U.S. citizenship, they would "always be a foreigner."[85]

Finally, for both FBI and CBP interviews, individuals' First Amendment activities sometimes triggered the selection decision. Part II of this article elaborates on interviews based on First Amendment profiling, the harm such interviews present, and the line separating justifiable from unwarranted scrutiny.

Ultimately, the coercion, content, and selection criteria of interviews affect not just the rights and liberties of the Muslim community, but also potentially the very interest in security that is the professed goal of the interviews themselves. A growing body of literature suggests that for U.S. Muslims, as with other communities, perceptions of the fairness of law enforcement practices affect community members' trust in, and willingness to assist, law enforcement.[86] For instance, a recent study of New York Muslims by Tom Tyler, Stephen Schulhofer, and Aziz Huq found that perceptions of "procedural justice" involving U.S. counterterrorism policies—but not self-described religiosity, cultural differences, or political background—strongly correlate with individuals' willingness to cooperate

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[82] *See, e.g.*, OFFICE OF THE INSPECTOR GEN., 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 15-16 (2003) (reporting post-9/11 detentions of individuals based on "anonymous tips called in by members of the public suspicious of Arab and Muslim neighbors who kept odd schedules").

[83] ASIAN LAW CAUCUS, *supra* note 34, at 29-31 (noting 2004 intelligence directive that called for greater scrutiny of naturalized citizens of Pakistani origin); *see also* Anne E. Kornblut & Spencer S. Hsu, *U.S. Changing Way Air Travelers Screened*, WASH. POST, Apr. 2, 2010, at A06.

[84] ASIAN LAW CAUCUS, *supra* note 34, at 25 (reporting interview in which CBP pulled aside a U.S. citizen because she was born in Pakistan).

[85] *Id.* at 24.

[86] *See, e.g.*, Harris, *supra* note 16, at 132-41; VERA INSTITUTE STUDY, *supra* note 75, at 87, 94-95.

with antiterrorism policing.[87] As a visible and overt practice affecting U.S. Muslims, FBI and CBP interviews perceived as unfair may impose broader systemic costs in addition to burdening individual rights.

B. *Interviews and Fourth Amendment Fictions*

The natural place to begin an examination of the constitutionality of interviews might be the Fourth Amendment—the usual standard for measuring the lawfulness of law enforcement detentions. Two legal fictions, however, presumptively exclude interviews from Fourth Amendment protection. First, because individuals are not required to submit to an FBI interview, courts deem these interviews "voluntary." Second, because border officials may question any traveler who seeks to enter the United States, courts consider CBP interviews "routine."

As Tracey Maclin has argued in reference to the Justice Department's initial post-9/11 interview campaign, most FBI interviews would not constitute seizures under the Supreme Court's interpretation of the Fourth Amendment, despite the fact that those approached would have difficulty refusing the interview request.[88] The Supreme Court has indicated that police questioning generally falls outside the scope of Fourth Amendment scrutiny because individuals in such encounters are free to terminate the questioning.[89] Under current legal norms, only in the extraordinary case where police engage in "patently abusive and intimidating behavior" would a court find that an interview constitutes a seizure.[90] According to Maclin, empirical evidence suggests that most people would not feel free to terminate ostensibly consensual police encounters because the average person interprets even a law enforcement officer's polite request for cooperation as a legal command.[91] Nonetheless, the constitutional standard for "voluntary"

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[87] Tom Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 368-69 (2010).

[88] Maclin, *supra* note 18, at 493-502.

[89] *Id.* at 494; *see also* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 16-20 (1999) (describing Supreme Court's "reasonable person fiction" that an ordinary person would be able to reject police questioning).

[90] Maclin, *supra* note 18, at 500-01.

[91] *Id.* at 507.

questioning "was never intended to measure the reality of police-citizen encounters."[92]

In the CBP context, the separate fiction that questioning is "routine" scuttles ordinary Fourth Amendment protections. The Supreme Court has long proclaimed the government's "paramount" authority to police the entry of people and objects across its borders[93] and has declared that border searches are reasonable simply because they occur at the border.[94] Thus, the Court has determined that the Fourth Amendment imposes no requirement of individualized suspicion for brief questioning on one's immigration status at border checkpoints[95] or for "routine" searches and seizures.[96]

Applying this restrictive Fourth Amendment doctrine, two federal courts deemed the border detentions of Muslim U.S. citizens returning from abroad routine, despite the fact that the detentions were substantially longer, more intrusive, and more stigmatizing than ordinary CBP inspections of returning U.S. citizens. Thus, in *Tabbaa v. Chertoff*, the Second Circuit Court of Appeals declared that the questioning, pat-down searches, fingerprinting, photographing, and four- to six-hour detentions of Muslim U.S. citizens returning from Canada—without individualized suspicion—were "routine" even though CBP used screening measures "normally reserved for suspected terrorists."[97] The district court in *Rahman v. Chertoff*, a case involving U.S. citizens screened at the border because of mistaken association with a terrorist watch list, dismissed most of the challenged detentions as "routine" border stops, even where the stops included detentions of as long as six hours, handcuffing, or brief displays of physical force.[98]

Thus, Fourth Amendment doctrine presumptively permits FBI and CBP interviews, even those that would not strike the average person as truly "voluntary" or "routine."

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[92] *Id.*

[93] United States v. Flores-Montano, 541 U.S. 149, 152-53 (2004).

[94] *Id.*

[95] United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976).

[96] United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985).

[97] 509 F.3d 89, 92, 95, 98-99 (2d Cir. 2007).

[98] Rahman v. Chertoff, No. 05C3761, 2010 WL 1335434, at *2 (N.D. Ill. Mar. 31, 2010).

C. *Weak Internal Constraints on Interviews*

Despite the documented historical use of interviews to suppress political activities, and current concerns over the practice, FBI and CBP internal guidelines impose few constraints on these interviews. In particular, existing guidelines do not limit the circumstances in which investigators can ask questions related to political and religious activities and do not provide effective constraints against selecting people for scrutiny on account of their First Amendment activities.

1. FBI Interviews

Guidelines for FBI investigations have grown progressively less stringent over time and now give FBI officers considerable discretion. The attorney general first issued internal guidelines for FBI domestic security investigations in 1976 in response to public outcry over abuses.[99] The first guidelines required a factual predicate for all investigations and additional procedural requirements for interviews, including, in most cases, a requirement for supervisory approval.[100] But successive versions of the attorney general's guidelines loosened such constraints, culminating in the newest and weakest version issued by Attorney General Michael Mukasey in late 2008.[101]

The Mukasey Guidelines include the most expansive definition yet of what FBI agents may legitimately investigate, permitting agents to conduct a form of investigation called "assessments" without any information or even allegation of a potential national-security threat.[102] The Mukasey Guidelines

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[99] *See generally* Allison Jones, Note, *The 2008 FBI Guidelines: Contradiction of Original Purpose*, 19 B.U. PUB. INT. L.J. 137 (2009).

[100] OFFICE OF THE ATT'Y GEN., DOMESTIC SECURITY INVESTIGATION GUIDELINES, *reprinted in FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, 96th Cong. 20-22 (1978). Under these 1976 "Levi" Guidelines, agents could use interviews in preliminary investigations (the least intrusive tier of investigation) only to gather certain public information or to identify the subject of an investigation; in limited investigations, the next tier, agents could use interviews for other purposes, but only with supervisory approval and after "full consideration of such factors as the seriousness of the allegation, the need for the interview, and the consequences of using the technique." *Id.* at 20-21.

[101] *See* MUKASEY GUIDELINES, *supra* note 38; *see also* Jones, *supra* note 99, at 139-50.

[102] MUKASEY GUIDELINES, *supra* note 38, at 17, 21; FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE 39 (2008), *available at* http://documents.nytimes.com/the-new-operations-manual-from-the-f-b-i [hereinafter OPERATIONS GUIDE].

authorize interviews in assessments as well as other methods "of relatively low intrusiveness,"[103] and generally do not require supervisory approval for interviews.[104] The Domestic Investigations and Operations Guide implementing the Mukasey Guidelines permits pretextual interviews, in which an agent fails to reveal an FBI affiliation or the true purpose of the information request.[105] The Mukasey Guidelines do not permit information collection for the purpose of monitoring First Amendment–protected activity,[106] and the Operations Guide states that assessments may not be based "solely" on the exercise of First Amendment rights.[107] That standard, however, appears to permit an assessment conducted mostly based on First Amendment activity but also based on some additional, facially innocent fact—say, an agent's decision to interview those who recently converted to Islam *and* serve in the U.S. armed forces.[108]

Beyond the use of interviews for assessments and investigations, the Mukasey Guidelines appear to give the FBI broad authorization to conduct interviews for intelligence planning that goes beyond the investigation of specific cases.[109] They seem to allow interviews that "develop overviews and analyses" of "present, emergent, and potential threats and vulnerabilities" and "their contexts and causes"[110]—a standard that could conceivably justify interviews initiated to inquire into the religious or political "contexts and causes" of extremist threats. Notably, while guidelines for the original post-9/11 interviews of Arab noncitizens forbade inquiries into religious

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[103] MUKASEY GUIDELINES, *supra* note 38, at 17-18, 20.

[104] *Id.* at 18; OPERATIONS GUIDE, *supra* note 102, at 63-64.

[105] OPERATIONS GUIDE, *supra* note 102, at 64, 68. The FBI plans to release a new version of the Domestic Investigations and Operations Guide that would grant still greater investigative powers to law enforcement agents. *See* Charlie Savage, *F.B.I. Agents Get Leeway to Push Privacy Bounds*, N.Y. TIMES (June 12, 2011), http://www.nytimes.com/2011/06/13/us/13fbi.html.

[106] MUKASEY GUIDELINES, *supra* note 38, at 13. For more detailed FBI interpretation of First Amendment restrictions on its activities, see OPERATIONS GUIDE, *supra* note 102, at 24-30.

[107] OPERATIONS GUIDE, *supra* note 102, at 44.

[108] Moreover, the Guide makes clear that its definition of "First Amendment activities" does not extend to all activities that would be protected by the First Amendment, such as the advocacy of violence. *Id.*

[109] *See* MUKASEY GUIDELINES, *supra* note 38, at 29 (permitting FBI to "draw on all lawful sources of information" in intelligence analysis).

[110] *Id.*

beliefs or practices,[111] the Mukasey Guidelines and Operations Guide do not.[112]

The Mukasey Guidelines and Operations Guide include some restrictions to prevent coercing interviewees, although the press accounts described above suggest that the FBI does not consistently follow them. The Operations Guide states that information in interviews "must be voluntarily provided" and that agents should not "state or imply in any way" that "adverse consequences may follow if the interviewee does not provide the information."[113] In addition, the Mukasey Guidelines state that agents should stop questioning "immediately" if a person indicates a desire to consult a lawyer.[114] Despite these limitations, the Operations Guide does not prohibit FBI agents from disregarding ambiguous or hesitant expressions of desire for legal counsel, even though individuals approached by the FBI may be too intimidated to state that desire definitively. Nor does the Guide disallow pressure tactics short of implying adverse consequences, such as insinuating that a reluctant interviewee "must have something to hide."

The Mukasey Guidelines also advise that where different investigative methods are each "operationally sound and effective," agents should use the "least intrusive method feasible,"[115] but the Mukasey Guidelines contain other language to minimize the constraint this principle suggests. The Operations Guide recognizes that interviews with "employers, neighbors, and associates," or those conducted at the workplace, are more intrusive than interviews in discrete locations.[116] Despite this helpful distinction, the Operations Guide also advises that agents should primarily measure the degree of intrusion based on how much procedural protection established law and the Mukasey Guidelines themselves provide for the investigative method[117]—thus designating interviews as a whole as a relatively nonintrusive choice. In addition, the Mukasey Guidelines give significant discretion to

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[111] GAO, PROJECT TO INTERVIEW ALIENS, *supra* note 22, at 9.

[112] Although the publicly released version of the Operations Guide is redacted, one does not expect that the government would redact a restriction that protects individual rights.

[113] OPERATIONS GUIDE, *supra* note 102, at 63.

[114] *Id.*

[115] MUKASEY GUIDELINES, *supra* note 38, at 12-13; *see also* Exec. Order No. 12,333, § 2.4, 46 Fed. Reg. 59,941 (Dec. 4, 1981), *reprinted as amended in* 50 U.S.C. § 401 (2006) (containing similar restriction on intelligence collection).

[116] OPERATIONS GUIDE, *supra* note 102, at 36.

[117] *Id.* at 35.

agents in interpreting these rules, advising agents not to hesitate to use any lawful method, especially in terrorism investigations.[118]

2. CBP Interviews

Documents released by the CBP suggest a lack of significant constraints on questioning, but the agency has not publicly released sufficient information on its border inspection policies to fully judge the level of constraint that agents have in choosing whom to interview, for how long, or in what manner. A CBP training manual states that "routine questioning" at the border does not require reasonable suspicion.[119] An immigration inspection manual released by the department, possibly outdated, states that "reasonable suspicion" is generally required to detain U.S. citizens for "extensive questioning," but it appears to vitiate that requirement in the next breath by permitting agents to "continue inspecting for Customs purposes."[120]

The CBP appears to have no written policy restricting the questioning of individuals about religious views, political activities, or other expression protected by the First Amendment.[121] In fact, one high-level CBP official told community organizations that it was appropriate to question an individual about the mosque the individual attends.[122] The agency does issue internal directives that may reflect First Amendment considerations; for instance, one CBP field office advised border agents not to apply special enforcement measures based "solely" on a person's return "from a

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[118] MUKASEY GUIDELINES, *supra* note 38, at 12-13.

[119] U.S. CUSTOMS & BORDER PROT., INSPECTOR'S FIELD MANUAL ch. 18.6, at 166 (Charles M. Miller ed., 2006), *available at* http://www.ilw.com/immigrationdaily/News/2008,0513-cbp.pdf [hereinafter INSPECTOR'S FIELD MANUAL]; U.S. CUSTOMS & BORDER PROT., CBP OFFICER BASIC TRAINING C2900—LAW COURSE STUDENT OUTLINE 10 (2006), *available at* http://www.eff.org/fn/directory/5283/312 (FOIA documents released to Asian Law Caucus and Electronic Frontier Foundation, June 26, 2008, Bates Stamp 112).

[120] INSPECTOR'S FIELD MANUAL, *supra* note 119, at 18. The policy requires probable cause for detentions beyond an unspecified "reasonable period of time." *Id.* These provisions, which appear in a 2006 edition released through a Freedom of Information Act request, may be outdated: the section on questioning U.S. citizens refers both to immigration inspectors as well as to "Customs," while the CBP consolidated the functions of the U.S. Customs Service and Immigration and Naturalization Service in 2003. *See* KNOW BEFORE YOU GO, *supra* note 32, at 3. The Inspector's Field Manual itself notes that the material is "gradually being updated" to reflect CBP policies. *See* INSPECTOR'S FIELD MANUAL, *supra* note 119, at 1.

[121] ASIAN LAW CAUCUS, *supra* note 34, at 13-14.

[122] *Id.* at 14-15.

pilgrimage to Mecca," while also advising that "the large influx of travelers during this time period may be used as a cover by extremists and/or terrorists to enter the United States."[123]

Thus, existing evidence of internal agency regulations suggests insignificant constraints on the factual basis for initiating interviews in either the FBI or CBP context, and few meaningful constraints on interviews that bear on individuals' political or religious expression. Neither the Fourth Amendment nor internal regulations offers real protection against the actual intrusion and stigma of FBI and CBP encounters.

II. FIRST AMENDMENT PROFILING

In the last part, this article argued that the coercion, content, and selection criteria behind law enforcement interviews present serious concerns that have largely been unaddressed. This article turns now to one set of interviews that raises particular concern: where individuals' lawful acts of expression or association trigger a knock on the door or detention at the border, it sends a particularly strong message of exclusion to individuals and their communities and creates a chilling effect on expression. This part defines *First Amendment profiling* and discusses the profound stigmatic costs and chilling effects of the practice. This article then argues that while First Amendment profiling is sometimes justifiable, it is inappropriate both where the government deliberately seeks to suppress speech and where law enforcement investigations—even those with a legitimate purpose—sweep too broadly and consequently burden lawful speech and association.

When the FBI or CBP agent questions a person because he wrote a letter to the editor criticizing U.S. intervention in Afghanistan, worshipped at a particular mosque, or visited a religious website, they engage in what I call First Amendment profiling: the selection of a person for law enforcement attention because she has engaged in acts of expression or association of a political, religious, or cultural nature that would be protected by the First Amendment. CBP's investigation of individuals returning to the United States

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[123] Memorandum from U.S. Customs & Border Prot. Port of Buffalo, Muslims Performing Hajj (Pilgrims to Mecca) (Dec. 12, 2007), *available at* https://www.eff.org/files/filenode/alc/073008_cbp_bordersearch01.pdf (FOIA document released in redacted form to Asian Law Caucus and Electronic Frontier Foundation, July 30, 2008, Bates Stamp 191).

after attending an Islamic religious conference in Canada, litigated in the Second Circuit in *Tabbaa v. Chertoff*,[124] provides a paradigmatic example of such profiling.

Murad Hussain described the detentions in *Tabbaa* as "cultural profiling," which he defined as government targeting of "expressions of cultural identity" as proxies for "criminality, terrorist connections, or other subversive propensities," noting that expressions of identity are often "significantly correlated" with membership in a racial, ethnic, or religious group.[125] Others have called investigations based on First Amendment conduct "political profiling"[126] or "First Amendment investigations."[127] Building on these conceptions, I consider First Amendment profiling to include investigative decisions triggered by expression or association of a cultural, religious, or political nature, whether "pure" speech or expressive conduct, that would be protected under the First Amendment.

Given that the First Amendment protects such a wide range of expression, with no consensus on the amendment's core meaning, scholars have recognized the difficulty in delimiting the scope of expression that raises First Amendment concerns in the investigative context. Eugene Volokh argues that a broad interpretation of the First Amendment might lead one to the untenable conclusion that because speaking or sending an e-mail are constitutionally protected actions, we should interpret the First Amendment as limiting government "subpoenas demanding that people testify about what someone said or wrote."[128] My definition focuses on expression or association of a religious, cultural, or political nature, not as a normative statement of the outer limits of First Amendment protection, but because expression or association outside these areas frequently raises concerns of a different kind, and arguably degree. A person who triggers FBI scrutiny by sending an e-mail about purchasing a vast quantity of fertilizer may have engaged in a communicative act protected by the First Amendment (sending an e-mail), but the act holds no particular political, cultural, or religious meaning. A law enforcement investigation into that speech act does not

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[124] 509 F.3d 89 (2d Cir. 2007). *See supra* notes 6-11 and accompanying text.

[125] Hussain, *supra* note 16, at 925-26.

[126] Fisher, *supra* note 16, at 625 (citing Chip Berlet & Abby Scher, *Political Profiling: Police Spy on Peaceful Activities*, AMNESTY NOW 20 (Spring 2003)).

[127] *See generally* Rosenthal, *supra* note 16.

[128] Eugene Volokh, *Deterring Speech: When Is It "McCarthyism"? When Is It Proper?*, 93 CALIF. L. REV. 1413, 1444 (2005); *see also* Solove, *supra* note 16, at 153.

stigmatize particular views or manifestations of identity in the same way as investigations triggered by the political, cultural, or religious aspect of a communication.

While I limit my definition of First Amendment profiling to expression and association of a political, cultural, or religious nature, I expand it in two other respects. First, I consider First Amendment profiling to include not just an initial decision to target a person for investigation, but also any subsequent decision to prolong an investigation on account of First Amendment expression. For example, First Amendment profiling would include a law enforcement agent's decision to broaden an investigation because of a person's responses to questions about religious affiliations. It would not include, however, incidental questioning on religious or political beliefs, even if independently objectionable, where it does not trigger the interview or intensify law enforcement scrutiny.[129]

Second, I include within First Amendment profiling investigative decisions based "predominantly"—not just "solely"—on protected expression. For instance, it would include not just border agents' decisions, as in *Tabbaa*, to question people solely because they attended an Islamic conference, but also a decision to question people because they had attended the conference *and* returned at night, or because they had attended the conference *and* were young men. The concerns raised by First Amendment profiling, as described in the next section, are not diminished in such cases.

A. *The Impact of First Amendment Profiling*

1. Stigmatic Harms

The most immediate, and perhaps most pervasive, harm of First Amendment profiling in law enforcement investigations, including interviews, is the imposition of stigma.[130] U.S. Muslims have described interviews triggered by

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[129] Inquiries on religion and politics, even without First Amendment profiling, might give rise to an independent challenge based on the Supreme Court's compelled disclosure cases, especially in compulsory border interviews. For some discussion of these cases, see *infra* notes 194-207 and accompanying text.

[130] A large volume of literature, since the publication of Erving Goffman's seminal account, has attempted to define and conceptualize stigma. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963). I use the term "stigma" in both the sense defined by Goffman (an "attribute that is deeply discrediting" that reduces the individual "from a whole and usual person to a tainted, discounted one") and according to Bruce Link and Jo Phelan's more recent

their religious or political activities as branding them, and their communities, as disloyal or suspicious—as outsiders excluded from "belonging" to the nation.

"We weren't treated as American citizens. We were treated as suspects," recounted one Muslim college student whom CBP detained for attending the conference referenced in *Tabbaa* and then ordered to "stand face-first against the wall," his legs apart, to be searched for weapons.[131] Such encounters affect not just the individuals questioned, but their broader ethnic or religious community's sense of belonging in the United States. An Oregon Muslim community leader questioned by CBP agents about why he made a religious pilgrimage to Mecca said that Muslims had grown accustomed to being "pariahs in their own country."[132]

The harms associated with First Amendment profiling mirror those arising from explicit racial or religious profiling.[133] Where a form of expression is strongly linked to one's ethnicity, national origin, or religion, government selection of individuals for special scrutiny on account of their expression will "feel" the same as targeting members of that racial or religious group directly. Certainly the Muslim Americans detained in *Tabbaa* did not perceive their detentions to be less stigmatizing because the trigger was membership at an Islamic conference—not their religion per se—or because CBP might theoretically have stopped any non-Muslims who said they had attended the conference. As the correlation between an expressive practice and membership in a particular racial or religious group approaches 100 percent, the technical distinction between the two collapses altogether: the questioning of seven Muslim men for praying in a convenience

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conceptualization of stigma as the co-occurrence of components including: the labeling of a particular human difference, the linkage of that difference with stereotypes, the use of that difference to separate "us" from "them," and the resulting loss of status and discrimination in a context of unequal power. *See id.* at 3; Bruce G. Link & Jo. C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 367 (2001).

[131] Jay Tokasz, *Local Muslims Troubled by Treatment at Border: About 40 Detained After Toronto Trip*, BUFFALO NEWS, Jan. 31, 2005, at B1.

[132] Noelle Crombie, *FBI Outreach to Muslims Comes Amid Interviews*, OREGONIAN, July 22, 2004, at C01.

[133] One might question why an Equal Protection or Free Exercise Clause challenge is not available to challenge these measures. *See* Hussain, *supra* note 16, at 944-52 (arguing that where the government selects people for scrutiny based not on their membership in a protected group, but based on behavior that largely correlates with it, the requirement that plaintiffs prove discriminatory intent will impede challenges under both the Equal Protection Clause and under prevailing Free Exercise Clause interpretations).

store parking lot illustrates an instance that is at once religious and First Amendment profiling.[134]

At the border, questioning and extensive searches of returning U.S. citizens particularly convey a message of exclusion since CBP agents effectively control the terms by which a person can return home. A Sacramento Muslim and naturalized citizen recounted that his experiences at the border—including repeated screenings, questioning on his political views, and searches of websites he visited—made him feel "unwelcome" in his own country.[135] He said, "I never experienced such a feeling at any international airport in the world, including Third World countries. But I have this feeling when I come home."[136]

Furthermore, First Amendment profiling sends a message to the nation as a whole, not just affected communities, that Muslims are unequal. As Murad Hussain has argued, law enforcement scrutiny of Muslim Americans' expressive activities labels Muslims "presumptively disloyal and unworthy of empathy" to the polity at large, facilitating hate crimes and private discrimination and stymieing the community's efforts to use civic engagement to achieve social equality.[137] Indeed, a growing social science and legal literature points to the tangible costs of stigma for individuals and communities.[138] Not only do stigmatized groups lose self-respect and tend to internalize "at least part of the version of their identities imposed by the stigma," but society correspondingly "acts toward the stigmatized person on the basis of the stigma," leading to a deprivation of material goods from economic opportunities to political representation.[139] While stigma is

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[134] *See* Ken Ritter, *Muslim Group Says FBI Still on Nevada Prayer Case*, KOLOTV.COM (June 21, 2010), http://www.kolotv.com/southernnevadanews/headlines/96852029.html. When one man questioned why their prayers had elicited suspicion, the police officer replied, "I don't know if you're . . . saying, 'I hope that I kill a police officer today.' . . . We just want to make sure that you guys are good people." CAIRtv, *Video: CAIR Concerned About FBI Questioning of "Henderson 7,"* YOUTUBE (June 23, 2010), http://www.youtube.com/watch?v=lxGNN3U6Dac&feature=player_embedded.

[135] ASIAN LAW CAUCUS, *supra* note 34, at 34.

[136] *Id.*; *see also* Kuruvila, *supra* note 73 (quoting U.S. citizen describing his experience of CBP questioning as "trying to instill in us a feeling that we don't belong here").

[137] Hussain, *supra* note 16, at 938-41.

[138] *See* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 836-47 (2004); Link & Phelan, *supra* note 130, at 370-74.

[139] KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 26-27 (1989). For recent studies suggesting links between stigma and the physical health of U.S. Arab communities, see Diane S. Lauderdale, *Birth Outcomes for Arabic-Named Women in California Before and After September 11*, 43 DEMOGRAPHY 185 (2006); Aasim I. Padela & Michele Heisler, *The Association of*

often seen as a result of equal protection violations, it results no less from First Amendment profiling.

2. Chilling Effects on Expression

Perhaps the most common harm legal scholars posit as resulting from law enforcement investigations into political and religious expression is the chilling impact on such expression.[140] Despite the fact that scholars sometimes favorably contrast interviews to clandestine surveillance,[141] the overt nature of interviews actually makes them more likely to directly and immediately influence behavior than covert investigative methods.

On some occasions, the chilling effect may be deliberate. Law enforcement agencies deliberately used interviews in the past to suppress lawful political activities by sowing mistrust within movements. The extensive congressional investigation of U.S. intelligence operations in the mid-1970s concluded that the FBI's fifteen-year Cointelpro programs, aimed at civil rights activists and others on the Left, deliberately used interviews to disrupt political activities.[142] An infamous FBI memorandum from 1970 advised that interviews could "enhance the paranoia in these circles" and convey the impression that "there is an FBI agent behind every mailbox."[143]

Even where law enforcement agencies do not deliberately use interviews to suppress expression, they acknowledge using them to send a message that government agents are watching. The Department of Justice explained its post-9/11 interviews of several thousand Arab immigrants as an attempt to "sow disruption among potential terrorists," and claimed that the interviews "ensured that potential terrorists sheltering themselves within our communities were aware that

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Perceived Abuse and Discrimination After September 11, 2001, with Psychological Distress, Level of Happiness, and Health Status Among Arab Americans, 100 AM. J. PUB. HEALTH 284 (2010).

[140] *See, e.g.*, Harris, *supra* note 16, at 165; Horn, *supra* note 16, at 750-51; Fisher, *supra* note 16, at 646-53; Hussain, *supra* note 16, at 934-38; Lininger, *supra* note 16, at 1233-37.

[141] Fisher, *supra* note 16, at 673.

[142] SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, U.S. SENATE, FINAL REPORT: SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. DOC. NO. 94-755, at 44 (2d Sess. 1976) [hereinafter CHURCH COMMITTEE REPORT].

[143] Socialist Workers Party v. Att'y Gen., 642 F. Supp. 1357, 1389 (S.D.N.Y. 1986) (quoting FBI memo and describing harassing FBI interviews targeting Socialist Workers Party).

law enforcement was on the job in their neighborhoods."[144] The FBI has also explained other interview programs—including interviews of potential anarchist protestors before the 2004 national political conventions[145] and surveillance of Muslims before that year's presidential election[146]—as efforts to deter acts of violence through obvious surveillance. While using an investigative technique to dissuade people from committing violence is not problematic in principle,[147] it is unclear that targets of such practices can distinguish that permissible message from others potentially received (e.g., "do not protest" or "do not go to the mosque").

Thus, when FBI agents interviewed sixty Muslims in Flint, Michigan, regarding their donations to Muslim American charities, many donors interpreted the investigation as intimidation aimed at chilling contributions to Muslim charities.[148] FBI agents visited a number of donors two years in a row, both times on the "eve of Ramadan," the Muslim holy month in which many individuals choose to give religiously ordained charitable contributions.[149] During these visits, two agents interviewed the donors at their workplaces, while two others simultaneously interviewed their spouses at home.[150] The inquiries, and particularly the return visits, convinced the donors that the government sought to intimidate them into not supporting lawful Muslim charities, with the implied message that "[i]f you keep giving, we'll keep coming back at you."[151] Whether or not the government intended that message, the fact that law enforcement agencies continue to acknowledge using

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[144] Final Report on Interview Project, *supra* note 43, at 1, 7.

[145] OVERSIGHT & REVIEW DIV., U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FBI'S INVESTIGATIVE ACTIVITIES CONCERNING POTENTIAL PROTESTORS AT THE 2004 DEMOCRATIC AND REPUBLICAN NATIONAL POLITICAL CONVENTIONS 31-34 (2006) [hereinafter A REVIEW OF THE FBI'S INVESTIGATIVE ACTIVITIES CONCERNING POTENTIAL PROTESTORS].

[146] *CBS News: FBI's Anti-Terror "October Plan"* (CBS television broadcast Sept. 17, 2004), *available at* http://www.cbsnews.com/stories/2004/09/17/eveningnews/main644096.shtml (reporting "aggressive" and "obvious" surveillance of alleged terrorist sympathizers and revisiting of mosques to question people about suspicious behavior).

[147] *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 690 (1978) (distinguishing "benign" deterrence resulting from "intentional regulation of speech or other activity properly subject to governmental control" from "invidious" chilling of activities protected by the First Amendment).

[148] AM. CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE "WAR ON TERRORISM FINANCING" 69-73 (2009) [hereinafter BLOCKING FAITH].

[149] *Id.* at 70.

[150] *Id.*

[151] *Id.* at 71.

interviews to send a message underscores the point that interviews can serve as an intervention, not just an information-gathering measure.

Indeed, there is powerful anecdotal evidence along with additional support from ethnographic and empirical studies of chilling effects on expression in the Muslim community. These accounts indicate that government investigative practices, including questioning, have led some U.S. Muslims to avoid attending political demonstrations or gatherings,[152] refrain from donating to political causes or religious charities,[153] avoid speaking out against U.S. foreign policies or express political opinions,[154] hesitate to join or participate in mosques or community organizations,[155] remove their names from group membership lists,[156] modify their use of the Internet,[157] stop purchasing political books abroad,[158] refuse to speak publicly about law enforcement practices,[159] and avoid names or clothing that express their religious or cultural identities.[160] For instance, a Muslim community leader asserted that the FBI questioned nearly every donor to one Southern California mosque, leading to a pronounced decline in donations.[161]

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[152] VERA INSTITUTE STUDY, *supra* note 75, at 66; JUNE HAN, "WE ARE AMERICANS TOO": A COMPARATIVE STUDY OF THE EFFECTS OF 9/11 ON SOUTH ASIAN COMMUNITIES 14 (2006).

[153] An extensive ACLU report documented FBI and CBP interviews of donors to Muslim charities and presented statements of numerous community members who had stopped giving money in response to questioning of themselves, friends, or family. BLOCKING FAITH, *supra* note 148, at 97-100; *see also* HAN, *supra* note 152, at 14; VERA INSTITUTE STUDY, *supra* note 75, at 66.

[154] Teresa Watanabe & Paloma Esquivel, *Muslims Say FBI Spying Is Causing Anxiety: Use of an Informant in Orange County Leads Some to Shun Mosques*, L.A. TIMES, Mar. 1, 2009, at 1; VERA INSTITUTE STUDY, *supra* note 75, at 58; Matthew Rothschild, *FBI Talks to Muslim High School Student About "PLO" Initials on His Binder*, PROGRESSIVE (Dec. 23, 2005), http://www.progressive.org/mag_mc122305 (reporting that high school student became hesitant to express his political views after FBI interview apparently triggered by his writing the initials "PLO" on a binder).

[155] Tyler et al., *supra* note 87, at 396; Watanabe & Esquivel, *supra* note 154.

[156] VERA INSTITUTE STUDY, *supra* note 75, at 66 (reporting statement of community organization that membership declined because people called to remove names from database).

[157] Sidhu, *supra* note 16, at 391.

[158] ASIAN LAW CAUCUS, *supra* note 34, at 18, 19 (citing examples of individuals subject to repeated lengthy CBP interviews and searches who no longer purchase books abroad).

[159] Carmen, *supra* note 44.

[160] Tyler et al., *supra* note 87, at 396; Brian Haynes, *Extra Scrutiny Chafes Muslims*, LAS VEGAS REV.-J., Oct. 4, 2004, at 1A (describing the decision of one Muslim convert, who was followed in an airport while reading the Quran, not to adopt a Muslim name for fear of harassment).

[161] Watanabe & Esquivel, *supra* note 154.

These claims are largely anecdotal, and one might question the extent to which individuals and communities have actually ceased to engage in expression or association. Some individuals subjected to First Amendment profiling say they would continue the activities that triggered the scrutiny.[162] In fact, ethnographic studies show that while post-9/11 scrutiny of Muslims led some people to withdraw from activities that would identify them as Muslim, Arab, or South Asian, others became more engaged in civic and political life in an effort to dispel stereotypes and resist unfair treatment.[163] Communities are not monolithic; they can simultaneously exhibit chilling of expression and signs of resistance. Both of these responses, however, stem from the stigma experienced, and thus even the engagement response should not dispel concern.

In two quantitative studies, members of the U.S. Muslim community, but not a majority, reported changing their behavior in response to government scrutiny of their community. In the study of New York Muslims described above, one in five surveyed reported altering behavior in response to general law enforcement scrutiny of Muslims, including changes in attendance at group prayers in a mosque (20 percent of respondents), manner of dress (22 percent), everyday activities (17 percent), and travel behavior (26 percent).[164] A 2007 study of Muslim Americans found more modest changes: while almost three-quarters of Muslims surveyed believed that the government was monitoring the general activities and Internet usage of Muslims, only 11.6 percent of respondents reported changing their general activities due to that concern, and 8.4 percent reported changing their Internet usage.[165]

These numbers are not negligible: assuming a population of two million Muslims in the United States, even 10 percent of U.S. Muslims represents two hundred thousand people who cease to engage in lawful expressive behavior for fear of government scrutiny. In addition, the proportion of individuals who report changing their behavior might be greater in particular subsets of the Muslim community: immigrants, working class community

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[162] Tabbaa v. Chertoff, 509 F.3d 89, 102 (2d Cir. 2007).

[163] VERA INSTITUTE STUDY, *supra* note 75, at 66-67; HAN, *supra* note 152, at 16-18; Sally Howell & Amaney Jamal, *The Aftermath of the 9/11 Attacks*, *in* CITIZENSHIP AND CRISIS: ARAB DETROIT AFTER 9/11, at 87-88 (2009).

[164] Tyler et al., *supra* note 87, at 396.

[165] Sidhu, *supra* note 16, at 390-91.

members, or those who directly experience law enforcement scrutiny[166] might feel particularly vulnerable.

Moreover, studies that measure the extent to which individuals report changing their behavior may underestimate the extent of more subtle, but potentially more pervasive, changes in behavior. A practicing Muslim, for instance, might not stop going to the mosque, but might hesitate to speak freely with other worshippers. Other questions (not asked in these studies) might elicit evidence of subtler changes: "Do you feel that you must reassure co-workers about your loyalty before participating in a casual workplace conversation about events in the Middle East?" "Do you hesitate to speak in Arabic or perform ritual prayers in public for fear of drawing suspicion?"

Focusing on the *hard* impacts of surveillance (the decision to avoid a political gathering) misses the *soft* impacts that may affect communities in equal or greater fashion (the diminished sense of trust in others and openness in communication). Several scholars have argued that the surveillance of mosques intrudes on the sense of security that worshippers seek at a place of worship, and surveillance of any community-based or political organization diminishes trust within the group, with longer-term effects on the quality of association.[167] Aziz Huq argues further that law enforcement's use of religious speech to signal high-risk terrorist threats interferes with religious communities' "epistemic autonomy"—their "collective interest . . . in determining the content and direction of . . . religious beliefs without interference by the government."[168] Thus, any assessment of chilling effects must take into account the cumulative impact of subtle, smaller changes and the qualitative aspects of changed behavior.

B. *Suppression and Overbreadth in First Amendment Profiling*

Accepting that First Amendment profiling, at least in some cases, imposes significant stigmatic costs and chilling

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[166] Neither study separated out the impact on individuals who had personally faced law enforcement scrutiny from that of the Muslim community at large.

[167] Lininger, *supra* note 16, at 1233-36; Harris, *supra* note 16, at 166-68; Fisher, *supra* note 16, at 653. *See, e.g.*, Dennis Wagner, *FBI's Queries of Muslims Spurs Anxiety*, ARIZONA REPUBLIC (Oct. 11, 2004, 12:00 AM), http://arizona.indymedia.org/news/2004/10/22062.php (reporting Muslim community leader's statement that FBI interviews led to "creeping distrust," leading people to question whether acquaintances might report their words to the government); *see also* CAINKAR, *supra* note 20, at 185-86.

[168] Huq, *supra* note 16, at 852-53.

effects does not tell us whether the practice in a given instance is justified. Not every law enforcement practice that qualifies as First Amendment profiling is wrong. For instance, few would argue that law enforcement should not scrutinize an influential religious leader advocating terrorist attacks in the United States or a person who has joined al Qaeda, at least in order to determine whether the person is actively recruiting or assisting terrorists. The permissible scope of government investigation exceeds the permissible scope of government criminalization: the government may investigate, in an effort to uncover potential violations of the law or threats to national security, activities that it cannot constitutionally ban.[169] The government could not, consistent with the First Amendment, outlaw the advocacy of terrorism or a person's membership in a terrorist organization unless those activities cross certain lines—e.g., the advocacy is directed at producing "imminent lawless action and is likely to" have such an effect,[170] the member has a specific intent to further the organization's illegal aims,[171] or either activity constitutes material support to a designated foreign terrorist organization.[172] Such activities, even without crossing these lines, may be so relevant to uncovering actual violations of the law that the government may legitimately investigate them.

These are relatively clear examples; even civil libertarians might agree that a close enough nexus exists between the protected activity and an actual threat in order to permit First Amendment profiling. On these narrow facts, a three-step justification for First Amendment profiling articulated by scholars and law enforcement officials seems least objectionable. First, because of the potential of grave harm from terrorism, investigators must identify terrorists early and prevent acts of violence in advance of the commission of any criminal act.[173] Second, these scholars and officials argue, because terrorists are elusive and hard to find, investigators need to cast their net broadly to identify those who pose a

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[169] *See, e.g.*, DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 14 (2002); Fisher, *supra* note 16, at 672.

[170] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[171] Scales v. United States, 367 U.S. 203, 228-30 (1961).

[172] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730-31 (2010).

[173] RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 114 (2006); Huq, *supra* note 16, at 839-42.

threat.[174] Third, they argue that where the threat stems from ideologically motivated violence, evidence of that ideology (whether religious or political) is a relevant and rational basis for suspicion.[175]

Of course, in most cases, the nexus between ideology and threat will not be as clear. At that point, the justifications for First Amendment profiling encounter serious questions. While terrorists may act out of religious or political motivation, the use of individuals' religious or political views or behavior to "predict" threats is fraught with peril. Claims about the relevance of ideological linkages to violence may appeal to intuition rather than actual evidence. In fact, research suggests that the relationship between religion and terrorism is complicated and contested: for instance, while a New York Police Department report cites a turn to religion as a risk factor for "radicalization" and identifies mosques, student associations, and nongovernmental organizations as examples of hubs where radicalizing Muslims might gather,[176] one academic study suggests that increased religious education and greater immersion in Muslim social institutions diminishes the religious naïveté and social isolation that can feed extremism.[177] Even assuming that the "experts" could arrive at an accurate and sophisticated understanding of the linkages between terrorism and ideology, there is good reason to question how well law enforcement agencies could apply that information.[178]

Beyond these reasons to doubt the effectiveness of First Amendment profiling, the primary objection rests on a broader

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[174] POSNER, *supra* note 173, at 114.

[175] *Id.* at 116; *see also* OPERATIONS GUIDE, *supra* note 102, at 27-28 (providing examples of where it would be "rational and permissible" for the FBI to consider religious adherence, affiliations, or practices in an investigation).

[176] MITCHELL D. SILBER & ARVIN BHATT, N.Y.C. POLICE DEP'T, RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT 30-31 (2007).

[177] Aziz Z. Huq, *Modeling Terrorist Radicalization*, 2 DUKE F. FOR L. & SOC. CHANGE 39, 63-64 (2010); DAVID SCHANZER ET AL., ANTI-TERROR LESSONS OF MUSLIM-AMERICANS 28-29, 45 (2010).

[178] *See* Huq, *supra* note 16, at 868-73 (arguing that use of religious speech as a counterterrorism signal will present high risks of error). Recent news reports on the biased content of counterterrorism training sessions for law enforcement officials, and the lack of vetting for self-declared terrorism experts, suggest even greater reason to question the capability of law enforcement agencies to obtain and apply accurate information on the relationship between religious beliefs and terrorist threats. *See, e.g.*, Lisa Fernandez, *Local Groups Allege Biased Training Colors FBI Dealings with American Muslims*, MERCURYNEWS.COM, http://www.mercurynews.com/top-stories/ci_19122246 (last updated Oct. 16, 2011); Dina Temple-Raston, *Terrorism Training Casts Pall over Muslim Employee*, NPR (July 18, 2011), http://www.npr.org/2011/07/18/137712352/terrorism-training-casts-pall-over-muslim-employee.

principle: where a large number of innocent people engage in religious or political behavior alleged to be linked to an actual threat, law enforcement should not define threats so broadly as to sweep in substantial amounts of protected expression. If, at one end of the spectrum, an influential religious leader's advocacy of terrorist attacks in the United States or a person's membership in al Qaeda justifies law enforcement attention, law enforcement scrutiny directed at those who don Islamic garb or become active in social causes—behaviors identified by the New York Police Department report as "signatures" of the "second stage of radicalization"[179]—is just as clearly unjustified.

So when is First Amendment profiling actually wrong? I argue that there are two situations where the government oversteps its bounds. First, it is wrong for the government to target people for investigation on account of lawful expression or association for the *purpose* of suppressing protected expression or association (what I label the *suppression concern*). Second, First Amendment profiling is wrong to the extent that the investigation imposes too great a burden on protected expression in relation to the government interest at hand (the *overbreadth concern*).[180] Thus, First Amendment profiling directed at the suppression of protected speech is presumptively wrong; First Amendment profiling not involving deliberate suppression is suspect but not categorically wrong.

1. The Suppression Concern

The principle behind the suppression concern is that if the government cannot criminalize expression, it cannot use indirect methods of coercion to achieve the same ends. This principle applies whether the government's ultimate goal is illegitimate (suppression of dissent or religious views out of hostility or self-interest) or legitimate (the prevention of violence), so long as the immediate objective is suppression of lawful speech or association. Although one might distinguish, at a theoretical level, between a purpose to suppress speech based on hostility to ideas and a purpose to suppress speech to prevent violence, the distinction collapses in the national-

[179] SILBER & BHATT, *supra* note 176, at 30-31; *see also* Huq, *supra* note 177, at 57.

[180] In using the term "overbreadth," I am not referring to the separate First Amendment standing doctrine that allows a party to challenge the constitutionality of a statute on the grounds that it impermissibly prohibits the speech of others, even if the party's own speech could constitutionally be prohibited. *See generally* Note, *Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1749 (2010).

security context, where hostility to ideas almost always takes the form of a belief that particular ideas are dangerous and likely to produce harm.[181] Thus, the suppression concern includes the scenario where a government official who believes that a particular religious movement inspires some individuals to embrace violence harasses adherents to prevent them from worshipping together—even if the official's ultimate purpose is to forestall acts of violence.

Though investigations today may raise the suppression concern, there is a relatively broad consensus that the purposeful use of investigations to suppress lawful expression is wrong. For instance, the FBI officially proscribes investigations of First Amendment activities solely for the purpose of monitoring or abridging lawful expression.[182] That principle stems from wide condemnation of the agency's historical abuses: a congressional investigation concluded that from 1956 to 1971, the FBI had "conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association,"[183] including the use of wiretaps and bugs to surveil and discredit Dr. Martin Luther King.[184] Despite near consensus today that investigations should not aim to disrupt lawful speech, that consensus may shift as federal agencies develop a counter-radicalization strategy to prevent and disrupt Islamic extremism within the United States, leading to renewed debate over government-sponsored efforts to suppress speech.[185]

2. The Overbreadth Concern

Second, though less obvious, First Amendment profiling raises the concern that regardless of motive—even assuming that law enforcement agents are acting for the legitimate purpose of investigating a terrorist threat—the government

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[181] Thus, in this context, the distinction Elena Kagan draws between "ideological" and "harm-based" motives for government actions collapses—as Kagan anticipated in suggesting that in certain cases, "the two kinds of motives become hopelessly entangled . . . in a kind of endless feedback loop." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 433-35 (1996).

[182] MUKASEY GUIDELINES, *supra* note 38, at 13.

[183] CHURCH COMMITTEE REPORT, *supra* note 142, at 3.

[184] *See id.* at 81-86. For other examples of FBI investigations focused on First Amendment expression, see generally COLE & DEMPSEY, *supra* note 169.

[185] *See* Ken Dilanian, *Fighting Threats from Within: Homegrown Terrorist Plots Spur a Search for a Strategy, but How Does the Government Battle an Ideology?*, L.A. TIMES, May 27, 2010, at 1.

may have defined threats too broadly, overclassifying innocent expression and association to improperly create a legitimate basis for scrutiny. There are two reasons why law enforcement investigations with a legitimate purpose should raise First Amendment concerns. First, even where the purpose of an investigation is not the suppression of expression, hostility to that expression may well influence the scope and shape of the investigation.[186] In *Tabbaa*, for example, CBP officials ordered intrusive screening measures on Muslims returning from a conference as a response to intelligence concerning the presence of suspected terrorists at the event. But unspoken assumptions that an *Islamic* conference was likely to be suspicious might well have colored the judgment that it was rational—and fair—to stop *all* people returning from a diverse gathering of thirteen thousand people based on the possibility that they may have met a terrorist at the event.[187] The unpopular and subordinate status of the communities affected may color threat perceptions, reduce empathy for innocent people affected by an investigation, or diminish fears of political backlash.[188] For instance, the knowledge that political leaders and the U.S. public would not raise howls of protest at the singling out of participants at an Islamic conference might well have lessened the perceived costs of a decision to target them.

The second reason for the overbreadth concern is that even where hostility to speech or speakers does not influence an investigation, First Amendment profiling is likely to result in particularly grave harms. Where an investigative decision on its face turns on First Amendment expression or association, it is particularly likely to result in stigmatic harm and chilled

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[186] *See* Kagan, *supra* note 181, at 435 (arguing that hostility to speech may lead the government to overestimate the harm the speech may cause).

[187] One commentator writes of *Tabbaa* that questioning attendees at an Islamic conference based on the presence of a suspected terrorist is no more "profiling" than questioning attendees at a State Fair for similar reasons, because it does not rely on stereotyping but on "suspect description." R. Richard Banks, *Group Harms in Antiterrorism Efforts: A Pervasive Problem with No Simple Solution*, 117 YALE L.J. POCKET PART 198, 199 (2008), http://yalelawjournal.org/the-yale-law-journal-pocket-part/civil-rights/group-harms-in-antiterrorism-efforts:-a-pervasive-problem-with-no-simple-solution/. This conclusion overlooks the likelihood of group-based assumptions behind investigators' decisions: it is hard to imagine that CBP would have detained, fingerprinted, and photographed *everyone* returning from a state fair attended by thirteen thousand people rather than choosing more tailored means to identify those who posed a threat.

[188] *See* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976) (arguing that government decisions not based on racial animus may still be affected by "racially selective sympathy and indifference" to other racial groups); *see also* Hussain, *supra* note 16, at 945 (discussing possibility of unconscious and cognitive biases in investigative decisions).

expression. Consider a hypothetical in which the FBI, responding to the attempted Times Square bomber Faisal Shahzad's claims that U.S. drone attacks in Pakistan motivated him,[189] began questioning hundreds of people who signed a petition protesting civilian deaths from drone strikes. The FBI might justify the interviews as an intelligence assessment to measure potential threats presented by Pakistani Americans opposed to U.S. policies. While such an inquiry might have a "legitimate" purpose—at least one that the current attorney general guidelines deems proper—the means employed would be well out of proportion to the declared objective and seriously likely to discourage others from voicing similar opposition to U.S. policies. Even where hostility to the ideas expressed does not influence an investigation, the government's use of First Amendment expression as a basis for selecting interviewees can result in grave harm to those questioned and their broader communities.

In recent years, some federal agencies have themselves concluded that certain investigative or intelligence activities they conducted were overbroad. For instance, the Department of Homeland Security distributed and then rescinded intelligence on certain First Amendment activities of U.S. Muslims, deeming it a violation of department policy.[190] A Department of Justice Inspector General review of the FBI's investigations of several domestic advocacy groups concluded that while the FBI did not deliberately target groups on account of their First Amendment activities, it had weak factual support for opening or continuing certain investigations.[191]

The overbreadth concern also draws support from history: David Cole and James Dempsey have argued, for instance, that the FBI investigation in the 1980s of the Committee in Support for the People of El Salvador, a peaceful political organization, continued and expanded despite a slim factual basis for concern.[192]

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[189] Benjamin Weiser, *A Guilty Plea in Plot to Bomb Times Square*, N.Y. TIMES, June 22, 2010, at A1.

[190] Sebastian Rotella, *Intelligence Note on Nation of Islam Pulled: Homeland Security Rescinds the 2007 Analysis After Deciding It Broke Rules on Information Collection*, L.A. TIMES, Dec. 17, 2009, at A26.

[191] OVERSIGHT & REVIEW DIV., U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FBI'S INVESTIGATION OF CERTAIN DOMESTIC ADVOCACY GROUPS 186-87 (2010). *But see* A REVIEW OF THE FBI'S INVESTIGATIVE ACTIVITIES CONCERNING POTENTIAL PROTESTORS, *supra* note 145, at 3 (finding that the FBI did not improperly target potential protestors at national political conventions to chill First Amendment activities).

[192] COLE & DEMPSEY, *supra* note 169, at 22-23.

The FBI later admitted that the investigation, which generated files on 2376 individuals and 1330 groups, was improperly focused on First Amendment activities.[193]

The most difficult challenge, of course, is making a coherent distinction between permissible First Amendment profiling and impermissible overbreadth, especially in interviews. Indeed, the overbreadth concern, unlike the suppression concern, does not suggest any bright line. Rather, overbreadth suggests a contextual, case-by-case determination of whether there is a tight enough nexus between the targeted expression and an actual threat of violence to justify the particular burden on First Amendment rights.

Two examples of actual interviews involving First Amendment profiling might help illustrate relevant considerations. First, as this article has argued, the First Amendment profiling in *Tabbaa* was overbroad, and the case was wrongly decided. There, the concern was the possibility of individuals using the mainstream gathering as a cover for meeting terrorist suspects. The size of the event (thirteen thousand participants), however, made any individual participant's probability of meeting suspects fairly small. In addition, the security measures taken, including interviews, lengthy detentions, fingerprinting, and the like were particularly stigmatizing and intrusive. Moreover, surveillance of specific suspects at the conference itself, which presumably could have been arranged through the cooperation of the Canadian government, suggested a ready alternative.[194] Given these facts, the nexus between the alleged security threat and the First Amendment trigger for the selection of interviewees—attendance at the conference—was too attenuated to justify the particularly burdensome measures taken.

Second, a more difficult case might be the FBI's numerous interviews of students who attended a sixteen-day Houston Islamic conference in 2008 that Umar Farouk Abdulmutallab, the Nigerian man who attempted to blow up an

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[193] *Id.* at 24, 33.

[194] The *Tabbaa* court rejected this alternative on the grounds that "the U.S. government cannot freely conduct surveillance . . . in Canada," without any explanation of why U.S. authorities could not coordinate with Canadian law enforcement to arrange any required surveillance. Tabbaa v. Chertoff, 509 F.3d 89, 104 (2d Cir. 2007).

airliner in December 2009, also attended.[195] The conference was sponsored by an Islamic religious institute known to teach a particularly conservative brand of Islam, though it did not advocate violence.[196] Following the attempted bombing, the FBI initially sought to interview all 156 participants and indeed interviewed an unknown (but apparently large) number.[197] Perhaps the FBI reasoned that other students who attended could provide information on Abdulmutallab, that a teacher at the conference might have influenced both Abdulmutallab and other attendees, or that the conference might have brought together like-minded individuals. How should we evaluate this case, which at first glance bears some resemblance to *Tabbaa*?

Several considerations inform this inquiry. One consideration involves the burden imposed: the FBI interviews likely did not create the same direct burden as the compulsory and extensive screening measures taken in *Tabbaa*. On the other hand, especially if the FBI approached all or nearly all the 156 participants, these interviews may well have chilled those who would otherwise wish to attend the institute's events. A second consideration is the strength of the nexus between the potential terrorist threat and the First Amendment trigger. Here, there had been an actual terrorist attempt, and compared to *Tabbaa*, the relatively small number of participants and the duration of the conference suggests a greater probability of other students having met Abdulmutallab or some other common source of influence. Also relevant is that a "tiny fraction" of the institute's other students (not those subject to the interviews) had turned to violence.[198] A third consideration is the scope of the questioning: to the extent it focused on Abdulmutallab, it would be much less problematic than broad-based inquiries that supposed that the interviewees at large presented a threat. Ultimately, whether these interviews were overbroad might come down to the strength of the FBI's preexisting evidence that the institute attracted students drawn to violence and the scale and content of the interviews conducted.

These examples suggest the complexity of the fact-specific inquiry required for determining overbreadth. Though

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[195] Andrea Elliott, *Why Yasir Qadhi Wants to Talk About Jihad*, N.Y. TIMES, Mar. 17, 2011, (Magazine), at MM34, *available at* http://www.nytimes.com/2011/03/20/magazine/mag-20Salafis-t.html?pagewanted=all.

[196] *Id.*

[197] *Id.*

[198] *Id.*

deciding when First Amendment profiling is permissible may not be easy, the real stigma and chilling effects of the practice, combined with the historical record of abuses, make that inquiry critical. In the next part, I argue that courts should undertake that inquiry through heightened scrutiny of First Amendment profiling, and that existing First Amendment doctrine provides a foundation for such review.

III. FIRST AMENDMENT PROFILING IN THE COURTS

Given the dual concerns of suppression and overbreadth raised by First Amendment profiling, courts ought to subject investigations involving First Amendment profiling, including interviews, to heightened scrutiny whenever plaintiffs establish that they have faced a substantial burden on their First Amendment rights to freedom of speech or association.[199] This article proposes a two-part test for such cases. A court should inquire first whether the government had a compelling interest in conducting the practice in question. In that step, the government will usually be able to prevail, citing national security, except in the rare case where direct evidence indicates a purpose to suppress speech or some other illegitimate reason for an investigation—in which case, the government would lose without further balancing. Assuming that the government establishes a compelling interest, the court should then query whether the means employed were "narrowly tailored" to serving the declared objective. The availability of less restrictive means for the government to resolve security concerns ought to create a rebuttable presumption that the investigation was overbroad. This heightened scrutiny would be neither traditional strict scrutiny weighted heavily against constitutionality nor a deferential balancing analysis in which the government always wins.[200]

While suppression and overbreadth are conceptually distinct, the test here would seek to address both concerns. The existence of a suppression purpose on the facts of any particular case can often be detected only from a demonstration of

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[199] I focus in this article on the First Amendment rights to freedom of speech and association, which cover religious speech and association, rather than the separate religion clauses of the First Amendment.

[200] A point of comparison might be the approach in freedom of association claims, where courts query whether state interests may be achieved by other means "significantly less restrictive of associational freedoms," Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984), not whether the means employed were the least restrictive alternative.

overbreadth. When government agents conduct an investigation in order to suppress protected speech, the invidious purpose is rarely apparent; law enforcement will almost always provide some facially legitimate reason for an improper investigation. Thus, the most plausible route to "uncover" an actual suppression purpose is through demonstrating such a remote connection between the investigated activity and an actual threat, or a burden on speech so disproportionate to the declared objective as to support the inference that no legitimate investigative purpose existed.[201]

I do not argue that courts, as opposed to Congress or administrative agencies, are necessarily best positioned to resolve First Amendment concerns regarding law enforcement investigations. Others have extensively debated the effectiveness and desirability of judicial enforcement of civil rights claims.[202] But political process theory suggests that where terrorism investigations predominantly affect communities that are subject to widespread public hostility, Congress and executive agencies may lack the political will to fully resolve concerns stemming from such investigations.[203] While executive oversight institutions, such as the Department of Justice Inspector General, have triggered impressive reform of certain investigative practices, even strong Inspector General reviews may not substantially constrain agency discretion to prevent future abuse, and these institutions cannot define substantive rights that would bind agency conduct.[204] Moreover, even if agency policies and guidelines are more likely to directly influence law enforcement behavior than court decisions, court decisions often set the baseline for agency guidelines: the FBI's Domestic Investigations and Operations Guide, for instance, references judicial opinions heavily in outlining First Amendment constraints on investigations.[205]

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[201] *See* Kagan, *supra* note 181, at 440-41.

[202] *See, e.g.*, Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010).

[203] For the classic political process argument for searching judicial review, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[204] Shirin Sinnar, Do Inspectors General Protect Individual Rights? Constraining Executive Power Against National Security Abuses (Sept. 9, 2011) (unpublished manuscript) (on file with author).

[205] OPERATIONS GUIDE, *supra* note 102, at 24-30.

The case for heightened scrutiny is justifiable, though not compelled, by existing law. The law on First Amendment profiling is deeply unsettled, as lower courts since the 1970s have struggled to answer the many questions the Supreme Court has left open. The first important question that has divided lower courts evaluating First Amendment profiling involves the circumstances in which plaintiffs challenging law enforcement investigations have suffered sufficient abridgment of their First Amendment rights. The harm from law enforcement investigations is less direct and certain than the harm from classic restrictions on speech or associational rights because investigations do not typically prohibit someone from expressing a view or associating with an organization. Lower courts since the 1970s have primarily confronted the question of sufficient harm as an issue of standing, and many have denied standing to plaintiffs challenging surveillance or investigations. Despite the restrictive standing doctrine created in this context, I argue that lower court decisions, and the Supreme Court precedent on which they rely, suggest that some plaintiffs challenging law enforcement interviews would be able to establish standing—overcoming a threshold hurdle that has stymied other First Amendment claims against covert surveillance or the observation of religious or political events. While plaintiffs will still need to establish, on the merits, that they suffered substantial harm, standing doctrine in this context already screens out most cases involving minimal harm, and the stigmatic and chilling effects of interviews should further help plaintiffs demonstrate the seriousness of harm suffered.

A second question that has divided lower courts is whether the government's articulation of a plausible legitimate purpose for a law enforcement investigation ends the First Amendment inquiry, or whether courts ought to apply heightened scrutiny to probe the "fit" between the claimed purpose and the means employed—either because heightened scrutiny is required to uncover an illicit motive (the suppression concern) or because even an investigation with an acknowledged legitimate purpose may still sweep too broadly in burdening First Amendment rights (the overbreadth concern). Despite the fundamental importance of this question, only one recent piece—an article by Lawrence Rosenthal discussed below—has discussed this divide, concluding that First Amendment investigations need not satisfy heightened

scrutiny.[206] I examine the split among lower courts on First Amendment profiling and challenge the view that First Amendment doctrine does not support heightened scrutiny for investigations. In doing so, I address the most significant objection to this view: the idea that narrow tailoring requirements would undermine the ability of law enforcement to identify and preempt potential threats.

A. *The Harm from Investigations*

1. The Supreme Court's Chilling Effects Cases Through *Laird*

In the 1950s and 1960s, the Supreme Court made clear that government actions that indirectly burden, rather than directly restrict, speech or association could violate the First Amendment.[207] Several classic cases establishing this principle arose out of investigations or inquiries into the membership of the National Association for the Advancement of Colored People (NAACP) or "subversive" organizations. Thus, in *NAACP v. Alabama*, the Supreme Court held that the state of Alabama had failed to show a compelling justification for requiring the NAACP to disclose its membership list, which the state sought as part of an investigation into whether the group had complied with a corporate registration requirement.[208] The Court recognized that although the requirement did not directly abridge NAACP members' freedom to associate, the practical consequence of disclosure would be to subject members to public threats and reprisals—and chill the organization's lawful political advocacy.[209]

Although in many cases, the Court surely suspected an illicit government motive behind an investigation—the suppression concern—these decisions did not conclude that the government purposes articulated were pretextual or implausible. For instance, in *Shelton v. Tucker*, the Court explicitly acknowledged the state's legitimate interest in investigating a public employee's associational ties, but

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[206] Rosenthal, *supra* note 16, at 57.

[207] *See, e.g.*, Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 544 (1963) (citations omitted); Shelton v. Tucker, 364 U.S. 479, 488 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461-62 (1958); Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957).

[208] *NAACP*, 357 U.S. at 466.

[209] *Id.* at 462-63.

nevertheless concluded that that interest did not justify the breadth of the inquiry undertaken.[210]

Moreover, the Court sometimes proved willing to engage in a rigorous examination of the facts in finding an insufficient "fit" between the state interest articulated and the information-gathering measure employed. Thus, in *Gibson v. Florida Legislative Investigative Committee*, the Court held that while state legislatures had broad power to investigate possible subversive activities, a Florida legislative committee's demand that the NAACP disclose whether fourteen "known" Communists were members of the association was not supported by "a substantial relation between the information sought and a subject of overriding and compelling state interest."[211] The state presented colorable evidence of Communist attempts to participate in the NAACP: some of the fourteen alleged Communists had attended NAACP meetings, one informant had "been instructed to infiltrate the NAACP," the organization had passed "antisubversion" resolutions that acknowledged attempts by Communists to take over the group, and one or two of the fourteen had given talks to the organization or distributed leaflets for the group.[212] Yet the Court rejected this evidence, fact by fact, as "merely indirect, less than unequivocal, and mostly hearsay testimony."[213] Without deferring to either the government's explanation for the investigation or its interpretation of the facts, the Court conducted its own, searching inquiry into whether the evidence justified the investigation.[214]

In these cases, the Court explicitly characterized the harm resulting from government investigative practices as the chilling effect such practices would have on legitimate expression and association. For instance, Alabama's attempt to compel disclosure of the NAACP's membership would hinder the group's advocacy efforts by dissuading individuals from participating out of fear of exposure.[215] Less explicitly, the decisions recognize that the chilling effect on First Amendment

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[210] *Shelton*, 364 U.S. at 490.

[211] *Gibson*, 372 U.S. at 546.

[212] *Id.* at 552-54, 554 n.6.

[213] *Id.* at 555.

[214] *Gibson* distinguished several earlier decisions that upheld disclosure requirements aimed at the Communist Party on the grounds that regulating the Communist Party did not present the same constitutional issues as disclosure requirements aimed at other political groups. *Id.* at 547-48.

[215] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1958).

rights results from an exercise of state power that subjects individuals to stigma—either directly or by exposing people to public hostility. In *NAACP v. Alabama*, the Court compared the compelled disclosure of group affiliation to a "requirement that adherents of particular religious faiths or political parties wear identifying armbands," drawing an implicit connection to the branding of minority or dissenting communities.[216] In a case involving legislative investigations into First Amendment views, the Court noted that such investigations could impose the "stain of the stamp of disloyalty" as significant as might result from an actual loss of employment.[217]

In spite of these decisions recognizing the stigmatic harm and chilling effects of indirect government burdens on expression, in 1972, the Court curbed the practical reach of these doctrines by restricting standing to challenge surveillance. In *Laird v. Tatum*, the Court announced that while indirect burdens on First Amendment rights might warrant constitutional review, individuals did not have standing to challenge government surveillance that created only a "subjective 'chill'" on political activities.[218] *Laird* remains the Court's last word on First Amendment claims against government surveillance of political activities, and has profoundly affected First Amendment challenges to law enforcement investigations and surveillance.

In *Laird*, a group of political activists and organizations sought to enjoin the army's collection of intelligence regarding their lawful political activities,[219] claiming that the army had surveilled them and continued to maintain files regarding their political activities.[220] The army acknowledged conducting surveillance (mostly through public sources such as the news media and attendance at public meetings) of political activities with the potential to result in civil disorder.[221] The Court distinguished the surveillance in *Laird* from past "'chilling' effect" cases, where "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature," and plaintiffs were or would be "subject to the regulations,

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[216] *Id.* at 462.

[217] Sweezy v. New Hampshire, 354 U.S. 234, 248 (1957).

[218] 408 U.S. 1, 12-14 (1972).

[219] *Id.* at 2.

[220] Brief for Respondents at 5, *Laird*, 408 U.S. 1 (No. 71-288), 1972 WL 135682, at *5.

[221] *Id.* at 6-7.

proscriptions, or compulsions" that they were contesting.[222] For instance, in past cases, plaintiffs stood to lose out on state bar membership or employment if they did not take loyalty oaths or answer questions about their political associations.[223] In *Laird*, by contrast, the Court characterized the plaintiffs' claims as arising from "the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose."[224] A "subjective 'chill'" alone, such as the plaintiffs' fears that the army might in the future misuse the information it had collected against them, could not substitute for a "claim of specific present objective harm or a threat of specific future harm."[225]

Although *Laird* did not address the merits of the plaintiffs' First Amendment claims, the five-to-four opinion suggested a reluctance to credit the stigma of general surveillance in the absence of other state action directly affecting the plaintiffs. But the Court dealt there with information-gathering from largely public sources, noting that the lower court described the investigation as uncovering no more than what a good newspaper reporter might uncover from attending meetings and clipping articles.[226] The plaintiffs did not allege any law enforcement interviews of individuals or intimidating contacts between individuals and army officers, and learned of the army's surveillance through a magazine article that described the program.[227] The Court qualified its concern over federal courts monitoring "the wisdom and soundness of Executive action" by making clear that an actual or immediately threatened injury could properly subject army surveillance to judicial review.[228] Thus, the Court left open the ability of courts to scrutinize overbroad and stigmatizing investigations in a case where plaintiffs could demonstrate "objective" harm.

2. Establishing Standing for Interviews, Post-*Laird*

Since *Laird*, lower courts facing First Amendment claims against law enforcement investigations have grappled

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[222] *Laird*, 408 U.S at 11.
[223] *Id.*
[224] *Id.* at 10.
[225] *Id.* at 13-14.
[226] *Id.* at 9 (quoting Tatum v. Laird, 444 F.2d 947, 953 (D.C. Cir. 1971)).
[227] *Id.* at 2 n.1.
[228] *Id.* at 15-16.

with the threshold question of whether the plaintiffs have standing to sue. A review of these decisions suggests that at least some plaintiffs challenging law enforcement interviews as unjustified or overbroad should be able to establish standing.

In the case of CBP interviews, where travelers cannot enter the United States without satisfying border inspectors, *Laird* is unlikely to present a challenge. Beyond a chilling effect, individuals interviewed on account of First Amendment expression can point to objective harm from interviews, minimally the detention they experienced—often in addition to intrusive searches, handcuffing or displays of physical force, or other screening measures.[229] In contexts involving the compelled disclosure of information, the Supreme Court has never held that organizations or individuals personally subject to that compulsion lacked standing. Although CBP presumably cannot deny entry altogether to U.S. citizens who refuse to speak, CBP can delay entry or subject people to more intense searches; even with a legal right to enter, U.S. citizens must still await the permission of border inspectors. Thus, for purposes of standing, courts should view border interviews as a type of involuntary detention, creating an objective injury.

FBI interviews, by contrast, present a more difficult question because they are ostensibly voluntary, and plaintiffs will not always be able to establish objective injury beyond the stigma or chilling effects of the practice. As Scott Michelman and others have described, some courts have interpreted *Laird* broadly to foreclose standing for claims of chilling effect injuries that did not arise out "of 'regulatory, proscriptive, or compulsory' government action."[230] For instance, the lead opinion in a Sixth Circuit case adopted this position and denied standing to plaintiffs who challenged the National Security Administration's warrantless wiretapping program; the plaintiffs could not establish that they were "regulated, constrained, or compelled directly by the government's" program.[231]

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[229] Standing was not an issue in *Tabbaa*, for instance, where on the merits the Second Circuit found that even without the "clear chilling of future expressive activity," the screening measures imposed a significant penalty on plaintiffs. Tabbaa v. Chertoff, 509 F.3d 89, 101 (2d Cir. 2007).

[230] Michelman, *supra* note 16, at 89-93. For additional discussion of standing in this context, see Eric Lardiere, *The Justiciability and Constitutionality of Political Intelligence Gathering*, 30 UCLA L. REV. 976, 987-99 (1983); Jonathan R. Siegel, Note, *Chilling Injuries as a Basis for Standing*, 98 YALE L.J. 905, 909-10 (1989).

[231] ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 661 (6th Cir. 2007) (Batchelder, J.); *see also* United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1378-79

Courts that embrace the broad view of *Laird* might find that chilling-effects claims arising out of FBI interviews are nonjusticiable since individuals need not agree to the interviews. On the other hand, plaintiffs approached by the FBI for interviews are subject to direct, personal contact with law enforcement making a request of them—in contrast to the surveillance in *Laird*, which did not require individuals to do anything at all.

Moreover, other courts have not interpreted *Laird* so broadly as to foreclose First Amendment standing in the absence of "regulatory, proscriptive, or compulsory" government action. Rather, many courts distinguished cases where litigants showed only a "subjective 'chill'"[232] from cases where plaintiffs established an "objective" chill, or specific adverse effects, from surveillance or investigations. Most recently, the Second Circuit held that plaintiffs who had taken costly measures to avoid surveillance of their international communications in reasonable fear of being monitored had standing to challenge a new foreign intelligence surveillance law.[233]

These decisions espouse a narrower view of *Laird* and suggest at least three bases for asserting justiciable challenges to FBI interviews that burden free expression and association. First, plaintiffs can establish standing where they demonstrate that interviews were aimed at disrupting speech or lawful activities or were undertaken in bad faith.[234]

(D.C. Cir. 1984) (denying standing where plaintiffs could not show that executive orders authorizing intelligence collection commanded or prohibited them from doing anything).

[232] Thus, several courts dismissed challenges to otherwise legal law enforcement data-gathering, photography, and physical surveillance at political events open to the public. *See, e.g.*, Phila. Yearly Meeting of Religious Soc'y of Friends v. Tate, 519 F.2d 1335, 1337-38 (3d Cir. 1975); Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326, 330-33 (2d Cir. 1973); Donohoe v. Duling, 465 F.2d 196, 202 (4th Cir. 1972). One court, finding no tangible harm, denied standing to students and teachers who claimed that the placement of an undercover police officer in two high school classes was ideologically motivated and stifled classroom discussion. Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778, 780-81 (6th Cir. 1983).

[233] Amnesty Int'l USA v. Clapper, 638 F.3d 118, 121-22 (2d Cir. 2011).

[234] *See, e.g*, Anderson v. Davila, 125 F.3d 148, 160 (3d Cir. 1997) (distinguishing *Laird* where plaintiff alleged that government surveilled him in retaliation for exercise of First Amendment rights); Alliance to End Repression v. City of Chicago, 627 F. Supp. 1044, 1047, 1050-52 (N.D. Ill. 1985) (finding standing where Chicago police placed informants and undercover agents in senior positions in organizations in order to "neutralize" their influence); Founding Church of Scientology of Wash., D.C. v. Dir., Fed. Bureau of Investigation, 459 F. Supp. 748, 760 (D.D.C. 1978) (ruling that Church of Scientology had standing where alleged that federal government had disrupted the organization and interfered with its activities); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 149-51 (D.D.C. 1976) (holding that plaintiffs had standing to contest surveillance activities that included terminating

Second, plaintiffs can overcome *Laird* where the FBI's actions cause individuals objective harm, such as damage to reputations or employment prospects. This type of harm sometimes occurs when FBI agents approach individuals at work and announce to employers that they want to investigate an employee. Indeed, in another context, the Supreme Court distinguished reputational injuries as a basis for standing from the chilling effects found nonjusticiable in *Laird*.[235] Lower courts have allowed individuals to challenge employment-related government loyalty investigations,[236] the public disclosure of information on individuals targeted,[237] and even the harm resulting from retention of an investigative file that carried a risk of potential future disclosure.[238]

Third, an organization that has experienced an identifiable decline in membership, support, or reputation from FBI interviews, such as a mosque whose congregants are questioned, could sue on its own behalf. Courts have ruled that organizations have standing to contest law enforcement investigative practices that dissuaded their members from participating and thereby caused the institutions tangible harm, such as a decline in membership or participation.[239] For instance, the Ninth Circuit found that churches sheltering refugees had standing to challenge surveillance of their activities because the chilling impact on their members concretely impaired the churches from carrying out their ministries.[240]

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plaintiffs' employment and disrupting lawful activities); Lowenstein v. Rooney, 401 F. Supp. 952, 957-60 (E.D.N.Y. 1975) (finding standing where former congressional candidate alleged that FBI conspired in bad faith to investigate him for political activities); Handschu v. Special Servs. Div., 349 F. Supp. 766, 770 (S.D.N.Y. 1972) (finding standing where plaintiffs alleged injuries resulting from use of secret informants who induced and initiated criminal activity).

[235] Meese v. Keene, 481 U.S. 465, 473-75 (1987) (holding that state legislator who sought to exhibit foreign films had standing to challenge statutory scheme labeling the films "political propaganda" because of potential harm to his reputation and professional interests).

[236] Ozonoff v. Berzak, 744 F.2d 224, 229-30 (1st Cir. 1984); Clark v. Library of Cong., 750 F.2d 89, 96-98 (D.C. Cir. 1984).

[237] Riggs v. City of Albuquerque, 916 F.2d 582, 586 (10th Cir. 1990); *Religious Soc'y of Friends*, 519 F.2d at 1339; Jabara v. Kelley, 476 F. Supp. 561, 568 (E.D. Mich. 1979), *vacated on other grounds sub nom.* Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982).

[238] Paton v. La Prade, 524 F.2d 862, 868 (3d Cir. 1975).

[239] Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 521-22 (9th Cir. 1989); Socialist Workers Party v. Att'y Gen., 419 U.S. 1314, 1319 (1974) (Marshall, J.) (finding standing where organization alleged that presence of informants at convention would dissuade delegates from participating and jeopardize employment); *see also* Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft, 459 F. Supp. 2d 592, 601 (E.D. Mich. 2006).

[240] *Presbyterian Church*, 870 F.2d at 521-22.

While *Laird* imposes a significant threshold requirement that could screen out many FBI encounters—even large-scale interviews with significant chilling effects, where plaintiffs did not have evidence of bad faith or tangible injuries—it does not foreclose First Amendment challenges to CBP or FBI interviews.

3. Beyond Standing: Establishing Sufficient Harm to First Amendment Rights

Even where courts find standing, they would still need to consider the extent of the harm, either as a threshold inquiry into whether the harms are "substantial,"[241] or at a minimum, in determining whether plaintiffs' injuries ought to prevail against governmental interests.[242] Interviews that survive *Laird*'s standing doctrine will usually be those where the government effectively penalized or compelled plaintiffs in some way, as in FBI interviews that cause reputational or economic damage or compulsory CBP inspections.

For CBP interviews, the compulsion involved brings potential challenges within the ambit of the Court's historic chilling effect cases, where the government threatened to withhold a concrete benefit based on protected expression. When CBP prevents individuals who have engaged in protected expression from entering the country until they comply with extensive and unusual CBP interviews, those individuals experience an actual restraint at least as severe as that invalidated in *Lamont v. Postmaster General*.[243] There, the Court struck down a rule preventing the delivery of foreign mail that the Post Office determined was "communist political propaganda" until recipients first sent in a reply card affirmatively requesting the delivery.[244] Though sending a reply card to receive mail did not create the same burden as, say, an employment requirement to disclose one's political affiliations,

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[241] *See, e.g.*, Tabbaa v. Chertoff, 509 F.3d 89, 101-02 (2d Cir. 2007) (evaluating whether burden on freedom of association was "substantial").

[242] *See, e.g.*, Meese v. Keene, 481 U.S. 465 (1987) (distinguishing extent of harm for standing purposes from merits inquiry); *Socialist Workers Party*, 419 U.S. at 1316 (same).

[243] 381 U.S. 301, 307 (1965). Whether the First Amendment analysis would differ in border inspections of individuals who are not U.S. citizens or lawful permanent residents is beyond the scope of this paper. While noncitizens residing in the United States enjoy First Amendment rights, Bridges v. Wixon, 326 U.S. 135, 148 (1945), some courts have rejected First Amendment challenges with respect to certain immigration decisions. *See* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999); Price v. INS, 962 F.2d 836, 841 (9th Cir. 1992).

[244] *Lamont*, 381 U.S. at 307.

the Court found the constraint presented by the regulation sufficient to implicate the First Amendment.[245] The stigma imposed by the designation of certain mail as "communist political propaganda," not just the degree of restraint, made the burden on First Amendment rights significant; the Court recognized that such a designation would deter individuals from reading "what the Federal Government says contains the seeds of treason" and has "condemned."[246]

In both FBI and CBP interviews, the stigma resulting from a person's selection for questioning on account of First Amendment activities should help plaintiffs establish that a law enforcement encounter effectively penalized them for engaging in protected expression. That reasoning appeared in *Tabbaa*, where the Second Circuit relied on the stigma of the investigative measures taken to conclude that they imposed a substantial disability on the plaintiffs' First Amendment rights. The court found that the extensive security measures the plaintiffs experienced, "when others, who had not attended the conference, did not have to endure these measures," qualified as a significant "penalty" and one that might reasonably deter others from attending similar conferences.[247] In other words, the fact of being *singled out* for this type of scrutiny, not just the "tangible" harm from the screening measures employed, led the court to find that the investigation substantially interfered with freedom of association.

As discussed above, the Supreme Court's classic First Amendment cases of the 1950s and 1960s explicitly recognized chilling effects, and implicitly recognized stigma, as a basis for harm.[248] Moreover, the Court frequently noted that the chilling effects on speech or association in those cases were grave precisely because the groups or individuals being investigated espoused dissenting or unpopular views.[249] Thus, the Court considered the actual burden of investigations on the specific communities involved in the specific social and political atmosphere of the time—a backdrop of hostility toward the civil rights movement and pervasive fear of communism. Courts examining the harm of First Amendment profiling

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[245] *Id.*

[246] *Id.*

[247] Tabbaa v. Chertoff, 509 F.3d 89, 102 (2d Cir. 2007).

[248] *See supra* notes 214-16 and accompanying text.

[249] *See* Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 555-57 (1963); Shelton v. Tucker, 364 U.S. 479, 486-87 & n.7 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

today could—and should—consider broader discrimination and hostility to U.S. Muslims in evaluating the extent to which interviews stigmatize targets and chill expression.

Beyond the First Amendment context, the Court has continued to consider stigmatic harm a judicially cognizable injury. In the equal protection context, the Court recognizes—as it did most famously in *Brown v. Board of Education*[250]—that discrimination imposes a noneconomic injury by "stigmatizing members of the disfavored group" as "less worthy participants in the political community."[251] The Court considers stigma, when accompanied by more tangible harm, a factor in determining what procedural protections the Due Process Clause requires[252] and as an important reason that laws prohibiting private, consensual sexual acts between persons of the same sex violate substantive due process.[253] In criminal procedure, the Court has justified rigorous procedural protections partly because of the stigma imposed by a criminal conviction.[254]

Thus, the fact that law enforcement interviews do not prohibit someone from expressing a view or associating with an organization should not categorically prevent individuals subjected to FBI or CBP interviews from establishing sufficient harm to First Amendment interests, either as a matter of standing doctrine or substantive law. Plaintiffs will be on stronger ground, however, where they can point to stigma and chilling effects in addition to more "objective" compulsion or harm.

B. Suppression, Overbreadth, and Heightened Scrutiny in the Lower Courts

Post-*Laird* cases involving challenges to First Amendment profiling suggest broad agreement that the First Amendment bars investigations that are directed at an illegitimate purpose. But courts divide as to whether a showing of a legitimate purpose ends the First Amendment inquiry, or whether investigations with a legitimate purpose may still sweep too broadly in burdening free speech, association, and religion as to violate the

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[250] 347 U.S. 483, 494-95 (1954).

[251] Heckler v. Mathews, 465 U.S. 728, 739-40 (1984) (citation omitted). *See* Lenhardt, *supra* note 138, at 864-78 (discussing Supreme Court cases on racial stigma).

[252] Paul v. Davis, 424 U.S. 693, 701 (1976). *See* Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 91 (2009) (criticizing limitations of "stigma-plus" doctrine).

[253] Lawrence v. Texas, 539 U.S. 558, 575 (2003).

[254] Apprendi v. New Jersey, 530 U.S. 466, 484 (2000).

First Amendment. And courts divide further as to whether heightened scrutiny should apply to such investigations.

Lower court decisions in First Amendment challenges to law enforcement investigations have generally concluded that the First Amendment bars investigations that are undertaken for the purpose of stifling dissent or interfering with lawful expressive activities. Beginning in the 1970s, a series of lawsuits challenged federal law enforcement and local police investigative practices that allegedly aimed to stifle dissent. Beyond finding standing where the law enforcement practices in question appeared to go beyond "legitimate surveillance,"[255] a number of courts held that investigations taken for the purpose of harassment, interference with lawful activities, or suppression of speech would violate the First Amendment.[256]

For instance, in *Hobson v. Wilson*, political activists involved in antiwar, civil rights, and other political causes sued the FBI and Washington, D.C., police for conspiring to deprive them of their rights to free speech and association.[257] Plaintiffs had a rare smoking gun: internal FBI memoranda explicitly described the agency's "Cointelpro" operation as seeking to "disrupt," "discredit," and "otherwise neutralize" the lawful activities of "New Left" and "Black Nationalist" activists in a purported attempt to prevent potential civil strife and

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[255] *See* Brief for Respondents, *supra* note 220, at 6a.

[256] United States v. Mayer, 503 F.3d 740, 752 (9th Cir. 2007) (stating that "the government must not investigate for the purpose of violating First Amendment rights, and must also have a legitimate law enforcement purpose"); Anderson v. Davila, 125 F.3d 148, 159-60 (3d Cir. 1997) (finding that tactics that ordinarily do not implicate the First Amendment, such as photographing and surveilling a person in public, violate the law when undertaken for a wrongful purpose, such as retaliation for a person's exercise of First Amendment rights); United States v. Aguilar, 883 F.2d 662, 705 (9th Cir. 1989), *superseded by statute on other grounds*, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (concluding that the use of informants to infiltrate an organization must not be for "the purpose of abridging [F]irst [A]mendment freedoms"); Socialist Workers Party v. Att'y Gen., 642 F. Supp. 1357, 1364, 1416 (S.D.N.Y. 1986) (concluding that the FBI's disruption of Socialist Workers Party's lawful political activities violated First Amendment rights of speech and assembly and awarding damages); Ghandi v. Police Dep't of City of Detroit, 747 F.2d 338, 349-50 (6th Cir. 1984) (suggesting that informant's alleged misrepresentation of labor party's goals, disruption of political campaign, and theft of party documents would violate First Amendment); Jabara v. Kelley, 476 F. Supp. 561, 574 (E.D. Mich. 1979), *vacated on other grounds sub nom.* Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982) (denying summary judgment on First Amendment claims where factual issues existed as to whether FBI investigation of attorney's political activities was in good faith); *see also* Alliance to End Repression v. City of Chicago, 561 F. Supp. 537, 549, 559 (N.D. Ill. 1982) (approving settlement agreement forbidding investigation or disruption because of First Amendment conduct).

[257] Hobson v. Wilson, 737 F.2d 1, 7 (D.C. Cir. 1984), *overruled in part on other grounds by* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

violence.[258] Holding that the alleged interference with plaintiffs' lawful political activities violated "fundamental and well-established constitutional rights," the court stated that "it is *never* permissible to impede or deter lawful civil rights/political organizations, expression or protest with no other direct purpose and no other immediate objective than to counter the influence of the target associations."[259] In so ruling, *Hobson* implies that even where the ultimate goal of an investigation is legitimate (the prevention of violence), the immediate purpose cannot be the disruption of lawful First Amendment activity.

Cases such as *Hobson* involved a range of law enforcement practices, and one might question whether courts would find *interviews* undertaken to suppress lawful expression to be per se impermissible. Decisions involving interviews are rare. Yet a case involving the Socialist Workers Party treated interviews no differently from other methods calculated to disrupt the organization's lawful political activities, finding such methods "patently unconstitutional."[260] The court noted that while interviews to gather information are usually a legitimate FBI activity, the FBI in that case used interviews of the organization's members and their relatives, employers, and landlords to foment paranoia within the group.[261] In *Zieper v. Metzinger*, the Second Circuit Court of Appeals held that FBI requests to a filmmaker to remove a film from the Internet that could provoke violence would violate the First Amendment if they crossed the line from persuasion to coercion.[262] The court held that the First Amendment prohibits such requests where the "totality of the circumstances" amount to an implied threat.[263] Thus, while courts would likely hold that interviews undertaken to suppress lawful activities through harassment violate the First Amendment, in circumstances like *Zieper*, courts might consider whether the interviews conveyed an implied threat to refrain from expression.

While lower courts have generally found that a purpose to suppress First Amendment rights cannot support an investigation, courts divide as to whether a showing of a legitimate purpose ends the inquiry, or whether investigations with a legitimate purpose may still sweep so broadly that they violate the First Amendment.

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[258] *Id.* at 10.
[259] *Id.* at 27.
[260] *Socialist Workers Party*, 642 F. Supp. at 1416-17.
[261] *Id.* at 1389.
[262] 474 F.3d 60, 65-66 (2d Cir. 2007).
[263] *Id.* at 70-71.

The lower courts further disagree as to whether they should employ heightened scrutiny to evaluate an investigation where the government provides a facially legitimate reason for its conduct—either to "smoke out" an actual illicit purpose or to invalidate the overbreadth of the investigation.

Rosenthal, the only commentator to review this split in authority, concludes that most courts have held that investigations into First Amendment activities require no more than a "good faith" law enforcement interest supporting the investigation.[264] That conclusion, however, understates the extent of conflict even within federal circuit courts of appeals. Thus, the Ninth Circuit, which had ruled that a government investigation threatening First Amendment rights need only be justified by a legitimate law enforcement purpose, modified its decision to state that that purpose also had to "outweigh[] any harm to First Amendment interests."[265] In an influential early decision, the D.C. Circuit declared that only a legitimate purpose was necessary to subpoena reporters' phone records.[266] In two later decisions, though, the D.C. Circuit stated that an investigation with a legitimate purpose might still be unconstitutional, and the court called for strict scrutiny of investigations that significantly burdened First Amendment rights.[267]

Amid the confusion, two broad views appear in the case law. One set of cases treats the requirement of a legitimate purpose as the only limitation that the First Amendment places on law enforcement investigations.[268] These decisions

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[264] Rosenthal, *supra* note 16, at 39-40.

[265] United States v. Mayer, 503 F.3d 740, 753 (9th Cir. 2007), *superseding* 490 F.3d 1129.

[266] Reporters Comm. for Freedom of Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1049 (D.C. Cir. 1978).

[267] Clark v. Library of Cong., 750 F.2d 89, 94 (D.C. Cir. 1984); Hobson v. Wilson, 737 F.2d 1, 28 (D.C. Cir. 1984), *overruled in part on other grounds by* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

[268] United States v. Aguilar, 883 F.2d 662, 708-09 (9th Cir. 1989) (refusing to suppress, on First Amendment grounds, evidence obtained from the INS's warrantless use of undercover agents and informants to infiltrate church meetings), *superseded by statute on other grounds*, Pub. L. No. 99-603, 100 Stat. 3359 (1986); Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778, 780-81 (6th Cir. 1983) (holding that the placement of undercover police officer in two high school classes to uncover drug trafficking did not violate the First Amendment, so long as investigation was not designed to control content of class discussions); *Reporters Comm. for Freedom of the Press*, 593 F.2d at 1050 (ruling that the government's good faith issuance of subpoenas to phone companies for reporters' phone records did not abridge First Amendment rights despite incidental burden on news gathering); Jabara v. Kelley, 476 F. Supp. 561, 572-73 (E.D. Mich. 1979) (holding that good faith surveillance of a political activist would not violate the First Amendment), *vacated on other grounds sub nom.* Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982); Anderson v. Sills, 265 A.2d 678, 688 (N.J. 1970) (holding that

generally do not make explicit how a court would ferret out such an illegitimate purpose, but the language of these cases suggests broad deference to the government's stated justifications rather than any hint of narrow tailoring.[269]

Perhaps the strongest statement of this view appears in several Seventh Circuit opinions that narrowed landmark consent decrees entered against the FBI and Chicago Police Department in *Alliance to End Repression v. City of Chicago*.[270] The defendants in that case acknowledged illegal surveillance and disruption of civil liberties organizations, religious activists, and political groups.[271] Three years after the district court approved the consent decree against the FBI, the Seventh Circuit interpreted the prohibition on investigating First Amendment activities narrowly to bar investigations only where there was no "genuine concern for law enforcement."[272] Later decisions interpreted the consent decree to exclude "negligent" noncompliance[273] and modified the Chicago Police Department's order to allow the agency to monitor political extremist groups to prevent "ideological terrorism," regardless of whether the police had reasonable suspicion of any crime.[274] The *Alliance* decisions make the court's view clear: the First Amendment itself, not just a proper reading of the consent decree, prohibited only those investigations with the purpose of interfering with lawful expression[275] and any more exacting requirement would impede law enforcement from protecting public safety.[276]

A second set of cases, however, rejects the view that under the First Amendment a lawful government purpose is the

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courts should not interfere with executive information-gathering in the absence of proof of bad faith or arbitrariness).

[269] One exception is *Presbyterian Church v. United States*, 752 F. Supp. 1505, 1513-15 (D. Ariz. 1990), which purported to apply strict scrutiny. In any event, that district court's use of strict scrutiny does not seem compatible with the Ninth Circuit's deferential inquiry in *United States v. Mayer*, 503 F.3d 740, 748-49 (9th Cir. 2007).

[270] Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1015 (7th Cir. 1984); Alliance to End Repression v. City of Chicago, 119 F.3d 472, 476 (7th Cir. 1997); Alliance to End Repression v. City of Chicago, 237 F.3d 799, 802 (7th Cir. 2001).

[271] *Alliance to End Repression*, 742 F.2d at 1015.

[272] *Id.* Specifically, the court interpreted the decree to permit investigations of groups based on their advocacy of violence, even where that advocacy was protected by the First Amendment.

[273] *Alliance to End Repression*, 119 F.3d at 476 (holding that FBI investigation into the Committee in Support of the People of El Salvador did not violate the consent decree even where the FBI acknowledged widespread negligence).

[274] *Alliance to End Repression*, 237 F.3d at 802.

[275] *See, e.g.*, *Alliance to End Repression*, 742 F.2d at 1010, 1015-16; *Alliance to End Repression*, 237 F.3d at 800.

[276] *See, e.g.*, *Alliance to End Repression*, 237 F.3d at 802.

sole test of the validity of a law enforcement investigation and instead also requires some form of heightened scrutiny to evaluate law enforcement investigations that burden free expression.[277] Thus, in *Clark v. Library of Congress*, the D.C. Circuit required "exacting scrutiny" of an individual's claim that an FBI investigation into his political activities had chilled his expression and prevented him from obtaining further federal employment.[278] The FBI had conducted a wide-ranging loyalty investigation into the plaintiff, mostly through interviews of his neighbors, friends, and associates because of allegations that he belonged to a lawful socialist organization.[279] The court ruled that regardless of whether the government "intended to punish or coerce the individual . . .[,] [w]here the government's action inflicts a palpable injury on the individual because of his lawful beliefs," it should demonstrate that it employed the "least restrictive" alternative.[280]

While *Clark* concerned an FBI investigation for employment purposes, other courts suggest a similar test for law enforcement investigations directed squarely at uncovering security threats. *Tabbaa* itself, while ultimately ruling against the plaintiffs, applied heightened scrutiny to the plaintiffs' freedom-of-association claims.[281] The court did not conclude its inquiry in finding a legitimate purpose for the investigation (identifying individuals who might pose a threat based on CBP intelligence on the conference), but further analyzed whether the government's actions "serve[d] compelling state interests,

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[277] Clark v. Library of Cong., 750 F.2d 89, 94 (D.C. Cir. 1984); Hobson v. Wilson, 737 F.2d 1, 27, 27 n.85, 28 (D.C. Cir. 1984) (stating that the "clearly established" right to freedom of association included the principle that government action taken for a legitimate purpose would nevertheless be unconstitutional where it "significantly interfered with protected rights of association, unless the [g]overnment . . . demonstrate[d] a substantial . . . or compelling . . . interest" that "could not more narrowly be accommodated" (citations omitted)), *overruled in part on other grounds by* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); White v. Davis, 533 P.2d 222, 227-28 (Cal. 1975) (requiring strict scrutiny of Los Angeles Police Department's covert surveillance of university classrooms, which police justified as intelligence-gathering to prevent future criminal activity); Tabbaa v. Chertoff, 509 F.3d 89, 102, 105-06 (2d Cir. 2007). With the exception of *United States v. Mayer*, 503 F.3d 740, 748-50 (9th Cir. 2007), most courts that express concern for the "overbreadth" of an investigation, not just its purpose, require some form of heightened scrutiny.

[278] 750 F.2d at 94.

[279] *Id.* at 91.

[280] *Id.* at 94.

[281] 509 F.3d at 102.

unrelated to the suppression of ideas, that [could not] be achieved through means significantly less restrictive."[282]

Notably, *Clark* and *Tabbaa* were both cases that involved claims of more concrete harm—loss of future employment and reputational injuries or detentions with intrusive screening measures—in addition to chilling effects and stigma. These cases suggest that while lower courts are split as to whether First Amendment profiling requires heightened scrutiny, plaintiffs demonstrating more objective harms from interviews are most likely to garner such review.

C. *Addressing Objections to Heightened Scrutiny*

Critics of heightened scrutiny for First Amendment profiling argue that judicially-imposed narrow tailoring requirements would undermine law enforcement investigations, which depend on discretion and flexibility to identify and preempt potential threats. One argument is that the Supreme Court, out of concern for law enforcement interests, has refused to create a higher standard for law enforcement investigations burdening First Amendment activities in other contexts. A second objection is that heightened scrutiny of First Amendment

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[282] *Id.* at 97, 102. Note that while the court applied strict scrutiny, one judge suggested that a less demanding standard might be appropriate because the inspections occurred at the border. *Id.* at 102 n.5. The extent of First Amendment protections at U.S. borders is unclear. *See generally* Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543 (2010). In *United States v. Ramsey*, 431 U.S. 606, 623-24 (1977), the Supreme Court ruled that border searches of incoming international mail did not violate the First Amendment where existing regulations forbade such searches without reasonable suspicion and flatly prohibited reading mail without a search warrant. The Court refused comment on the "constitutional reach of the First Amendment" in the absence of such protections. *Id.* at 624. Lower courts have considered First Amendment claims in recent challenges to warrantless border searches of laptop computers. Two appeals courts rejected First Amendment arguments in refusing to suppress evidence of child pornography uncovered through warrantless searches of defendants' laptop computers. *See* United States v. Arnold, 533 F.3d 1003, 1010 (9th Cir. 2008); United States v. Ickes, 393 F.3d 501, 502-07 (4th Cir. 2005). A district court is now considering a Fourth and First Amendment challenge to a Department of Homeland Security policy permitting searches and copying of laptop computers and other electronic devices without reasonable suspicion. *See generally* Complaint, Abidor v. Napolitano, No. 1:10-cv-04059 (E.D.N.Y. Sept. 7, 2010), *available at* http://www.aclu.org/free-speech-technology-and-liberty/abidor-v-napolitano-complaint. While the border search doctrine in Fourth Amendment law rests on the idea that individuals have a lesser expectation of privacy at the border, these cases do not suggest that individuals at the border have diminished First Amendment rights not to be singled out on the basis of protected speech or association. Neither *Arnold* nor *Ickes* involved a claim of First Amendment profiling, but the separate First Amendment claim that searches of laptop computers require individual suspicion because computers store expressive materials. *See Arnold*, 533 F.3d at 1006; *Ickes*, 393 F.3d at 506.

profiling would place courts in the inappropriate role of second-guessing law enforcement judgments in critical terrorism-related investigations. A third argument is that law enforcement agents need clear, consistent rules when making decisions about whom and how to investigate, and narrow tailoring requirements would force law enforcement agents to make complicated "balancing" decisions whenever a First Amendment interest is implicated.

First, the argument from precedent, which appears both in lower court decisions rejecting heightened scrutiny as well as in recent commentary, stems from the fact that the Supreme Court in several cases has refused to create greater protections for law enforcement investigative practices that burden First Amendment rights.[283] For instance, the Court has held that the ordinary Fourth Amendment warrant requirement sufficiently protects First Amendment interests in the seizure of allegedly obscene films or the search of a newspaper office, rejecting arguments that the expressive materials or institutions involved required the provision of a prior adversary hearing or a higher showing of necessity.[284]

Similarly, in *Branzburg v. Hayes*, the Court ruled that requiring reporters to testify before grand juries on information obtained from confidential sources did not abridge the First Amendment, despite claims that the disclosure of confidential sources would deter people from speaking freely to reporters and diminish the press's ability to gather news.[285] The Court concluded that grand jury subpoenas of reporters required only a good faith law enforcement interest—creating a standard that Rosenthal notes is "remarkably like that employed by the courts that have rejected any form of heightened scrutiny for First Amendment investigations."[286] The Court deemed the burden on First

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[283] *See, e.g.*, Rosenthal, *supra* note 16, at 60-63; Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1015-16 (7th Cir. 1984) (reargued en banc); Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1055 (D.C. Cir. 1978).

[284] New York v. P.J. Video, Inc., 475 U.S. 868, 875 (1986) (holding that ordinary probable cause standard applied to warrant application for sexually explicit videos presumptively protected by First Amendment); Zurcher v. Stanford Daily, 436 U.S. 547, 567-68 (1978) (holding that Fourth Amendment warrant requirement offered sufficient protection in searches of a newspaper office); Heller v. New York, 413 U.S. 483, 492 (1973) (holding that the seizure of a single allegedly obscene film for evidentiary purposes did not require a prior adversary hearing); *see also* Univ. of Penn. v. EEOC, 493 U.S. 182, 201 (1990) (rejecting a university's First Amendment claim that subpoenas requesting tenure-related materials should be supported by a higher standard of necessity).

[285] 408 U.S. 665, 667 (1972).

[286] Rosenthal, *supra* note 16, at 54-56.

Amendment rights "incidental" and found any such interest outweighed by the public interest in grand juries exercising broad power to investigate potential criminal conduct.[287]

Despite the Court's unwillingness to create a special standard for searches and seizures of expressive material or testimony that potentially chills expression, these decisions do not require a rejection of heightened scrutiny in cases of First Amendment profiling. These decisions all involved First Amendment challenges to law enforcement procedures where other protections against government overreaching already existed; while affirming the important First Amendment interests involved,[288] the Court found those procedures sufficient to accommodate First Amendment interests. For instance, the Court concluded that judges could safeguard First Amendment concerns in searches of newspaper offices by assessing the ordinary preconditions for a warrant: probable cause, specificity regarding the places to be searched or objects to be seized, and overall reasonableness.[289] As Daniel Solove has argued, the search warrant cases leave open the question as to how the Court would rule in situations where Fourth Amendment procedural protections were unavailable.[290]

At first glance, the explanation that other procedural protections existed seems less persuasive with respect to *Branzburg*, since grand jury investigations do not provide as much protection: the government does not have to demonstrate probable cause or satisfy Fourth Amendment standards to subpoena witnesses.[291] Even so, a person still has recourse to a motion to quash or modify a subpoena where "compliance would be unreasonable or oppressive."[292] While the standard by which a court considers such motions is deferential,[293] the very prospect of prior resort to a court provides protection that is lacking in the case of FBI or CBP interviews. In addition, despite the wide latitude that grand juries enjoy in investigating potential crimes, the fact that grand juries are convened by courts, not law enforcement agents, and that they

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[287] *Branzburg*, 408 U.S. at 701.

[288] *See, e.g.*, *P.J. Video*, 475 U.S. at 873-74; *Zurcher*, 436 U.S. at 564-65.

[289] *Zurcher*, 436 U.S. at 565.

[290] Solove, *supra* note 16, at 128-31.

[291] United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991) (holding that a court can quash a grand jury subpoena only where it finds no reasonable possibility that it would produce relevant evidence, but refusing to consider whether the standard would differ in cases involving First Amendment interests).

[292] FED. R. CRIM. P. 17(c)(2).

[293] *See R. Enters.*, 498 U.S. at 301.

necessitate the seating of sixteen to twenty-three jurors, provide some practical restraints on overreaching that are simply lacking in FBI and CBP interviews.[294] Moreover, the First Amendment claim in *Branzburg* differs from claims in potential challenges to First Amendment profiling: the reporters in *Branzburg* alleged a chilling effect on First Amendment activity, but not that the *decision* to subpoena them involved any improper First Amendment considerations. The Court has not considered whether a different result might be appropriate for situations involving a greater threat that hostility to the speakers or speech in question affected the decision of who to select for questioning.[295] Thus, the Court's unwillingness to create additional procedural protections in First Amendment challenges to search warrants and grand jury subpoenas does not dictate the outcome in other First Amendment profiling contexts, including FBI and CBP interviews.[296]

A second objection to heightened scrutiny of First Amendment profiling is that even if Supreme Court precedent is distinguishable, courts should not be in a position to second-guess law enforcement judgments in critical terrorism-related investigations. Especially in the terrorism context, courts and critics maintain that law enforcement must be permitted wide discretion to identify and pursue potential threats, and the

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[294] *See* FED. R. CRIM. P. 6(a)(1).

[295] While lower courts, following *Branzburg*, have rejected a First Amendment privilege for journalists challenging grand jury subpoenas, some have suggested a higher First Amendment standard might be appropriate for grand jury subpoenas involving greater risk that the government was targeting individuals on account of expressive activities. *See, e.g.*, *In re* First Nat'l Bank, 701 F.2d 115 (10th Cir. 1983) (granting evidentiary hearing on First Amendment claim); *In re* Grand Jury Subpoenas Duces Tecum, 78 F.3d 1307, 1312-13 (8th Cir. 1996) (enforcing subpoenas where government demonstrated a compelling interest in information and a sufficient nexus between information sought and subject matter of investigation); *In re* Grand Jury Proceeding, 842 F.2d 1229, 1236-37 (11th Cir. 1988) (finding compelling interest and substantial relationship, without deciding standard). *But see In re* Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229, 232 (4th Cir. 1992) (declining to create "substantial relationship" test for subpoenas involving First Amendment claims).

[296] Rosenthal also argues that in cases involving "no prohibition or direct cost on the exercise of First Amendment rights," the Supreme Court as a general matter does not impose heightened scrutiny but simply balances the degree of inhibition against the government interests involved. Rosenthal, *supra* note 16, at 49. Deferential balancing on account of the indirect nature of the restraint in question may accurately describe the Court's approach in certain cases, such as *Meese v. Keene*, 481 U.S. 465 (1987), a case involving a registration requirement applicable to distributors of foreign films. But Rosenthal's statement offers too sweeping a characterization of the Court's practice as a whole. For instance, it does not explain *Gibson*, where the Court rigorously scrutinized government justifications for the investigation of the NAACP and limited two Cold War decisions cited by Rosenthal as examples of deferential balancing. *See* Rosenthal, *supra* note 16, at 47-48.

prospect of courts inquiring into whether law enforcement sufficiently tailored investigative methods would unduly "chill" law enforcement.[297]

To the extent, however, that this argument rests on the assumption that courts applying heightened scrutiny to First Amendment profiling will routinely second-guess law enforcement decisions, that assumption is unwarranted. Even courts applying heightened scrutiny have sustained law enforcement practices where they credited law enforcement justifications for the necessity of a practice: heightened scrutiny in this context is not "strict in theory, fatal in fact."[298] *Tabbaa*, of course, sided with CBP's determination that the security measures employed were necessary.[299] Other judicial doctrines already protect law enforcement officers from second-guessing of reasonable decisions, including the idea that factual determinations of the executive branch are entitled to some deference[300] and the qualified immunity defense in damages cases.[301] The risk that heightened scrutiny for First Amendment profiling will lead to pervasive overturning of executive determinations is remote. Rather, the alternative rule of categorical deference to law enforcement justifications presents the more immediate risk—that even investigations significantly burdening speech or association, or aimed at the suppression of expression, will altogether escape First Amendment scrutiny.

A third objection to heightened scrutiny is rooted in concerns over practical administrability. Specifically, this concern centers on the idea that law enforcement needs clear, consistent rules when making decisions about whom and how to interview, and that narrow tailoring requirements would force agencies (or even individual agents) to make complicated balancing calculations whenever a First Amendment interest is implicated. The Supreme Court itself has pointed to the need for "readily administrable rules" in law enforcement contexts, especially where decisions are made on the spot.[302] Some courts and commentators have expressed concern that because the

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[297] *See, e.g.*, Socialist Workers Party v. Att'y Gen., 510 F.2d 253, 255 (2d Cir.) (per curiam), *rev'd in part*, 419 U.S. 1314 (1974) (Marshall, J.).

[298] *See* Presbyterian Church v. United States, 752 F. Supp. 1505, 1513-16 (D. Ariz. 1990) (holding that the government demonstrated a "significant and intimate relationship between the conduct" and a compelling government interest when it secretly recorded a church's services).

[299] Tabbaa v. Chertoff, 509 F.3d 89, 106 (2d Cir. 2007).

[300] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2727 (2010).

[301] Harlow v. Fitzgerald, 457 U.S. 800, 807, 813, 819 n.34 (1982).

[302] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001).

First Amendment protects such a wide range of expression and association, heightened scrutiny requirements would force investigators to assess innumerable circumstances potentially implicating First Amendment rights.[303] Such considerations might favor a clear rule holding law enforcement to account only for investigations without a legitimate purpose—and deferential review of such investigations rather than heightened scrutiny.

Indeed, the distinction between overbreadth and permissible First Amendment profiling is contextual and fact-specific, and therefore often complex.[304] Law enforcement agencies can reduce the uncertainty by adopting more concrete guidelines to instruct officers on questioning decisions involving First Amendment concerns; the border officer charged with interviewing travelers would not be left alone to ruminate, in the heat of the moment, whether an interview would be "narrowly tailored," but to implement practical agency rules devised in response to constitutional requirements.[305] Although such guidelines would not eliminate line-drawing questions, they would reduce uncertainty for law enforcement agents. And the judicial doctrines discussed above, such as the qualified immunity defense, already protect officers from second-guessing of reasonable decisions.

More fundamentally, a court's decision to adopt a deferential bright-line rule to ensure "administrability" is at bottom a judgment that the interest in clarity trumps the harm to individuals potentially subject to abuses.[306] It is unsurprising that decisions favoring clarity for law enforcement officers over competing liberty concerns often include language discounting the severity of the civil liberties problem at issue. Thus, the *Laird* Court declared full confidence that the political branches of government would remedy any actual abuses by the military,[307] *Branzburg* opined that the press was not vulnerable

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[303] *See, e.g.*, United States v. Ickes, 393 F.3d 501, 506 (4th Cir. 2005); Reporters Comm. for Freedom of the Press v. Am. Tel. &Tel. Co., 593 F.2d 1030, 1059-60 (D.C. Cir. 1978); Jabara v. Kelley, 476 F. Supp. 561, 572 (E.D. Mich. 1979), *vacated on other grounds sub nom.* Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982).

[304] *See supra* notes 192-98 and accompanying text.

[305] In the border context, for instance, the CBP might impose stricter rules for interviews longer than a certain period of time or for inquiries into religious or political activities, such as requirements of individualized suspicion, advance supervisory approval, and consultation with agency counsel. Moreover, agency directives, such as the one at issue in *Tabbaa*, do not require spur-of-the-moment decisions by individual officers.

[306] *See Atwater*, 532 U.S. at 366 (O'Connor, J., dissenting).

[307] Laird v. Tatum, 408 U.S. 1, 15-16 (1972).

to abuse,[308] and the Seventh Circuit court that dismantled the Chicago consent decree proclaimed that "[t]he era in which the Red Squad flourished is history."[309] Courts less sanguine about the tendency of law enforcement agencies to respect individual rights—and more attuned to the real stigmatic costs and chilling effects on communities subject to First Amendment profiling—should rather conclude that meaningful judicial review is a necessary protection against government overreaching.

CONCLUSION

Law enforcement interviews in the terrorism context involve intrusion and stigma that the existing literature has not recognized or explored. As overt and highly personal encounters between individuals in the U.S. Muslim community and law enforcement, interviews can shape individuals' and communities' very sense of belonging. Where interviews result from First Amendment profiling, they are especially likely to stigmatize communities and chill First Amendment–protected expression and association. Moreover, such interviews carry a particular risk that improper considerations influenced the scope of the investigation, even where law enforcement did not intend to suppress speech. In light of the suppression and overbreadth concerns in investigations triggered by protected expression, I have argued that courts should apply heightened scrutiny to provide some accountability in FBI and CBP interviews—and that existing First Amendment doctrine provides a foundation for such review.

First Amendment challenges in this context will not be easy for plaintiffs. Before a case even gets to court, individuals must overcome the chilling effects of interviews and submit themselves to the additional public exposure of a lawsuit. That chilling effect conundrum—those who are most chilled by an investigation are least likely to challenge it—will screen out a great many claims at the very outset. Those who do sue must establish standing according to the exceptions courts have carved out after *Laird*, convince a court to apply heightened scrutiny, and persuade the court not to defer to law

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[308] Branzburg v. Hayes, 408 U.S. 665, 706 (1972); *see also* Zurcher v. Stanford Daily, 436 U.S. 547, 566 (1978) (noting that the few reported searches of newspaper offices in the recent past "hardly suggests abuse").

[309] Alliance to End Repression v. City of Chicago, 237 F.3d 799, 801 (7th Cir. 2001); *see also Atwater*, 532 U.S. at 353.

enforcement justifications on the facts of their case. They must also overcome additional barriers facing all civil rights plaintiffs, such as the Court's new "plausibility" pleading standard[310] and restrictive standing doctrine in claims for injunctive relief.[311]

Even under these restrictive conditions, some plaintiffs challenging First Amendment profiling in interviews may prevail. Those with the greatest likelihood of succeeding, of course, are those who can establish significant harm with the least persuasive government justifications. Plaintiffs who can demonstrate a combination of stigma and chilling effects plus some further evidence of tangible harm stand the greatest chance. In the case of CBP interviews, lengthy detentions and additional screening measures at the border might suffice to establish such tangible harm. In the case of FBI interviews, such harm might include reputational or economic injuries incurred where law enforcement sought interviews in highly public contexts; where organizations were the target of numerous interviews conducted of other individuals; or where interviewees suffered additional consequences from First Amendment profiling, such as inclusion on a watch list, along with interviews.

In addition, courts will be most persuaded by challenges to interviews where the relationship to actual security threats is so attenuated as to suggest law enforcement decision-making tainted by possible hostility or group-based generalizations—even without a suppression purpose. While the court in *Tabbaa* declined to find for plaintiffs, the same court might have ruled for plaintiffs had the threat information been even weaker—say, information that suspects might be gathering at Islamic conferences in general without any evidence pertaining to the particular conference in question. Similarly, courts might reject stigmatizing interviews triggered by political letters to the editor, statements in newspapers, or postings on a Facebook page, where there is no suggestion of violence.

Although legal challenges to First Amendment profiling will not be easy, First Amendment freedom of speech and association doctrine offers potential redress for individuals subject to onerous interviews where there is strong evidence of law enforcement overreaching.

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[310] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

[311] City of Los Angeles v. Lyons, 461 U.S. 95, 105-12 (1983).