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***65 GOVERNING GIFTS: LAW, RISK, AND THE “WAR ON TERROR”**

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Introduction

This essay seeks to trace the contours of a changing legal sensibility regarding the governance of charitable gifts in the United States with a particular focus on Muslim American communities. I analyze how anti-terrorism financing laws and practices are criminalizing Islamic charitable giving and transforming the “legal sensibility” [FN1] and “legal consciousness” [FN2] of Muslims in America. I approach the study of this evolving culture of legality using Clifford Geertz’s anthropological interpretation of law as local, plural, and constitutive of human behavior, while also a product of particular cultures and historical moments. Susan S. Silbey’s discussion of legality and legal consciousness further highlights how the power of law is not merely contained in formal rules and regulations. Rather, law is constituted as a powerful institution by virtue of processes of habituation and normalization in everyday life. In addition to these points, I argue the power of law is also constituted by the capacity to suspend the rule, regulation, or norm in times of crisis or emergency.

Tensions between several domains of law have reportedly “chilled” [FN3] Muslim philanthropy by pushing Muslim Americans toward avoidance of *66 risk: U.S. constitutional and administrative law, which govern freedom of religion and regulations applied to faith-based tax-exempt organizations; U.S. national security and counterterrorism law, which are increasingly applied to determine if charitable financial transfers of tax-exempt organizations and private individuals provide material support for terrorist activity; international humanitarian and human rights law, which govern the right to give and receive humanitarian relief, especially for vulnerable refugee populations; and Islamic law, in which Muslims are obligated to give charitably in order to fulfill religious duties. In response, Muslim American nonprofit organizations and the communities that they serve are at the forefront of a paradigm shift toward “risk-based” philanthropy and charity. Risk-based approaches to giving “guard against the threat of diversion of charitable funds or exploitation of charitable activity by terrorist organizations and their support networks.” [FN4] Risk-based approaches also promote “best practices”: programmatic responsibility, accountability, transparency, and adherence to local, state, and federal statutes and regulations. [FN5] The adoption of “risk-based” charitable giving strategies is transforming modes of Muslim American religious practice and legal sensibilities at both individual and organizational levels.

My goals with this discussion are the following: first, to illustrate how “chilling” occurs in practice; and second, to discuss how risk-based approaches to charity (and other financial transfers) raise questions regarding whether the rationalization, bureaucratization, and governance of gifts will inhibit the free exercise of religion, ultimately homogenizing and domesticating culturally distinct forms of gift exchange. In the first section of this

Article I discuss the concepts of legal sensibilities and consciousnesses as a theoretical frame for an analysis of the politics of charity currently affecting Muslim Americans. The next section outlines recent changes in national security policies and procedures that have targeted Muslim nonprofit organizations suspected of providing material support to terrorist activities abroad. The third section discusses how suspension of law in states of emergency constrained civil liberties, especially for Muslims in the United States. Section four deepens the theoretical discussion of the politics of charity in the context of anthropological writings on the social phenomena of gift exchange. Section five traces how the politicization and increased surveillance of gift-giving has provoked new practices of preemptive self-governance, in *67 which institutions and individuals self-regulate to avoid any risk of inadvertently providing material support for terrorism. The conclusion suggests that counterterrorism laws and practices are eroding constitutional rights to the free exercise of religion, unduly burdening both institutions and individuals with the responsibility to implement counterterrorism measures on behalf of the state.

I. Legal Sensibilities and Legal Consciousness

In his discussion of comparative law and what has come to be called legal pluralism, the anthropologist Clifford Geertz defines law as a form of “local knowledge.” [FN6] Inasmuch as law is composed of formal rules and regulations, in each local or cultural setting, the “method and manner of conceiving decision situations so that settled rules can be applied to decide them” reflects the local or vernacular “legal sensibility.” [FN7] Law is thus “rooted in the collective resources of culture rather than in the separate capacities of individuals” and is composed of a “complex of characterizations and imaginings [and] stories about events cast in imagery about principles.” [FN8] At the same time, however, law is constitutive of behavior and “constructive of social life” [FN9] rather than merely reflecting social life. Comparative or pluralistic approaches to law, therefore, should “attempt ... to reformulate the presuppositions, the preoccupations, and the frames of action characteristic of one sort of legal sensibility in terms of those characteristic of another.” [FN10]

In a similar manner, the sociologist of law, Susan S. Silbey, describes “legal consciousness” as a concept deployed in socio-legal research to explain the hegemony of law, or “how the law sustains its institutional power despite a persistent gap between the law on the books and the law in action.” [FN11] In part the gaps between formal rules and regulations that result in legal inequalities in practice can be attributed to the ways in which subjects become habituated to legal authority:

Legal hegemony derives from long habituation to the legal authority that is almost imperceptibly infused into the material and social organization of ordinary life, for example in traffic lanes, parking rules, and sales receipts... law is powerful, and it rules everyday life because its constructions are uncontroversial and have become normalized and habitual. [FN12]

*68 The aggregate of these activities and practices are evidence of legal consciousness and legality in local settings. Like Geertz's suggestions regarding methods to study legal sensibilities, Silbey proposes that studies of legal consciousness should analyze “the forms of participation and interpretation through which actors construct, sustain, reproduce, or amend the circulating (contested or hegemonic) structures of meanings concerning law.” [FN13]

The governance of gifts in the “War on Terror” is creating new legal sensibilities and consciousnesses among prospective donors of charity. An example from recent ethnographic fieldwork illustrates how macropolitical conditions are influencing the rise in risk-based philanthropic practices at micropolitical levels in the

United States. In the summer of 2009, I attended the annual gathering of one of the largest Islamic advocacy organizations in the United States, an event that regularly draws 30,000-40,000 participants over the course of several days. At this meeting, participants reflected on how to exercise their rights to life, liberty, and the pursuit of happiness, while also protecting their distinct identities as members of a minority religious group in the United States. During the course of this conference a prominent official from the Obama administration addressed the assemblage and emphasized how American Muslims have contributed to civic life in the United States and have performed extraordinary acts of service since the nation's founding. The spokesperson also made reference to the practical ways in which the Obama administration was working to improve relationships between the United States and the world's Muslims, including taking steps to close the detention facility in Guantánamo Bay, prohibiting torture, and promoting a two-state solution to the conflict between Israel and Palestine.

These affirmations echoed the rhetoric in President Obama's historic June 4, 2009 address at Al-Azhar University in Cairo. In an effort to demonstrate his administration's commitment to normalized diplomatic relations between the United States and the Middle East, Obama highlighted several tensions impeding relationships between the United States and Muslims around the world. Areas of heightened diplomatic sensitivity mentioned in the talk included the global specter of violent extremism [FN14] and the wars in Afghanistan and Iraq; the ongoing crisis between Israelis, Palestinians, and the Arab world; the rights and responsibilities of all nations on nuclear weapons;*69 ideals regarding the global promotion and protection of democracy, rule of law, justice, human rights, and accountable and transparent forms of governance; issues of religious freedom and tolerance, with particular focus on the United States' duty to recognize and protect Islamic rules on charitable giving; women's rights; and economic development.

President Obama explicitly acknowledged that the United States is obligated to uphold constitutional rights to freedom of religion, including the Islamic obligation to give charitably through the practice of zakat (obligatory charitable giving), one of the five pillars of Islam. In doing so, Obama highlighted the challenges currently facing Muslim Americans:

Freedom of religion is central to the ability of peoples to live together. We must always examine the ways in which we protect it. For instance, in the United States, rules on charitable giving have made it harder for Muslims to fulfill their religious obligation. That's why I'm committed to working with American Muslims to ensure that they can fulfill zakat. [FN15]

These links between ideals of public service and civic duty, inalienable rights, appropriate responses to extremism, and other pressing issues of peace and security for the United States and the world, are all inextricably embedded in federal antiterrorism policies and practices targeted at Muslim charitable giving.

II. Background

Following the September 11, 2001 attacks in the United States, tremendous global attention has been paid to charities as institutions that directly or indirectly promote “economies of terror” [FN16]: material support moving from private organizations and financial institutions to agents and agencies that are reputed to promote terror and hatred, and that foment political, social, and economic insecurity. The federal surveillance of Muslim charitable activity in the United States has been a prominent component of global efforts to staunch the “lifeblood of terrorist operations” [FN17] by attacking the financial networks that are believed to sustain terrorism. Surveillance activities are thus intended to reduce the risk of future terror attacks. [FN18] In particular the U.S. Departments of Justice and Treasury have scrutinized Islamic charitable organizations to determine if any of their re-

ported works directly or indirectly *70 supported “Jihad,” which literally means striving or “exerting oneself in the way of God,” and which is invoked in the course of armed resistance [FN19]; although, government agencies frequently conceive of it solely as terrorist activity. [FN20]

On September 23, 2001, under the authority of the International Emergency Economic Powers Act (“IEEPA”) (and other emergency power provisions of domestic and international law), President George W. Bush issued [Executive Order 13224](#), inaugurating a new era of antiterrorism practices targeting the “financial foundation of foreign terrorists.” [FN21] The order authorized the U.S. Department of the Treasury (in consultation with the Secretary of State and Attorney General) to use technical assistance and multilateral agreements with other countries to suppress acts of terrorism. [FN22] In addition to sharing intelligence, counterterrorism activities include denial of financial services and support to suspected terrorists and terrorist organizations. [Executive Order 13224](#) also authorized the blocking or freezing of the U.S.-based property of any “persons” [FN23] engaged in--or posing a significant risk of committing--technological, material, and financial support for terrorism. [FN24]

The order further prohibited any United States “person” [FN25] from transactions or exchanges with thousands of listed “Specially Designated Global Terrorists” (“SDGTs”). Undoubtedly, many of the designated individuals and entities legitimately pose risks to U.S. security; however, a large percentage*71 of SDGTs are international Muslim charitable organizations that had not previously been seen as or categorized as security risks. Many of these organizations were shut down without meaningful judicial review. Supporting documentation was withheld from the organizations charged with providing material support for terrorism (as well as from the public) because revealing such materials reportedly threatened or exposed federal counterterrorism strategies. By designating thousands of persons and institutions as terrorists without supporting documentation justifying such categorizations, the executive order not only criminalized the exercise of charity by and to such individuals and entities, it also criminalized otherwise legitimate aid to the communities that they represent, govern, or serve. [FN26]

The criminal prosecutions against Muslim “persons” --both individuals and corporate entities charged with providing material support to “terrorists” (as well as more common fraudulent activities violating a nonprofit organization's 501(c)(3) tax status)--have had significant effects on local communities. For example, the cases against the Muslim charities Holy Land Foundation for Relief and Development (Texas), Al Haramain (Oregon), KindHearts for Charitable Humanitarian Development, Inc. (Ohio), Care International (Massachusetts), and the Alavi Foundation (New York), among many others, use fraud, tax, and antiterrorist financing laws to criminalize the purported charitable activities of these organizations. As these criminal cases have unfolded, their assets have been frozen and other U.S. Muslim organizations have been shut down. The arrest, detention, interrogation, imprisonment, and deportation of “designated” Muslims--the so-called SDGTs--and individuals deemed guilty by actual or imagined association with terrorists, [FN27] have created a pervasive climate of fear that has chilled charitable activity in the Muslim community. [FN28]

Muslim individuals in the United States have also been disproportionately targeted for scrutiny of their personal and professional financial transfers, especially since the September 11, 2001 attacks. That the Bush anti-terrorism practices have been profoundly negative for the American Muslim*72 community is demonstrated by the June 2009 ACLU report, *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the “War on Terrorism Financing*. The report describes how anti-terrorist financing practices have unfairly violated the civil and human rights of American Muslims. Just as defense counsel for indicted Muslim charities also argued, the ACLU charged that the designation of individuals and corporate entities as terrorist-- without adequate evid-

ence and possibility for an opportunity to refute such claims--is unlawful. In addition to being prohibited from freely practicing their faith, Muslims in the United States continue to endure a "climate of fear," in which they may be subject to arrest, prosecution, interrogation by law enforcement agents, denied citizenship, and even deported because of their reputed charitable donations. [FN29] Federal agents frequently question Muslim Americans, Muslim non-nationals, and persons of Middle Eastern and North African backgrounds (among others) about their reputed activities and associations in mundane spaces like the home, [FN30] but especially when in transit across international borders. [FN31]

The practices of racial and ethnic profiling and surveillance of Muslim financial and charitable transactions have produced a pervasive sense of stigma, and even shame, for many American Muslims. [FN32] A generalized fear within the American Muslim community has resulted in the return and suspension of gifts. Because of fears that charitable acts are being linked to terrorism, giving has been deterred not only between Muslim donors and recipients, but also between Muslim donors and non-Muslim recipients of philanthropy, as well as among non-Muslim donors to Muslim, Middle Eastern, South Asian, and other international recipients of gifts, grants, and other kinds of aid. [FN33] The additional scrutiny placed on the gift exchanges and transactions between Muslims and non-Muslims has led many Muslims to experience these security practices as being politically motivated, chilling relations between Muslims and non-Muslims worldwide. Given such circumstances,*73 sentiments of caution, anxiety, and fear of practicing one's faith are being echoed repeatedly by Muslims in the United States. [FN34]

III. Civil Liberties in States of Emergency

Federal security measures that inhibit First Amendment rights to the free exercise of religion in the United States raise ongoing concerns about how civil liberties may be suspended during "states of emergency" or "states of exception" in order to promote national security. The rise of formal and informal interrogations recalls the philosopher Giorgio Agamben's works [FN35] describing zones of indistinction--spaces like the immigration zones in airports or the detention center at Guantánamo, as well as more domestic spaces like a person's home--in which civil liberties and human rights may be suspended. Such spaces highlight both the power of the executive or sovereign in her capacity to suspend the law and declare a state of emergency, as well as the power of law itself when law has been suspended or abrogated during these so-called states of emergency. The loss of rights formerly recognized (or taken for granted) has tremendous effects on those who fall into zones of indistinction. But as Agamben, following Walter Benjamin, has noted, states of emergency tend to become the rule rather than the exception. [FN36] Thus, interstitial interrogation practices aimed at Muslim Americans portend greater routinization and generalization of these security tactics.

In its recent outreach to Muslims worldwide, and in its announcement that it will no longer use the phrase "global War on Terror" to describe its counterterrorism practices, [FN37] the Obama administration has inaugurated what may be a new paradigm in counterterrorist activities. Nevertheless, the list of SDGTs has been updated continually. Recent additions suggest that while the Obama administration recognizes that "rules on charitable giving have made it harder for Muslims to fulfill their religious obligation," and that the administration intends to work "with American Muslims to ensure that they can fulfill zakat," [FN38] the maintenance and expansion of Bush administration anti-terrorism practices continues. Such practices not only affect the lives of American Muslims but also have led to significant reverberations that have *74 caused concern throughout the non-Muslim nonprofit world. As the policies of the Obama administration continue to unfold, a question that must be considered is what forms of charitable giving will be lawful or unlawful for all U.S. "persons" in the fu-

ture?

IV. Power, Politics, and the Gift

Charity, humanitarian relief, development aid, and philanthropic work are related practices of gift giving to those who are viewed as vulnerable, in need, or deserving of assistance. [FN39] Each form of exchange arises from distinct ideologies that help structure relationships and economies of compassion. Each transaction also implies different temporal, spatial, socioeconomic, and political distances between givers and recipients of gifts. Practices of gift giving are diverse, ranging from direct exchanges between individuals to indirect transactions among individuals, organizations, and institutions, and from simple exchanges to transactions involving complex bureaucratic systems. As social scientists have studied the institution of gift exchange, they have noted how these types of relationships encode and often reinforce inequalities of power.

In his classic treatise on exchange, *The Gift*, Marcel Mauss describes how practices of gift giving encode implicit assumptions about the morality and value of exchanged objects, as well as about the status, character, or prestige of both givers and receivers. [FN40] Through these transfers, collective desires to witness, care for, or provide material support to others are fulfilled, as are religious obligations to give. Practices of gift exchange also involve the dimension of time; implicit in the gift giving is an expectation of a future return.

Gift exchanges are increasingly becoming rationalized and regulated, especially in the United States. Whereas administrative laws governing tax exempt organizations have historically regulated gift giving to prevent income tax fraud, the new regulation and governance of gifts has transformed temporalities of exchange, especially as such practices intersect with discourses and practices of risk and security. Susan Bibler Coutin has characterized new discourses of risk and security after 9/11 as ones that produce *75 temporal distortions. [FN41] In such discourses, an orientation toward unknowable future risks is ever present, leading to the failure of conventional modes of knowledge production:

When trained on risks that are deemed unquantifiable and dangers that are considered unknowable, surveillance, profiling, policing, and criminalization become something other than knowledge practices—perhaps what might be better termed forays into the unknown. ... “The concept of risk reverses the relationship of past, present, and future. The past loses its power to determine the present. Its place as the cause of present-day experience and action is taken by the future.” [FN42]

When the probabilities of harm are unknowable and indeterminate, but nonetheless always-already written into the present by the potential acts of institutional and personal associates, the onus is placed upon persons and organizations to adopt self-surveillance and scrutiny of potential hazards in their everyday practices of giving.

The surveillance of American Muslim “persons,” whether institutional or individual, represents an extreme example of a growing trend toward scrutiny of nonprofit financial transfers as part of risk-based approaches to preventing terror. Among the institutions that have been scrutinized are private philanthropies: charitable organizations of diverse complexity and financial capacity ranging from institutions like the Ford Foundation, to smaller family foundations and other nongovernmental organizations (“NGOs”). [FN43] The targeting of Muslim persons has alarmed the general nonprofit community because such security practices may erode the capacity of all civil society organizations to function freely. [FN44] These organizations confront a dilemma or double bind produced by the conflict between the free exercise of religion from U.S. constitutional law, the constraints on the free exercise of *76 religion posed by antiterrorism laws, ideals of the right to humanitarian intervention (in the form of material support) in international humanitarian law, and international human rights law.

Faith-based organizations, a subset of nonprofits, face additional demands to fulfill religious laws and obligations as part of their missions, and struggle to uphold their right to the free exercise of religion without government intrusion. [FN45]

To assist charitable organizations with complying with the law, the U.S. Department of the Treasury has issued a series of documents instructing U.S.-based charities (and by extension, individuals associated therewith) on how to adopt risk-based practices to protect themselves and their assets from potential terrorist financing or abuse. [FN46] While the Department of Treasury affirms that its guidelines are not obligatory, it strongly encourages charities to apply these tactics to their overall practices. The guidelines have been incorporated into regulations of other federal offices, leading many charities to feel that these suggestions are legally authoritative, rather than voluntary. The growing power of administrative guidelines on risk-based giving raises a cutting-edge legal question: could nonprofits be criminally prosecuted for failing to implement such agency guidelines? In effect, these guidelines suggest processes of self-regulation, transparency, and accountability that constrain what some nonprofits characterize as a right to give, forcing nonprofits to adopt a precautionary position oriented toward avoiding future temporal risks, rather than building future “salvific merit” [FN47] through more risky charitable acts. As the philosopher Michel Foucault [FN48] reminds us, where there is power, there is resistance. He also stresses, however, how governmental security practices are also productive: new cultures of risk-based accountability and transparent practices of compassion are evolving in the aftermath of such *77 disciplinary strategies. Thus, while some institutions and individuals have begun using direct cash transfers or other less traceable means of exchange to give at will in defiance of federal guidelines, others have adopted the practices suggested by federal regulators in their institutional and individual giving.

In response to this heightened surveillance and litigation directed at Muslims, and the U.S. Treasury's sub-regulatory guidelines governing charitable best practices, Islamic advocacy organizations have not only created formal programs to educate American Muslims about their rights, but also have conducted trainings on how to observe “best practices” in both personal and organizational charitable giving. Best practice programs instruct participants in nonprofit financial accounting methods and provide guidelines for the conduct of charitable work with transparency and accountability--components of contemporary audit cultures. [FN49] These programs aim to bring personal and organizational charitable practices into alignment with federal rules and guidelines on individual and organizational voluntary giving, not only to “reduce [the] risk of terrorist financing or abuse,” [FN50] but also to reduce another kind of risk: the risk of federal scrutiny of personal and institutional charitable activities.

Best practices programs that instruct participants in risk-based philanthropy and charity are actively inculcating in participants legal sensibilities and consciousnesses in which risk avoidance is practiced in daily modes of (self) governance. These self-auditing initiatives join existing uses of rational bureaucratic practices and technologies--such as the online zakat calculators [FN51]--to enable Muslims to assess, collect, and distribute obligatory charitable gifts systematically. Self-auditing programs also mitigate the risk of violating religious as well as federal laws.

In 2009 and 2010 I attended several best practices seminars organized for Muslim “persons” that discussed issues of legal compliance with state and federal regulations on nonprofits for charitable giving, promotion and protection of individual civil rights given the increased role of law enforcement in counterterrorism security measures, and included presentations by both accountants and federal IRS auditors. Participants at the seminars comprised representatives from Islamic associations, organizations, mosques, schools, and other nonprofits, as well as business owners.

*78 Of particular interest and emphasis was an attorney's discussion of the way in which tax exempt organizations must comply with anti-terrorism laws in performing charitable activities, while also complying with tax exemption laws. As discussed above, donors must guard against performing any action that provides financial support, in-kind support, material support, humanitarian support, and technical support to any "person" on the SDGT lists following [Executive Order 13224](#). According to the speaker, a crucial point regarding compliance with the law is that an individual or organization may violate the law without knowledge of or intent to support a "specially designated" terrorist. In practical terms this means that if an individual or charitable organization responds to an international humanitarian crisis like a natural disaster and provides aid to persons in need without having first checked whether the aid recipients are on any terror lists, the donor may have violated the law by providing this material support. [FN52] In the provision of grants to international organizations, the speaker further emphasized the necessity for charitable organizations (and implicitly individuals) to comply with the voluntary treasury best practice guidelines by fulfilling the following steps: first, conducting a reasonable search of publicly available information about the activities of a grantee; second, gathering information on key employees and the principal place of business of the grant recipient to ensure that the grantee does not appear on any international SDGT list; third, obtain a certificate of compliance from any U.S.-based grantee stating that they are not involved in supporting any terrorist activities; and four, gather information about persons in the donor's employ to affirm that none are on such lists, among other tasks.

In effect, these voluntary guidelines suggest that individuals and organizations engaged in charitable activities perform precautionary investigative and policing work to forestall the possibility of inadvertent material support to "terrorists." Not only must such precautionary work be aimed at uncovering the past activities of recipients of funds (whether grantees or employees), donors must also anticipate whether a prospective fund recipient may engage in activities that might be deemed terrorist in the future. Should a fund recipient come under investigation in the future, any past associations or support may be subject to scrutiny and criminalization for material support. Acts of "charity" under such circumstances inculcate in the aid giver (or tax-exempt *79 employer) the practice of calculating future risks of association, whether in the form of property (tangible or intangible), money, personnel, training, advice, or assistance. Coupled with the possible reprisals that failure to comply with these laws and regulations may provoke, these voluntary guidelines are an important component that is transforming the legal sensibility and consciousness of not only Muslim American prospective donors, but of any persons intending to perform charitable acts. At the best practice seminar, prospective donors were encouraged to funnel aid to "persons" that demonstrably comply with U.S. federal and other international antiterrorist guidelines in the form of grants to U.S.-based Islamic organizations that work abroad. Participants representing organizations like mosques were also encouraged to document all direct gifts to individuals by using checks rather than cash, as well as to collect as much information about the intended recipient as possible. In theory these acts of financial discipline will prevent federal audits of a "person's" charitable transactions. As will be demonstrated by the following anecdote, however, this calculus of risk instills a legal sensibility or consciousness that is an integral component of the phenomena of "chilling," in which prospective donors police themselves from fear of federal, state, or local retribution for ungoverned gift giving.

V. Surveillance, Risk, and Self-Governance

An additional account from the annual gathering of the Islamic nonprofit organization described in the opening of this discussion further demonstrates the links between charity, security, and the chilling effects of counterterrorism activities. During the course of the meeting I had several exchanges with Muslim professionals regarding their fears about charitable giving in light of the intensification of federal scrutiny of their religious

practices. Of note, however, was my observance of the way such concerns affected seemingly mundane aspects of everyday life. On a walk to a private \$200+ a plate luncheon honoring prominent Muslim Americans being held at a hotel close to one of the conference sites, I noted small groups of Muslim women who had gathered on sidewalks surrounding the conference buildings, but in larger numbers along the route to the hotel. The women had small makeshift posters upon which figured prominently the photo of a young Iraqi child who needed money for an expensive eye surgery. They held out donation cups to us as we walked past and pleaded for assistance with great emotion. Most of the hundred or so conference participants that I observed walking by these women passed without acknowledgment and without giving money, much like the passersby I was accustomed to seeing who frequently walk past homeless persons soliciting funds in Harvard Square in Cambridge, Massachusetts.

*80 Nevertheless, these two circumstances of solicited charity have clear distinctions: a reluctance to give directly when confronted by an anonymous homeless person in an urban setting might stem from compassion fatigue or fiscal conservatism during times of economic decline. It might also stem from concerns that donations might support the solicitor's substance abuse problems, among other reasons. In addition to these reasons, the request for aid and the reluctance to give in the context of the Islamic convention also stemmed from the contemporary politics of charity, humanitarianism, and development aid in an era of insecurity. The Muslim women petitioners made a pointed charge to the conference participants to share their blessings and good fortune by invoking their presumed shared religious identity--one visibly marked by conference badges and the modest garb of both men and women on a warm summer day. That the child who was to receive the solicited charitable assistance was presumably injured during the war in Iraq, however, made the request for donations explicitly political: his injury was a visible reminder of the many unnoted casualties of the War on Terror.

The lack of gift exchange under these circumstances has additional dimensions to religious identity and politics of war casualties. Upon being seated at a table at the luncheon, I introduced myself to other members of the table and learned that most were physicians or business owners. When asked why I was attending the gathering (presumably as a non-Muslim), I expressed personal interest in Islam and more generally in faith-based charity, then I described the project I was undertaking to understand the role of charity in Islam--in particular, how individual obligatory religious practices were being influenced by counterterrorism measures in the United States. While the disclosure of my research goals may have been overt for this lunch gathering, I had decided it was better to be completely forthright rather than risk being considered an "informer" or spy (or of possessing questionable research ethics), especially considering what I had learned about the controversial "agents provocateurs" in contemporary terror cases. A brief description of such cases is integral to a full analysis of this vignette on the lived experience of the politics of charity.

In the course of the researching a book on faith-based charity provided to Haitian immigrants and refugees, [FN53] several criminal cases targeting the supposed terrorist activities of Haitians led me to explore the similarities between the treatment of Haitians and Muslim Americans. After September 11, *81 2001, members of both populations have been profiled as "enemy aliens." [FN54] Covert federal agents whom some have called agents provocateurs have infiltrated mosques, civic groups, and other Muslim associations to gather intelligence about potential terror threats, including by inciting extremist speech and acts among disgruntled youth. Haitians have also been subject to such provocative counterterrorist measures. In 2006, seven men--a group of mostly Haitians with U.S. citizenship--were charged with allegedly conspiring with al-Qa'ida to conduct terrorist activities in the United States by bombing the Sears Tower in Chicago and federal buildings in South Florida. [FN55]

The circumstances provoking criminal charges are also unsettling. A U.S. government informant posing as a

member of al-Qa'ida encouraged these young men to swear fealty to al-Qa'ida, although the men had no actual contact with al-Qa'ida. They reportedly made oaths in order to acquire the "material support" the agent promised to them (weapons, uniforms, shoes, etc.), but the group never progressed beyond the planning stage. Indeed, Deputy FBI Director John S. Pistole characterized the plot as "aspirational rather than operational." [FN56] After three trials, three juries, and three years, five of the men were convicted. The men argued, however, that their intent *82 was to help their impoverished community through social aid and not to conduct acts of terror. [FN57]

The use of covert security practices in order to uncover (or provoke) terrorist plots is one form of policing that has become prevalent in the "War on Terror." Some critics have called this pattern, in which an FBI informant provides the material support or inducement for potential terrorists to conspire against the U.S., a form of entrapment and violation of First Amendment rights to free speech. [FN58] Others view such covert federal anti-terrorism practices as legitimate, the results of which demonstrate the successes of and justify the continued need for such "fraudulent" U.S. national security strategies. [FN59] Antiterrorist practices against Muslim nonprofits, some of which allegedly provide the material support for terrorism, have also exhibited this same pattern in which an FBI informer infiltrates an organization in order to incite acts of or speech encouraging terror. [FN60] The criminalization of charitable activity and search for extremism among a broad range of marginalized groups suggests that counterterrorist measures arising from a state of emergency--in which concerns for national security justify the suspension of civil liberties--are becoming the norm. [FN61]

These critical issues of power and knowledge, and of truth, fraud, and identity are inextricably linked to the politics of charity, as well as the politics of ethnographic research. After I shared my interests in charity, Islam, and security issues at the private convention luncheon, I anticipated that guests would express caution about my project or be reluctant to speak to me about personal instances regarding anxieties about surveillance and security. *83 I was very surprised then when one man at the table immediately gave me an example of the lived experience of fear that the politics of charity has incited. He described how the groups of women who were petitioning for donations for the Iraqi child's medical treatment were cause for concern and caution. He noted that he did not give them any money, in part because he did not know who they really were or whether their charitable activities were legitimate or fraudulent. He also described a reluctance to acknowledge the women in passing because of unseen others who might be watching any exchanges with them, regardless of whether such exchanges were verbal or monetary. Given these uncertainties it was better to refrain from any engagement with these solitons and from indiscriminate giving altogether.

Some might argue that this man's conscious decision to refuse to give, despite Islamic religious obligations exhorting believers to be charitable to others in need, is precisely the intent of contemporary counterterrorism measures. However, my participation in trainings on risk-based philanthropy suggests that federal agencies merely seek to regulate or govern gifts rather than curtail such practices altogether. Nevertheless, what is striking about this description of an internal calculation of risk--regarding whether to provide aid or to refrain from engagement--is the extent to which the judgment and power of "unseen others" looms over such deliberations. To some extent, what Erica Bornstein calls an "impulse to philanthropy," [FN62] a spontaneous "desire to end misery and suffering" in "immediate others in distress," [FN63] was not possible in this instance. A charitable exchange might place the gift giver in a precarious position that could precipitate the unwanted scrutiny of federal agents, especially if the petitioners were under investigation for fraudulent activity, but even if they were not. Thus, this man's expressions of caution regarding the surveillance of Muslim Americans' public and private interactions with others were prudent. As Susan Bibler Coutin suggests above, the considerations of possible future harm should a charitable exchange occur in any form prohibits association, thereby reinforcing a legal sens-

ibility and consciousness that associates giving with risk of reprisal. Providing support to unknown actors soliciting aid carries risks--not simply in the present, but particularly in the future. The fear of the potential negative repercussions of a spontaneous gift is both a product of and reproduces the chilling effect.

*84 Conclusion

The endurance of legal structures and practices that discriminate against or designate risky others as potential or future threats--despite little confirming evidence of the reality of such associations--provides further indication that the state of exception [FN64] has now become the norm. The use of emergency powers to expand the administrative legal authority of the Department of Treasury has transformed the agency from one concerned with financial regulation--including economic and fiscal policy, enforcement of tax and tariff laws, and accounting and collection of revenue--to a national security agency with much more extensive and relatively unchecked power. In the current state of emergency, antiterrorism rules and regulations governing charitable giving combine with the threat of antiterrorist surveillance and policing practices to inhibit donors from making ungoverned gifts. In the United States, prospective donors are encouraged to give to institutions (and individuals) using transparent, verifiable procedures subject to the approval of federal authorities. Increasingly, institutions based in the United States that follow best practice guidelines previously discussed are rated as least risky to the prospective donor. The net effect of such self-auditing practices is therefore, the homogenization and domestication of charitable giving.

Tax-exempt organizations (and private individuals) are bringing gift giving at all levels (from gifts to individuals to gifts and grants to institutions) into alignment with the requirements of secular powers, deepening what some perceive as an irreconcilable conflict between church and state, and between religious and secular obligations. Social scientists must trace, historicize, and deconstruct these transformations, as avoiding risk has become the rationale for contemporary laws, regulations, and policy that have direct and pervasive effects on daily lived experience.

[FN1]. Erica Caple James is the Class of 1947 Career Development Professor and Associate Professor of Anthropology at MIT. The author wishes to acknowledge support for the research upon which this Article is based from the MIT School of Humanities, Arts, and Social Sciences Research Fund. Thanks also to Malick Ghachem, Susan Slyomovics, Bill Maurer, Susan Silbey, and the editorial staff of JINEL for their thoughtful comments on various drafts of this Article.

[FN1]. See Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (1983).

[FN2]. See Susan S. Silbey, *Making a Place for Cultural Analyses of Law*, 17 *Law & Soc. Inquiry* 39 (1992); see also Susan S. Silbey, *After Legal Consciousness*, 1 *Annual Rev. L. & Soc. Sci.* 323 (2005).

[FN3]. American Civil Liberties Union, *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the "War on Terrorism Financing"* (2009) (hereinafter "ACLU Report").

[FN4]. U.S. Dep't of the Treasury, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities 2* (2006) (revised from original Guidelines released in November 2002), available at <http://www.ustreas.gov/press/releases/hp122.htm>.

[FN5]. *Id.* at 4-6.

[FN6]. Geertz, *supra* note 1, at 215.

[FN7]. *Id.*

[FN8]. *Id.*

[FN9]. *Id.* at 218.

[FN10]. *Id.*

[FN11]. Silbey, *After Legal Consciousness*, *supra* note 2, at 323.

[FN12]. *Id.* at 331-332.

[FN13]. *Id.* at 334.

[FN14]. By “violent extremists” President Obama referred to “a small but potent minority of Muslims” like members of Al-Qa’ida and the Taliban who have “exploited these tensions,” “engage[ing] in violence against civilians” and leading “some in my country to view Islam as inevitably hostile not only to America and Western countries, but also to human rights.” President Barack Obama, Remarks at Cairo University (June 4, 2009), available at http://www.usatoday.com/news/world/2009-06-04-Obama-text_N.htm.

[FN15]. *Id.*

[FN16]. See Erica Caple James, *Democratic Insecurities: Violence, Trauma, and Intervention in Haiti* (2010).

[FN17]. Ibrahim Warde, *The Price of Fear: The Truth Behind the Financial War on Terror* xv (2007).

[FN18]. Marieke de Goede, Risk, Preemption and Exception in the War on Terrorist Financing, in *Risk and the War on Terror* (Louise Amoore & Marieke de Goede, eds., 2008).

[FN19]. See Annemarie Schimmel, *Islam: An Introduction* 163 (1992), see also John L. Esposito, *Islam: The Straight Path* 13 (3rd ed. 2005).

[FN20]. See, e.g., U.S. Dep’t of State, Office of the Coordinator for Terrorism, *Country Reports on Terrorism 2004* (2005).

[FN21]. The Bush policies expanded those implemented in earlier historical periods. For examples, during the Clinton administration, “secret evidence” was used in cases of the detention and deportation of alleged illegal aliens being accused of having links to terrorism. The accused were not provided with evidence for these charges because providing such evidence “would supply a road map to intelligence sources and methods that would thwart the government’s ability to stop terrorism.” William Glaberson, *A Nation Challenged: The Law; U.S. Asks to Use Secret Evidence in Many Cases of Deportation*, N.Y. Times, Dec. 9, 2001, available at <http://www.nytimes.com/2001/12/09/us/nation-challenged-law-us-asks-use-secret-evidence-many-cases-deportation.html?pagewanted=1>.

[FN22]. The order defined terrorism as activities involving “violent acts or acts dangerous to human life, prop-

erty, or infrastructure” intended to “intimidate or coerce a civilian population; ... influence the policy of a government by intimidation or coercion; or ... affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.” [Exec. Order No. 13224](#), 66 Fed. Reg. 49,079 (Sept. 23, 2001).

[FN23]. “Persons” were considered to be individuals or entities like partnerships, associations, corporations, organizations, groups, or subgroups. *Id.*

[FN24]. See *id.*

[FN25]. Here defined as citizens, resident aliens, or entities organized under U.S. laws. *Id.*

[FN26]. See ACLU Report, *supra* note 3.

[FN27]. See *id.*; see also de Goede, *supra* note 17 at 109; Warde, *supra* note 18.

[FN28]. See ACLU Report, *supra* note 3; see also Bill Maurer, Articulating Islamic Knowledge to an American Dream: Islamic Home Financing Alternatives after September 11, 2001, 26 Pol. & Legal Anthropology Rev. 196 (Nov. 2003); A Nation Challenged: Contributions; Drop in Gifts to Muslim Charities Is Attributed to U.S. Scrutiny, N.Y. Times, Dec. 13, 2001, available at <http://www.nytimes.com/2001/12/13/us/nation-challenged-contributions-drop-gifts-muslim-charities-attributed-us.html>; Neil MacFarquhar, Fears of Inquiry Dampen Giving by U.S. Muslims, N.Y. Times, Oct. 30, 2006, available at <http://www.nytimes.com/2006/10/30/us/30CHARITY.html>.

[FN29]. See ACLU Report *supra* note 3, at 8-9.

[FN30]. See, e.g. Muslim Advocates, Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home (April 2009).

[FN31]. *Id.*

[FN32]. See ACLU Report, *supra* note 3; see also Homeland Insecurity: The Arab American and Muslim American Experience After 9/11 (Louise A. Cainkar ed., 2009); Being and Belonging: Muslims in the United States Since 9/11 (Katherine Pratt Ewing ed., 2008); Race and Arab Americans Before and After 9/11: From Invisible Citizens to Visible Subjects (Amaney Jamal & Nadine Naber eds., 2008).

[FN33]. See, e.g., Stephen M. Marks, Harvard Returns Gift to Arab President: Qualms about United Arab Emirates president's ties prompt return, The Harvard Crimson, July 30, 2004, available at <http://www.thecrimson.com/article/2004/7/30/harvard-returns-gift-to-arab-president/>; see also ACLU Report, *supra* note 3.

[FN34]. See ACLU Report, *supra* note 3.

[FN35]. See, e.g., Giorgio Agamben, Homo Sacer: Sovereign Power and Bare Life (Daniel Heller-Roazen trans., 1995); Giorgio Agamben, State of Exception (Kevin Attell trans., 2005).

[FN36]. See Agamben, Homo Sacer, *supra* note 35, at 12.

[FN37]. See Edward Luce & Daniel Dombey, Obama junks ‘global war on terror’ label, Fin. Times, June 30, 2009, available at <http://www.ft.com>

www.ft.com/cms/s/d4bd1bb6-64f7-11de-a13f-00144feabdc0,dwp_uuid=5aedc804-2f7b-11da-8b51-00000e2511c8,print=yes.html.

[FN38]. President Barack Obama, *supra* note 14.

[FN39]. Assumptions about the “worthiness” or moral character of receivers of aid are often implicit in such exchanges, but not always a condition of giving. Discourse about the worthiness of donors is increasingly a component of charitable exchanges.

[FN40]. Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies*. (W.D. Halls trans., 1950).

[FN41]. Susan Bibler Coutin, *Subverting Discourse of Risk in the War on Terror*, in *Risk and the War on Terror*, *supra* note 18.

[FN42]. *Id.* at 218-219, citing Ulrich Beck, *Risk Society Revisited: Theory, Politics and Research Programmes*, in *The Risk Society and Beyond: Critical Issues for Social Theory* 214 (B. Adam, U. Beck & J. Van Loon eds., 2000).

[FN43]. What these institutions have in common is their tax status as 501(c)(3) organizations, a status that encompasses foundations, universities, religious organizations, and others. [I.R.C. § 501\(c\)\(3\)](#) (2006).

[FN44]. In November 2008, concerned with the unfettered power of the executive branch to limit the practices of nonprofit organizations, OMB Watch, a group that has surveyed the White House Office of Budget and Management since 1983, formed the “Charity and Security Network.” The Network’s goals are to draw attention to the impact of antiterrorism laws and practices on NGO efforts to “fight poverty and disease, respond to disasters and promote human rights.” See Charity and Security Network, <http://www.charityandsecurity.org/> (last visited Aug. 17, 2009).

[FN45]. See, e.g., John Orr, *Should Catholic Charities Have to Pay for Contraceptive Drugs*, in *Sanctioning Religion? Politics, Law, and Faith-Based Public Services* 89 (David K. Ryden & Jeffrey Polet eds., 2005); see also Erica Bornstein, *The Spirit of Development: Protestant NGOs, Morality, and Economics in Zimbabwe* (2005).

[FN46]. See U.S. Dep’t of the Treasury, *supra* note 4.

[FN47]. Rachel M. McCleary, *Salvation, Damnation, and Economic Incentives*, 22 *J. Contemp. Religion* 62 (2007). McCleary argues that religions differ in their ideas of the relationship between correct or moral action in life and fate. In some religions adherents have opportunities to correct past mistakes and accumulate salvific merit through good works during life to influence one’s destination after death--whether of salvation, damnation, or an intermediary space prior to final judgment. In other religions, the opportunities to accumulate merit are fewer, therefore, compliance with religious obligations and correct comportment during life are stressed. Fewer opportunities exist for a person to make restitution for wrongdoings while living.

[FN48]. Michel Foucault, *Governmentality*, in *The Foucault Effect: Studies in Governmentality* 87 (Graham Burchell, Colin Gordon & Peter Miller eds., 1991).

[FN49]. See Marilyn Strathern, *Audit Cultures: Anthropological Studies in Accountability, Ethics, and the Academy* (2000); see also James, *supra* note 16.

[FN50]. See U.S. Dep't of the Treasury, *supra* note 4.

[FN51]. Amy Singer, *Charity in Islamic Societies* 63 (2008).

[FN52]. However, legal scholars have argued that the crime of material support should have a clear criminal intent requirement, since the statute calls for criminalizing those who 'knowingly' provide material support to terrorist organizations designated by the Secretary of State. 18 U.S.C. § 2339(b). See generally Randolph Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 *Baylor L. Rev.* 861 (2004).

[FN53]. I am in the process of writing a book manuscript based on research conducted between 2006 and 2009 with a faith-based charitable organization serving Haitian immigrants and refugees residing in the greater-Boston area.

[FN54]. See David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (2003) and Erica Caple James, 'Phantoms of Lost Liberty': Haiti, Security, and the Politics of Asylum (unpublished manuscript) (on file with author).

[FN55]. See *United States v. Batiste et. al.*, Indictment, Case No. 06-20373 (S.D. Fla. 22 June 2006).

[FN56]. Peter Whoriskey & Dan Eggen, *Terror Suspects Had No Explosives and Few Contacts; Sears Tower Plan Never Finished, Authorities Say*, *Wash. Post*, June 24, 2006, at A3. In another recent case in New York of thwarted terrorism, four American Muslims—three African American men, and one Haitian immigrant of questionable mental competence—were allegedly incited to attack a Bronx synagogue by a federal agent provocateur. In this case the federal agent also supplied materials to enable the terror attack and the label "aspirational" was also used to describe the reputed plot. See Al Baker & Javier C. Hernandez, *4 Accused of Bombing Plot at Bronx Synagogues*, *N.Y. Times*, May 21, 2009, available at <http://www.nytimes.com/2009/05/21/nyregion/21arrests.html>; see also Michael Daly, Alison Gendar, & Helen Kennedy, *FBI Arrest Four in Alleged Plot to Bomb Bronx Synagogues, Shoot down Plane*, *N.Y. Daily News*, May 21, 2009, available at http://www.nydailynews.com/news/ny_crime/2009/05/20/2009-05-20_fbi_arrest_four_in_alleged_plot_to_car_bomb_bronx_synagogue.html. See also accusations of entrapment using "Muslim" or immigrant informers with legal, economic, or other vulnerabilities in Joe Kemp, Nicole Bode, Alison Gendar, & John Lauinger, *Informant Offered Liver Transplant for Bronx Terror Suspect's Brother Sez Mom*, *N.Y. Daily News*, May 23, 2009, available at http://www.nydailynews.com/news/ny_crime/2009/05/24/2009-05-24_the_bait_and_snitch_informant_offered_liver_transplant_for_suspects_brother_sez_.html.

[FN57]. Damien Cave & Carmen Gentile, *Five Convicted in Plot to Blow Up Sears Tower*, *N.Y. Times*, May 12, 2009, available at <http://www.nytimes.com/2009/05/13/us/13miami.html?scp=1&sq=5%20Miami%20Men%20Convicted%20of%20Sears%20Tower%20Attack%20Plot&st=cse>.

[FN58]. See Harvey Silverglate, *A spate of phony terror plots*, *The Phoenix*, July 12, 2006, available at <http://www.thephoenix.com/Article.aspx?id=17389>; see also Gary T. Marx, *Ironies of Social Control: Authorities as Contributors to Deviance Through Escalation, Nonenforcement and Covert Facilitation*, 28 *Social Problems* 221 (Feb. 1981).

[FN59]. Tom A. Peter, New York terror plotters wanted to 'do jihad,' *Christian Sci. Monitor*, May 21, 2009, available at <http://www.csmonitor.com/World/terrorism-security/2009/0521/p06s04-duts.html>

[FN60]. See Alexandra Marks, FBI and American Muslims at Odds, *Christian Sci. Monitor*, Mar. 25, 2009, available at <http://www.csmonitor.com/USA/Society/2009/0325/p02s01-ussc.html>.

[FN61]. Some argue, however, that such scrutiny is merely a new phase in federal surveillance of domestic enemies that recalls the surveillance of African Americans beginning in the 1920s; of Black Muslims, especially in the 1960s; of McCarthy era anticommunist activities in the 1950s, as well as the unlawful detention of Japanese Americans during WWII.

[FN62]. Erica Bornstein, *The Impulse of Philanthropy*, 24 *Cultural Anthropology* 622 (2009).

[FN63]. *Id.*

[FN64]. See Agamben, *Homo Sacer* and Agamben, *State of Exception*, *supra* note 35.
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