

**LIBERTY OR SAFETY: IMPLICATIONS OF THE USA
PATRIOT ACT AND THE U.K.'S ANTI-TERROR LAWS ON
FREEDOM OF EXPRESSION AND FREE EXERCISE OF
RELIGION**

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Benjamin Franklin once said, “[t]hose, who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.”¹ Justice Brandeis echoed this sentiment when he delivered his famous admonition:

[I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.²

So important was the protection from government intrusion on the personal essential liberties of expression and religion that the framers of the United States Constitution listed them first in the Bill of Rights: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech”³ Similarly, in the United Kingdom, these essential liberties are protected under the Human Rights Act, which was instituted in accordance with the European Convention on Human Rights.⁴

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¹ BENJAMIN FRANKLIN, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA, FROM ITS ORIGIN (1759), *reprinted in* 3 THE WORKS OF BENJAMIN FRANKLIN, at 107 (Jared Sparks ed., Townsend MacCoun 1882).

² *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

³ U.S. CONST. amend. I.

⁴ Human Rights Act, 1998, c. 42 (Eng.), *available at* <http://www.opsi.gov.uk/acts/acts1998/19980042.htm>.

Prior to the attacks on the World Trade Center and the Pentagon on September 11, 2001, the United Kingdom already had some of the toughest anti-terrorism laws in the world, such as the Terrorism Act 2000,⁵ having dealt with internal terrorist conflicts for years due to the dispute over Northern Ireland. After September 11, 2001, both the United States and the United Kingdom passed more stringent anti-terror legislation. In the United States, the USA PATRIOT Act ("PATRIOT Act") was enacted, making it easier for law enforcement officials to conduct surveillance of suspected terrorists.⁶ In the United Kingdom, the Prevention of Terrorism Act 2005⁷ and the Anti-Terrorism, Crime and Security Act⁸ were enacted by British Parliament, making it easier for British law enforcement to conduct surveillance on suspected terrorists and to detain them without charge for an extended period of time.⁹

While these laws were enacted to protect the general public from harm by terrorists,¹⁰ the implications of the PATRIOT Act in the United States and the Anti-Terror Laws in the United Kingdom are far-reaching with respect to the personal liberty of every person in those nations.¹¹ In particular, because of their religious beliefs,

⁵ Terrorism Act, 2000, c. 11 (Eng.), available at <http://www.opsi.gov.uk/acts/acts2000/20000011.htm>.

⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.).

⁷ Prevention of Terrorism Act, 2005, c. 2 (Eng.), available at <http://www.opsi.gov.uk/acts/acts2005/50002-a.htm>.

⁸ Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.), available at http://www.opsi.gov.uk/acts/acts2001/ukpga_20010024_en.pdf.

⁹ See Prevention of Terrorism Act; Anti-Terrorism Crime and Security Act.

¹⁰ See PATRIOT Act (stating the purpose of the Act as "to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes"); see also, e.g., Prevention of Terrorism Act (stating the purpose of the Act as "to provide for the making against individuals involved in terrorism-related activity of orders imposing obligations on them for purposes connected with preventing or restricting their further involvement in such activity; to make provision about appeals and other proceedings relating to such orders; and for connected purposes"); Anti-Terrorism, Crime and Security Act (stating the purpose of the Act as "to strengthen legislation in a number of areas to ensure that the Government, in the light of the new situation arising from the September 11 terrorist attacks on New York and Washington, have the necessary powers to counter the increased threat to the UK"); Terrorism Act, 2000, Explanatory Notes, available at <http://www.opsi.gov.uk/acts/en2000/2000en11.htm> (stating the purpose of the Act as to reform and expand "previous counter-terrorist legislation . . . largely on a permanent basis").

¹¹ See, e.g., Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505 (2002) (discussing

members of the Muslim community have suffered, and will continue to suffer, adverse effects on their civil liberties due to these laws.¹² Specifically, Muslims have suffered and continue to be exposed to civil and criminal penalties in both the United States and the United Kingdom for merely expressing themselves in accordance with their religious beliefs.¹³ In an even more recent troubling evolution of U.K. law, the newly passed Terrorism Act 2006¹⁴ potentially contravenes freedoms protected under the Human Rights Act 1998, leaving those who merely express a political opinion open to deportation from the United Kingdom.¹⁵ In short, the PATRIOT Act and the Anti-Terror Laws may have gone too far, stepping away from the essential liberties guaranteed by the supreme laws of the respective na-

the bars to asylum and withholding for non-citizens in the United States after the implementation of the PATRIOT Act); Edgar and Witold Walczak, *Perspectives on the USA PATRIOT Act: We Can Be Both Safe and Free: How the PATRIOT Act Threatens Civil Liberties*, 76 PA BAR ASSN. QTRLY. 21, 21 (2005) (discussing the threats to civil liberties based upon relaxed requirements for government surveillance and wiretapping warrants); Liberty, Press Release, Government Publishes Terrorism Bill (Oct. 12, 2005), available at <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2005/terrorism-bill-date-of-publication.shtml> [hereinafter Liberty, Press Release].

¹² See generally D.C., Md., and Va. Advisory Comms. to the U.S. Comm'n on Civil Rights, *Civil Rights Concerns in the Metropolitan Washington, D.C. Area: In the Aftermath of the September 11, 2001, Tragedies* (2003), reprinted in 8 J. ISLAMIC L. & CULTURE 107 (2003) [hereinafter *Civil Rights Concerns*] (discussing the impact of the September 11, 2001 tragedies, as well as the implementation of the PATRIOT Act, on the civil liberties of Muslims and Sikhs, as well as persons of South Asian and Arabic descent living in the United States).

¹³ See *Civil Rights Concerns*, *supra* note 12, at 146–60 (describing the raids of homes of Muslims not accused of terrorist acts, as well as the seizure of “property ranging from computers to children’s toys”; describing the arrests of Muslims for visa violations which were relatively minor in nature and would probably not have been prosecuted before September 11, 2001; and describing the detention and deportation of immigrants of the Muslim faith and of Arabic descent without benefit of counsel); Liberty, Press Release, *supra* note 11 (describing the potential problems of the proposed laws, including the lack of any intent requirement in criminal prosecutions, as well as the change in potential detention period of suspects, without charge, from two weeks to three months). For a further discussion of these issues, see *infra* notes 99–230 and accompanying text.

¹⁴ The Terrorism Act 2006 received Royal Assent on March 30, 2006. Press Release, Home Office, Terrorism, ID Cards and Immigration Bills Become Law (Mar. 30, 2006), available at <http://www.homeoffice.gov.uk/about-us/news/new-acts> [hereinafter Clarke Press Release].

¹⁵ STATEWATCH, PROTECT OUR RIGHTS: A BRIEFING DOCUMENT ON THE GOVERNMENTS [SIC] ANTI-TERRORISM PROPOSALS 7 (2005), <http://www.statewatch.org/news/2005/sep/protectourrightsbriefing.pdf> [hereinafter PROTECT OUR RIGHTS].

tions and toward a sort of safety which the framers of human rights laws in both nations may never have intended.¹⁶

This Comment will explore the effect the PATRIOT Act and the Anti-Terror laws have on freedom of expression and free exercise of religion in both the United States and the United Kingdom. Section I.A gives a description of the laws in both countries, as well as their effects to date on Muslim persons within their borders.¹⁷ Section I.B gives a brief history of Islam and the possible interpretations of the faith that cause particular problems for fundamentalist Muslims.¹⁸ Section II.A discusses hypothetical situations in which Muslims could unexpectedly find themselves should they express their firmly-held and genuine religious beliefs.¹⁹ Section II.B gives a constitutional and statutory assessment of the PATRIOT Act.²⁰ Section II.C discusses the U.K.'s Anti-Terror legislation in light of the Human Rights Act 1998 and the European Convention on Human Rights.²¹ Section II.D discusses the potential penalties and defenses to charges brought under either the PATRIOT Act or the U.K.'s Anti-Terror Laws.²² Finally, Section III concludes the Comment with a synopsis of the issues discussed therein.²³

I. INTRODUCTION

A. *History of the Laws Against Terrorism*

The USA PATRIOT Act is an acronym for the full name of the law, "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001."²⁴ The PATRIOT Act was enacted by Congress on October 26, 2001, just weeks after the September 11, 2001 attacks on the United States.²⁵ The PATRIOT Act was eventually codified as several different laws

¹⁶ See generally *Civil Rights Concerns*, *supra* note 12, at 146–60; PROTECT OUR RIGHTS, *supra* note 15, at 7.

¹⁷ See *infra* notes 24–73 and accompanying text.

¹⁸ See *infra* notes 74–101 and accompanying text.

¹⁹ See *infra* notes 102–107 and accompanying text.

²⁰ See *infra* notes 108–156 and accompanying text.

²¹ See *infra* notes 157–182 and accompanying text.

²² See *infra* notes 183–230 and accompanying text.

²³ See *infra* notes 231–232 and accompanying text.

²⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.).

²⁵ *Id.*

under the United States Code, as it both modified prior United States Code sections and created several new sections as well.²⁶

The stated purpose of the PATRIOT Act seems genuine as it seeks “[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”²⁷ As such, the PATRIOT Act amends many laws already in place and strengthens the ability of the federal government to “combat terrorism” in general.²⁸ This includes the ability of the federal government to use formerly illegal methods of surveillance to gather critical information about suspected terrorists.²⁹ It also includes cross-departmental and cross-agency cooperation and sharing of information to follow up on leads regarding suspected terrorist activities.³⁰ No longer does the Foreign Intelligence Surveillance Act of 1978 (FISA)³¹ cause the Federal Bureau of Investigation (FBI) to remain under the limitations and strictures imposed by the former Attorney General, Janet Reno, when sharing information with the Department of Justice.³² Prior to the passage of the PATRIOT Act, the FBI and the Department of Justice were precluded from sharing information regarding criminal activity obtained by way of a FISA wiretap when the primary purpose of the tap was surveillance of foreign intelligence, unless certain conditions were met.³³ Since the inception of the PATRIOT Act, the agencies may more freely share information when pursuing a “significant purpose” of foreign intelligence gathering, regardless of the primary purpose of the surveillance.³⁴ Such information sharing would allow the Department of Homeland Security to follow up on leads without the previous “red tape” involved.³⁵ These new methods of surveillance include monitoring of bank records and charities, wire tapping, and access to per-

²⁶ *Id.*

²⁷ *Id.*, preamble.

²⁸ *See id.* (modifying scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.).

²⁹ *Id.* tit. II.

³⁰ USA PATRIOT Act tit. II.

³¹ Pub. L. No. 95-511, 92 Stat. 1783 (current version at 50 U.S.C. §§ 1801-1811 (Supp. 2006)).

³² *See, e.g.*, USA PATRIOT Act; *see also* Craig S. Lerner, *The USA PATRIOT Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*, 11 GEO. MASON L. REV. 493, 495-506 (2003) (discussing the prior problems of information sharing between the Department of Justice and the FBI where matters of purely internal criminal activity were the focus of an investigation).

³³ Lerner, *supra* note 32, at 500-01.

³⁴ USA PATRIOT Act § 218.

³⁵ *See, e.g.*, USA PATRIOT Act tit. II; *see also* Lerner, *supra* note 32, at 495-506.

sonal e-mail of suspected terrorists, to name a few.³⁶ The federal government also maintains a watch list of charities linked with material support of terrorist activity,³⁷ which was provided for under the PATRIOT Act and is monitored by the Secretary of the Treasury in concert with the Attorney General and the Department of Homeland Security.³⁸

In the United Kingdom, many so-called “Anti-Terror Laws” existed prior to the September 11, 2001 attacks and the Iraq conflict.³⁹ Many of these were in place specifically because of the attacks on Great Britain and its territories by movements for the liberation of Northern Ireland.⁴⁰ However, the United Kingdom also believed that the threat of international terrorism was on the rise, so it put in place the Terrorism Act 2000 (“TACT”) in order to account for international terrorist groups.⁴¹

TACT was passed by British Parliament on July 20, 2000.⁴² The law came into force on February 19, 2001, as a response to the continuing threat of international terrorism, and it replaced much of the previous, temporary anti-terror legislation in the U.K., which dealt primarily with problems in Northern Ireland.⁴³ Similar in scope to the PATRIOT Act, though passed and entered into force long before the PATRIOT Act, TACT allows for law enforcement to monitor and investigate suspected terrorists more easily than before TACT entered into force.⁴⁴ In addition to outlawing fourteen Irish groups, TACT also outlaws twenty-five international groups,⁴⁵ many of which are on the Terrorist Exclusion List in the United States as well.⁴⁶

In addition, TACT criminalizes several offenses not previously contemplated by the Crown, including: 1) inciting terrorist acts;⁴⁷ 2) seeking or providing training for terrorist purposes at home or over-

³⁶ See, e.g., USA PATRIOT Act tit. II, III, & X; see also Lerner, *supra* note 31, at 495–506.

³⁷ OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT. OF STATE, TERRORIST EXCLUSION LIST (2003), <http://www.state.gov/s/ct/rls/fs/2002/15222.htm> [hereinafter TERRORIST EXCLUSION LIST].

³⁸ See, e.g., USA PATRIOT Act tit. III; see also Lerner, *supra* note 31, at 495–506.

³⁹ Terrorism Act, 2000, c. 11 (Eng.).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Terrorism Act, 2000, c. 11 (Eng.).

⁴⁶ TERRORIST EXCLUSION LIST, *supra* note 37.

⁴⁷ Terrorism Act, 2000, c. 11, Pt. VI (Eng.).

seas;⁴⁸ and 3) providing instruction or training in the use of firearms, explosives or chemical, biological or nuclear weapons.⁴⁹ These provisions are similar in scope to the criminalization of such activities in the United States under the PATRIOT Act.⁵⁰

After the September 11, 2001 attacks, the United Kingdom passed two new terrorism laws. The first of these, the Anti-Terrorism Crime and Security Act 2001 (“ATCSA”), was passed in November 2001 by British Parliament, in direct response to the September 11, 2001 attacks.⁵¹ Its purpose and scope were similar to those listed in the PATRIOT Act in the United States.⁵² In addition to amending the Terrorist Act 2000, the ATCSA seeks to keep funds out of the hands of terrorists by: 1) monitoring banks and charities more closely;⁵³ 2) allowing for easier collection and sharing of information regarding terrorist threats between government departments and agencies;⁵⁴ 3) streamlining the immigration procedures that might be relevant to terrorist threats to the U.K.;⁵⁵ 4) stopping people who seek to promote any kind of religious and racial hatred and/or violence;⁵⁶ 5) ensuring the secure operation of nuclear and aviation industry in the U.K.;⁵⁷ 6) improving the security surrounding dangerous chemicals and substances that may be targeted for destruction or used by terrorists in attacks;⁵⁸ 7) extending the police powers of relevant law enforcement and military agencies;⁵⁹ 8) ensuring that Great Britain can meet its obligations to the rest of Europe in reference to cooperation between the police and judiciary, and its international obligations to end bribery and corruption;⁶⁰ and 9) revamping portions of

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 805, 115 Stat. 272, 377–78 (amending the provisions of 18 U.S.C. § 2339A to broaden the scope of the definition of training to include expert advice); *id.* § 817, 115 Stat. 385–86 (expanding the scope of the Biological Weapons Statute, 18 U.S.C. § 175, to include as a punishable offense the possession of a biological agent or delivery system of such agent).

⁵¹ Anti-Terrorism, Crime and Security Act, 2001, c. 24, Explanatory Notes (Eng.).

⁵² *See id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Anti-terrorism, Crime and Security Act, 2001, Explanatory Notes.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

the U.K.'s anti-terrorist laws.⁶¹ ATCSA goes even further than the PATRIOT Act in some respects, as it contains a large section that attempts to regulate nuclear, chemical, and biological weapons of mass destruction,⁶² whereas this is only a peripheral function of the PATRIOT Act.⁶³

The second major anti-terror law passed in the United Kingdom was The Prevention of Terrorism Act 2005 ("PTA").⁶⁴ The PTA, passed on March 11, 2005, replaced Part 4 of ATCSA,⁶⁵ largely because Part 4 was considered to be racist and nationalist in nature, as it originally affected only foreign nationals and did not have the power to affect U.K. citizens.⁶⁶ The reason the PTA was introduced by the U.K. government was to reduce the risk of terrorism by providing for "control orders" so that residents of Great Britain could go forward with their business freely and with confidence.⁶⁷ According to the U.K. government, the PTA further seeks to balance individual liberty and collective security by allowing the Home Secretary to place a person suspected of terrorism under a control order.⁶⁸ These control orders grant permission for British law enforcement to monitor the suspect, take away the suspect's freedom to leave the country or move around the U.K., and force the suspect to submit to searches of his or her home.⁶⁹

The Terrorism Act 2006, though drafted prior to the July 7, 2005 bombings of the London public transportation system, was brought to bear on Parliament in August 2005.⁷⁰ At the time named the Terrorism Bill, the Terrorism Act 2006 will lead to more stringent regulations as to associating or speaking with others who "glorify terrorism."⁷¹ However, the Terrorism Act 2006 goes much further than other legislation of its kind in the U.K. Under this new law, acts such as looking at certain websites or reading certain books may result in

⁶¹ *See id.*

⁶² *See id.*

⁶³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 817, 115 Stat. 272, 385-86.

⁶⁴ Prevention of Terrorism Act, 2005, c. 2 (Eng.).

⁶⁵ Anti-terrorism, Crime and Security Act, 2001, *supra* note 8, Part IV.

⁶⁶ AMNESTY INT'L, REPORT 2005: UNITED KINGDOM (2005), <http://web.amnesty.org/report2005/gbr-summary-eng>.

⁶⁷ Prevention of Terrorism Act 2005, Explanatory Notes.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ PROTECT OUR RIGHTS, *supra* note 15.

⁷¹ *Id.*

deportation for foreign nationals in the U.K..⁷² Under a corollary law to the Terrorism Act 2006 called the Identity Cards Act, U.K. citizens will have to carry ID cards with vital biometric information, such as fingerprints, and present them at spot checks and border crossings.⁷³

B. A Brief History of Islam and the Problems Created For It By the PATRIOT Act and the U.K. Anti-Terror Laws.

In both the United States and the United Kingdom, many of the organizations which make up terrorist watch lists are Muslim charities and religious groups.⁷⁴ As such, it is important to understand the background of Islam and its followers in order to understand the problems created for them by the laws of general applicability in both countries.

Islam was founded approximately 1,400 years ago by the prophet Muhammad in what is modern-day Saudi Arabia. According to the majority view, there are Five Pillars of the religion:

1. submitting oneself by stating that there is no God but God (Allah) and that Muhammad is His Prophet;⁷⁵
2. observing the faith through prayer five times per day;⁷⁶
3. giving alms to the poor (also known as “Zakat”);⁷⁷
4. making the pilgrimage to Mecca (also known as the “Hajj”);⁷⁸ and
5. observing the required fasting during the month of Ramadan.⁷⁹

Preaching, referred to as *da'wah*,⁸⁰ and proselytizing, often referred to as *tabligh*,⁸¹ are also regarded as fundamental principles of the faith.⁸²

A minority view among Muslims is that there is a sixth pillar of the faith: Jihad,⁸³ often translated as the “the duty to ‘struggle’ or

⁷² *Id.*

⁷³ *Id.*; see also Clarke Press Release, *supra* note 14.

⁷⁴ TERRORIST EXCLUSION LIST, *supra* note 37; Anti-Terrorism, Crime and Security Act, 2001, c. 24, Explanatory Notes (Eng.).

⁷⁵ Donna E. Arzt, *The Role of Compulsion in Islamic Conversion: Jihad, Dhimma and Ridda*, 8 BUFF. HUM. RTS. L. REV. 15, 19 (2002).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 20.

⁸¹ Arzt, *supra* note 75, at 20.

⁸² See, e.g., *Saudi Arabia: Friend or Foe in the War on Terror?*, Hearing Before the S. Judiciary Comm., 109th Cong. (2005) (testimony of Steve Emerson, Executive Director, Investigative Project on Terrorism), available at http://judiciary.senate.gov/testimony.cfm?id=1669&wit_id=4791.

⁸³ See Arzt, *supra* note 75, at 19–21 (citations omitted).

'sacrifice' in the path of God."⁸⁴ This minority view has often been rejected by scholars in the faith.⁸⁵ However, many Muslims do believe that Jihad is an element of the faith, even if it is not a pillar of the faith.⁸⁶ Often, this element is interpreted broadly as meaning a personal struggle.⁸⁷ Among the minority, however, it can mean a variety of things, from preaching and teaching the faith to acts of violence in an attempt to end oppression of Muslims in certain areas of the world.⁸⁸

Even among the majority belief system, some elements of the Five Pillars may lead to a belief in the validity of Jihad.⁸⁹ In particular, Surah 9, Section 8, Verse 60 of the Qur'an, which sets forth the classes of people who are eligible for Zakah, or almsgiving, states that the following people may receive aid:

1. the needy;
2. the poor;
3. those who work to administer funds to the poor;
4. those who are recently converted and may be disdained for their beliefs, and thus must receive funds until they can establish a new livelihood for themselves;
5. those who are in bondage, physical or otherwise (including slaves and prisoners of war);
6. those who are in debt;
7. those who *struggle in the cause of God* and are thus unable to earn a living otherwise; and
8. those who are stranded (wayfarers).⁹⁰

In the United States, the most prevalent problem for Muslims is the restriction on religious conduct, namely, giving freely to charity in accordance with Surah 9:60.⁹¹ In the United Kingdom, the most prevalent problem for Muslims is the restriction on preaching and other forms of religious free speech.⁹² Both restrictions cause a sub-

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ ABDULLAH YUSUF ALI, MEANING OF THE HOLY QUR'AN 456 (10th ed. 1996).

⁹⁰ *Id.* (emphasis added).

⁹¹ *See id.* In the United States, because of the protections on free speech where such speech does not directly incite violence, the main restriction appears to be on religious conduct. This restriction comes in the form of generalized laws which ban any party, regardless of religion, from donating to specific charitable organizations. *See infra* notes 108–156 and accompanying text.

⁹² *See infra* notes 172–180 and accompanying text.

stantial burden upon Muslims, as both limit their ability to practice their religion freely. However, the restriction on speech in the United Kingdom is the more substantial of the two because it is a more complete restriction than that on giving to charities in either nation.

In two of the world's leading democratic societies, anti-terror legislation provides for harsh restrictions on free speech, free association, and free exercise of religion.⁹³ While the legal systems in each nation differ based upon the existence, or lack thereof, of a written constitution, these societies have nonetheless made certain guarantees to their people that their rights to speak, associate, and practice in accordance with their firmly held religious beliefs shall not be infringed except where the governments of those nations have a compelling reason in so doing.⁹⁴ Islam, while practiced the world over by over one billion people,⁹⁵ is a minority faith in both of these nations.⁹⁶ The impact of anti-terrorism legislation in both nations could be significant if the laws are not narrowly tailored and interpreted by the judiciary in a way that respects the fundamental freedoms of expression and speech, association, and religion. The government's interest in preventing terrorism is certainly compelling. However, the compelling interest of the government may not be as narrowly tailored as it should be, in that some claim that the ability of a minority of religious people to conduct themselves in accordance with their beliefs has been chilled.⁹⁷ Such a practice may, in fact, work to chill the practice of the minority religion. In addition, there may be a less restrictive means of preventing acts of terrorism in these democratic societies.⁹⁸

The governments of both the United States and the United Kingdom may restrict speech and religious conduct in a less restrictive way than those found within the PATRIOT Act and the proposed

⁹³ See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.); *Terrorism Act, 2006*, c. 11 (Eng.); *Prevention of Terrorism Act, 2005*, c. 2 (Eng.); *Anti-Terrorism, Crime and Security Act, 2001*, c. 24 (Eng.); *Terrorism Act, 2000*, c. 11 (Eng.).

⁹⁴ See U.S. CONST. amend. 1; *Human Rights Act, 1998*, c. 42 (Eng.).

⁹⁵ BRITISH BROAD. CO., *RELIGION & ETHICS—ISLAM AT A GLANCE*, <http://www.bbc.co.uk/religion/religions/islam/ataglance/glance.shtml> (last visited Feb. 5, 2007).

⁹⁶ See TOLERANCE.ORG, *WHAT IS ISLAM?* (2001), http://www.tolerance.org/news/article_tol.jsp?id=273.

⁹⁷ See *Civil Rights Concerns*, *supra* note 12, at 146–60.

⁹⁸ See *id.*

British laws by using other existing laws and legal concepts. The laws already in place, such as FISA⁹⁹ in the United States, with a few adjustments as to protocol¹⁰⁰ would work just as well in catching potential terrorists of all varieties, including persons born and raised in the United States. Similarly, in the United Kingdom, where stringent laws such as TACT were already in place prior to September 11, 2001, laws that did not target specific religious or racial groups could be used to catch terrorists without causing undue burdens to free speech, free exercise, and free association.¹⁰¹

II. COMPARISON BETWEEN THE USA PATRIOT ACT AND THE U.K.'S ANTI-TERROR LAWS

A. *Hypothetical Situations In Which Muslims Could Run Afoul of the PATRIOT Act and the U.K.'s Anti-Terror Laws*

The laws of both the United States and the United Kingdom may not be as protective of free exercise and free speech as they once were,¹⁰² and many possibilities for people to violate the PATRIOT Act and the British Anti-Terror Laws exist, even under seemingly innocent circumstances.¹⁰³ For instance, it is possible for a Muslim, giving to charity, to violate the laws amended by the PATRIOT Act, subjecting him or her to the possible civil and criminal penalties of the Act.¹⁰⁴ For example, Jane Doe, a Muslim residing in Jersey City, New Jersey regularly attends prayer services at a mosque in town. Jane wants to give to charity, and decides to “adopt an orphan” in Palestine. After sponsoring a child for nearly a year through the charity, an article is published on the front page of the local newspaper, indicating that the charity and other similar charitable funds in the area guarantee support to the children of suicide bombers in Palestine,

⁹⁹ Lerner, *supra* note 32, at 500–01.

¹⁰⁰ *Id.*

¹⁰¹ See Prevention of Terrorism Act, 2005, c. 2 (Eng.).

¹⁰² See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.); Prevention of Terrorism Act 2005; Anti-Terrorism, Crime and Security Act, 2001, c. 24; Terrorism Act, 2000, c. 11.

¹⁰³ See, e.g., USA PATRIOT Act; Prevention of Terrorism Act; Anti-Terrorism, Crime and Security Act; Terrorism Act.

¹⁰⁴ See, e.g., 18 U.S.C. § 2339C (2000 & Supp. 2006) (proscribing collection of funds for the intended purpose of causing bodily injury to a non-combatant under penalty of fine and imprisonment of up to ten years); *Id.* § 981(a)(1)(G) (permitting civil forfeiture of all assets associated with terrorist enterprise). For a detailed analysis, see *infra* notes 102–56 and accompanying text.

specifically those working with Hamas. In fact, after performing some research, Jane learns that she has been sending money to support the child of a suicide bomber who killed seven people on a street corner in Tel-Aviv just days after she agreed to sponsor the child. Immediately after finding out that the charity is funding terrorist operations, Jane cancels her sponsorship of the Palestinian child. The Department of Justice begins searching through the charity's receipts for the last seven years and discovers that Jane Doe has been giving money to the charity for nearly a year. They begin to investigate her for materially aiding a terrorist organization. Penalties for Ms. Doe's actions could be as severe as civil forfeiture of all of her assets.¹⁰⁵

It is also possible for a person to violate the British Anti-Terror Laws by expressing political and religious beliefs. For example, John Roe is a Muslim originally from Morocco who became a naturalized citizen of the United Kingdom about five years ago after fleeing political persecution in his nation of origin. He has recently taken an interest in the state of the conflict between Palestine and Israel, and has decided to come down on the side of Palestine. He believes that Israel should be eliminated as a state, but through diplomatic and peaceful means. John Roe has never advocated for violence, and believes firmly that a diplomatic solution to the problem will be best for everyone in the long run. A few weeks ago, on a Friday after his mosque's prayer service, John spoke publicly about his belief that Israel should be eliminated as a state. His speech was reported to the U.K. government, and John is currently under investigation by law enforcement. If found culpable, Mr. Roe will be subject to penalties ranging from control orders monitoring his movements,¹⁰⁶ to being stripped of his naturalized citizen status and deported to his native country.¹⁰⁷

B. The United States Constitutional and Statutory Assessment of the PATRIOT Act

The United States Constitution guarantees certain protections to all people within the borders of the United States.¹⁰⁸ Laws passed by

¹⁰⁵ See, e.g., § 2339C; § 981(a)(1)(G).

¹⁰⁶ PROTECT OUR RIGHTS, *supra* note 15.

¹⁰⁷ *Id.* By way of an act passed at the same time as the Terrorism Act 2006, the United Kingdom Secretary of State is empowered to deprive any person of citizenship if he believes it is "conducive to the public good." Immigration, Asylum and Nationality Act, 2006, c. 13, § 56 (Eng.), available at <http://www.opsi.gov.uk/acts/acts2006/20060013.htm>.

¹⁰⁸ U.S. CONST. amend. XIV, § 1.

the Congress must comport with the provisions of the Constitution.¹⁰⁹ Generally, the laws must not unduly impinge upon fundamental rights and freedoms without a compelling government interest.¹¹⁰ More specifically, they must be facially neutral as to race, religion, gender, ethnicity, and other characteristics, in accordance with the Fourteenth Amendment of the U.S. Constitution.¹¹¹

The rights to free speech and free association are guaranteed under the First Amendment, and are thus viewed as fundamental rights which may not be impinged upon by the government without a compelling interest.¹¹² Prior to the enactment of the Religious Freedom Restoration Act (“RFRA”),¹¹³ rights to free exercise of religion were reviewed based upon the compelling interest test only when they were considered to be a hybrid of the rights to free exercise and some other fundamental right, usually freedom of association or freedom of speech.¹¹⁴ Since the institution of RFRA, claims of infringement upon free exercise rights must be reviewed using the compelling interest test.¹¹⁵ Additionally, in the sphere of First Amendment rights, the government impingement must generally be content-neutral, restricting all people equally or none at all.¹¹⁶

¹⁰⁹ U.S. CONST. art. VI, cl. 2.

¹¹⁰ See *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986) (“The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote . . . or, as here, the freedom of political association.”) (internal citations omitted).

¹¹¹ See *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973) (holding that, as aliens were a discrete and insular minority, a law prohibiting any alien from holding a position in New York City government was a violation of the Fourteenth Amendment).

¹¹² See *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940):

[A] State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

¹¹³ 42 U.S.C. §2000bb (2000 & Supp. 2006).

¹¹⁴ See *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990).

¹¹⁵ 42 U.S.C. § 2000bb; see also *Gonzales v. O Centro Espirita Benficiente Uniao Do Vegetal*, 126 S. Ct. 1211, 1216–17 (2006).

¹¹⁶ See *Cantwell*, 310 U.S. at 304; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (“Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.”). The relevance of free speech cases to restrictions on time, place, and manner in the free exercise context is illustrated in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 160 n.8 (2002):

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the

The PATRIOT Act was passed in order “to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.”¹¹⁷ Presumably, the protection of human beings from terrorist acts is a compelling government interest, as was similarly stated in *Korematsu v. United States*,¹¹⁸ where the Court held that “[p]ressing public necessity may sometimes justify the existence of such restrictions”¹¹⁹ Title III of the PATRIOT Act regulates the flow of currency through national and international organizations, including charities.¹²⁰ In particular, section 311 governs the treatment of organizations, including charities, which are found to have “laundered money” for the material support of terrorism by the Secretary of the Treasury.¹²¹ The Secretary of the Treasury, along with the Secretary of State and the Attorney General of the United States, may work together after the Secretary of the Treasury has designated that a person or an organization has laundered money, to take steps to criminally and civilly punish these organizations.¹²²

In addition, the Secretary of State and Attorney General of the United States have put together a list of charitable organizations that have ties to terrorist organizations, and thus may be guilty of funneling money to terrorists.¹²³ Some have argued that, by placing these charities on a “banned” list, the federal government is restricting a form of religious conduct, and thus, free exercise of religion.¹²⁴ Individual persons and non-charitable organizations may also be subject to the ban, in accordance with section 411 of the PATRIOT Act, which “authorizes the Secretary of State, in consultation with or upon the request of the Attorney General, to designate terrorist organiza-

Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press

Id. (internal citations omitted).

¹¹⁷ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272, preamble (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.)

¹¹⁸ 323 U.S. 214 (1944).

¹¹⁹ *Id.* at 216.

¹²⁰ USA PATRIOT Act, tit. 3.

¹²¹ *Id.* § 311.

¹²² Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

¹²³ *Id.*

¹²⁴ *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003) (holding that the Religious Freedom Restoration Act does not protect as freedom of religion the right to fund a terrorist organization).

tions for immigration purposes.”¹²⁵ The list designates organizations which have come to the attention of the Attorney General as having done one of the following: 1) “commits or incites to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;” 2) “prepares or plans a terrorist activity;” 3) “gathers information on potential targets for terrorist activity; or” 4) “provides material support to further terrorist activity.”¹²⁶ The list contains organizations outside the Islamic world, including several Communist organizations and a few for the liberation of Northern Ireland.¹²⁷

Largely, the litigation surrounding the PATRIOT Act as it pertains to Muslim-Americans has been in the arena of restrictions upon charities.¹²⁸ As charity is one of the Five Pillars of the Islamic faith,¹²⁹ the act of almsgiving is extremely important to the free exercise of the Muslim religion.¹³⁰ While courts have thus far held that the PATRIOT Act’s provisions are, in their general application, constitutional,¹³¹ the provisions regarding charitable contributions have been challenged numerous times because of the importance of charity to Muslim-Americans.¹³² In almost every one of these cases, the provisions of the PATRIOT Act which result in civil and criminal penalties for Muslims who give to organizations on the Terrorist Exclusion List¹³³ have been challenged under the RFRA.¹³⁴

The RFRA was passed in response to the decision of the Court in *Employment Division v. Smith*,¹³⁵ which invalidated the compelling interest test established under *Sherbert v. Verner*¹³⁶ and *Wisconsin v. Yoder*¹³⁷ for facially neutral laws, stating “[i]t is a permissible reading of the text [of the First Amendment] . . . to say that if prohibiting the exercise of religion . . . is not the object of the . . . [law] but merely

¹²⁵ TERRORIST EXCLUSION LIST, *supra* note 37 (bulleted list in original).

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ *See, e.g.,* Boim v. Quranic Literacy Inst., 340 F. Supp. 2d 885 (D. Ill. 2004) (holding in part that the First Amendment protections of freedom of religion, expression, and association cannot shield criminal and civil liability for criminal action); *Holy Land Found.*, 333 F.3d at 160.

¹²⁹ Arzt, *supra* note 75, at 19.

¹³⁰ *See id.*

¹³¹ *See Holy Land Found.*, 333 F.3d at 165.

¹³² *Id.*

¹³³ TERRORIST EXCLUSION LIST, *supra* note 37.

¹³⁴ *Holy Land Found.*, 333 F.3d at 160.

¹³⁵ 494 U.S. 872 (1990).

¹³⁶ 374 U.S. 398 (1963).

¹³⁷ 406 U.S. 205 (1972).

the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”¹³⁸ The Court held that prior cases where “the First Amendment bar[red] application of a neutral, generally applicable law to religiously motivated action . . . involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.”¹³⁹ The RFRA, passed in 1993, overturned the *Smith* decision by statute.¹⁴⁰

The RFRA states that only when the compelling interest test, established under *Sherbert*¹⁴¹ and *Yoder*,¹⁴² is met can the government impede the free exercise of religion, even by facially neutral, generally applicable laws.¹⁴³ This would include religious conduct as well as religious speech, as the aforementioned cases included both.¹⁴⁴ Although the RFRA was invalidated under *City of Boerne v. Flores*¹⁴⁵ as to its Fourteenth Amendment implications for states,¹⁴⁶ the statute was recently affirmed by *Gonzales v. O Centro Espirita Benficiente Uniao Do Vegetal*.¹⁴⁷ As such, the RFRA applies to all federal laws, including the PATRIOT Act.

In *O Centro Espirita*, the Court applied the compelling interest test established under *Sherbert* and *Yoder* to Schedule I of the Con-

¹³⁸ *Smith*, 494 U.S. at 878. In *Smith*, the issue was whether Smith’s use of peyote for sacramental purposes was a legitimate reason for the termination of his employment and subsequent denial of unemployment benefits under Oregon state law. *Id.* at 874–75. Smith claimed that his First Amendment rights were violated under the Oregon statute, which prohibited the knowing or intentional possession of a controlled substance, including peyote, by any individual, regardless of purpose. *Id.* The Court indicated that a compelling interest test was not required where a facially neutral law had some incidental burden on free exercise of religion. *Id.* at 885.

¹³⁹ *Id.* at 881 (citations omitted).

¹⁴⁰ 42 U.S.C. § 2000bb (2000 & Supp. 2006).

¹⁴¹ 374 U.S. 398, 406–07 (1963).

¹⁴² 406 U.S. 205, 219–22 (1972).

¹⁴³ 42 U.S.C. § 2000bb.

¹⁴⁴ *See id.* In *Sherbert*, the court upheld the plaintiff’s right to collect unemployment benefits after she was fired for refusing to come to work on Saturdays, citing her religious objection as a Seventh-Day Adventist. *See Sherbert*, 374 U.S. at 398. In *Yoder*, the court upheld the right of Amish parents to keep their children home from school, despite a local regulation to the contrary, citing their religious belief that education after the eighth grade was unnecessary for members of their religion. *See Yoder*, 406 U.S. at 205.

¹⁴⁵ 521 U.S. 507, 534 (1997). The main reason why the Court invalidated RFRA as to the states was federalism. *Id.* (“Even assuming RFRA would be interpreted in effect to mandate some lesser test . . . the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States’ traditional prerogatives . . .”).

¹⁴⁶ *Id.*

¹⁴⁷ 126 S. Ct. 1211 (2006).

trolled Substances Act (“CSA”), which prohibited the importing, possession, or use of a substance known as dimethyltryptamine (“DMT”).¹⁴⁸ DMT, a chemical naturally occurring in certain plants native to the Amazon forest, was used in a sacramental tea by a church founded in the Amazon region.¹⁴⁹ The Court held that, regardless of its intentions, the government bore the burden of proving that its interests in prohibiting all uses of DMT, including religious ones, were compelling, and that the prohibitive measures in place were the least restrictive means of protecting its compelling interests.¹⁵⁰ Further, the Court found the government’s argument against making a religious exception to the CSA unconvincing.¹⁵¹

The Government’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to “rule[s] of general applicability.” Congress determined that the legislated test “is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” This determination finds support in our cases

We reaffirmed just last Term the feasibility of case-by-case consideration of religious exemptions to generally applicable rules. . . . We had “no cause to believe” that the compelling interest test “would not be applied in an appropriately balanced way” to specific claims for exemptions as they arose. Nothing in our opinion suggested that courts were not up to the task.¹⁵²

There are no provisions in the PATRIOT Act that prevent free speech or free association *per se*.¹⁵³ However, the relaxation of laws regarding government surveillance and wiretapping of suspected terrorists may have a chilling effect upon certain forms of free speech and free association, especially as they pertain to the exercise of the Islamic faith.¹⁵⁴ The question that begs asking is whether the safeguards proposed under the PATRIOT Act are the least restrictive

¹⁴⁸ *Id.* at 1216.

¹⁴⁹ *Id.*

¹⁵⁰ *See id.*

¹⁵¹ *Id.* at 1223.

¹⁵² *Id.* at 1223–24 (internal citations omitted).

¹⁵³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.).

¹⁵⁴ *See* Lerner, *supra* note 32, at 495–506; *Civil Rights Concerns*, *supra* note 12, at 146–60.

means of promoting and protecting the compelling interest of the United States government in preventing terrorism.¹⁵⁵ In many instances, the clear response from Muslims in the United States has been “no.”¹⁵⁶

C. An Assessment of the U.K.’s Anti-Terror Laws In Light of the European Convention on Human Rights and the Human Rights Act 1998

By comparison with the United States, the United Kingdom has far more stringent anti-terrorism laws.¹⁵⁷ Their legislation stems from decades of dealing with internal terrorism and terrorism in colonial states abroad.¹⁵⁸ Its laws are also tempered, however, by the Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁵⁹ also known as the European Convention on Human Rights (“ECHR”), to which Britain is a signatory.¹⁶⁰ In addition, the U.K. passed the Human Rights Act 1998, which incorporates the main rights of the ECHR into British law.¹⁶¹ The rights guaranteed by the Human Rights Act 1998 include those found under Articles 9, 10, and 11 of the ECHR: freedom of religion, freedom of expression, and freedom of peaceful assembly.¹⁶²

The United Kingdom has no written constitution, but many of the provisions of the ECHR are strikingly similar to those in the United States Constitution, with one main exception, at Article 10, Section 2 of the ECHR, which states:

[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, terri-

¹⁵⁵ *Gonzales v. O Centro Espirita Uniao do Vegetal*, 126 S. Ct. 1211, 1217 (2006).

¹⁵⁶ See *Civil Rights Concerns*, *supra* note 12, at 146–60.

¹⁵⁷ These laws are sometimes described by those in the human rights community as “draconian.” See, e.g., AMNESTY INTERNATIONAL, UNITED KINGDOM—JUSTICE PERVERTED UNDER THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 (2003), available at <http://web.amnesty.org/library/index/ENGEUR450292003>.

¹⁵⁸ See *id.* at Background.

¹⁵⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter ECHR], available at <http://www.hri.org/docs/ECHR50.html>.

¹⁶⁰ *Id.* The ECHR came into force in all signatory nations in September 1953. European Court of Human Rights, *History of the Court*, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/> (last visited Feb. 21, 2007).

¹⁶¹ Human Rights Act, 1998, c. 42 (Eng.).

¹⁶² *Id.* § 1; see ECHR, *supra* note 159, Arts. 9–11.

torial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁶³

Article 10, Section 2 provides for the preservation of personal dignity over the right to free speech. Unlike the United States,¹⁶⁴ in the United Kingdom, speech advocating hatred of others is not tolerated.¹⁶⁵

As to free exercise of religion, in addition to the restrictions already in place, the United Kingdom has also proscribed, by way of the PTA, TACT, ATCSA, and its previous laws, funding of terrorist organizations.¹⁶⁶ It has changed its charity monitoring laws to make it tougher for charities to illegally fund terrorist operations.¹⁶⁷ In addition, it has similar forfeiture laws to those in the U.S.¹⁶⁸ The United Kingdom has also put in place provisions for freezing orders that can last for up to two years from the date the freezing order is given.¹⁶⁹ This could potentially tie up the assets of suspected terrorists for a long enough period of time so as to thwart whatever plans the terrorist organization may have had.¹⁷⁰ Immigration policies have also been changed under the ATCSA to make it more difficult for terrorists to enter the country.¹⁷¹

The Terrorism Act 2006 and its corollaries go much further in regulating activity in the U.K.¹⁷² These laws greatly limit the rights to free speech, free association, and free exercise of religion guaranteed to all people in the United Kingdom by Articles 9, 10, and 11 of the ECHR.¹⁷³ The mere visiting of certain designated websites and book

¹⁶³ ECHR, *supra* note 159, Art. 10, cl. 2.

¹⁶⁴ *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁶⁵ Human Rights Act, 1998, c. 42, ¶ 1 (Eng.).

¹⁶⁶ Terrorist Act, 2000, c. 11, Explanatory Note (Eng.):

The Act reforms and extends previous counter-terrorist legislation, and puts it largely on a permanent basis. The previous legislation concerned is: the Prevention of Terrorism (Temporary Provisions) Act 1989 (c. 4) ('the PTA'); the Northern Ireland (Emergency Provisions) Act 1996 (c. 22) ('the EPA'); and sections 1 to 4 of the Criminal Justice (Terrorism and Conspiracy) Act 1998 (c. 40).

¹⁶⁷ Anti-Terrorism Crime and Security Act, 2001, c. 24, Explanatory Notes ¶¶ 41–42 (Eng.).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at Part 2.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Terrorism Act, 2006, c. 11 (Eng.); Clarke Press Release, *supra* note 14.

¹⁷³ *See* Terrorism Act, 2006.

stores, or association with designated organizations, may be grounds for criminal sanctions under the law.¹⁷⁴

In addition, condoning or glorifying terrorist acts that have occurred anywhere in the world is a criminal offense.¹⁷⁵ Naturalized citizens may be stripped of their citizen status for acting in a manner “contrary to the interests of the country” and for participating in extremism.¹⁷⁶ Extremism is defined by the government in a rather simplistic way, stating, “[t]hey demand the elimination of Israel; the withdrawal of all Westerners from Muslim countries, irrespective of the wishes of people and government; the establishment of effectively Taleban states and Sharia law in the Arab world en route to one caliphate of all Muslim nations.”¹⁷⁷

Because of the broad wording of the Terrorism Act 2006, it is possible that people who have never participated in terrorist acts believe in the ideas expressed by the U.K. government as being “extremist.”¹⁷⁸ The danger here is that people who have done nothing wrong, who merely hold an opinion, could be stripped of citizenship and removed from their country merely for having that opinion.¹⁷⁹ This goes against the spirit of the ECHR, which was meant to promote and protect basic human rights for all people within the European jurisdictions that were signatories to the Convention.¹⁸⁰

Other provisions in violation of the ECHR are: relaxing of restrictions on holding time of suspects without charge, which was increased from fourteen days to twenty-eight days (a potential violation of Article 5, Sub. 2 of the ECHR); designation of “special judges” for secret courts where public trials are not held (a potential violation of Article 6 of the ECHR); and further proscriptive powers given to the government to ban “extremist” groups from the country.¹⁸¹ As the new law has only recently been passed by Parliament, no cases exist to examine these principles.¹⁸²

¹⁷⁴ PROTECT OUR RIGHTS, *supra* note 15, at 16.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 6.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See ECHR, *supra* note 159.

¹⁸¹ PROTECT OUR RIGHTS, *supra* note 15, at 8–10.

¹⁸² Several cases, however, have examined and quashed the Control Orders entered pursuant to the PTA because the orders have been found to conflict with the Human Rights Act 1998. See *Judge Quashes Anti-terror Orders*, BBC NEWS, June 28, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/5125668.stm.

D. *Impact of the PATRIOT Act and the U.K.'s Anti-Terror Laws on Freedom of Expression and Free Exercise of Religion*

The impact of both the PATRIOT Act and the U.K.'s Anti-Terror legislation on freedom of expression and free exercise of religion may be chilling to genuine followers of the Islamic faith. As stated *supra*, the penalties for violating the anti-terror legislation in either country can be quite severe.¹⁸³ Recall the hypothetical situations of Jane Doe and John Roe, proposed in Section II.A, wherein both individuals merely acted in accordance with their genuinely and firmly-held religious beliefs.¹⁸⁴ Both were under investigation for potential violations of the anti-terror laws in their respective countries.¹⁸⁵

It is unclear what would happen to Jane Doe under the PATRIOT Act. Certainly, under the PATRIOT Act, the penalties for materially aiding a terrorist organization are rather severe.¹⁸⁶ The penalties range from civil forfeiture of all assets belonging to the person materially aiding a terrorist organization¹⁸⁷ to criminal sanctions and prison time.¹⁸⁸ As codified, the relevant statutes are 18 U.S.C. §§ 981, 983, 985, 2331, and 2339B (2000 and Supp. 2006). In this case, as Jane Doe did not knowingly aid a terrorist organization, she probably would not be subject to criminal penalties under 18 U.S.C. § 2339B, which requires the defendant to “*knowingly* [provide] material support or resources to a foreign terrorist organization”¹⁸⁹

However, the standard for proving that Jane's assets are subject to civil forfeiture is far lower than the standard for proving criminal responsibility in this case.¹⁹⁰ The relevant statute describes the government's burden of proof in detail, stating that it shall be by a preponderance of the evidence.¹⁹¹ The government bears the burden of proof in establishing that any property used bears a substantial connection to the criminal activity alleged, if any.¹⁹² As civil forfeiture is based, at least in part, on the legal fiction that an inanimate object can do something unlawful while its owner/possessor is wholly inno-

¹⁸³ See *supra* notes 102–7 and accompanying text.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ 18 U.S.C. § 981 (2000 and Supp. 2006).

¹⁸⁷ *Id.* § 981(a)(1)(G)(iii).

¹⁸⁸ *Id.* § 2339B.

¹⁸⁹ *Id.* § 2339B(a)(1) (emphasis added).

¹⁹⁰ *Id.* § 983(c).

¹⁹¹ *Id.*

¹⁹² 18 U.S.C. § 983(c)(3) (2000 and Supp. 2006).

cent of wrongdoing,¹⁹³ all the property need do is be in the wrong place at the wrong time.

In this case, the property would likely be Jane's bank account, as she allowed a direct deduction and wire transfer each month to the charity.¹⁹⁴ Other property subject to civil forfeiture under this act might include Jane's computer, if she had used it to set up the transfer or contact the charity regarding the funds, and her home, if she had used her home telephone to set up the transfer of money or the charity's representatives.¹⁹⁵

Jane's main defense under the law would come from 18 U.S.C. § 983(d), the Innocent Owner Defense.¹⁹⁶ Under Section 983(d)(2)(A), Jane can claim that "upon learning of the conduct giving rise to the forfeiture, [she] did all that reasonably could be expected under the circumstances to terminate such use of the property."¹⁹⁷ She terminated payments from her bank account to the charity immediately after she saw the newspaper article.

However, if for some reason this defense fails Jane in court, then she has only one viable defense option left: she must plead an Excessive Fines defense under the Eighth Amendment, which states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹⁹⁸ In this case, a forfeiture of the entirety of Jane's property would probably be viewed as excessive by the court.¹⁹⁹ If the fine, or in this case the forfeiture, is grossly disproportionate to the crime committed, then the Eighth Amendment prohibits its enforcement.²⁰⁰ Jane's contributions to

¹⁹³ H.R. REP. NO. 106-192, at 11 (1999).

¹⁹⁴ See *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789, 792 (N.D. Ill. 1999) (bank account used as a conduit to transfer money between terrorist organizations was subject to civil forfeiture).

¹⁹⁵ *United States v. 45 Claremont St.*, 395 F.3d 1 (1st Cir. 2004) (holding that a substantial connection between property and offense existed where a home was used as the storage place for illegal narcotics, and that the home was therefore subject to forfeiture).

¹⁹⁶ 18 U.S.C. § 983(d).

¹⁹⁷ *Id.* § 983 (d)(2)(A).

¹⁹⁸ U.S. CONST. amend. VIII.

¹⁹⁹ See Deborah F. Buckman, Annotation, *When Does Forfeiture of Real Property Violate Excessive Fines Clause of Eighth Amendment—Post-Austin Cases*, 168 A.L.R. Fed. 375 § 5 (2005) (stating that factors to be considered in evaluating whether a forfeiture is excessive include: (1) harshness of the forfeiture, when compared to the gravity of the offense, and any sentence that may be imposed on a person committing such an offense; (2) any relationship between the property to be forfeited and the offense alleged; and (3) the role played by the owner of the property in the alleged offense, as well as the owner's potential degree of culpability).

²⁰⁰ *Id.*

charity over the past year probably amounted to no more than \$500.00. In such a case, forfeiture of a house, computer, and the entirety of Jane's bank account would probably be viewed as grossly disproportionate.

Jane could probably not make a viable defense for herself under the RFRA²⁰¹ or the free exercise clause of the First Amendment.²⁰² The PATRIOT Act is a facially neutral law, general in its application to all individuals, regardless of religious affiliation.²⁰³ Therefore, the RFRA would apply, and the compelling interest test would be used by courts to review the PATRIOT Act.²⁰⁴ While few courts have examined this issue, a court faced with it would probably find that the government's compelling interest in protecting its citizens from acts of terrorism supercedes the individual right to free exercise of religion.²⁰⁵ Additionally, unlike the Controlled Substances Act (the law of general applicability claimed to have burdened the religious freedoms of members of the UDV in *O Centro Espirita*),²⁰⁶ which contained explicit allowances for the exemption of certain persons from compliance therewith,²⁰⁷ the PATRIOT Act contains no such legislative enforcement waiver.²⁰⁸ It appears that the legislature felt the enforcement provisions of the PATRIOT Act were sufficiently narrowly tailored to the compelling state interest of preventing terrorism in the United States, and thus made no allowance for free exercise rights when giving to charities linked with terrorist activities.²⁰⁹ After all, Jane was not stopped by the law from giving to all Islamic chari-

²⁰¹ 42 U.S.C. § 2000bb.

²⁰² U.S. CONST. amend. I; *see also* *Gonzales v. O Centro Espirita Uniao do Vegetal*, 126 S. Ct. 1211, 1217 (2006).

²⁰³ *See* *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)*, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.).

²⁰⁴ 42 U.S.C. § 2000bb(a)(3).

²⁰⁵ *See, e.g., Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003) ("Acting against the funding of terrorism does not violate the free exercise rights protected by RFRA and the First Amendment.").

²⁰⁶ *O Centro Espirita*, 126 S. Ct. at 1217 (citing the Controlled Substances Act as the law of general application).

²⁰⁷ *Id.* at 1221.

²⁰⁸ *See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)* § 411, Pub. L. No. 107-56, 115 Stat. 272, 345-50 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.).

²⁰⁹ *See id.* § 411(a)(1)(F)(II), 115 Stat. 345-50.

ties; she was merely prevented from giving to a charity that was linked with terrorist activities.²¹⁰

If Jane Doe lived in London before the passage of the Terrorism Act 2006 instead of Jersey City, her situation might not be much different. The PTA, TACT, and ATCSA provide for charity monitoring procedures and for the forfeiture of assets that are considered “terrorist cash” and “terrorist property.”²¹¹ Based upon a reading of the ATCSA Parts 1 and 2,²¹² Jane would probably not be subject to forfeiture of any of her property. The provisions for forfeiture of “terrorist cash” state:

- (1) Schedule 1 which makes provision for enabling cash which-
 - a. is intended to be used for the purposes of terrorism,
 - b. consists of resources of an organization which is a proscribed organization, or
 - c. is, or represents, property obtained through terrorism, to be forfeited in civil proceedings before a magistrates’ court or (in Scotland) the sheriff) [sic] is to have effect.²¹³

Any forfeiture would be subject to subsection (a) of Paragraph 1, and would result in a forty-eight hour hold prior to an actual order for forfeiture being issued.²¹⁴ During that time, it is incumbent upon

²¹⁰ This could be construed as the least restrictive means under the compelling interest test of preventing support of terrorism while respecting the right of individuals to give to religious charities.

²¹¹ See Prevention of Terrorism Act, 2005, c. 2 (Eng.); Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.); Terrorism Act, 2000, c. 11 (Eng.).

²¹² Anti-Terrorism, Crime and Security Act, 2001, Pts. 1, 2.

²¹³ Anti-Terrorism, Crime and Security Act, 2001, Pt. 1, ¶ 1.

²¹⁴ *Id.* at Sched. 1, Pt. 2. The ATCSA states that one of three preconditions of continued detention of forfeited cash must be met:

- that there are reasonable grounds for suspecting that the cash is intended to be used for the purposes of terrorism and that either-
- (a) its continued detention is justified while its intended use is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the cash is connected, or
 - (b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded;

that there are reasonable grounds for suspecting that the cash consists of resources of an organisation which is a proscribed organisation and that either-

- (a) its continued detention is justified while investigation is made into whether or not it consists of such resources or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the cash is connected, or
- (b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded;

both the victim (here, Jane) and the government to investigate the matter.²¹⁵ Jane would have to make an application to have the money returned to her.²¹⁶ In addition, the provisions for forfeiture of “terrorist property” put forward similar criteria for making a finding that the property is, in fact, “terrorist property.”²¹⁷

However, under the Terrorism Act 2006,²¹⁸ Ms. Doe may not be so lucky. Jane’s ability to protect her assets will turn largely on the rhetoric of the charity. If the charity is an “extremist” organization, Jane may have problems refuting that she herself is an “extremist.” Only time will tell if she might be subject to forfeiture of all her assets merely because she gave to a charity with an “extremist” message.

Under the laws in place in the United Kingdom prior to the passage of Terrorism Act 2006, John Roe might have some problems with law enforcement. John Roe is not a terrorist and he has not publicly advocated terrorist ideology. However, he may be investigated as a suspected terrorist because, regardless of his intent, his ideas could incite others to violence.²¹⁹ Under the PTA, the British government may issue a control order limiting a person’s movement in the U.K. and forcing them to submit to searches based upon the belief of the Home Secretary that the suspect is involved in terrorist activities.²²⁰ While he may not face any charges under the current legislation for merely expressing his opinion, John Roe may have his life disrupted for as long as the Home Secretary sees fit in order to ascertain John’s true motives.²²¹

that there are reasonable grounds for suspecting that the cash is property earmarked as terrorist property and that either—
(a) its continued detention is justified while its derivation is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the cash is connected, or
(b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

Id.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at Sched. 1, Pt. 3.

²¹⁸ Terrorism Act, 2006, c. 11 (Eng.).

²¹⁹ See Human Rights Act, 1998, c. 42 (Eng.) (incorporating, among other things, Article 10 of the ECHR, entitled “Freedom of Expression,” which states that “[t]he exercise of [freedom of expression] . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime . . .”).

²²⁰ Prevention of Terrorism Act, 2005, ch. 2, §§ 1–4 (Eng.).

²²¹ *Id.* § 1.3.1.a.

Under the Terrorism Act 2006, John Roe could be in for far more trouble. His comment could be construed as “extremist” under the definition proffered in the newly proposed legislation.²²² As an extremist, John could be stripped of his citizenship.²²³ Though he was originally a political refugee who became a naturalized citizen, John could be deported for his actions.²²⁴ In this case, however, because John’s country of origin may seek his death if he returns, the U.K. government would be constrained by the ECHR not to deport John back to Morocco.²²⁵ The U.K. has been negotiating Memoranda of Understanding with countries such as Morocco to circumvent the problem created in this area by the ECHR.²²⁶

Just for expressing his firmly-held beliefs, John may be subjected to a punishment so harsh as to strip him of all rights in his nation-state. Certainly, this would work a chilling effect on the free expression of ideas, and may drive such ideas underground, where they are more likely to fester and produce violent results.²²⁷

If we assume the same facts, with the exception that John Roe is a naturalized U.S. citizen living in New York, the results are far better for Mr. Roe. Under the laws currently established in the United States, John would be free to express his idea that Israel should be eliminated as a state, regardless of how others feel about it.²²⁸ Such an idea, presented in the manner in which John presented it, would be acceptable under the standard set in *Brandenburg*.²²⁹ In order for John’s speech to be punishable in the United States, John would have to incite violence in his intended audience.²³⁰

Both the United States and the United Kingdom face a crisis, and both walk a precarious line between protecting their citizens from terrorist attacks and protecting their citizens’ rights under their domestic laws. In addition, both countries have put in place laws that limit individual freedom of expression, and in some cases, religion, in order to protect national security. Both countries have also ap-

²²² PROTECT OUR RIGHTS, *supra* note 15, at 6–7.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *See id.*

²²⁷ *Cf.* Liberty, Press Release, *supra* note 11 (citing the over-broad nature of the Terrorism Bill 2006 in the area of inciting terrorist acts and glorifying terrorism).

²²⁸ *See* *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (standing for the proposition that mere advocacy of a position, without more, is protected speech under the First Amendment).

²²⁹ *Id.* at 448.

²³⁰ *Id.*

proached the situation as though they are at war with another nation, as opposed to merely catching criminals who do heinous acts of murder in the name of religion. As such, people who are merely exercising their rights to expression and religion may be mistaken for “the enemy.”

III. CONCLUSION

The laws of two great western nations, the United States and the United Kingdom, are in jeopardy of stripping from their people the very freedoms upon which the modern states were respectively founded. In the United Kingdom, the loss of freedom threatened is far worse for those naturalized citizens with unpopular political and religious beliefs than it is for any other citizen. In the United States, the loss of freedom, while not as great as that in the United Kingdom, is still significant. It is the praxis that will most affect the Muslim population in both the United States and the United Kingdom. The relaxation of civil rights protections initiated by the recent legislation in both nations greatly affects those with minority political and religious beliefs. Unfortunately, once a precedent allowing discrimination toward one group with unpopular beliefs is set, all persons are in jeopardy of sliding down a slippery slope of steadily eroded civil rights. Perhaps today, the unpopular religious belief is that people should physically struggle and fight in the cause of God, as opposed to conducting a personal struggle within oneself; perhaps tomorrow, it will be something we view now as far less controversial, and will affect far more people.

In conclusion, while the governments of both the United States and the United Kingdom certainly have a compelling interest in protecting their citizens from harm by terrorist attack, those governments must find a more narrowly-tailored way in which to regulate that possible harm. Both governments had laws in place before the September 11, 2001 and July 7, 2005 attacks that allowed for surveillance, civil forfeiture of illegally used or obtained assets, and criminal penalties for terrorist acts.²³¹ Otherwise, these great nations run the risk of alienating the very people they claim to protect, through fear, through animus, and worst of all, through hate, all in the guise of protecting and serving the public. As Benjamin Franklin once said, “[t]hose, who would give up essential liberty to purchase a little

²³¹ See 18 U.S.C. § 2339C (Supp. 2006); Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified in scattered sections of 18 and 28 U.S.C.); Terrorism Act, 2000, c. 11 (Eng.).

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temporary safety, deserve neither liberty nor safety.”²³² We who love liberty must face the responsibility it confers upon each of us. While the liberties we love are threatened by our government, none who claim citizenship there under may rightly claim safety as well.

²³² FRANKLIN, *supra* note 1, at 107.