

Terror and Tolerance: Criminal Justice for the New Age of Anxiety

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The U.S. criminal justice system has been characterized by substantive legislation criminalizing more conduct, and providing for more severe penalties, than the system could enforce or impose. Overcriminalization has been limited in part by executive discretion, and in part by constitutional and legislative constraints based on respect for privacy. The system is now challenged by subnational groups, and even individuals, who pose asymmetrical threats of mass casualty terrorism, such as the attacks perpetrated on September 11, 2001. The potential means of preventing future attacks all invade informational privacy. History teaches that governments will not permit principles such as privacy to endanger national security. It follows that we must either accept a system that relies solely on official discretion to limit the application of an overbroad and draconian substantive criminal law, or devise a new model that protects individual autonomy without relying heavily on respect for informational privacy. This essay proposes a move from informational privacy to substantive tolerance, enabling individuals to act freely but not secretly. The turn to tolerance is defended on both liberal and conservative grounds, and then illustrated by reference to national identity cards, firearms tracking, and drug prohibition.

*They are nothing now but names assigned to
Anguish in others, areas of grief.
Many have perished; more will.¹*

I. INTRODUCTION

We have encountered times that are paradoxically both complacent and desperate. It would appear that in our foreseeable future, however one might feel about this state of affairs, the vast majority of an increasingly cosmopolitan global populace will go on getting rich, wise, and jaded, while a very small percentage of malcontents will cause trouble to the very limit of their capabilities. I have little doubt that terrorism, as a method of political struggle or religious expression, will pass from the scene within a generation. The question is at what price, and in what currency?

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¹ W.H. AUDEN, *The Age of Anxiety*, in W.H. AUDEN COLLECTED POEMS 342, 351 (Edward Mendelson ed., 1976). Cf. HOWEL RAINES ET AL., PORTRAITS 9/11/01: THE COLLECTED "PORTRAITS OF GRIEF" FROM THE NEW YORK TIMES (2002).

One might begin to assess this price by considering the various fantasies at large among the interested. There is, to begin with, the liberal fantasy, in which the traditional forms of law enforcement, updated a bit to deal with current circumstances, meet the test and nothing really important changes. There is, in the second place, the conservative fantasy, in which the palpable threat of terrorism finally delivers the effective ability to enforce everything in the criminal code, completely yet selectively.

I regard both of these positions as fantasies, and yet in many quarters these are regarded as the standard positions, the beginnings of debate. Much of what occupies current attention, quite justifiably, is the present effort to avenge, and if possible to prevent a recurrence of, the murders committed on September 11, 2001. The current focus on a single source of terrorism—Islamic fundamentalism—however urgent, is a rather distorted vision. The ability of committed fanatics to kill mass numbers is now a fact of life (and death). The question is not whether this is so, or whether this fact can be made to go away by killing the al Qaeda membership, root and branch, if that be possible. The question is how to reorganize civil society so as to prevent—and this is an important adverb—absolutely—mass murder. Al Qaeda is not the only group extant prepared to commit mass murder for supposed causes; and there are more such groups in the offing.² Leaving that aside, we have reached a technical state where even a disaffected individual can kill a great many persons for no better reason than whim.³

The liberal fantasy, then, is a dead letter. Justly so; for the supposedly liberal regime upon which the current crises are overlaid was never quite so liberal as supposed. Reasonable citizens, then, have two choices. One is to embrace the authoritarian and discriminatory conservative fantasy, at once as foreign to our traditions as it is odious in its own right. The other alternative is to discover, articulate, and defend a new kind of free society, one based not on privacy but on tolerance. My thesis is both descriptive and normative. As a descriptive matter, I predict that our society will move toward a relationship between the state and the individual that is characterized by less informational privacy, and more behavioral autonomy. As a normative matter I defend this realignment of our values and suggest that the sooner the transformation can be completed, the better.

The argument is legal and political, but the themes are literary and historical. The defenders of liberal democracy realize now, after the long struggle with Soviet Communism, that the world has not been rid of dangers, and that indeed our new challenges may be more sinister, and more stubborn, than the old ones. In this, our epoch resembles the 1940s, when, following the epic struggle against Hitler, the liberal West found itself threatened once again by the Cold War and the numbing risk that the political conflict might be resolved—or at any rate ended—by the use of nuclear weapons.

² See *infra* notes 21–26 and accompanying text.

³ See, e.g., James Brooke, *Final Calls Add to Anguish Over Korean Subway Fire*, N.Y. TIMES, Feb. 20, 2003, at A8 (suicide-arsonist killed 125 with more injured and missing).

I shall try to draw some useful inferences from the experience of the 1940s. In the United States, for example, liberty was long understood as best protected by a federal system with a strictly limited central government. The Depression and the war changed all that, and both the Supreme Court and political culture more generally turned to procedural limits on public authority, both state and federal, as the best defense against a larger and more powerful government. It is time to move the lines of liberty's defenses once again, this time away from procedural safeguards built on the idea of informational privacy and toward substantive freedom to act freely but not secretly.

My heroes, then, are Churchill, Roosevelt, and Marshall, who rallied the West against Hitler and then Stalin, without permitting their own societies to slide into totalitarianism. The chorus will be played by W.H. Auden, who saw quite clearly how much was lost during the war and its aftermath, but never gave up his revulsion at political oppression and who captured many of the most tragic choices of the times in memorable language.⁴

Before we turn to how the society and its law are likely to change, we need to take stock of the criminal justice system as it stood on September 11, 2001. The more clearly we see how the system operated in the twentieth century, the fewer tears will be shed over its impending transformation. Part II, therefore, describes the criminal justice system's *status quo ante*. Part III sets forth the context of the present dilemma, laid out as three plain facts: we face asymmetrical threats of mass destruction, proactive law-enforcement necessarily invades privacy, and governments do whatever is necessary to protect national security. Part IV explains why neither conventional liberal, nor conventional conservative, responses to these facts are tenable. Part V puts forth a revised model of the criminal justice system, in which discretion and surveillance are limited not by procedural conceptions of privacy but by substantive conceptions of tolerance. Prudent liberals should recognize that the *status quo ante* was never very liberal, and principled conservatives should realize that guarantees of tolerance are both the best way to win, and the only way to deserve, security's demand for major incursions on informational privacy. Part VI considers some illustrative examples of the transformation I have in mind—national identity cards, firearms tracers, and drug decriminalization. In each instance I suggest that security from terror justifies curtailments of informational privacy, and that the required reductions in privacy depend, normatively and politically, on firm assurances of substantive tolerance.

⁴ For biographies of Auden, see generally CHARLES OSBORNE, *W.H. AUDEN: THE LIFE OF A POET* (1980); RICHARD DAVENPORT-HINES, *AUDEN* (1995).

II. THE *STATUS QUO ANTE*: CRIMINAL JUSTICE BEFORE SEPTEMBER 11, 2001

*Lies and lethargies police the world
In its periods of peace.*⁵

The American criminal justice system has three key, distinctive interlocking features. The first is overcriminalization.⁶ Not only are many harmless or trivially harmful acts made crimes,⁷ but harmful wrongdoing that all agree should be criminal is made punishable by draconian prison terms.⁸ Universal enforcement of laws in the first category would bring the force of the criminal law down on millions of people in upper socioeconomic levels, with the collateral consequence of energizing political opposition to the existence of the laws. Universal imposition of the penalties in the second category would require hundreds of billions of dollars for the operation of an even larger gulag than we now maintain. Both vice laws and “tough-on-crime” sentences have defenders, but the undeniable fact that both are enforced only rarely relative to their formal applicability belies the tired arguments on their behalf.

Thus the second key feature of the system is pervasive official discretion.⁹ Middle-class white parents do not want to see their children jailed for marijuana use, any more than California’s legislators want to vote the taxes required to incarcerate every three-time loser for a quarter of a century. Both parents and legislators are spared the contradictions between their commitments by a policy of discretionary enforcement. So long as executive-branch discretion operates to nullify overcriminalization, American moralists can have their cake and eat it too.

The third is the prominent place of informational privacy in the limits on official discretion. The Fourth and Fifth Amendment limitations on law enforcement reflect a far greater concern with informational privacy than with security from coercion.¹⁰ Moreover, political opposition to expanded law-enforcement powers, even when such

⁵ AUDEN, *supra* note 1, at 353.

⁶ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (“American criminal law, federal and state, is very broad; it covers far more conduct than any jurisdiction could possibly punish.”).

⁷ I am in general sympathy with the arguments made by J.S. Mill’s *Essay on Liberty*, although I think that the harm principle itself needs to be mediated by more practically effective institutional rules and practices. See Donald A. Dripps, *The Liberal Critique of the Harm Principle*, CRIM. JUST. ETHICS Summer/Fall 1998, at 3. Whatever moral limits on the criminal law one recognizes, however, it is very difficult to justify criminal prohibitions of adult marijuana use or of consensual sexual relations between adults in private.

⁸ See, e.g., FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA (2001) (study of California’s three strikes law).

⁹ For the classic study, see KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

¹⁰ See, e.g., William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020 (1995) (arguing for criminal procedure to be more focused on force and coercion and less on information gathering).

powers might be granted within the limits of the Fourth and Fifth Amendments, typically relies on the appeal of privacy to counter the government's request for expanded powers.

As Professor Stuntz has demonstrated the most thoroughly, these three features of the criminal justice process are thoroughly intertwined.¹¹ Legislators tolerate overcriminalization because they know that discretionary enforcement will shield most of the technically liable from actual punishment.¹² Police and prosecutors know that their discretion is tolerated so long as it does not offend powerful political constituencies. Discretionary enforcement gives both police and prosecutors great practical power, a power that includes the ability of prosecutors to make functionally coercive plea offers. And legislatures know that overcriminalization facilitates these same coercive offers.¹³

Professor Stuntz is not entirely uncomfortable with this arrangement,¹⁴ but liberals should be rather less equivocal about this Kafkaesque structure. Discretion

¹¹ See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 58–59 (1997):

Federal law and practice is where overcriminalization and oversentencing seem most prevalent—and, not coincidentally, that is also where defendants with resources are concentrated (which makes overcriminalization especially useful from the government's perspective). Yet a version of the same phenomenon occurs on a smaller scale at the state level, and not only to wealthy defendants. Criminal sodomy laws, where they remain on the books, serve as useful devices for extracting guilty pleas in sexual assault cases. The same is probably true of marijuana laws in jurisdictions where those laws go largely unenforced; such unenforced prohibitions may be used as vehicles for prosecuting people suspected of other, more serious offenses. Those are examples of legislative passivity, of broadening criminal liability by leaving on the books prohibitions that once were taken seriously but no longer are. Other examples of state-law substantive manipulation are more straightforward. Facing an Eighth Amendment proportionality challenge, Michigan defended its high mandatory sentences for cocaine possession as a means of punishing distribution without having to prove it. . . . Like unenforced crimes used to prosecute more traditional offenses, these practices use substantive law to evade what would otherwise be expensive criminal procedure requirements.

The greater the burdens these requirements impose, the more the government gains from following this strategy. . . . At the margin, every pro-defense procedural rule raises the gain to the government from overcriminalization. (footnotes omitted)

¹² See Stuntz, *supra* note 6, at 554 (“[I]n any regime in which politically accountable prosecutors can pick their cases, their primary political incentive is to charge people the public wants charged.”).

¹³ *Id.* at 510 (“Prosecutors are better off when criminal law is broad than when it is narrow. Legislators are better off when prosecutors are better off. The potential for alliance is strong, and obvious.”).

¹⁴ See William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1834 (1998) (“Poor urban communities suffer a disproportionate share of the cost of the drug trade, and though some of that cost is caused by criminalization, some of it is caused by the drug trade itself. Legalization would, in effect, abandon those communities to their fate.”). If one believes that “most” should be substituted for the first “some” in the quoted sentence, however, present enforcement patterns lose any patina of plausibility.

rarely directs unpleasant consequences *up* the socioeconomic ladder, and it never does so for very long. Pushed by a lack of educational and employment opportunities, and pulled by the huge profits that can be made in the trade, many members of racial minorities end up accepting the risks of low-level drug dealing. Whether they have an equal number of Caucasian counterparts we shall never know, because drug enforcement resources are not directed at whatever drug transactions occur in the privacy of the home in “nice neighborhoods.” We do know that social science data indicate the white and black usage rates for marijuana and cocaine are nearly identical, but that blacks are five times more likely than whites to be convicted of drug offenses.¹⁵ We know also that nationwide, roughly a third of the young black men in our big cities have come under the control of the criminal justice system.¹⁶

The present arrangement thus profoundly offends both Liberty and Equality—no easy feat. Millions of law-abiding folk refrain from pleasures such as smoking marijuana or employing prostitutes, and thus lose the liberty to engage in private conduct that poses only very remote threats of external harm. The millions who defy the government by violating the same laws are effectively screened for prosecution along the lines of wealth and race. Whatever else this may be, it is not liberalism. Nor does our criminal justice system reflect, in any positive ways, the values of conservatives. The only virtue that could possibly be ascribed to it is that the alternatives might be worse.

This basic arrangement is likely to change in the wake of the new urgency with which we now regard the threat of terrorism. We should not regard such changes as suspect *per se*. On the contrary, liberals at least should see in the current crisis the opportunity for making our society both fairer and freer.

III. THREE PLAIN FACTS

*New Machiavellis, flying through the air,
Express a metaphysical despair,
Murder their last voluptuous sensation,
All passion in one passionate negation.*¹⁷

I begin by recognizing the unpleasant realities of the current situation. The first of these realities is that we have entered a new era of asymmetrical threats, in which individuals and subnational organizations harbor murderous grudges but lack a sufficient stake in peace to be deterred by the prospect of retaliation. The second fact is that in this new age of undeterrable threats, the best preventive measures necessarily

¹⁵ See MICHAEL TONRY, *MALIGN NEGLECT* 109–11 (1995); REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION, *THE REAL WAR ON CRIME* 115 (Steven Donziger ed., 1996).

¹⁶ See DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 190 (1999).

¹⁷ W.H. AUDEN, *In Sickness and in Health*, in W.H. AUDEN COLLECTED POEMS, *supra* note 1, at 247, 248.

reduce the scope of informational privacy. The third basic fact we have to reckon with is that democratic governments do whatever they can to protect their peoples; deontological notions of individual right will be disregarded by the authorities. All three claims are purely descriptive. I do not welcome the coming world of pervasive surveillance. But facts, as Justice Holmes once remarked, are stubborn things. These three facts together suggest that we are destined to move in the direction of far more pervasive surveillance. Many thoughtful people oppose this transition. My argument here maintains that “whether” is not the issue. The issues are “how” and “how fast.” Let us turn, first, to the dimensions of the threat.

A. *Asymmetrical Threats*

*Clutching a little case,
He walks out briskly to infect a city
Whose terrible future may have just arrived.*¹⁸

The Soviet Union threatened the United States and its allies with an infinitely greater arsenal than al Qaeda could possibly acquire. Yet al Qaeda inflicted more casualties on the United States than the Soviet Union. The explanation for this is simple. The Soviet Union not only had the ability to threaten the assets of the West, it also had assets of its own that it wished to protect. Dickey as it may be have been on a few occasions, nuclear deterrence worked in that instance.

Even before 9/11 it had become clear that terrorism was changing in two highly dangerous ways. First, terrorists were increasingly willing to inflict mass casualties; and second, terrorism was becoming the domain of subnational groups and even individuals.¹⁹ Like a nation-state possessing a strategic nuclear arsenal, terrorism now threatens to inflict mass casualties. Unlike a nation-state, however, the terrorist threat is asymmetrical. The terrorists can threaten the assets of their enemies, but they have no assets—not even their own lives—that they regard as more valuable than their ability to inflict casualties.²⁰ The point is widely understood and I shall not belabor it. The danger, however, is not confined to Islamic fundamentalists.

Anyone who reads the newspapers realizes that terrorists sprung up in many places and cultural contexts. We know, for instance, that the credible threat of the death penalty was not sufficient to deter all potential *domestic* terrorists, such as Timothy McVeigh. To take another example, the most prominent actual use of chemical and biological weapons by terrorists was committed not by al Qaeda, but by

¹⁸ *Id.* at 147 (*Gare du Midi*).

¹⁹ See generally BRUCE HOFFMAN, *INSIDE TERRORISM* (1998).

²⁰ See, e.g., Nicholas Lemann, *The War on What? The White House and the Debate About Whom to Fight Next*, *NEW YORKER*, Sept. 16, 2002, at 36 (quoting Stephen Van Evera: “I think this could be the highest threat to our national security ever: a non-deterrable enemy that may acquire weapons of mass destruction.”).

Aum Shinri, a Japanese cult.²¹ Terrorism in Palestine is nothing novel; in 1946 the Irgun blew up the King David Hotel, killing 91 people.²²

We are apt to see more such fanatical groups and individuals. In the first place, the world's population is growing apace. Global population is now estimated in excess of six billion, having nearly doubled in the last thirty years.²³ There is no reason to think that the frequency of political and religious fanaticism—not to mention the frequency of mental illness—has diminished. It has been estimated that across cultures at least .1% of the general population suffers from schizophrenia at any given time;²⁴ that would imply that we are sharing the planet with six million schizophrenics. It is estimated that sociopaths make up 3-4% of the U.S. male population.²⁵ If that percentage obtains globally, we are sharing the planet with ninety million sociopaths, to count only the males.

As the world economy grows, the resources available to each generation increase. That includes the resources available to ideologues with inheritances, such as bin Laden, as well as to operators in the underground economy, such as that for illegal drugs. What goes for resources goes for technical sophistication, as terrorists acquire new skills without shedding old ideologies. None of the September 11 hijackers, for example, made the transition from flight manuals to Locke, Kant, or Mill. We need to assume that a proliferating number of subnational groups will have both the capability and the intention to use mass murder for political or religious purposes (or, hardest of all to track and prevent, for nihilistic or psychotic purposes).²⁶

The plurality of potential sources of terrorism suggests that policies directed toward reducing the motivations (never mind forcibly eliminating the capabilities) of terrorists will never wholly succeed in eliminating the threat of catastrophe. A comprehensive Middle East peace settlement, for example, would do nothing to reduce the terrorism potential of, say, Chechnya. Indeed, it is entirely possible that a

²¹ See U.S. OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 9 (2002) (“As the 1995 Tokyo subway attack revealed, even sophisticated nerve agents are within the reach of terrorist groups.”) [hereinafter NATIONAL STRATEGY FOR HOMELAND SECURITY].

²² See Theodore P. Seto, *The Morality of Terrorism*, 35 LOY. L.A. L. REV. 1227, 1228 (2002).

²³ See POPULATION REFERENCE BUREAU, 2002 WORLD POPULATION DATA SHEET 2 (2002), available at <http://www.prb.org> (last visited Oct. 14, 2003).

²⁴ According to the World Health Organization: “there is considerable variation in the total number of cases (i.e. new cases occurring each year plus the chronic cases) in the general population which ranges from 1 to 7.5 per 1000 population.” See RANGASWAMY THARA ET AL., SCHIZOPHRENIA: YOUTH'S GREATEST DISABLER 19 (2001), available at <http://www.who.org> (last visited Oct. 14, 2003).

²⁵ See Linda Mealey, *The Sociobiology of Sociopathy: An Integrated Evolutionary Model*, 18 BEHAV. & BRAIN SCI. 523 (1995).

²⁶ See David Johnston & James Risen, *Lone Terrorists May Strike in the U.S. Agencies Warn*, N.Y. TIMES, Feb. 23, 2003, § 1, at 14 (“Many lone extremists have no links to conventional terrorist groups,” the bulletin of the Federal Bureau of Investigation said. “In fact, F.B.I. analysis suggests that psychological abnormalities, as much as devotion to an ideology, drive lone extremists to commit violent acts.”). The potential is well-illustrated by the acts of a lone arsonist on a Korean subway. See James Brooke, *Disaster in Korea*, N.Y. TIMES, Feb. 23, 2003, § 4, at 2 (“The toll was 133 dead, 146 injured, and scores missing.”).

Middle East settlement would *breed* terrorism, as both Arab and Jewish extremists react against the acceptance of unappetizing peace terms.

As to the capabilities side of the equation, the frequency of very dense population concentrations, coupled with the energy or toxins stored in common engineering systems, will continue to offer those bent on mass murder potential targets.²⁷ Ghastly as the September 11 attacks were, four jetliners crashed into alternative targets might have inflicted considerably higher casualties. Think about the crowds packed into small spaces for football games, NASCAR races, and rock concerts. As to future attacks, chemical, biological, and radiological weapons are not beyond the technical skill of well-funded private persons.²⁸ Nor can we exclude the possibility that terrorist groups may gain access to the strategic weapons of a current or former nation state.²⁹

More mundane methods can work consequences a little less dreadful.³⁰ The Washington area snipers killed ten and terrorized millions allegedly using an old car and a single rifle.³¹ Had they refused to communicate with the authorities and kept on killing, who can say how many victims they might have slain? Teams of terrorists might easily employ similar methods with more professional discipline.

A commonplace among officials charged with antiterrorism policy is that the more one knows the more one is afraid. Fear is not the same thing as impotent terror.

We have means of defense. The critical recognition, however, is that retaliation is *not* defense. The goal must be to prevent terrorist attacks, realizing that even one successful plot could cost thousands of lives—perhaps more.

B. *Proactive Law Enforcement Invades Informational Privacy*

*Was he free? Was he happy? The question is absurd:
Had anything been wrong, we should certainly have heard.*³²

We cannot prevent terrorist attacks unless we know something about them. Precise tactical intelligence about specific attacks can enable the authorities to defeat

²⁷ See, e.g., NATIONAL STRATEGY FOR HOMELAND SECURITY, *supra* note 21, at 7–8 (“Americans congregate at schools, sporting arenas, malls, concert halls, office buildings, high-rise residences, and places of worship, presenting targets with the potential for many casualties. Much of America lives in densely populated urban areas, making our major cities conspicuous targets.”).

²⁸ See, e.g., *id.* at 9.

²⁹ See *id.* (“To get around these significant but not insurmountable challenges [acquiring sufficient fissile material and technical expertise to fashion a nuclear explosive], terrorists could seek to steal or purchase a nuclear weapon.”).

³⁰ See *id.* (“Terrorists, both domestic and international, continue to use traditional methods of violence and destruction to inflict harm and spread fear.”).

³¹ See Carol Morello et al., *Pair Seized in Sniper Attacks*, WASH. POST, Oct. 25, 2002, at A1 (“A military-style rifle allegedly seized from two suspects in the Washington area sniper attacks was used in at least 11 of the 13 shootings, authorities announced last night, signaling the end of a three-week siege in which a seemingly faceless gunman terrified the region by killing indiscriminately.”).

³² W.H. AUDEN, *The Unknown Citizen*, in W.H. AUDEN COLLECTED POEMS, *supra* note 1, at 201.

such attacks directly.³³ More general strategic intelligence about terrorist groups and their intentions can enable the authorities to arrest, deport, or kill those planning attacks that have not reached the stage of tactical details.³⁴ Even in conventional military combat, knowledge about the other side's capabilities and intentions is very valuable. In the anti-terrorism context, in which the enemy masquerades as law-abiding private persons, information is more than valuable; it is essential.

As the criminal justice system turns from a reactive to a proactive approach—from deterrent penalties meted out for past crimes toward preventing attacks before they occur—informational privacy is bound to suffer. Every weapon in the counter-terrorism arsenal—searches, detention, interrogations, informants, electronic surveillance, visual surveillance, analysis of bank records and telephone records—increases what is known by the authorities. In the considerable but decidedly unpublic record of counter-terrorism successes, each of these methods has shown some utility.

The plot to bomb the Los Angeles airport on New Year's Eve 1999 was detected when a border search turned up explosives.³⁵ McVeigh was identified as the Oklahoma City bombing suspect while under arrest on a weapons charge following a traffic stop that was very likely pretextual.³⁶ Information obtained from an al Qaeda fighter held prisoner has produced, apparently, useful information.³⁷ Informants, again apparently, played a key role in exposing a supposed terrorist cell in Buffalo, New York.³⁸

³³ See, e.g., NATIONAL STRATEGY FOR HOMELAND SECURITY, *supra* note 21, at 15 (“Terrorism depends on surprise. . . . Without it, the terrorists stand a good chance of being thwarted by authorities, and even if they are not, the damage from their attacks is likely to be less severe.”).

³⁴ See *id.* at 17 (“The United States has at its disposal numerous tools that allow for the disruption of terrorist acts in the United States and the detention of the terrorists themselves. These tools can be deployed as soon as the analysis uncovers evidence of terrorist planning.”). The vague and euphemistic terminology is itself rather revealing.

³⁵ See, e.g., Frontline, *Ahmed Ressam's Millennium Plot*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/trial/inside/cron.html> (last visited March 25, 2003). Ressam concealed 100 pounds of explosives in the trunk of a rented car. “Upon his arrival at Port Angeles, a U.S. customs agent became suspicious of his hesitant answers to her questions, and she asked for identification. Agents began searching the car. As they discovered the explosive materials—which they at first took to be drugs—in the trunk of the car, Ressam tried to run away. He was caught and arrested.”

³⁶ See, e.g., *Oklahoma Bombing Grand Jury Final Report*, Dec. 30, 1998, available at <http://newsmax.com> (last visited Mar. 25, 2003):

Trooper Hanger initiated a traffic stop of a 1977 Mercury Marquis for failure to display a proper license plate. During this routine stop, the trooper became suspicious of the driver, Timothy McVeigh, removed him from his vehicle and placed him in the trooper's car. McVeigh was subsequently arrested for failure to display a current license plate, failure to maintain proof of insurance, unlawfully carrying a weapon, and transporting a firearm.

³⁷ See, e.g., Romesh Ratnesar, *Confessions of an Al-Qaeda Terrorist*, TIME, Sept. 23, 2002, at 34.

³⁸ See, e.g., *Terrorism: The Hunt for Sleeper Cells*, Sept. 25, 2002, available at <http://bulletin.ninensn.com> (last visited Mar. 25, 2003) (“The Justice Department credited unnamed sources inside Lackawanna's Yemeni community with telling the FBI that the men had been overseas.”).

Attacks we have failed to prevent likewise suggest the conflict between proactive enforcement and informational privacy. Zacharias Moussaoui, a member of the September 11 conspiracy, was detained for immigration violations before the attacks took place. Agents of the FBI wanted to search his computer, but supervisors in the Bureau concluded that the agents could not satisfy either the traditional probable cause standard or show probable cause to believe that Moussaoui was an agent of a terrorist organization so as to fall under the laxer standards of the Foreign Intelligence Surveillance Act (FISA).³⁹ Whether such a search would have led to the frustration of the plot is unknowable.⁴⁰ It might have—but only by invading Moussaoui’s privacy and the privacy of many other similarly-situated individuals in the future, some quite innocent.

Recognizing the conflict between privacy and security from terror is far from a novel insight. The balance, however, has shifted decidedly. For a long time it was thought that terrorists had political disincentives to inflicting mass casualties, and that potential terrorists lacked either the means or the resolve to stage attacks on U.S. territory. The 1993 World Trade Center bombing should have shaken these beliefs, but because that attack failed to inflict mass casualties the public mindset changed little.

September 11 did not change the *risk* that terrorists might inflict mass casualties. The day’s events, however, did change the willingness to accept that risk as a fact. The anthrax murders that followed connected the dots for anyone open to persuasion. It has become difficult to discount the possibility that, sooner or later, someone will make a potentially successful effort to kill hundreds of thousands. Hitler needed the apparatus of an industrialized, totalitarian state to commit murder on that scale. Private groups, perhaps even an individual acting alone, might be able to accomplish that today. And invasions of privacy offer the only possible means of defense against this threat.

³⁹ See, e.g., Stuart Taylor, Jr., *How Flawed Laws Help Terrorists and Serial Killers*, 34 NAT’L. J. Oct. 19, 2002, at 42. Whether the agents were correct in their interpretation of the applicable law is debated. Compare *id.* (arguing that neither FISA nor the Fourth Amendment permitted searching Moussaoui’s computer) with *A Sobering Picture*, WASH. POST, Sept. 28, 2002, at A22 (2002), available at WL 101064201 [hereinafter *A Sobering Picture*] (arguing that search was permissible under FISA). After a thorough review of the facts, a recent article concludes that “[h]owever the probable cause question is cast, when the evidence available to the Minneapolis office is totaled up, one may be struck by how little of it there was.” Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 971 (2003). Yet, as the author points out, given the severity of the threat, the reasonableness of going forward with the search seems apparent.

⁴⁰ See *A Sobering Picture*, *supra* note 39, at A22 (Moussaoui’s papers “contained crucial leads: phone numbers and names that could have linked him to two of the hijackers and to the Hamburg al Qaeda cell that planned the attacks.”).

C. *Governments are Ruthless*

*The dilemma that to fight Fascism you have to become fascist
yourself is now pretty generally realised.*⁴¹

To these grim realities I add a third: Governments, including, perhaps especially including, democratic governments, willingly sacrifice individual rights to protect public security.⁴² When the threat to public security is ordinary crime, the limited nature of the threat and the doubtful efficiency of repressive measures have sufficed to maintain at least some respect for informational privacy. Threats on the scale of the September 11 attacks are a different matter.

I shall illustrate this point by reference to the 1940s. Other historical examples could serve (the American Civil War period, the experience of Britain in Northern Ireland, and so on) but the '40s offer some uniquely instructive parallels. To begin with, the grim, even fierce, resolve generated by December 7, 1941 has obvious parallels to that generated by September 11, 2001. Second, the horrific scale of the political homicides of the 1940s gives us a good index of how officials respond to the threat of true catastrophes. Finally, if the period is close enough in time to our own that the technological context remains informative, it is far enough removed that partisan disputes have subsided while at least a degree of consensus has emerged on many issues.

There is, for instance, very widespread admiration for some of the principal Allied leaders of the war period. Winston Churchill held England in the war after the fall of France and while the Soviet Union remained in a nonaggression pact with Germany. His hatred of totalitarianism, whether Nazi or Communist, was lifelong and sincere, however poorly it may have coexisted with his colonialism.⁴³ Franklin Roosevelt prepared for the war before it arrived, and then made key decisions that made victory possible.⁴⁴ George Marshall planned the American war effort and, after

⁴¹ W.H. AUDEN, *THE PROLIFIC AND THE DEVOURER* 77 (1976) (The book is a fragment, written in 1939, but published only posthumously.).

⁴² See, e.g., Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 *YALE L.J.* 1011, 1044 (2003) (“When faced with serious threats to the life of the nation, government will take whatever measures it deems necessary to abate the crisis. Regardless of whether government *ought* to do so, history demonstrates that it *does*.”).

⁴³ Even Churchill’s iconoclastically critical biographer concludes “that he was a great man cannot be doubted, but his flaws too were on the same heroic scale as the rest of the man.” JOHN CHARMLEY, *CHURCHILL: THE END OF GLORY* 648 (1993).

⁴⁴ See, e.g., GERHARD L. WEINBERG, *A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II* 828–29 (1994):

President Roosevelt had guided the United States through the travails of the great depression and had given his people hope in desperate times. He had tried, but without success, to keep the country out of war by assisting others to defeat Germany and to stall off Japan. Driven into the war by the Tripartite Pact powers, he had set the basic priorities and aims in the great conflict: the defeat of Germany first, an engagement of American troops against the Germans in 1942, the double

the war, lent critical prestige to the proposal for the program of economic aid to Europe that came to bear his name.⁴⁵ Whatever the criticisms one might level at these figures, their places in history as key champions of liberal democracy in its hour of greatest peril seem secure. Roosevelt was a hero both to millions of ordinary people and to professional historians.⁴⁶ Churchill and Marshall each received the Nobel Prize.⁴⁷

When push came to shove each of these statesmen chose very harsh means to the end of waging war. All three accepted the policy of strategic bombing, i.e., making industrial operations targets of aerial bombardment. Given the imprecision of the available weapons this amounted to bombing cities as such.⁴⁸ The loss of civilian life was horrific, the majority of casualties being women and children.⁴⁹ Hiroshima and Nagasaki are the most salient examples, but comparable if not greater casualties were inflicted by conventional raids on Dresden and Tokyo.⁵⁰ In each of these cities conventional incendiaries had the effect of creating a firestorm, killings tens of thousands. After watching newsreel footage of bombed-out German cities, Churchill exclaimed “Are we beasts?”⁵¹ But he continued the practice of area bombing of urban centers.⁵² Marshall lent key support to the use of atomic weapons against cities.⁵³

thrust toward Japan in the Pacific, the direct thrust at Germany across the Channel, and the development of atomic weapons.

⁴⁵ See, e.g., ALLEN W. DULLES, *THE MARSHALL PLAN* vi–vii (1993).

⁴⁶ See, e.g., James Lindgren & Steven G. Calabresi, *Rating the Presidents of the United States: A Survey of Scholars in Political Science, History, and Law*, 18 CONST. COMMENT. 583, 589 (2001) (scholars ranked Roosevelt as one of only three “great presidents,” the others being Washington and Lincoln).

⁴⁷ Both prizes were awarded in 1953, Churchill’s for literature, and Marshall’s for peace. See *Lists of Laureates and Nationalities*, available at <http://www.nobel.se/search/nationalities.html> (last visited Oct. 16, 2003).

⁴⁸ See, e.g., WEINBERG, *supra* note 44, at 577 (“The choice, fairly obvious by early 1942, was either to abandon most bombing altogether or to make German cities, which were large enough to hit, the targets. In this situation, the London government opted for the latter alternative.”); *id.* at 580 (“[T]he Americans in February–March 1945 in the war against Japan made essentially the same decision the British had made three years earlier in Europe: rather than abandon bombing of distant targets altogether, they shifted to area bombardment of cities, burning them down one by one, beginning with Tokyo.”).

⁴⁹ See JOHN KEEGAN, *THE SECOND WORLD WAR* 433 (1989) (“Altogether some 600,000 German civilians died under bombing attack and 800,000 were seriously injured. Children represented some 20 percent of the dead and female deaths exceeded male by as much as 40 percent at Hamburg and 80 percent at Darmstadt, both cities where firestorms occurred. In the aftermath, privation added to the suffering caused by bereavement and homelessness. . . .”).

⁵⁰ See, e.g., RICHARD RHODES, *THE MAKING OF THE ATOMIC BOMB* 592–600 (1986).

⁵¹ See CHRISTOPHER C. HARMON, *ARE WE BEASTS? CHURCHILL AND THE MORAL QUESTION OF WORLD WAR II “AREA BOMBING”* (1991).

⁵² Although responsibility is debated, Rhodes for one concluded that “Winston Churchill instigated the Dresden raid.” RHODES, *supra* note 50, at 592.

⁵³ See *id.* at 687–88.

Roosevelt signed Executive Order 9066 authorizing the internment of Japanese-Americans in California. The policy ousted tens of thousands of American citizens from their homes and confined them behind barbed wire.⁵⁴ The administration defended the policy in court, and the Supreme Court refused to strike it down.⁵⁵ *Korematsu* has become notorious, a sort of anti-precedent.⁵⁶ I do not question that characterization of *Korematsu*; I merely reflect on how many generally decent people went along with the internment policy.

Conscription and censorship are standard features of democracies at war. Strategic bombing and race-based indefinite detention, however, go beyond the inevitable compromises of individual rights in wartime. My point is not to second-guess the figures responsible for terrible choices. My point, rather, is that when leaders—even leaders profoundly committed to liberal ideals of individual liberty, equality, and self-government—face genuine threats to national security, they put the categorical imperative in mothballs. If a policy helps to defeat a genuine threat to the nation's existence or to the lives of many of its citizens, leaders will adopt it—even if that means imprisoning or even killing blameless children.

Those who put these three plain facts together ought to realize that informational privacy is going to be greatly curtailed. The stock arguments of privacy proponents are (1) that privacy deserves priority over security; (2) that proposed privacy infringements will fail to promote security; and (3) that the cost of such measures outweighs any utility they may possess.⁵⁷ Arguments (1) and (3) have lost their credibility. Argument (2) is indeed plausible—frighteningly so—but even if true it will not prevent massive reductions in privacy.

Leaders do not know that monitoring, searches, informants and interrogations will prevent future attacks and they do not know that such measures will fail, but they do know that nothing else stands a chance of success. In the 1940s no one could be sure that strategic bombing would work (controversy on that score has never abated),⁵⁸ or that confining Japanese-Americans would prevent sabotage (it probably did not, because the people detained were loyal to begin with). Moreover, the futility argument supposes that eventually a terrorist attempt to inflict mass casualties will

⁵⁴ See, e.g., WEINBERG, *supra* note 44, at 494–95 (“Deprived of their rights and their property, these victims of fears aroused by Japanese actions, war hysteria and racial prejudice were herded into camps, called ‘relocation centers’, from which they were not released until late in the war.”).

⁵⁵ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁵⁶ See, e.g., JESSE CHOPER ET AL., CONSTITUTIONAL LAW 1167 (9th ed. 2001) (Commission on Wartime Relocation and Internment of Civilians concluded that internment policy was result of prejudice rather than military necessity; Congress passed, and President Reagan signed, legislation apologizing for the internment and paying reparations); see also Eric L. Muller, *Inference or Impact? Racial Profiling and the Internment's True Legacy*, 1 OHIO ST. J. CRIM. L. 103 (2003).

⁵⁷ See, e.g., American Civil Liberties Union, *National ID Cards: 5 Reasons Why They Should Be Rejected* (a position paper deploying each of these stock arguments), available at http://archive.aclu.org/issues/privacy/National_ID_Feature.html (last visited Oct. 16, 2003).

⁵⁸ See, e.g., ERIC LARRABEE, COMMANDER IN CHIEF: FRANKLIN DELANO ROOSEVELT, HIS LIEUTENANTS & THEIR WAR 605 (1987) (noting conflicting views on the success of strategic bombing).

succeed. When that occurs, the pressures on privacy generated by September 11 will be made much more urgent. Additional monitoring and surveillance measures would follow—to be followed by more yet if these in turn prove futile.⁵⁹

In such a cycle, those who resist broader government powers do so at the peril of being blamed for a subsequent terrorist strike. Those who support greater surveillance lose nothing politically if such measures fail. Those on record in opposition to proposals that might have prevented an attack stand to lose a great deal. The recriminations over Moussaoui's hard drive are illustrative.⁶⁰

Thus a key element in the present overcriminalization/discretion/privacy arrangement is in the process of erosion. The liberal fantasy is to preserve enough privacy that the basic model does not change. The conservative fantasy is to displace the privacy component, leaving only overcriminalization and discretion. I turn now to explain why thoughtful citizens, whether liberal or conservative, should turn away from these fantasies and begin the process of replacing the existing model in which the loss of privacy is compensated for by the end of overcriminalization.

IV. AFTER PRIVACY

A. *The Liberal Fantasy*

*How warped the mirrors where our worlds are made;
What armies burn up honour, and degrade
Our will-to-order into thermal waste;
What goods are smashed that cannot be replaced.*⁶¹

The position I have described as the liberal fantasy goes something like this: government currently has all the authority it needs to combat terrorism, and further encroachments on privacy are more likely to be abused than to prevent terrorism. The basic arguments, as previously outlined, are that privacy is of great value, that intrusive methods of investigation are unlikely to succeed, and that in any event their cost exceeds the expected benefit. With modest variations, this is the position taken by such groups as of the American Civil Liberties Union⁶² and the Cato Institute.⁶³

⁵⁹ See Gross, *supra* note 42, at 1091 (“Much like the need to gradually increase the dosage of a heavily used medication in order to experience the same level of relief, so too with respect to emergency powers: The perception may be that new, more radical powers are needed to fight impending crises.”).

⁶⁰ See, e.g., *Persons of the Year*, TIME, Dec. 30, 2002, at 34, available at 2002 WL 102387132 (news magazine names Coleen Rowley a person of the year for exposing FBI's failure to pursue the Moussaoui investigation).

⁶¹ W.H. AUDEN, *In Sickness and in Health*, in W.H. AUDEN COLLECTED POEMS, *supra* note 1, at 247.

⁶² See, e.g., American Civil Liberties Union, *Civil Liberties After 9/11: The ACLU Defends Freedom*, available at <http://www.aclu.org> (last visited Oct. 16, 2003).

⁶³ See, e.g., Timothy Lynch, *Breaking the Vicious Cycle: Preserving Our Liberties While Fighting Terrorism*, CATO INSTITUTE POLICY ANALYSIS, June 26, 2002, available at <http://www.cato.org/>

If the expected losses from future terrorist strikes remained on the level of ordinary crime, I would probably endorse this position. Privacy is valuable; it encourages free thought and free expression, and limits the reach of government power.⁶⁴ Surveillance is expensive and becomes less efficient the more widely it sweeps (limited to cases of antecedent suspicion the batting average will be high; applied to the general population, it will be minuscule).

When, however, the expected cost of unprevented crime includes the loss of entire cities, the standard liberal position becomes either untenable or fanatical. Anyone but a recluse casually yields informational privacy on a regular basis. If privacy were intrinsically good and this good were weighty, we would expect ordinary people to keep more of it. A privacy fanatic can say, without risk of falsification, that privacy is intrinsically good and so valuable that the deaths of thousands of innocents (*their* privacy being extinguished with their lives) are less important. If we value privacy as a means to such ends as free inquiry and the prevention of tyranny, however, the new prospect of terrorist use of weapons of mass destruction changes the calculus dramatically.

The remaining argument for the liberal fantasy is that governments can secure the benefits of surveillance without encroaching on the privacy of the general population.

For example, FISA provides lenient rules on government surveillance of agents of foreign powers.⁶⁵ A more mundane example is Title III of the 1968 Crime Control Act, which authorizes electronic surveillance but only to investigate an enumerated list of serious crimes.⁶⁶ The basic idea, which Professor Stuntz would extend to Fourth Amendment jurisprudence generally, is to permit greater intrusions on privacy when the offense is more, rather than less, serious.⁶⁷

The strategy of bifurcating the antiterrorism effort from conventional law-enforcement is appealing. But is it feasible? In the adjudicatory context, special

pubs/pas/pa-443es.html.

⁶⁴ For a classic expression of this view, see *United States v. White*, 401 U.S. 745, 762–63 (1971) (Douglas, J., dissenting):

Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse—a First Amendment value—may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance. Free discourse liberates the spirit, though it may produce only froth. The individual must keep some facts concerning his thoughts within a small zone of people. At the same time he must be free to pour out his woes or inspirations or dreams to others. He remains the sole judge as to what must be said and must remain unspoken. This is the essence of the idea of privacy implicit in the First and Fifth Amendments as well as in the Fourth. (footnote omitted)

⁶⁵ For a practical analysis of the showing required by FISA prior to the USA-PATRIOT Act, see Louis A. Chiarell & Michael A. Newton, “*So Judge, How do I Get that FISA Warrant?*”: *The Policy and Procedure for Conducting Electronic Surveillance*, *ARMY LAW*, Oct. 1996, at 25.

⁶⁶ 18 U.S.C. § 2516(1).

⁶⁷ See William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 *HARV. L. REV.* 842 (2001).

courts such as the proposed military tribunals pose little risk of infecting the general criminal justice system. The decision to proceed through special courts, however, is reactive, not proactive. Officials make the decision to proceed in special tribunals after the investigation is over. Confining proactive terrorism investigations poses a much more difficult challenge.

Bifurcation strategies might pursue one of three basic approaches. The first approach would be to limit new surveillance powers to certain classes of suspected offenses. The second would be to limit new surveillance powers to certain classes of suspects. The third approach would be to limit the time frame in which the government enjoys the use of broader powers. None of these strategies appear to be very promising.⁶⁸

Officials engaged in a proactive investigation may not know the precise scale of the threatened attack. The FBI, for instance, received what it regarded as credible information that al Qaeda planned attacks on the U.S. transportation sector. If such attacks aimed at causing the release of radioactive or toxic substances in a major urban area, they would threaten mass casualties and justify the most sweeping surveillance. The possible threats go down from there, ranging from the detonation of conventional explosives in tunnels or on bridges, to the hijacking of a passenger train, all the way down to mere vandalism.

If officials always postulate the worst-case scenario, the limitations on investigations directed toward non-catastrophic threats would be illusory. If the officials discount the worst-case scenario and accept stricter limits on surveillance, the worst-case scenario increases in probability. Unfortunately, precise tactical threat information is rarely available. Indeed the very point to launching more intrusive surveillance in response to a threat assessment is that the threat assessment is insufficiently precise to enable tactical intervention.

The connections between potential terrorist threats and the work-a-day criminal justice system pose a further challenge to bifurcation strategies based on scale-of-threat distinctions. Anti-terrorism includes the intelligence community, but it also necessarily involves traditional law-enforcement agencies such as the FBI, the ATF, and local police departments. A terrorism connection may show up in an investigation into immigration violations, firearms or explosives violations, or drug offenses.⁶⁹

The flip side of this coin is that a proactive terrorism investigation may generate evidence of murder, drug dealing, tax evasion or other mundane offenses. One can imagine operatives of the CIA disregarding such evidence as *infra dignatum*, but professional law-enforcement officers are another matter. The Supreme Court has

⁶⁸ For a thorough review of the difficulties attending bifurcation strategies, see Gross, *supra* note 42, at 1073–96. Professor Gross also takes up the possibility of limiting emergency powers geographically, an important possibility but one that does not pertain to the problem of cabinining the powers of domestic law enforcement agencies investigating terrorism within the United States.

⁶⁹ Recall that a state trooper, not an FBI agent, arrested McVeigh on traffic and weapons charges before he was identified as the Oklahoma City bomber. See *Oklahoma Bombing Grand Jury Final Report*, *supra* note 36.

never taken the step of excluding evidence lawfully obtained by police with an ulterior motive, such as drug-squad police stopping a vehicle for traffic infractions.⁷⁰ If an anti-terror investigation produces evidence of ordinary crimes it will be very hard to persuade police, prosecutors, or judges to turn a blind eye.⁷¹ In any event, there seems little chance that the courts will, at this late date, begin the process of trying to proportion search authority to the seriousness of the offense.⁷²

As for bifurcating investigations based on the identity of the suspects, existing law has attempted this approach with at best mixed results. The express limitations of FISA to agents of foreign powers, and the pretextual use of immigration laws for terrorism investigations, reflect the belief that foreign nationals pose the primary threat. The drift of current policy appears to be in the direction of subjecting “non-U.S. persons” to pervasive surveillance in the hope of maintaining pre-9/11 privacy levels for “U.S. persons.”

The basic strategy is problematic for a variety of reasons. The first is simply that limiting the scope of broader surveillance powers is dangerous. Even granting the assumption that Islamic fundamentalists pose the highest present risk of a catastrophic attack, some Islamic fundamentalists are either U.S. citizens or permanent residents. Moreover, if a regime bifurcated along these lines becomes well-established, we can expect Islamic fundamentalists bent on terrorism to recruit mercenary proxies, or to employ innocent dupes, to carry out attacks.

In the second place, as previously discussed, terrorism is not a Muslim monopoly.⁷³ Run “Zionist Occupation Government” through an internet search engine sometime. There are American Nazis, American Communists, black separatists, white supremacists, and so on. Notably, the investigation into the 2001

⁷⁰ See, e.g., *Whren v. United States*, 517 U.S. 806 (1996) (upholding stop of motorist by drug squad officers who had probable cause to believe traffic offense had been committed). Likewise the Court has refused to suppress evidence discovered by a search that was justified by the need to search for entirely different items. See, e.g., *United States v. Robinson*, 414 U.S. 218 (1973) (refusing to suppress heroin capsules found inside crumpled cigarette package after search incident to arrest for driving after revocation of defendant’s driver’s license).

⁷¹ Cf. Marc Rotenberg, *Privacy and Secrecy after September 11*, 86 MINN. L. REV. 1115, 1119 (2002) (“And proposals currently pending in Congress would enable access by state police to records previously restricted under the Foreign Intelligence Surveillance Act.”).

⁷² See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2140 (2002) (“[M]ost constitutional limits on policing are transsubstantive—they apply equally to suspected drug dealers and suspected terrorists. A number of scholars have bemoaned this fact, but it remains a fact, and there is no reason to believe that current exigencies will change it.”). Illuminatingly, Professor Stuntz does not suggest the sort of bifurcation strategy that might be suggested by his *Transsubstantive Fourth Amendment* piece. Instead, he envisions broader police power across the board, tempered by limitations on the ways in which search or interrogation authority is exercised and/or limits on the uses to which information thereby discovered may be put. See Stuntz, *supra*, note 67. Like Stuntz, I believe broader surveillance powers are both inevitable and justified, but I imagine a different “grand trade” than the one he proposes.

Professor Davies considers Stuntz’s proposed trade in greater detail. See Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 85 (2003).

⁷³ See *supra* notes 19–25 and accompanying text.

anthrax attacks has focused on domestic, rather than foreign, possibilities.⁷⁴

In the third place, any division of suspects along racial, ethnic or religious lines runs the standing risk of invidious discrimination. Many entirely innocent persons will be targeted simply because of national origin or religion. That not only compromises an important principle; it also runs the risk of alienating the very people who are in the best position to observe suspicious activity among persons of Middle Eastern extraction or Islamic faith.⁷⁵

In the fourth place, this approach depends on the ability of investigators to determine *ex ante* who is and who is not subject to broader surveillance authority. The FBI, for instance, did not really know, and certainly could not prove, that Moussaoui was an agent of a foreign power so as to trigger FISA.⁷⁶ If target-class limitations are rigorously observed, too many potential suspects will get a pass. If the limitation is not rigorously observed, anyone appearing foreign will be subject to whatever heightened powers the government may apply.

Both target-based and offense-based bifurcation strategies face one further challenge. Privacy depends not only on official respect for personal control over information; it depends on individuals *believing* that officials respect personal control over information. If citizens generally believe that the government is monitoring communications, financial transactions, and movements, people will behave more circumspectly even if their suspicions are unfounded.

The final bifurcation strategy—the temporal one—is equally unpromising. Experience in other countries suggests that the “entrenched emergency” is a likely possibility.⁷⁷ Moreover, the basic problem of asymmetrical threats of mass casualties is indeed permanent. The demise of al Qaeda would reduce the threat but not eliminate it.

If this analysis is correct, the USA-PATRIOT Act⁷⁸ was only the first step in the transition to broader government powers to engage in electronic surveillance. Likewise, the use of immigration violations and material-witness authority is likely only the first step in a transition to broader detention powers. Future grants of

⁷⁴ See, e.g., Dan Eggen & Guy Gugliotta, *FBI Secretly Trying to Re-Crete Anthrax from Mail Attacks*, WASH. POST, Nov. 2, 2002, at A9.

⁷⁵ See, e.g., David Cole, *Terrorizing Immigrants in the Name of Fighting Terrorism*, HUM. RTS., Winter 2002, at 11. (“[W]hat we have done is to sacrifice the liberties of some—immigrants, and especially Arab and Muslim immigrants—for the purported security of the rest of us. This double standard is an all too tempting way to strike the balance—it allows citizens to enjoy a sense of security without sacrificing their own liberty, but it is an illegitimate trade-off. In the end, moreover, it is likely to be counterproductive, as it will alienate the very communities that we most need to work with as we fight the war on terrorism.”).

⁷⁶ See Taylor, *supra* note 39.

⁷⁷ See, e.g., Oren Gross, “Once More Unto the Breach”: *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT’L L. 437, 442–43 (1998) (noting that in Northern Ireland and Turkey states of emergency have continued for decades).

⁷⁸ United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act of 2001, P.L. 107-56 (HR 3162) 107th Cong., 1st Sess. (Oct. 26, 2001)).

authority may be limited, on their face, to terrorism investigations, but it seems unlikely that those limits will insulate domestic telecommunications, internet traffic, travel, and financial transactions from police scrutiny.

B. *The Conservative Fantasy*

*And culture on all fours to greet
A butch and criminal elite,
While in the vale of silly sheep
Rheumatic old patricians weep.*⁷⁹

The emerging choice between pervasive surveillance and mass-casualty terrorism is deeply disturbing. As bifurcation strategies break down, government will have access to far more information, and its various agencies will share and store that information more efficiently. Government agents will have the evidence to prosecute a very substantial proportion of the population, and the information to embarrass almost all of it.

A sincere social conservative might fantasize that the new era would pressure an unruly populace into finally conforming to society's purported standards of behavior. Knowing that the government is watching everyone, individuals will quit using illegal drugs, lead less frisky sex lives, pay the nanny tax, and so on. No one who knows America could believe this will ever happen.

As anti-terror surveillance authority runs into the pervasive illegal behaviors, we can expect powerful resistance to the creation of the surveillance authority. Sooner or later terrorist successes will force the opposition to give way, with assurances that both by legal limitation and discretionary restraint current behavior patterns will not be disturbed. Legal limits predicated on bifurcation strategies are, as previously discussed, unlikely to contain the new powers.

What then? The model would be the current one minus privacy, i.e., nothing but overcriminalization and discretion. This is the cynical conservative's fantasy, the Ashcroftian future. It has a fair chance of materializing, with baleful consequences.

Such a regime, when fully established, would at least do all that can be done to prevent terrorism. It would also leave most private behavior alone. People would be let alone, however, only in the discretion of the authorities. That is a most disturbing prospect for the security of political dissent, for equal justice, and for the rule of law.

Take the dissent problem first. The statistical likelihood is that any given individual is violating one of society's purported standards, if not a criminal standard (like the laws against drug use, obscenity, DUI, prostitution and so on) then at least a social standard (such as those forbidding adultery or homosexuality). As surveillance grows more pervasive and as the authorities keep information more efficiently, it will be possible to select almost anyone for humiliation if not prosecution. The authorities can be trusted not to target their own supporters, but they cannot be trusted to exempt

⁷⁹ W.H. AUDEN, *New Year Letter*, in W.H. AUDEN COLLECTED POEMS, *supra* note 1, at 159, 191.

members of racial, religious, or ethnic minorities any more than they can be trusted to exempt political dissenters.

The immigration laws offer a good illustration. Apparently technical violations of immigration rules are almost as hard to avoid as traffic offenses. With full information, it follows that almost any foreign visitor to this country can be lawfully detained. Official discretion, however, exempts supposedly safe visitors from the sort of scrutiny that is applied to potential terrorists. That the immigration laws have been used in this way is rather openly admitted.⁸⁰

Fuller information about other types of unlawful behavior will soon be put to similar uses. If authorities know that a suspected terrorist has violated the currency regulations, or the tax laws, or the drug laws, such violations offer a perfectly legal hook for arrest and interrogation. The Supreme Court's easy tolerance of arbitrary discretion⁸¹ in criminal justice is not about to change now.

Freedom to dissent, the nondiscrimination principle, and the rule of law are *very great values*. They have been surrendered before in wartime, but only as a last resort and often with subsequent regrets. If indeed the alternative to a man-made smallpox epidemic or the detonation of a nuclear weapon in downtown Chicago is a regime in which the combined effects of overcriminalization and pervasive surveillance amount to a *de facto* police state, then we have already lost the struggle for civil society, for "our way of life" as the saying goes.

Concern is warranted but despair is not. In December of 1941 the military situation confronting the Allies was acutely desperate. As Churchill said at that bleak point, however, the West has not succeeded so far "because we are made of sugar candy."⁸² We can reject privacy's invitation to terrorism at the same time we repudiate lawless control over destructive personal information by public officials. To do this, however, we need to develop a new model of criminal justice, a model that respects the liberty of the individual, the rule of law, and equal justice, without blinking the plain facts of the threat we face and the means our governments will surely deploy to meet it. What follows is one attempt to devise such a model.

⁸⁰ See, e.g., Laurie L. Levinson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217, 1220 (2002) ("Of the hundreds of aliens who were rounded up on immigration violations, none have been directly linked to the terrorist attacks of September 11. However, the admitted purpose of the roundup was preventive detention."). Responding to a critical report by the Department of Justice's Inspector General, a justice department spokesman stated "Our policy is to use all legal tools available to protect innocent Americans from terrorist attacks. We make no apologies for finding every legal way possible to protect the American public from further terrorist attacks." Statement of Barbara Comstock, Director Public Affairs, Dept. of Just., June 2, 2003, available at http://usdoj.gov/opa/pr/june03_opa_324.htm.

⁸¹ *Whren v. United States*, 517 U.S. 806 (1996).

⁸² Winston Churchill, Speech to the Canadian Parliament (Dec. 30, 1941).

V. TERROR AND TOLERANCE

*True democracy begins
With free confession of our sins.
In this alone are all the same,
All are so weak that none dare claim
'I have the right to govern,' or
'Behold in me the Moral Law,'
And all real unity commences
In consciousness of difference . . .*⁸³

A. *The Basic Idea*

If we reject the liberal fantasy, then privacy is indeed on the wane. To reject the conservative fantasy, we must find some way out of the unhappy intersection of overcriminalization and discretion. Discretion itself seems an unpromising target. For decades reformers have sought to confine discretion in the criminal process, but (with the salient yet ambiguous exception of the Federal Sentencing Guidelines) discretion has shown itself impervious to reform.

This is so only in part because of overcriminalization. No one denies, at least publicly, that the intentional infliction of serious harm to unconsenting victims ought to be treated as a crime. It should suffice to mention domestic violence and tax evasion as offenses any liberal government must recognize as crimes, which are as a sociological matter too frequently committed to be fully prosecuted, at least within the existing penalty structure.⁸⁴ The criminal code could reflect even a rigorous respect for J.S. Mill's harm principle⁸⁵ and still call for a great many discretionary (non)enforcement decisions.

No doubt discretion might be regulated more successfully than it has been, but the more promising strategy aims to take a bite out of overcriminalization. Professor Stuntz and Professor Sundby have developed the idea that Fourth Amendment jurisprudence should reflect an implicit understanding between citizens and government.⁸⁶ Due to the prospect of terrorism, reasonable citizens now accept (if not

⁸³ AUDEN, *supra* note 79, at 191.

⁸⁴ See, e.g., Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 52 (2000) ("According to the National Crime Victimization Survey (NCVS) of people ages 12 and older, nearly one million women are victimized annually by an intimate partner."); James Andreoni et al., *Tax Compliance*, 36 J.L. & ECON. 818, 822 (1998) (IRS estimates that more than slightly more than 80% of income taxes are paid). A 20% noncompliance rate is perhaps a happy surprise, but it still leaves a 20% rate of noncompliance—hardly a number the criminal justice system can target on anything but a highly selective basis.

⁸⁵ According to Mill, "[t]he only purpose of which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS 12 (Edward Alexander ed., 1999).

⁸⁶ See William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44

demand) less privacy. Perhaps, as a *quid pro quo*, the citizenry is entitled to more substantive freedom.

The equation might seem like one between apples and oranges; not so. Privacy has played the role of protecting substantive autonomy for time out of mind (or at least since the Boyd brothers avoided the duty on glass back in the 1880s).⁸⁷ In a great many instances (I shan't say most; who can fathom motives?) the appeal of privacy is not that it restricts official access to information but rather that it prevents the enforcement of disagreeable laws. But what if the laws were less disagreeable?

Hypothesize a world in which public officials had complete information about the behavior of every person, arbitrary discretion to prosecute whom they choose—and in which the criminal code contains no laws that you regard as unjust or mistaken. In the strongest version of this thought-experiment, not only do you agree with the criminal code in all particulars, but you also agree with prevailing social norms. Given an optimal set of limits on individual behavior, why might you object to an omniscient government?

You might criticize this arrangement along one of two lines. The first line is a defense of informational privacy wholly divorced from information's utility in enforcing bad laws (or in triggering social sanctions for violations of bad norms). The second line opposes arbitrary discretion in selecting, from among the large pool of those guilty of breaking good laws, some to be prosecuted and some to be exempted.

The first line merely repeats the claim that privacy is intrinsically valuable. If negative legal and social consequences did not attend the expression of private opinion, or private behavior, both discourse and behavior would be as spontaneous as Justice Douglas could have wished.⁸⁸ People value privacy most when they feel afraid of unjust reprisal for who they are, what they think and say, and what they do. Take that fear away and all that Mill wished for in the way of diversity could be secured.

As for the second line of complaint, it is indeed unjust when two similarly situated offenders receive dramatically different treatment. But recall the hypothesis that you agree with the substantive set of legal and social norms made enforceable by the death of privacy. Given that assumption, the escape of some offenders rather than others is due not to overcriminalization but to the converse phenomena of over-offending.

Over-offending might be defined as the phenomenon of substantial noncompliance by the populace with just laws. Domestic violence and tax evasion are again prime examples. If the polity elects to make criminal bad but pervasive behavior, it does so at the risk of many unintended consequences.⁸⁹ But if with due

STAN. L. REV. 553 (1992); Scott E. Sundby, "Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751 (1994).

⁸⁷ See *Boyd v. United States*, 116 U.S. 616 (1886).

⁸⁸ See *United States v. White*, 401 U.S. at 762–63.

⁸⁹ Even James Fitzjames Stephen, who wrote a classic critique of Mill's *Essay on Liberty*, was careful to point the various practical reasons not to criminalize all immoral behavior. See JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 159–60 (R.J. White ed., 1967).

regard to these risks, a society decides to use the criminal process to modify wrongful and harmful private behavior that is also quite common, there seems no nonpragmatic reason not to do so. There *are* important pragmatic risks, and even at the purely normative level widespread violation ought to suggest caution about condemning morally, let alone criminally, what is not deviant.

Domestic violence and tax evasion offer compelling examples of over-offending. If the available sanctions permit the punishment of only a small percentage of offenders, whose fault is that? Nondiscrimination ideas play a role here; if a just law, widely violated, is enforced only against groups invidiously selected, that would offend equality and the rule of law. But if the law be just, violations too common to prosecute consistently, and the choice of targets is based on strength of the evidence or drawing names from a hat, it is hard to lay the sins of the people at the feet of the government.

The point of the thought experiment is to show that a large part of privacy's appeal, both morally and politically, depends on overcriminalization. Given overcriminalization, privacy allows people to conduct experiments in living, and, perhaps as importantly, to talk about such experiments. Moreover, whatever the moral force of privacy's claims, as a political matter, overcriminalization gives privacy proponents a powerful argument.

As a teenager I once expressed some harshly moralistic opprobrium against some public official who had been discovered owning too much of the people's money. My father said that I was being too harsh: "If you send any man in America a telegram reading 'ALL IS DISCOVERED. FLY!' the poor sap will grab his car keys and his toothbrush and head for the highway." As a generalization no doubt the "any" sweeps too far, but the remark nicely captures privacy's political appeal.

Individuals can profit from privacy politically whether they are victims of overcriminalization or perpetrators of over-offending. There are, however, reasons to believe that privacy is a better shield against unjust, as opposed to just, laws. The violations of most (some would say all) just laws inflict harm on unconsenting victims. The most robust conception of informational privacy would not prevent victims from coming forward to complain and, if needed, testify. Occasionally the victims do not know they have been injured (the tax evasion example), but in the main over-offending flourishes not because of privacy but because of the government's limited resources or the political influence of the offending demographic. The basic idea, then, is that as privacy declines the criminal justice system should reduce the scope of substantive criminal liability. Legal changes should be made with the plausible hope that social norms will follow legal ones in the direction of tolerance in those instances in which public opinion is not indeed more tolerant than the law. The two supporting arguments have similar weight but very different content. The normative argument holds that we can retain most of the good work that informational privacy has done by substituting tolerance for privacy. The political argument holds that guarantees of substantive freedom will greatly facilitate the political case for the sweeping surveillance powers needed to prevent terrorism.

B. *Why Liberals Should Accept the Move from Privacy to Tolerance*

Liberals in principle have always stood for tolerance. Oddly, liberals lately have fought harder for privacy than they have for decriminalization. This strategy reflects a variety of considerations, including the view that the struggle against drug prohibitions is hopeless, the experience of the American left with surveillance during the McCarthy and Nixon periods, as well as the genuine appeal of the idea that certain facts are nobody else's business. Why should liberals now give up on privacy and commit themselves to tolerance?

First, the risk of mass casualties from a terrorist attack has greatly increased the risks run by a privacy-based strategy. Thoughtful liberals recognize the need for greater surveillance powers.⁹⁰ Not only do people of all political persuasions recognize the evil of mass murder. The ultimate objectives of the McVeighs and bin Ladens of the world is a political order odious to liberal ideals. Current efforts by liberals to compromise new surveillance authority for the sake of privacy largely reflect the fear that without privacy a police state is inevitable. The tolerance model gives liberals of this view another option. Second, even if the risk of terrorism does not justify new surveillance powers, those powers are coming anyway.⁹¹ The best argument against them is that they are futile, in which case we can expect continued successful terrorist strikes. It is inconceivable that governments will do nothing in response, and one of the few things they can do is increase surveillance.

Third, the decline of privacy offers liberals better political chances in the struggle for tolerance. As the government acquires the ability to monitor behavior more thoroughly, citizens who violate the weapons, drugs, sex and gambling laws will have to count on discretion alone to protect them from unpleasant consequences. There may very well be more urgency to the case against overcriminalization when the prospect of actual enforcement is made more likely.

Fourth and finally, the current criminal justice system is nothing for liberals to celebrate. Crime is down, but drug usage, street prices, and purity levels yielded little if at all to a vast enforcement effort. When many states have more young black men in prison than graduate from college, something has gone terribly wrong. Overcriminalization is at the heart of the problem, but privacy has played a role by shielding overcriminalization from political challenge by those segments of society

⁹⁰ See, e.g., Floyd Abrams, *The First Amendment and the War Against Terrorism*, 5 U. PA. J. CONST. L. 1, 5–6 (2002) (“[W]e must accept that we now live at a level of vulnerability which requires distressing steps of a continuing nature in an effort to protect ourselves. As a result, we must, I think, be prepared to yield some of our privacy, to accept a higher level of surveillance of our conduct, even to risk some level of confrontation with the Fourth Amendment of the United States Constitution.”).

⁹¹ This argument is developed at length in Part II; others have reached the same conclusion. See, e.g., Stuntz, *supra* note 72, at 2141 (“For all these reasons, Fourth and Fifth Amendment law is likely to move toward greater authority for the police—not just for the FBI, and not just when fighting terrorists. The natural conclusion is that we see a loss of individual liberty and privacy.”).

that violate the applicable laws behind closed doors. Whatever hazards we face in building a criminal justice system for a dangerous future, let us not wax nostalgic about the system left behind.

C. Why Conservatives Should Accept the Move from Privacy to Tolerance

Thoughtful conservatives should also support the move from privacy to tolerance. For conservatives on the libertarian side of the Republican party the argument is easy; as between clinging to what scraps of informational privacy remain in a post-9/11 world, or giving up privacy in exchange for substantive liberty, the choice cannot be difficult. For social conservatives who support, and would enforce more thoroughly, the laws against drug use, gambling, prostitution, and so on, the case is harder but nonetheless persuasive.⁹²

The first point is that however one regards the evils combated by the Vice Squad, those combated by antiterrorism units are vastly greater. Murder is worse than prostitution, and mass murder is worse than all the evils of the drug trade put together, even on the bogus assumption that the traffic's costs are due to the demand for the product rather than to prohibition itself. One good thing that might come from 9/11 is an overdue recognition about the relative gravity of different kinds of wrongs.

The case for tolerance points out to the conservative that in at least two ways overcriminalization positively weakens the effort to prevent terrorism. First, the resources devoted to even discretionary enforcement are ideally-suited to help in the work against terrorism. Tens of thousands of trained law-enforcement agents, with sophisticated equipment, knowledgeable informants, and so on, are now at work trying to raise the price of cocaine and marijuana by a dollar or two. The United States has invested a great deal of international influence to persuade the world to cooperate in this project. Could not one who regards recreational drug use with the most serious moral disapproval entertain the suggestion that law-enforcement resources be retasked from a mission they have not accomplished to one of vastly greater urgency? Judge Posner, for one, seems sympathetic to this view.⁹³

Second, overcriminalization supplies privacy advocates with a great deal of their political support. Sweeping surveillance powers will come, but would not the prudent conservative prefer to have them sooner rather than later? Later, in this case, might mean later than a time when they might have prevented an attack costing thousands of lives. Simply as a *quid pro quo* to facilitate authorization of antiterrorism powers, conservatives might be persuaded to accept a new model based on tolerance.

The conservative, then, has good reasons, rooted in the fear of terrorism, to endorse the move toward tolerance. Conservatives may well also be impressed by the liberal's case against a post-privacy model based exclusively on overcriminalization and discretion. Conservatives know what it is like to be out of power; they can

⁹² I have in mind conservatives in the tradition of STEPHEN, *supra* note 89.

⁹³ See Richard A. Posner, *Security Versus Civil Liberties*, (Dec. 2001), available at <http://www.theatlantic.com/issues/2001/12/posner.htm> (last visited Oct. 16, 2003).

appreciate the threat to dissent posed by discretionary enforcement of widely-violated laws. And regardless of how conservatives feel about equality, they surely rank the rule of law very highly among the political virtues.

VI. ILLUSTRATIVE APPLICATIONS

Thus far the argument has proceeded at a high level of generality. I close by considering some specific ways in which the substitution of tolerance for privacy might contribute to defense against terrorism. In some cases, the proposed reform moves in the direction of reducing privacy, and in some cases in the direction of limiting substantive criminal liability. In each instance, however, there are terms of trade between privacy and tolerance. When the government seeks newer powers to monitor private life, those powers will be more readily granted and less dangerously held. When reformers press for decriminalization, they should expect to concede strong government powers to monitor the new borders between lawful and unlawful conduct.

A. *National Identity Cards*

Perfect intelligence on terrorist operations can be nullified by the adoption of false identities. If a terrorist operative is on a wanted list but neither authorities nor citizens can penetrate a false identity, that operative can function as effectively as if the government had never come to suspect him in the first place. National identity cards, using biometric identifiers such as a fingerprint, would make it more difficult for terrorists (or anyone else) to shed their past.⁹⁴ Some democratic countries require such identity papers and some do not. In the United States there is fierce resistance to the concept, based partly on the theory that identity cards will not work and partly on the theory that they will work. In the former scenario they will not stop terrorists; in the latter they will restrict individual liberty. In the worst-case-scenario identity cards would permit the government to keep tabs on law-abiding citizens but not on criminals.⁹⁵

The debate stood in this posture as of September 11, 2001. Security advocates have now gained some points. The USA-PATRIOT Act mandated better identification processes for visas and passports of foreign nationals entering the United States; the National Institute of Standards and Technology has just taken the first step toward implementing that portion of the Act by recommending a

⁹⁴ See John D. Woodward, Jr., *Biometrics: Facing Up to Terrorism*, RAND Corporation Issue Paper, at 19–20 (“There is no high-tech silver bullet to solve the problem of terrorism. . . . But to the extent we can improve access control at sensitive facilities such as airports, reduce identity theft and immigration fraud, and identify known or suspect terrorists, then we make terrorism more difficult in the future.”), available at <http://www.rand.org/publications/IP/IP218/IP218.pdf> (last visited Oct. 16, 2003).

⁹⁵ For a strong statement of the case against national identity cards, see Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319, 321 (2002).

combination of facial-recognition and fingerprint identification. The INS is requiring passports to include biometric identifiers.⁹⁶ An alien traveling on a false passport, however, can pretend citizenship without producing biometric identification. The claim will soon be made that identity cards for everyone are the only way of monitoring foreign nationals, terrorists included. That claim will be resisted stoutly by the libertarian right as well as traditional civil-liberties groups such as the ACLU.

The effectiveness of biometric identification methods presents a purely technical question.⁹⁷ It seems fair to say, however, that the opposition's intensity is not explained by fears that an expensive but useless law-enforcement technology's costs will be borne by the public fisc. What is driving the opposition is a visceral fear that the technology really will work, thereby denying those who wish it the ability to shed their liabilities along with their former identities.

And why, one might ask, do so many people harbor such fears? To some extent the opposition to effective national identification policies reflects over-offending; too many people wish to evade just and lawful obligations, ranging the gamut from crime to tort to tax to child support. Insofar as this is true, the opposition is simply a lobby on behalf of a small minority's right to the functional equivalent of diplomatic immunity. However predictable private desires to evade legal liabilities may be, the law cannot possibly show the slightest respect for such motives.⁹⁸ To state the contrary proposition is to refute it.

Given that solid political majorities support existing criminal, tort, tax, and family-law obligations, what explains the continued success of the opposition?⁹⁹ The most obvious explanation is illegal immigration, a pervasive though unlawful practice with enormous economic benefits. One obvious use of national identity cards would be to require employers to verify the citizenship of their employees. There is a political consensus to limit immigration, and there is a political consensus that immigration illegal *de jure* is too valuable to be prohibited *de facto*. In a familiar alignment of motives and arguments, a beleaguered hypocrisy appeals to privacy for salvation.

Arguments that were in equipoise on 9/11 need to be resolved in light of that day's events. If security professionals believe national biometric identity cards would contribute substantially to the prevention of terrorism, then we need to proceed promptly in that direction. To pretend to outlaw a functional economic relationship, and then to turn about and oppose legitimate security measures because they might actually enforce the paper prohibition, is so quintessentially American that it would be

⁹⁶ See Jennifer Lee, *Foreigners' Ids May Soon Have Biometrics Imprinted*, SAN DIEGO UNION TRIB., Feb. 19, 2003, at A2.

⁹⁷ For overviews of the technology, see JULIAN ASHBURN, *BIOMETRICS: ADVANCED IDENTITY VERIFICATION: THE COMPLETE GUIDE* (2000); Woodward, *supra* note 94.

⁹⁸ See, e.g., Alan M. Dershowitz, *Why Fear National ID Cards?*, N.Y. TIMES, Oct. 13, 2001, at A23 (Right to anonymity is not even "hinted at in the Constitution.").

⁹⁹ See Sobel, *supra* note 95, at 380 (noting post 9/11 opposition to national identity cards, both by President Bush and by members of Congress).

hilarious if it were not so dangerous. That does not mean actually deporting the millions of illegal immigrants. It means tolerating them.

Whatever answer we might have given pre-9/11, we need to bring the issue of undocumented workers into the light of day. Probably that means officially recognizing some kind of guest-worker status, with all the dubious implications attending such an arrangement.¹⁰⁰ If employers (and their consumers, who at present are happy not to know what their preferences would cost to satisfy with legal labor) are assured that the present *de facto* immigration regime will survive, opposition to national identity cards would be dealt a powerful, perhaps fatal, blow.

B. *Tracing Firearms*

Over opposition from the gun lobby, law enforcement agencies have begun experimenting with technological methods of identifying the weapon from which a particular bullet has been fired. The standard ballistics test has long done this once the police have recovered a weapon to be tested. The new approach aims at establishing a database capable of identifying the weapon based solely on information from a projectile or a cartridge casing.¹⁰¹

As with national identity cards, there is much dispute about the efficacy of these experimental methods.¹⁰² As with identity cards, much of the opposition seems predicated on the risk that the new methods would succeed. If they do, the government would be able to connect bullets to weapons; all that would be left would be connecting the weapons to people. To do this the government would need a record of who possessed the weapon at the time of the crime, and this of course triggers the obsessive fear of a national gun registry.¹⁰³

¹⁰⁰ See Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 N.C. J. INT'L L. & COM. REG. 465, 480 (2002).

¹⁰¹ See William C. Boesman & William J. Krouse, *National Integrated Ballistics Information Network (NIBIN) for Law Enforcement, Congressional Research Service Report for Congress* (July 3, 2001) (federal funding for ballistic imaging tripled in 2000), available at http://shelby.senate.gov/legislation/leg_pdf/gun2/pdf; *id.* at 10 (“The states of Maryland and New York recently enacted laws that require the establishment of state ballistics imaging systems that directly link these images to firearm ownership.”).

¹⁰² See Steven Milloy, “Ballistic Fingerprinting” *Bunk*, Orange Cty. Register, Oct. 23, 2002, available at http://www.cato.org/research/articles/milloy_021022.html (In one study computerized cartridge matching failed in 62% of trials with cartridges from different manufacturers). The classic ballistics test, it should be noted, matches bullets rather than cartridge casings to the firearm. *Cf.* The Newshour with Jim Lehrer, *Fingerprinting Firearms* (Oct. 23 2002) [hereinafter *Fingerprinting Firearms*] (“Joe Vince, the former chief of the crime guns analysis branch of the ATF, says that after repeatedly firing a gun, its ‘fingerprints’ can still be compared. ‘We test-fired a gun 5,000 times, and the technology was able to match the first round with the last round,’ Vince told the New York Times.”), available at <http://www.pbs.org/newshour/extra/features/july-dec02/ballistics.html> (last visited Oct. 16, 2003).

¹⁰³ See, e.g., Boesman & Krouse, *supra* note 101, at 8 (“Ballistically imaging newly manufactured and imported firearms nationally, however, could be controversial because some gun control opponents are likely to view such a development as a first step toward a national firearms registry unless stronger

To law-abiding gun owners, registration is simply a precursor to confiscation.¹⁰⁴ Indeed, some proponents of modest gun regulations openly favor prohibition.¹⁰⁵ Here is an excellent example of how guarantees of substantive tolerance might be coupled with reductions in informational privacy, to the great benefit of public security, including the fight against terrorism.

There *ought* to be a national gun registry, but *not* as a precursor to confiscation. Many law-abiding citizens own firearms for sporting purposes and/or self-defense, and as instrumentalities of violence these are in about the same class as automobiles. The two great acts of terrorism in this country were perpetrated with box-cutters and fertilizer, respectively. Hostility to gun ownership is akin to hostility toward recreational drug use or homosexuality. It is bigotry against a lifestyle.¹⁰⁶

From a security standpoint, gun control policies have to grapple with the vast supply of firearms already in circulation,¹⁰⁷ and with the profound unsuccess of our efforts to prevent the importation of drugs, which are no easier to smuggle than guns. The effect of control policies is more likely to have the effect of disarming socially functional individuals than dysfunctional ones. Private gun ownership also has substantial benefits to public security, according to extensive social science research on defensive gun use.¹⁰⁸ While we cannot be certain, presumably terrorist planning of attacks on the United States is complicated by the pervasive presence of firearms.

That said, opposition to registration and tracing reduces to a claimed right to shoot people anonymously. I fully grant the occasional necessity to shoot in self-defense, but the only justification for that right is imminent violence.¹⁰⁹ Absent exigency, disputes should be resolved by due process of law. Given that the law recognizes reasonable mistake about the need for self-defense as a justification or

statutory prohibitions against basing such a registry on ballistics imaging were enacted. The Gun Control Act of 1968, as amended in 1986, prohibits the establishment of ‘any system of registration of firearms, firearms owners, or firearms transactions or disposition. . . .’”).

¹⁰⁴ See *Fingerprinting Firearms*, *supra* note 102 (The NRA says it also opposes the database for privacy reasons. Ballistics fingerprinting, NRA officials say, “is national gun registration.” Their concern is that if the government registers the guns of law-abiding citizens, it would have a list of guns to confiscate if it decided to.)

¹⁰⁵ See Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. CRIM. L. REV. 53, 87–88 (1992) (noting that many supporters of Brady Bill favor an outright ban).

¹⁰⁶ As Professor Luna has shown in an excellent article, the divide between antigun and progun opinion is more cultural than technical. The debate is between opposed worldviews rather than between opposed assessments of public security. See Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53 (2002).

¹⁰⁷ See Bernard E. Harcourt, *Introduction: Guns, Crime, and Punishment in America*, 43 ARIZ. L. REV. 261, 261 (2001) (“There are over 200 million firearms in private hands in the United States, more than a third of which are handguns.”).

¹⁰⁸ *Id.* (“Estimates of defensive uses of firearms—situations where individuals used a gun to protect themselves, someone else, or their property—range from 65,000 to 2.5 million per year.”).

¹⁰⁹ See, e.g., WAYNE R. LAFAVE ET AL., CRIMINAL LAW 495 (3d ed. 2000) (“Case law and legislation concerning self-defense require that the defendant reasonably believe his adversary’s unlawful violence to be almost immediately forthcoming.”) (footnote omitted).

excuse,¹¹⁰ it is hard to imagine a noncriminal reason why anyone would insist on the right to use deadly force anonymously. Certainly the NRA's paradigm case of the homeowner shooting an intruder presents no such reasons.

The analogy to automobiles holds up perfectly. It is a crime to leave the scene of a fender-bender without leaving a note.¹¹¹ The opponents of registration and tracing are claiming the moral equivalent of a right to remove one's license plate, run down a pedestrian, and then speed off. The analogy breaks down only because the polity does not regard automobile ownership as a distinctive lifestyle choice, vulnerable to future prohibition.¹¹²

What is needed is the substitution of tolerance for privacy. Currently, millions of otherwise honest citizens rely on privacy to hold onto unregistered, untraceable weapons. They should be persuaded to surrender their privacy but to keep their guns. If law-enforcement interests and the gun control lobby gave up, credibly and publicly, on opposition to private ownership of guns *per se*, it might be possible to create the kind of registration-and-tracing system that could do a great deal to curb violent crime.

The Supreme Court might have a role to play here. An announced constitutional right to *keep* and *bear* arms that are *registered* and *traceable* would strike the very balance I have called for here on policy grounds.¹¹³ Whether such an interpretation could be squared with the conventional sources of constitutional law is another question, but the proposed resolution is surely not one that can be quickly dismissed on formalist grounds.¹¹⁴

Such a system might very well aid in the prevention of terrorism. We cannot exclude the use of firearms, D.C. sniper style, in future attacks. Moreover, whatever their chosen means of attack, terrorists need firearms for personal defense. Timothy McVeigh was jailed on a weapons charge, for instance, before he was identified as the bomber. A computerized database of legal firearms would enable the arrest of people

¹¹⁰ See, e.g., *id.* at 494 (“When his belief is reasonable, however, he may be mistaken in his belief and still have the defense.”).

¹¹¹ See, e.g., MINN. STAT. § 169.09 (2001).

¹¹² See Luna, *supra* note 106, at 78 (“Regardless of whether the alarm is sounded by the mainstream or the margin, however, it seems clear that state tyranny and firearm seizures are of utmost concern to all members of the pro-gun culture.”).

¹¹³ See James B. Jacobs, “*Right to Keep and Bear Arms*” *Decision Would Improve Gun Control*, USA TODAY, Dec. 16, 2002, at A15:

If the Supreme Court were so inclined, it could easily render a strong individual-rights interpretation of the Second Amendment. . . . A decision—especially a unanimous one—recognizing that the Second Amendment protects individuals, not states, would change the whole nature of the gun-control debate by paving the way for a national registry that makes ballistic fingerprinting, comprehensive licensing and other forms of regulation possible to implement and enforce.

¹¹⁴ As Professor Luna says, “In truth, there may be no limit on the linguistic arguments that can be made in support of one or the other interpretation.” Luna, *supra* note 106, at 109.

found with unregistered weapons. That authority might be of considerable use against terrorism as well as other types of crime.

C. Drug Prohibition

The war on drugs offers at least three important opportunities for combating terrorism. First, the law-enforcement resources now devoted to the futile effort to reduce supply could be redeployed to prevent terrorism.¹¹⁵ Indeed, anti-terror responsibilities since 9/11 have imposed substantial demands on conventional law-enforcement resources.¹¹⁶ If terrorism is a priority that justifies re-allocating law-enforcement resources away from the prevention and investigation of murders, rapes, and robberies, surely it justifies re-allocating them away from policing consensual transactions.¹¹⁷

Second, the lucrative black market offers desperate people, including terrorists, the standing opportunity to raise large amounts of money for illegal purposes. Terrorists do indeed profit from the narcotics trade.¹¹⁸ Al Qaeda may have derived some of its funding from opium transactions.¹¹⁹ Decriminalizing recreational drug use would free up resources for enforcement at the same time it dried up resources for terrorism.¹²⁰

The Office of National Drug Control Policy's televised claim that drug consumption fosters terrorism sounds like something out of Orwell. In one sense, of course, consumer demand for drugs is a but-for cause of the illegal profits available to terrorists. There is consumer demand, however, for many products, yet terrorists do not dabble in the market for coffee or cigarettes. Prohibition creates the huge returns

¹¹⁵ See Posner, *supra* note 93, at 3 ("Perhaps it is time to redirect law-enforcement resources from the investigation and apprehension of drug dealers to the investigation and apprehension of terrorists. By doing so we may be able to minimize the net decrease in our civil liberties that the events of September 11 have made inevitable.").

¹¹⁶ See Stuntz, *supra* note 72, at 2139:

[T]he domestic war on terrorism is already affecting local police departments' ability to deal with more typical sorts of crime. A lot of police manpower has been diverted to various forms of homeland security, such as guarding at-risk public spaces and responding to reports of possible attacks. That drains resources from more ordinary policing, which may in turn lead to an increase in crime generally—some cities have seen sharp increases in homicides since September 11.

¹¹⁷ To a degree this is happening already. See Mary Jordan, *Terrorism Fight Hurts Drug War: with U.S. Resources Elsewhere, Mexican Cartels Step Up Cocaine Shipments*, WASH. POST, Dec. 13, 2001, at A30.

¹¹⁸ See, e.g., Raphael F. Perl, *Taliban and the Drug Trade* (Congressional Research Service Oct. 5, 2001) at 1 ("There is evidence that many terrorist organizations and some rogue regimes pressed for cash rely on the illicit drug trade as a source of income.").

¹¹⁹ *Id.* at 4.

¹²⁰ See, e.g., Canadian Drug Policy Foundation, *How Drug Prohibition Finances and Otherwise Enables Terrorism*, Oct. 29, 2001 (Submission to the Senate of Canada Special Committee on Illegal Drugs).

offered by the drug trade. Absent those returns terrorists could derive no more funds from drugs than they could from coffee or cigarettes.

There is a third, and less widely-recognized, opportunity here as well. Political opposition to government surveillance authority is animated by a variety of concerns, but prominent among them is the apprehension of otherwise law-abiding drug users that broader surveillance powers will expose them to prosecution. This is an angle that, in the nature of things, cannot be quantified, but if the millions of current users act rationally they will be among the strongest proponents of strong privacy rights. Since those are the same privacy rights the government must overcome to prevent terrorism, decriminalization's political benefits might well rival the resource effects.

The standard arguments for decriminalization remain powerful, but hitherto they have failed to persuade a political majority. Once again, however, arguments in equipoise before September 11 must now be reconsidered. In this context, the substitution of tolerance for privacy might help overcome the daunting political challenge facing decriminalization advocates.

The biggest risk of any decriminalization strategy is the prospect that any legal market for the recreational drugs will enable increased rates of use by children.¹²¹ Serious as this concern is as a policy matter, it is even more salient as a political matter. Suppose, however, that adult use were decriminalized at the same time that minors were tested for drug use on a general basis? For instance, former President Clinton once proposed conditioning the issuance of drivers' licenses to minors on passing drug testing.¹²² The proposal was a cynical campaign gambit, quickly abandoned after the election. In spite of its dubious origins, however, there is much to be said for this proposal.

Drug testing is widely used, by the military and by private industry.¹²³ It is not perfectly accurate but then neither is any other investigative tool.¹²⁴ It seems fair to think that juvenile drug use would be significantly discouraged, but by no means eliminated, by a drug-testing program. There would be a significant loss of privacy for minors, but there would also be a massive increase in substantive liberty for adults.

Constitutional objections to this proposal border on the frivolous: the Supreme Court has held that minors have only a diminished interest in privacy compared to

¹²¹ See, e.g., Daniel D. Polsby, *Ending the War on Drugs and Children*, 31 VAL. L. REV. 537, 537–38 (1997) (nothing that any legalization policy would lead to increased use by minors).

¹²² See Paul Magnusson, *The Ten Worst Ideas of the Campaign*, BUS. WK., Nov. 11, 1996, at 39 (deriding the proposal).

¹²³ See, e.g., John B. Wiefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799–816 (2000) (“Today, many employers engage in some form of drug testing, and millions of drug tests are performed each year.”).

¹²⁴ The usual procedure is an initial immunoassay test on urine, which is vulnerable to, among other errors, those resulting from cross-reactivity—a legal substance leaving traces indistinguishable from the markers for illegal ones. The initial test, if positive, then is backed up by a confirmatory gas-chromatography/mass spectrometry test. “These tests, if properly conducted, identify the presence of alcohol or drugs in the biological samples tested with great accuracy.” *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602, 610 n.3 (1989).

adults,¹²⁵ that licenses can be revoked if a motorist who appears intoxicated refuses to consent to a breath test,¹²⁶ and that traffic safety can justify seizures without individual suspicion.¹²⁷ All three lines of justification would support drug-testing linked to drivers' licenses. The linkage between wider drug testing and decriminalization is not an academic fantasy. To a significant degree that linkage is inevitable. The prospect of exposing millions of middle-class youths to criminal liability goes a long way toward explaining why the Clinton proposal fell on deaf ears, drug-war politics notwithstanding. If a drug-testing program were imposed without any formal linkage to decriminalization, decriminalization would still become vastly more attractive politically, precisely because millions of middle-class youth would feel the effects of prohibition for the first time. Privacy and overcriminalization are not coincidental features of the status quo. They are inextricably connected, for without privacy, overcriminalization could continue only by ever more naked discretionary preferences for middle and upper class violators. The genuine need to curtail privacy to prevent terrorism, then, offers new opportunities to attack overcriminalization.

VII. CONCLUSION

*The sense of danger must not disappear:
The way is certainly both short and steep,
However gradual it looks from here:
Look if you like, but you will have to leap.*¹²⁸

Some of the prospects I have outlined will strike good lawyers and good citizens as profoundly disturbing, if not outrageous. National identity cards, gun registration, and general drug testing might well be examples selected by privacy advocates as nightmares sure to energize political opposition to broader government powers. Surely we do not need such means to protect ourselves; surely they are hallmarks of a police state.

The truth is that such measures are necessary to protect ourselves, and that we will adopt them sooner or later. Such measures likewise *could be* hallmarks of a police state. But they do not have to be.

In 1936 a huge standing military, pervasive treaty obligations with foreign nations, and sweeping federal power under the commerce clause would have been

¹²⁵ See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

¹²⁶ The implied-consent laws provide that if a person is stopped or arrested for driving while intoxicated, refusal to submit to a breath test triggers suspension or revocation of the driver's license. "Such a penalty for refusing to take a blood-alcohol test is unquestionably legitimate, assuming appropriate procedural protections." *South Dakota v. Neville*, 459 U.S. 553, 560 (1983).

¹²⁷ See *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). The Court has upheld conditioning participating in extra-curricular activities on drug testing. See generally *Bd. of Educ. v. Earls*, 536 U.S. 882 (2002); *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995).

¹²⁸ W.H. AUDEN, *Leap Before you Look*, in W.H. AUDEN COLLECTED POEMS, *supra* note 1, at 244.

regarded by many thoughtful citizens as hallmarks of a totalitarian state. They might have been, but it turned out that resourceful people, lawyers not least among them, found ways to accommodate the necessary instruments of security with a free society's respect for individual liberty. Privacy was a significant component in that accommodation, but today we need a new compromise between liberty and security, one in which privacy is very greatly diminished.

The accommodation proposed here is the substitution of tolerance for privacy. Such a substitution would both reduce political opposition to necessary security measures and preserve, often actually increase, the scope of individual autonomy. There are devils in the details, but that can be said about the terms of any general compromise between freedom and safety. The decisive question is "Compared to what?" Those who ask that question honestly, whether liberals or conservatives, will see good reasons to move in the direction I propose. And it should give us considerable satisfaction if civil society's murderous enemies induced, not the oppressive national-security state that would be the mirror-image of their own aspirations, but a society that honored more fully than ever before both liberty and equality in the administration of criminal justice.