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THE TERRORIST INFORMANT

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Abstract: A man sets himself on fire in front of the White House in a dispute with the Federal Bureau of Investigation (FBI). He has been working as an informant for the FBI in a high-profile terrorism prosecution and is unhappy with the $100,000 he has been paid so far. He has also been recently convicted of bank fraud. As a result, the government declines to call him as a witness, given the damage his actions have on his credibility and trustworthiness. This incident underscores the difficulty inherent in relying on paid informants to drive a prosecution, where material considerations such as money and legal assistance are often the price the government pays for an informant's services. In the years since September 11, 2001, informants have been at the heart of many major terrorism prosecutions. The entrapment defense, perhaps the only legal tool available to defendants in such prosecutions, has proven ineffective. This is evident when one considers the context of generally heightened suspicion of the Arab and Muslim communities in the United States. Further, a closer look at several of these prosecutions reveals repeated instances of suggestive and provocative activity by informants geared at obtaining a conviction, calling into question whether a genuine threat to U.S. national security actually existed in the first place. This Article argues that the government should cease its current practice of using informants to generate terrorism prosecutions.

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INTRODUCTION

Terrorism-related offenses often involve individuals operating in close secrecy, a predicament that requires law enforcement officials to think creatively about the means of extracting information about a particular terrorist plot or group. This dynamic has in turn led to the increased use of confidential informants[1] in criminal terrorism prosecutions throughout the United States in the years following September 11, 2001 (9/11).[2] Several high-profile federal trials in recent years highlight the risks inherent in using an informant to make a case. These risks are particularly evident in the terrorism arena, where a complex mix of vigilance, concern for national security, ignorance, and prejudice can lead law enforcement agents and prosecutors to believe a threat exists where it does not.

A close reading of post-9/11 terrorism prosecutions demonstrates two distinct, yet interrelated, trends. First, the conduct of informants in general raises the issue of entrapment in a direct and pointed manner.

1. This Article analyzes the use of informants—"people who never intended to aid their alleged terrorist companions"—as distinguished from cooperators—those who "conspired with terrorists at one point but were induced to cooperate with law enforcement." *See* CTR. ON LAW & SECURITY, N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2009, at 43 (2010) [hereinafter REPORT CARD 2009], *available at* http://www.lawandsecurity.org/publications/TTRCFinalJan14.pdf.

2. *See* CTR. ON LAW & SECURITY, N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2010, at 20 (2010) [hereinafter REPORT CARD 2010] ("Of the 156 prosecutions of defendants implicated in the top 50 plots [after September 11, 2001], informants were relied on in 97 of them, or 62%"), *available at* http://www.lawandsecurity.org/publications/TTRC2010Final.pdf.

Whether a defendant intended to commit a crime or an informant actually entrapped a defendant is a legitimate query that may be difficult to answer. Second, regardless of whether an informant's conduct legally constitutes entrapment, several of the post-9/11 cases highlight situations in which the existence of any real threat to national security was questionable. Where the very existence of a threat is doubtful, it is appropriate to question the efficacy and feasibility of how informants purport to investigate suspected terrorists when their ability to discern true criminality seems subordinated to other, less altruistic concerns.

While the academic literature surrounding the use of informants in terrorism prosecutions is relatively undeveloped, any study of the relevant cases must take into account the unique context in which those cases arise. The use of confidential informants in criminal cases is nothing new.[3] Currently, informants are used most frequently to prosecute drug trafficking and dealing in cases that share many characteristics with terrorism investigations. In the realm of drug trafficking and dealing, confidential informants often have incentives to lie because they are paid or compensated in the form of reduced sentences, and verifying the information they provide can prove difficult at best.[4] Legal scholars have focused on the prevalent use of informants in drug investigations, producing a sophisticated and detailed critique of the deleterious effects of informant use on disadvantaged youth of color and the communities in which they live.[5]

The use of informants by law enforcement in the War on Drugs has resulted in significant abuses; these abuses are magnified in the terrorism context.[6] Informant recruitment occurs generally in the shadows,

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3. The U.S. Supreme Court first granted constitutional imprimatur to the use of confidential informants in 1966. *See* Hoffa v. United States, 385 U.S. 293, 303–04 (1966) (ruling that use of a confidential informant does not violate any principle of the Fourth Amendment and that any statements made to the informant were voluntary and did not run afoul of the Fifth Amendment).

4. ALEXANDRA NATAPOFF, SNITCHING, CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN CRIMINAL JUSTICE 27–29 (2009) [hereinafter NATAPOFF, SNITCHING].

5. *See* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 79–100 (2009) (discussing the negative role informants play in underprivileged communities and advocating noncooperation with the police in most situations when they request that someone become a "snitch"); NATAPOFF, SNITCHING, *supra* note 4, at 101–19 (detailing how the use of "snitches" can lead to more distrust and violence in inner-city communities, as well as an unwillingness to cooperate with the police); Andrea L. Dennis, *Collateral Damage? Juvenile Snitches in America's "Wars" on Drugs, Crime, and Gangs*, 46 AM. CRIM. L. REV. 1145, 1170–76 (2009) (highlighting the particular danger of using juvenile informants, given their youth and susceptibility to violent reprisal); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 683–96 (2004) (analyzing the various harms to disadvantaged communities that are riddled with informants).

6. *See infra* Part III.B.

targeting primarily poor young men of color in America's inner cities, a traditionally underrepresented and disenfranchised group within mainstream society.[7] The harsh penalties that await defendants in drug cases, especially those charged with non-violent offenses, are perhaps the most unfortunate consequence of the War on Drugs.[8] Using informants to investigate low-level drug crime may be unfair, particularly when a defendant is facing an unusually harsh sentence, but it occurs in a time when the racial profiling of African-American or Latino youth has been generally renounced.[9] In the terrorism context, by contrast, the American public is anything but apathetic toward the threat of terrorism. In fact, evidence suggests that there is widespread support for or tolerance of the racial profiling of Arab- and Muslim-Americans for national security purposes.[10] Accordingly, certain investigative tactics seem to be consistent with this public support. For example, the Federal Bureau of Investigation (FBI) has used infiltrators and informants to monitor the workings of mosques around the country, despite no articulable suspicion linking the mosque or its congregants to violent activity.[11]

A reflection on terrorism prosecutions post-9/11 reveals that simply because the government invests tremendous resources in counterterrorism, law enforcement does not mean terrorism is always—or even often—occurring or being planned. While there is much we do not know about the roles informants play in most national security operations, a review of several major terrorism prosecutions paints a

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7. *See infra* Part III.B.

8. *See* James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1004–09 (2010) (reviewing PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009)).

9. *See, e.g.*, Kevin R. Johnson, *The Story of* Whren v. United States, *in* RACE LAW STORIES 445–48 (Rachel F. Moran & Devon W. Carbado eds., 2008) (discussing the political context in which police agencies abandoned the use of racial profiling in traditional law enforcement, only to see it return as a tool to combat terrorism after September 11, 2001); Asli Ü Bâli, *Changes in Immigration Law and Practice After September 11: A Practitioner's Perspective*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 161, 163–64 (2003) (noting the reemergence of racial profiling against people of Middle Eastern and South Asian origin in the wake of September 11, 2001); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 574–75 (2003) (detailing the successful campaign against racial profiling in the traditional law enforcement realm).

10. *See* John Tehranian, *The Last Minstrel Show? Racial Profiling, the War on Terrorism and the Mass Media*, 41 CONN. L. REV. 781, 784 (2009) ("Support for racial profiling in the war on terrorism continues unabated, despite its underlying irrationality, because of fear—an emotion that has animated ill-conceived and discriminatory government projects since time immemorial. The specter of another 9/11 causes otherwise sound policy makers to support anti-terrorism policies that target individuals of Middle-Eastern descent.").

11. *See infra* Part II.B.

troubling picture of the informants' performance.[12] Using informants to create cases is a poor substitute for traditional investigatory techniques and can implicate a defendant's religious and political beliefs in a manner that suggests that whole communities are suspect. In evaluating the efficacy of terrorism prosecutions, an analysis of informants' roles in several high-profile cases reflects current fears and prejudices as to what characteristics constitute a terrorist. When the archetypical terrorist assumes a certain race and religion in the popular imagination, deciding whether an informant has entrapped that individual becomes a fraught exercise demanding a close look at those preconceived notions and their effect on the legal analysis in a given case.

This Article argues that using informants to generate federal terrorism prosecutions in the absence of any articulable suspicion should end because it typically leads to cases in which there is, at best, a real question about whether the defendant would have broken the law but for the informant's prodding. At worst, the practice raises real questions about a defendant's guilt, as several of the cases discussed in this Article will demonstrate. Specifically, this Article calls for a halt to the practice of allowing an individual untrained in law enforcement techniques to target individuals of an already suspect minority. Given the context in which terrorism prosecutions occur, the experience of using informants reveals that the practice arguably does nothing to interdict actual violent activity.

Part I of this Article focuses on the development of entrapment as a legal doctrine and the difficulties of applying the doctrine within the context of a terrorism prosecution. Part II examines legal standards as well as popular conceptions of who a terrorist is and, in so doing, emphasizes the difficulties inherent in articulating a successful entrapment defense when confronting allegations of terrorism. Part III discusses the history of informant use in the counterterrorism setting and examines cases involving the use of informants before and after 9/11. This Part features an extended discussion of several prosecutions that typify the problems associated with relying on an informant to build a case in the counterterrorism context. Part IV analyzes the trends revealed by the cases discussed in Part III and discusses the reasons why investigators should cease informant use in cases generated by the informants themselves without a previous articulable suspicion of terrorist activities to cause the government to investigate the suspect.[13]

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12. *See* NATAPOFF, SNITCHING, *supra* note 4, at 167–68.

13. Although the term has "never [been] properly defined" by the Supreme Court, this Article uses "articulable suspicion" in this context to mean some suspicious characteristic other than being

I. ENTRAPMENT: OPERATIVE LEGAL STANDARDS

A. History

The history of the entrapment doctrine has been discussed extensively in academic literature,[14] so only a short explication of the relevant legal precedents is in order. Entrapment is a judicially created doctrine not typically codified by statute.[15] The first instance of a federal court recognizing an entrapment defense was in 1915 in Woo Wai v. United States.[16] There, the Ninth Circuit evaluated a government scheme to induce a Chinese resident of San Francisco to smuggle Chinese immigrants into the United States across the Mexican border.[17] Key to the Ninth Circuit's recognition of the defense was the length of time—one and a half years—over which the government agents tried to convince the defendant to participate in the plan before he "finally assented to enter into the scheme which had been so assiduously and persistently urged upon him."[18]

Although the U.S. Supreme Court first acknowledged the defense of entrapment in federal criminal law in 1928,[19] it was not until 1932 that it actually upheld the defense in *Sorrells v. United States*.[20] In this Prohibition-era decision, a government agent posed as a fellow World War I veteran as part of an elaborate ruse to get Sorrells, a farmer, to obtain whiskey for him; after the agent asked several times for over an hour, Sorrells finally relented and produced a five-dollar jug of

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an Arab or Muslim. *See* Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment* 47 (Chi. Pub. Law & Legal Theory, Working Paper No. 317, (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1665562 (arguing that the term "individualized suspicion" should be abandoned).

14. *See, e.g.*, Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 SETON HALL L. REV. 257, 278–85 (2003) (discussing the origin of the doctrine in the lower courts).

15. Anthony M. Dillof, *Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827, 831 (2004); Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 591 (2009).

16. 223 F. 412 (9th Cir. 1915).

17. *Id.* at 414 ("The fact that a detective or other person suspected that the defendant was about to commit a crime, and prepared for his detection, as a result of which he was entrapped in its commission, is no excuse, if the defendant alone conceived the original criminal design." (quotation marks and citation omitted)); United States v. Russell, 411 U.S. 423, 428 n.5 (1973); Roiphe, *supra* note 14, at 282.

18. *See Woo Wai*, 223 F. at 414.

19. *See* Casey v. United States, 276 U.S. 413, 419–20 (1928).

20. 287 U.S. 435 (1932).

whiskey.[21] While recognizing that "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises," the Court noted that "[a] different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[22]

In 1958, the Court again upheld the entrapment defense in *Sherman v. United States*,[23] a case involving a government informant's ultimately successful efforts to persuade a recovering drug addict to supply him with narcotics on the basis that the informant was allegedly "suffering" and "not responding to treatment."[24] The Court explicitly reaffirmed its ruling in *Sorrells*, and further elaborated that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[25] In a subsequent decision upholding the *Sorrells-Sherman* approach to entrapment, the Supreme Court in *United States v. Russell*[26] explained that "the principal element in the defense of entrapment [is] the defendant's predisposition to commit the crime."[27] This focus on a defendant's propensity or "predisposition" to commit the crime came to be dubbed the "subjective" test for entrapment.[28] The subjective test is currently employed by the federal courts and the majority of state jurisdictions.[29]

The subjective test stands in contrast to what has been dubbed the "objective"[30] test for entrapment, which, rather than focusing on a defendant's predisposition to commit a given crime, centers on the conduct of government actors.[31] Justice Brandeis was the first to articulate the principles of the objective test, albeit in dissent, when the issue of entrapment first came before the Court in 1928 in *Casey v.*

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21. *Id.* at 439–40.

22. *Id.* at 441–42.

23. 356 U.S. 369, 372–73 (1958).

24. *Id.* at 371.

25. *Id.* at 372.

26. 411 U.S. 423 (1973).

27. *Id.* at 433.

28. *Id.* at 440 (Stewart, J., dissenting).

29. *See* Andrew Carlon, Note, *Entrapment, Punishment, and the Sadistic State*, 93 VA. L. REV. 1081, 1087 (2007); Dillof, *supra* note 15, at 831.

30. *See Russell*, 411 U.S. at 446 (Stewart, J., dissenting).

31. *Id.*

United States.[32] Significant minorities of the Court in *Sorrells*, *Sherman*, and *Russell* unsuccessfully advocated for the adoption of the objective test.[33] While most academic commentators endorse the objective test,[34] it has never been upheld by the Supreme Court and is in force only in a minority of state jurisdictions and in the Model Penal Code.[35] Somewhat related to the objective test is a motion to dismiss an indictment based on "outrageous" government conduct,[36] but the bar for obtaining relief is set so high that it occurs only in the most extreme cases, and even then only rarely.[37]

B. Jacobson v. United States

The U.S. Supreme Court's most recent foray into the contours of the entrapment doctrine upheld the subjective test, thereby reaffirming the *Sorrells-Sherman* approach. In *Jacobson v. United States*,[38] the Court confronted the case of "a 56-year-old veteran-turned-farmer who supported his elderly father in Nebraska" who was convicted of ordering child pornography after a twenty-six-month-long government investigation involving a series of inquiries and solicitations regarding

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32. 276 U.S. 413, 423–25 (1928) (Brandeis, J., dissenting); Bennett L. Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1568–69 (1982) ("Brandeis was less concerned with providing a defense for unwary criminals than with protecting the courts from becoming unwilling parties in the prosecution of individuals whose crimes were induced by governmental officials . . . . In Brandeis's view, the defendant's state of mind was irrelevant to the question of whether the prosecution should go forward. Here, then, lay the foundation for an objective approach to entrapment theory.").

33. *Russell*, 411 U.S. at 436–38 (Douglas, J., dissenting); *id.* at 441, 450 (Stewart, J., dissenting); Sherman v. United States, 356 U.S. 369, 378–79 (1958) (Frankfurter, J., concurring); Sorrells v. United States, 287 U.S. 435, 453 (1932) (Roberts, J., concurring).

34. Carlon, *supra* note 29, at 1090.

35. MODEL PENAL CODE § 2.13 (2001); Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 151–52 (2008) ("Due process, however, is the entire concern of the objective test; some courts actually call it the 'due process test.'" (citation omitted)).

36. *See Russell*, 411 U.S. at 431–32 (1973) ("[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . .") (citing Rochin v. California, 342 U.S. 165 (1952)); United States v. Williams, 547 F.3d 1187, 1199 (9th Cir. 2008). *Rochin* also first applied the roughly similar "shocks-the-conscience" test in the Fourth and Fifth Amendment contexts. *See* Wadie E. Said, *Coercing Voluntariness*, 85 IND. L.J. 1, 7–10 (2010).

37. *See Williams*, 547 F.3d at 1200 (noting conduct must "'violate fundamental fairness' or 'shock the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment.'" (citations and alterations omitted)); *see also* NATAPOFF, SNITCHING, *supra* note 4, at 61.

38. 503 U.S. 540 (1992).

his sexual proclivities.[39] In finding that Jacobson had been entrapped, the Court highlighted "2 1/2 years [of] repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal, to explore petitioner's willingness to break the . . . law by ordering sexually explicit photographs of children through the mail."[40]

There were two critical facts that led the Court to find that entrapment had occurred. First, Jacobson had come to the government's attention because he had previously ordered two magazines depicting underage naked boys from a California bookstore at a time when possession of such materials was legal.[41] The government began its investigation after Congress had outlawed receiving sexually explicit depictions of children, such as those Jacobson had legally ordered in the past.[42] Second, government investigators framed their false inquiries and solicitations to him as emanating from groups challenging government censorship and protecting individual rights.[43] This not only appealed to his sexual desires but also amounted to strong pressure to join in a political effort to change the law.[44]

These factors, when coupled with the lengthy nature of the government's investigation, led the Court to endorse Jacobson's entrapment defense.[45] The Court clarified that the issue of a defendant's predisposition is to be evaluated prior to his being approached by the government.[46] Perhaps what is most remarkable about the *Jacobson*

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39. *Id.* at 542–43.

40. *Id.* at 543.

41. *Id.* at 542–43.

42. *Id.*; *see also* Gabriel J. Chin, *The Story of* Jacobson v. United States*: Catching Criminals or Creating Crime*, *in* CRIMINAL LAW STORIES (Robert Weisberg & Donna K. Coker eds., forthcoming 2011) (manuscript at 25), *available at* http://ssrn.com/abstract=725281.

43. *Jacobson*, 503 U.S. at 542–47; *see also* Chin, *supra* note 42.

44. *Jacobson*, 503 U.S. at 552. Specifically, the Court remarked:

> On the other hand, the strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights. For instance, [the Heartland Institute for a New Tomorrow, a fictitious organization invented by the Government during its investigation] described itself as "an organization founded to protect and promote sexual freedom and freedom of choice" and stated that the most appropriate means to accomplish [its] objectives is to promote honest dialogue among concerned individuals and to continue its lobbying efforts with State Legislators." These lobbying efforts were to be financed through catalog sales. Mailings from the equally fictitious American Hedonist Society and the correspondence from the nonexistent Carl Long endorsed these themes.

Id. (citations omitted).

45. *Id.* at 551–54.

46. *Id.* at 548–49; *see also* Chin, *supra* note 42, at 23 (noting that while there was a dispute as to

opinion is that the Court ruled in favor of an individual convicted of a child pornography offense, a class of crime regarded as particularly reprehensible by society at large.[47] Although *Jacobson* was a 5–4 decision over a spirited dissent,[48] it was heralded as the case that resurrected the entrapment defense, which had long lain dormant.[49]

C. Predisposition

The Supreme Court has clearly recognized entrapment as a defense and has articulated that the subjective test is the operative legal inquiry in federal courts. The three opinions upholding the entrapment defense over the past eighty years, however, have not answered the question of how to prove or disprove a suspect's predisposition. Essentially, the predisposition inquiry attempts to predict what a given defendant would have done had law enforcement agents not intervened.[50] Professor Ronald Allen has argued that the predisposition inquiry is meaningless in that only a saint would not commit a crime given the right inducement; Allen urges that the real question is whether one's price is reasonable enough to conclude that entrapment has occurred, given law enforcement's conduct.[51] Whatever "predisposition" means—a topic that

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whether this was a novel holding or based on precedent, language in *Sherman* supported the *Jacobson* majority's position, and in any event, the government "conceded the point at oral argument").

47. *See* Chin, *supra* note 42, at 23 ("The Court recognized that even someone who was ultimately persuaded to do something quite wrong could be the beneficiary of the defense.").

48. *Jacobson*, 503 U.S. at 554 (O'Connor, J., dissenting) ("Keith Jacobson was offered only two opportunities to buy child pornography through the mail. Both times, he ordered. Both times, he asked for opportunities to buy more. He needed no Government agent to coax, threaten, or persuade him; no one played on his sympathies, friendship, or suggested that his committing the crime would further a greater good. In fact, no Government agent even contacted him face to face. The Government contends that from the enthusiasm with which Mr. Jacobson responded to the chance to commit a crime, a reasonable jury could permissibly infer beyond a reasonable doubt that he was predisposed to commit the crime. I agree.").

49. Paul Marcus, *Presenting, Back from the (Almost) Dead, the Entrapment Defense*, 47 FLA. L. REV. 205, 228–33 (1995).

50. *See, e.g.*, Kevin A. Smith, Note, *Psychology, Factfinding, and Entrapment*, 103 MICH. L. REV. 759, 761 (2005).

51. Ronald J. Allen, Melissa Luttrell & Anne Kreeger, *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 413 (1999) ("The real point is that talk of 'predisposition' is meaningless and commits an existential fallacy. A person who takes the bait has had his price met; a person who does not, has not. But, the person who does not take the bait almost surely would take a higher, even if greatly higher, bait. The failure to take this one is evidence of his price, but not of predisposition."); *see also* Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011, 1040 (1987) ("There is arguably a point at which any individual will commit crime if the risks are low enough and the rewards inviting enough."). *But see* Smith, *supra* note 50, at 761 n.11 (criticizing this position as "circular").

has been the subject of considerable scholarly attention—there remains a great deal of confusion regarding how it can be proved or disproved, as the case may be.[52]

In the context of a terrorism prosecution, it is not difficult to imagine how a defendant's statements can be used to prove predisposition, given the typical ideological and political nature of terrorism charges. Demonstrating predisposition can therefore become a referendum on a defendant's political or religious views when the inquiry focuses on how sympathetic the defendant is to terrorist objectives.[53] An analysis of predisposition to commit a given crime entails an inquiry into an individual's general character, something the law normally rejects.[54] The more an individual can be shown to be predisposed to commit crime—"through proof of prior crimes, prior bad acts, bad reputation, or other evidence of bad character"—the more extreme the government can be in its inducements to commit the crime.[55]

A significant attempt by the lower courts to refine the predisposition test came in *United States v. Hollingsworth*.[56] In *Hollingsworth*, a money laundering case involving complex facts, Judge Richard Posner of the Seventh Circuit articulated what he believed was required by *Jacobson*, namely, that predisposition is not merely the willingness to commit the crime, but also the ability to do so without the government's help.[57] This is referred to as "positional" predisposition.[58] The rationale behind *Hollingsworth* is rooted in a belief that the government creates a serious risk of inducing crime when it provides the means for individuals to carry out crimes that they otherwise would not have been able to commit.[59]

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52. Richard H. McAdams, *Reforming Entrapment Doctrine in* United States v. Hollingsworth, 74 U. CHI. L. REV. 1795, 1797 (2007) (arguing that the concept of predisposition "is difficult; many cases and a vast commentary have tried to clarify it").

53. *See infra* Part II, notes 63–135 and accompanying text.

54. Carlson, *supra* note 51, at 1039.

55. *Id.* ("More troubling, though, is the uncontrolled license that the predisposition test gives to the government to use even the most extreme inducements against persons whose 'general lifestyle and pattern of behavior are associated with criminality.'"(citations omitted)).

56. 9 F.3d 593 (7th Cir. 1993), *aff'd en banc*, 27 F.3d 1196, 1199–1200 (7th Cir. 1994).

57. *See id.*, 27 F.3d at 1200; *see also* McAdams, *supra* note 52, at 1797; Ian J. McLoughlin, Note, *The Meaning of Predisposition in Practice*, 79 B.U. L. REV. 1067, 1074 (1999).

58. *See Hollingsworth*, 27 F.3d at 1200 ("[Predisposition] has positional as well as dispositional force . . . . The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so . . . .").

59. McAdams, *supra* note 52, at 1807–08.

The rationale of *Hollingsworth*, a 6–5 decision by the en banc court, has not been adopted outside of the Seventh Circuit,[60] and the Ninth Circuit has expressly rejected the "positional" predisposition test.[61] Nevertheless, *Hollingsworth* represents a departure from the quixotic debates in courts and academia on predisposition. It also raises the very salient question of culpability when a defendant may have been willing to commit a crime but lacked the realistic means to perpetrate it, and would not have sought out those means but for the government's assistance. In the scope of a terrorism prosecution, evaluating positional predisposition can serve the valuable goal of eliminating liability based solely on a defendant's constitutionally protected political views, religious beliefs, or both. *Hollingsworth*'s limited acceptance outside the Seventh Circuit, however, does not allow for a full airing of this hypothesis.[62]

II. ATTENDANT ASSUMPTIONS IN EVALUATING THE TERRORIST THREAT

The entrapment analysis does not occur in a vacuum in any context, and a terrorism prosecution is no exception to this general rule. Exploring society's attendant assumptions as to who is a terrorist is crucial for evaluating the effectiveness of the entrapment doctrine, as well as for understanding the role that bias plays in creating those assumptions. While there has been serious and sustained academic commentary analyzing how Arab and Muslim communities in the United States have been racialized as terrorists, that analysis has not yet been incorporated into the discussion of informant use by the government. A thorough accounting of informant use requires an examination of that analysis and how it affects the resulting prosecutions. Identifying the role bias plays in determining who society believes is a terrorist can allow for a more accurate determination of true threats to national security, and can minimize the potential for convicting individuals based solely on their political or religious views.

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60. *Id.* at 1795–96 n.6 (citing cases from the Fifth Circuit indicating an initial adoption of the positional test in a case that was later vacated, then subsequently declining to revisit the issue; also noting that the Fourth Circuit expressly refused to rule on the matter).

61. Thickstun v. United States, 110 F.3d 1394, 1398 (9th Cir. 1997).

62. Additionally, there is the issue of how Judge Posner himself would respond to the application of the positional predisposition test for entrapment in a terrorism prosecution, given his advocating for expanded governmental powers to tackle the problem of terrorist violence. *See* McAdams, *supra* note 52, at 1809 n.63 (citing RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006)).

A. Academic Commentary: The Terrorism Context

To date, there are only two articles in American law reviews that focus on the topic of informant use in terrorism prosecutions, both of recent vintage.[63] The first article on the subject,[64] by Professor Dru Stevenson, approaches the topic of entrapment and terrorism from a law and economics perspective.[65]

Professor Stevenson expressly omits certain factors and phenomena from his analysis[66] and explains the scope of his article as follows:

> This Article does not address the ethical or moral problems with undercover government operations, many of which are obvious: the problem of government deception, the problem of the government creating crimes that would not otherwise have occurred, the conceptual asymmetry of recognizing government entrapment while ignoring the problem of private entrapment, the role of moral luck in the outcomes, among others. Other commentators cover these moral issues comprehensively, and such deontological arguments must stand on their own, rather than be pitted against teleological (utilitarian) concerns as if they were offsetting disutilities. The fact that something is wrong does not offset its social value; it makes the social value irrelevant or out of bounds. This Article explores the best version of the rule, from a pragmatic standpoint, and is not a moral endorsement of the things undercover agents may do. Similarly, this Article skirts the obvious moral and ethical quandaries that often arise in antiterrorism efforts, such as ethnic or religious profiling, protection of international scoundrels because of their "usefulness" as informants, prolonged detention of terror suspects without due process, or the use of torture to extract information about upcoming attacks. These are very appropriate subjects for academic inquiry but are outside the

63. Jon Sherman, *"A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475 (2009); Stevenson, *supra* note 35.

64. Stevenson, *supra* note 35, at 129 ("[T]his is the first academic article to consider this specific issue in depth.").

65. *Id.* at 146. The second article, by Jon Sherman, analyzes recent terrorism prosecutions from a more critical perspective than Professor Stevenson, and concludes by providing several suggestions that might make informant use more effective and less suspect. *See* Sherman, *supra* note 63, at 1499–510.

66. Stevenson, *supra* note 35, at 146.

> scope of this Article, even though they may be relevant in the same adjudications in which this Article is relevant.[67]

This statement misses a valuable opportunity to engage with an important aspect of informant use. Given the government's tremendous power and the concomitant asymmetrical relationship between its agents and the target suspect, any analysis of entrapment must consider the government's role in creating crime.[68] But to take Professor Stevenson at his word, it is fair to assume that it is worthwhile to define the precise contours of the optimal entrapment defense.

In conducting a search for the best entrapment rule in the terrorism context, Professor Stevenson arrives at a curious conclusion. He contends "that given the difficulty of preventing terrorist acts and the civil liberties implications of intrusive surveillance—the alternative to stings—there should be a rebuttable presumption that anyone who provides material support to terrorism was predisposed to do so."[69] The basis for this recommendation is "that terrorism is such a heinous crime that it is unlikely the government could induce someone to support such criminals unless the person was one of the few predisposed to do so."[70]

Using this assumption to justify stacking the deck against criminal defendants charged with providing material support to terrorists is flawed for two reasons. First, the assumption of predisposition ignores the central debates at the heart of the material support ban, namely, those dealing with the criminalization of humanitarian aid and the overly broad construction of what constitutes material support. Second, this assumption does not take into account the inherently political nature of deciding which groups to designate as terrorists.

In 1996, as part of the larger Antiterrorism and Effective Death Penalty Act, Congress prohibited material support to certain designated foreign terrorist organizations (FTOs).[71] The ban on providing material support to FTOs encompasses a fair range of activity[72] and was intended

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67. *Id.* at 146–48 (citations omitted).

68. *See, e.g.*, Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 113 ("The [entrapment] doctrine illustrates the pervasive limitations on the power of government to impose criminal sanctions—limitations that are supremely important.").

69. Stevenson, *supra* note 35, at 125.

70. *Id.*

71. For an extended discussion of this topic, see Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. (forthcoming 2011).

72. *See* 18 U.S.C. § 2339A(b)(1) (2006) ("'[M]aterial support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or

initially to address the supposed problem of terrorist groups raising money under the guise of humanitarian activity.[73] While courts and commentators have scrutinized and criticized the ban on providing material support to FTOs since its passage, the law serves as the main legal vehicle for prosecuting terrorist cases in federal court.[74] A conviction under the law can carry with it up to fifteen years in prison, with a potential life sentence authorized if the material support can be connected to a specific act of violence that results in loss of life.[75]

First, there has been a great deal of litigation on the constitutionality of banning material support to an FTO when a donor's motivation was rooted in purely humanitarian purposes.[76] The vast majority of courts considering the issue have ruled that providing support to an FTO in the knowledge that the group has been so listed, regardless of whether the support is intended for legal or illegal ends, is a sufficient standard to sustain a conviction.[77] Whatever the merits of such a standard, it is easy to envision a situation where individuals can violate the ban on providing material support even when those same individuals lack any desire to further violence and instead legitimately intend to alleviate the suffering of others living in proximity to the FTO's sphere of influence.[78] If an informant tries to get someone to donate to an FTO on

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identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.").

73. Said, supra note 71 (manuscript at 14) (on file with the author).

74. *Id.* (manuscript at 13).

75. 18 U.S.C. § 2339B(a)(1) (2006).

76. Said, *supra* note 71 (manuscript at 33–49). Professor Stevenson notes that the material support laws have been controversial and the subject of academic criticism. He provides a citation to a few law review articles, but does not fully explore these issues. *See* Stevenson, *supra* note 35, at 179 n.268.

77. Said, *supra* note 71 (manuscript at 33–38) (discussing cases).

78. During oral argument on the constitutionality of 18 U.S.C. § 2339B, the ban on providing material support to a designated FTO, the district court judge in *United States v. Al-Arian*, 308 F. Supp. 2d 1322 (M.D. Fla. 2004), asked the prosecutor whether the judge's elderly mother would be in violation of the law if she were to write a check to a known FTO but direct that the money go to an orphanage. The government noted that were she to do so with the knowledge that the group was an FTO, she would be breaking the law, regardless of her motives. Graham Brink, *Charges in Terror Case Are Faulted*, ST. PETERSBURG TIMES, Jan. 22, 2004, at 1B. In the Guantanamo detainee litigation, the government also argued that the wide scope of material support laws could justify detaining individuals indefinitely as enemy combatants:

> [T]he Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities," a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.

a humanitarian basis by making an appeal to conscience, it is hard to see why predisposition should be presumed in such circumstances.[79] Solicitees are not likely to understand the wrongfulness of their conduct, given that a clever informant could make arguments about the valid need for aid, which could convince individuals otherwise not predisposed.

Further, the material support ban is focused on groups, rather than on particular acts of violence. It is quite conceivable that individuals sympathetic to a group's aims, but completely opposed to the use of violence, can be entrapped when material support is so broadly construed. This point is underscored by the Supreme Court's recent opinion in *Holder v. Humanitarian Law Project*,[80] a civil suit involving individuals in the United States who wished to aid certain FTOs via peaceful means.[81] At issue was the constitutionality of the terms "training," "personnel," "service," and "expert advice or assistance," all of which are impermissible forms of material support under the statute.[82] The Court ultimately ruled that the statute and all of the challenged terms were not unconstitutionally vague, nor did they violate the plaintiffs' First Amendment rights to freedom of speech or association.[83] Therefore, individuals wishing to help an FTO advocate for its cause using peaceful means are providing illegal material support, even if their goal is to steer a group away from violence. The Court made clear that the ban applied to such speech-related activities, provided that they take place on behalf of the FTO itself; individual advocacy unconnected to the group remains protected.[84] However, the Court's position does not distinguish terrorism *tactics* from the *aims* of a group, which fallaciously

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In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (citations omitted).

79. This dynamic was represented in *United States v. al-Moayad*, 545 F.3d 139 (2d Cir. 2008), discussed in detail in Part II.B.7.

80. 561 U.S. __, 130 S. Ct. 2705 (2010).

81. The *Holder* Court noted various peaceful activities advocated by the plaintiffs:

> (1) "train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes"; (2) "engag[ing] in political advocacy on behalf of Kurds who live in Turkey"; and (3) "teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief." . . . (1) "train[ing] members of [the] LTTE to present claims for tsunami-related aid to mediators and international bodies"; (2) "offer[ing] their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government"; and (3) "engage[ing] in political advocacy on behalf of Tamils who live in Sri Lanka."

Id. at 2716 (alterations in original) (citations omitted) (quoting Humanitarian Law Project v. Mukasey, 552 F.3d 916, 921 n.1 (9th Cir. 2009)).

82. *Id.*; 18 U.S.C. § 2339A(b)(1) (2006).

83. *Holder*, 561 U.S. at __, 130 S. Ct. at 2722–31.

84. *Id.* at 2726, 2730 ("In particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations.").

conflates means and ends. It therefore remains possible for an informant to entrap someone to provide material support when the conduct being criminalized has no connection to terrorist activity, such as advising a group on how to petition the United Nations or United States Congress to recognize the plight of the people it claims to represent, or providing humanitarian aid for people in need. In such a scenario, not only is there no link to an act of violence, but the activity itself may be engineered to steer a group away from violence. Expecting someone unfamiliar with the complexities of material support litigation to make these distinctions, especially when confronted with an informant who is suggesting an incriminating course of action, is unrealistic at best.

Second, Stevenson's statement on the nature of terrorism does not allow for a discussion of any distinctions between groups, let alone an examination of a group's motives, causes, or methods. Instead, his assumption that only someone so inclined would provide material support to an FTO sweeps too broadly against all those charged with violations of the material support ban. It ignores the inherently political nature of defining terrorism and how foreign policy concerns, as opposed to a principled commitment to even-handed legality, influence which groups are classified as FTOs.[85] Central to a group being designated as an FTO is a determination that the group constitutes a threat to the security of U.S. nationals or U.S. national security—both expansively defined terms. Courts reviewing such designations have refused to look into the reasons behind the designation.[86] By requesting aid for peaceful purposes, knowing full well that such aid violates the ban on providing material support, an informant could entrap an individual who may be sympathetic to an FTO's aims but does not wish to support violence in any way. In so doing, the informant could highlight the perceived unfairness in designating the FTO as politically motivated, while at the same time stressing the non-violent nature of the proposed material support.

The above discussion demonstrates the danger of making sweeping assumptions about the crime of material support without examining the permutations and implications of the law's scope. While in the abstract it is clear that terrorism is a contemptible and illegal tactic, there are ethical and political reasons why someone might provide material support to an FTO and also reject violence. To presume prejudice when

85. *See* Said, *supra* note 71 (manuscript at 24–32).

86. *Id.* (manuscript at 25).

an informant is part of the equation in inducing such support is going further than the law should allow.

B. Attendant Assumptions: Who Is a Terrorist?

Any entrapment discussion requires addressing the question of who is a terrorist according to popular and governmental perceptions in the United States. Currently, thirty-one of the forty-six designated FTOs are either Arab or Muslim, with the majority of that number being Islamist in ideology.[87] The government identifies the greatest threat as terrorism committed by al-Qaeda and its related groups,[88] although there are a significant number of non-al-Qaeda-affiliated Arab and Muslim groups of both religious and secular outlook.[89] Additionally, of the four countries officially designated as "State Sponsors of Terrorism," three are Arab or Muslim majority.[90] Even assuming the validity of all these designations on political and normative grounds, the official numbers suggest that the archetypal terrorist comes from a certain background, particularly in light of the al-Qaeda network's leading role as primary terrorist actor and threat.

The construction of the terrorist as Arab or Muslim, as reflected in the composition of the various official terrorist lists maintained by the government, is borne out by other factors. Specifically, government action in the antiterrorism arena has resulted in a construct of the terrorist as irreducibly Muslim or "Muslim-looking."[91] This construct is

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87. U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, *Foreign Terrorist Organizations* (last visited Oct. 15, 2010), http://www.state.gov/s/ct/rls/other/des/123085.htm.

88. U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, *The Terrorist Enemy*, http://www.state.gov/s/ct/enemy/index.htm (last visited Oct. 21, 2010) ("Terrorist networks currently pose the greatest national security threat to the United States. The greatest threat and the most wanted terrorists come from the al-Qaida (AQ) network, which includes a core al-Qaida organization and numerous confederated extremist groups.").

89. U.S. DEP'T OF STATE, *supra* note 87 (listing, for example, Hamas (Palestinian Islamist FTO), Hezbollah (Lebanese Islamist FTO), and the Popular Front for the Liberation of Palestine (Palestinian Marxist FTO)).

90. U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, *State Sponsors of Terrorism*, http://www.state.gov/s/ct/c14151.htm (last visited Oct. 21, 2010) (listing Cuba, Iran, Sudan, and Syria).

91. Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1697 (2009) ("[There was] a racialized social construction of the terrorist that had already taken hold in the aftermath of September 11, and that has its antecedents well before. Immediately following the terrorist attacks, the Bush Administration deployed a set of racially directed immigration enforcement and detention practices which, coupled with thousands of incidents of hate violence—including nineteen murders—helped to consolidate the disparate identities of Arabs, Muslims, and South Asians into a newly minted monolithic category in the

not new, nor is it limited to the period after 9/11. Just after the attacks on Israeli athletes at the 1972 Munich Olympic Games, the Nixon administration established a commission to examine the existence of terrorism in the United States.[92] The commission ultimately came up with a set of policies, known as "Special Measures," which resulted in increased restrictions on Arab immigration to the United States, as well as more stringent and invasive surveillance of Arab-Americans.[93] Later historical events, such as the 1979 Iranian hostage crisis, the first Gulf War of 1990–91, and the first World Trade Center bombing in 1993, further cast Muslims and Arabs as the enemy.[94] As early as 1986, the government was considering plans to use two military bases to detain Arab- and Iranian-Americans in the same vein as the Japanese internment of World War II.[95] The post-9/11 immigration crackdowns on Arab and Muslim noncitizens[96] were preceded by pre-9/11 selective immigration prosecutions against individuals based on their political beliefs,[97] and the use of secret evidence to detain and deport.[98]

American racial lexicon: the 'Muslim-looking' person."); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1278 (2004) ("The logic of governmental profiling is only slightly more nuanced: (1) because all of the September 11 terrorists were Arab and Muslim; (2) because most Arabs are Muslims; and (3) because the terrorists claim religious motivation for their actions; (4) all Arabs and all Muslims are likely to be terrorists.").

92. JOHN TEHRANIAN, WHITEWASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY 121 (2009); Susan M. Akram & Kevin R. Johnson, *Race and Civil Rights Pre-September 11, 2001: The Targeting of Arabs and Muslims*, *in* CIVIL RIGHTS IN PERIL: THE TARGETING OF ARABS AND MUSLIMS 18 (Elaine C. Hagopian ed., 2004).

93. *See* TEHRANIAN, *supra* note 92, at 121; Akram, *supra* note 92, at 18.

94. *See* TEHRANIAN, *supra* note 92, at 122; Akram, *supra* note 92, at 18; *see also* Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2849–52 (2001).

95. YVONNE YAZBECK HADDAD, NOT QUITE AMERICAN? THE SHAPING OF ARAB AND MUSLIM IDENTITY IN THE UNITED STATES 21 (2004).

96. Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 624–31 (2005); *see also* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003), http://www.justice.gov/oig/special/0306/ (documenting violations of Muslim and Arab immigrants' civil rights while detained by the authorities in the wake of 9/11).

97. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999) (holding that immigrants cannot assert a selective-enforcement claim in the immigration context).

98. Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 (1999) (detailing cases and the practice of using secret evidence against Arab and Muslim noncitizens suspected of involvement with terrorist groups).

Ultimately, Arab- and Muslim-Americans became presumptive terrorists, as detailed by Professors Susan Akram and Kevin Johnson:

> Since at least the 1970s, US laws and policies have been founded on the assumption that Arab and Muslim noncitizens are potential terrorists and have targeted this group for special treatment under the law. This post-September 11 targeting of Muslims and Arabs is simply the latest chapter in this history.[99]

Stated another way, well before 9/11, as noted by Professor Natsu Taylor Saito, "Arab Americans and Muslims have been 'raced' as 'terrorists': foreign, disloyal, and imminently threatening."[100] The rendering of Arab- and Muslim-Americans as presumptive terrorists for the purposes of official policy has been mirrored by longstanding portrayals of Arabs and Muslims as terrorists in the news media and Hollywood.[101]

This state of affairs also has helped shape popular perceptions of Arabs and Muslims as terrorists. Where popular support for racial profiling in law enforcement operations had plummeted in the period prior to 9/11, a public opinion poll taken shortly after 9/11 indicated that a majority of Americans approved of racial profiling against Arabs and Muslims in terrorism investigations.[102] According to Professor John Tehranian, "Middle Eastern Americans . . . now suffer from more systemic racism than ever before, a fact that makes them unique among America's ethnic and racial groups."[103] To illustrate his point, he points to the example of the uproar in 2006 over the proposed transfer of

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99. Akram & Johnson, *supra* note 92, at 10.

100. Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists*," 8 ASIAN L.J. 1, 12 (2001); *see also* Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1488–89 (2002). *But see* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA. L. REV. 1575, 1575–76 (stating that the racialization of Arab- and Muslim-Americans occurred as a result of 9/11).

101. *See generally* JACK G. SHAHEEN, GUILTY: HOLLYWOOD'S VERDICT ON ARABS AFTER 9/11 (2008); JACK G. SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE (2001); EDWARD W. SAID, COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD (1997).

102. *See* TEHRANIAN, *supra* note 92, at 124 (noting additionally that African-American support for the use of racial profiling was significantly higher than that of whites, even though members of that particular ethnic group were disproportionately victimized by the tactic). It bears noting that racial profiling has been disavowed and disapproved as a tactic for federal law enforcement officers in traditional law enforcement activities, but may be used in national security investigations "to the extent permitted by the Constitution and laws of the United States." U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003), http://www.justice.gov/crt/split/documents/guidance_on_race.php.

103. *See* TEHRANIAN, *supra* note 92, at 119.

control over operations at several American ports to DP World, an entity owned by the government of the United Arab Emirates (UAE).[104] Despite the Bush administration's support for the deal, overwhelming popular and bi-partisan opposition to the transfer of control led to the deal being scuttled, despite the fact that the UAE is a major ally of the United States in the Middle East.[105] Ultimately the incident revealed an ominous development:

> Foreign companies and contractors have long managed operations of American ports—in fact, DP World's immediate predecessor was a foreign entity. The issue was plainly not one of foreign control—a practice that had gone unnoticed until the specter of Arab-run port operations arose. The port incident highlighted the way that rampant racism had caused Americans to harbor such misgivings about Middle Easterners, though not any other group of individuals, from having some control over our infrastructure. Sadly, the incident seemed to suggest that one of the few things both the populist left and right can agree on is their distaste for Arabs and people from the Middle East.[106]

This sentiment has now transformed and grown into a fear and distrust of an entire faith, as evidenced by the current upheaval over the proposed construction of a mosque near the site of the former World Trade Center in New York,[107] the fact that a large number of Americans suspect that President Obama is in fact a Muslim,[108] a Florida minister's now-suspended plan to burn the Quran publicly,[109] and Oklahoma voters passing a state constitutional amendment prohibiting state courts from considering Islamic law (the Shari'ah) or international law in rendering decisions.[110]

C. Law Enforcement's Cultivation and Utilization of Informants

The preceding discussion on the racialization of Arabs and Muslims as terrorists influences the government's use of informants in the

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104. *Id.* at 119–20.

105. *Id.* at 120.

106. *Id.*

107. Paul Vitello, *Furor on Islamic Center Exposes Mixed Feelings of Local Muslims*, N.Y. TIMES, Aug. 20, 2010, at A1.

108. Helene Cooper, *Obama Tries to Calm Tensions in Call for Religious Tolerance*, N.Y. TIMES, Sept. 11, 2010, at A1.

109. *Id.*

110. James C. McKinley, Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES, Nov. 15, 2010, at A12.

investigatory phase of a prosecution and the government's methods of cultivating informants. A review of the guidelines governing the FBI's use of informants, as well as the tactics the agency employs to cultivate informants, is instructive.

1. FBI Guidelines

The latest guidelines on FBI domestic operations, issued by then-Attorney General Michael Mukasey in late September 2008, permit the agency to open "assessments," meaning potentially probing surveillance and investigations on a target, "without any particular factual predication."[111] The techniques that the FBI uses in conducting its assessments have not been disclosed to the public, despite Freedom of Information Act inquiries for such information by public interest groups.[112]

More specifically, the FBI's use of informants is governed by the Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations (Guidelines), the latest version of which was issued in 2002 by then-Attorney General John Ashcroft.[113] The Guidelines are very influential, not simply for the FBI and its investigations, but also for other federal agencies and state and local law enforcement.[114] The Guidelines assign enforcement of their terms to an internal administrative body, but otherwise disclaim responsibility for any violations by FBI agents.[115] Federal courts have not upheld an entrapment defense rooted in violations of the Guidelines.[116] The Guidelines do have a subsection on entrapment, which includes language that tracks the subjective test accurately.[117] In addition to the warning on

111. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC OPERATIONS (Sept. 29, 2008), http://www.justice.gov/ag/readingroom/guidelines.pdf.

112. *See, e.g.*, David L. Sobel, *Prompted by EFF Lawsuit, FBI (Partially) Releases Domestic Surveillance Guidelines*, ELEC. FRONTIER FOUND. (Sept. 29, 2009), http://www.eff.org/deeplinks/2009/09/prompted-eff-lawsuit-fbi-partially-releases-domest (commenting on FBI's release of requested report with almost all relevant sections redacted).

113. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES ON FEDERAL BUREAU OF INVESTIGATION UNDERCOVER OPERATIONS (May 30, 2002) [hereinafter FBI GUIDELINES], *available at* http://www.fas.org/irp/agency/doj/fbi/fbiundercover.pdf.

114. Stevenson, *supra* note 35, at 163.

115. FBI GUIDELINES, *supra* note 113, para. VII ("These Guidelines are set forth solely for the purpose of internal DOJ guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.").

116. Stevenson, *supra* note 35, at 164 n.191 (citing examples).

117. FBI GUIDELINES, *supra* note 113, para. V.A. ("Entrapment must be scrupulously avoided.

the legal standard for entrapment, there are a series of preconditions that must be met before an undercover operation can be authorized, and the focus of these conditions is on the critical element of a target's predisposition, or lack thereof.[118] The Guidelines make clear that FBI personnel are bound by the contours of the entrapment defense, but the Guidelines do not purport to modify the defense itself.[119]

2. FBI Tactics

When coupled with the perception that Arabs and Muslims are suspect, the standards governing the FBI's use of informants and broad authority to conduct assessments have led to controversial results and trends. Most emblematic of this recent dynamic is the tactic of sending informants to mosques in the United States to report on possible terrorist activity without any articulable suspicion or probable cause.[120] Revelations about informants secretly taping conversations at a Los Angeles-area mosque in 2006 and 2007 led FBI Director Robert Mueller to defend the tactic, despite the controversy and potential chill of religious freedom the reports engendered.[121] Specific to the issue of entrapment, the tactic created the impression that the FBI's real goal was

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Entrapment occurs when the Government implants in the mind of a person who is not otherwise disposed to commit the offense the disposition to commit the offense and then induces the commission of that offense in order to prosecute.").

118. *Id.* at para. V.B. The Guidelines focus on establishing a series of preconditions before engaging in an undercover operation, with specific mention of a subject's predisposition as a prerequisite:

> [N]o undercover activity involving an inducement to an individual to engage in crime shall be authorized unless the approving official is satisfied that—
>
> (1) The illegal nature of the activity is reasonably clear to potential subjects; and
>
> (2) The nature of any inducement offered is justifiable in view of the character of the illegal transaction in which the individual is invited to engage; and
>
> (3) There is a reasonable expectation that offering the inducement will reveal illegal activity; and
>
> (4) One of the two following limitations is met:
>
> > (i) There is reasonable indication that the subject is engaging, has engaged, or is likely to engage in the illegal activity proposed or in similar illegal conduct; or
> >
> > (ii) The opportunity for illegal activity has been structured so that there is reason to believe that any persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal conduct.).

119. Stevenson, *supra* note 35, at 166.

120. Teresa Watanabe & Paloma Esquivel, *L.A. Area Muslims Say FBI Surveillance Has a Chilling Effect on Their Free Speech and Religious Practices*, L.A. TIMES, Mar. 1, 2009, http://articles.latimes.com/2009/mar/01/local/me-muslim1.

121. *See* Michael R. Blood, *FBI Director Defends Use of Informants in Mosques*, MSNBC.COM, June 8, 2009, http://www.msnbc.msn.com/id/31177049/.

not to seriously evaluate threats, but to "entrap and incite" Muslim-Americans.[122]

Some have criticized sending informants to mosques as a lazy law-enforcement tactic, because "it's much more difficult to catch real terrorists than it is to catch mosque-goers."[123] It is hard to imagine, however, that houses of worship could become targets of investigation without any cause or suspicion whatsoever, if the ethnic or religious group in question was not so vilified or readily identified with a threat to national security.

Further, the underhanded tactic of spying on worshippers at mosques is only part of a strategy to produce information that creates great discord within the Muslim community. Recent press reports detail the FBI's attempts to convince noncitizens, including Muslim religious leaders, to become informants.[124] In cases where the individuals refuse the FBI's invitation, the agency increases the pressure by seeking to deport them, in the hopes that the threat of being forcibly removed from the United States will cause them to change their minds.[125] Manipulating vulnerability to induce an individual to become an informant is a tried-and-true tactic widely used by law enforcement in the domestic law enforcement sphere.[126]

The case of Foad Farahi, an imam of Iranian origin at a Florida mosque, illustrates this trend.[127] In 2004, FBI agents approached him and requested that he work as an informant for the agency.[128] Farahi agreed to help the FBI by providing information about the local Muslim community and translating documents on the condition that his

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122. *Id.*

123. Coleen Rowley, Letter to the Editor, *Fear, Terror, and the Mosques*, L.A. TIMES, Mar. 7, 2009, at A28 (criticizing the practice as lacking "factual justification"). Rowley is a former FBI agent turned whistleblower who criticized the FBI's handling of the pre-9/11 investigation of the suspected "20th hijacker" Zacarias Moussaoui. *Id.*; *Coleen Rowley's Memo to FBI Director Robert Mueller*, TIME, June 3, 2002, *available at* http://www.time.com/time/covers/1101020603/memo.html.

124. *See* Trevor Aaronson, *FBI Tries to Deport Muslim Man for Refusing to Be an Informant*, MIAMI NEW TIMES, Oct. 8, 2009, http://www.miaminewtimes.com/2009-10-08/news/unholy-war-fbi-tries-to-deport-north-miami-beach-imam-foad-farahi-for-refusing-to-be-an-informant/; Paul Vitello & Kirk Semple, *Muslims Say F.B.I. Tactics Sow Anger and Fear*, N.Y. TIMES, Dec. 18, 2009, at A1 (noting case of Brooklyn cleric who sued the government after the FBI allegedly threatened to derail his green card application were he not to spy on relatives abroad).

125. *See* Aaronson, *supra* note 124.

126. *See* NATAPOFF, SNITCHING, *supra* note 4, at 40 ("Indeed, part of the process of creating informants involves the purposeful manipulation of their vulnerability.").

127. *See* Aaronson, *supra* note 124.

128. *Id.*

cooperation with the government be made public.[129] When the agency asked that he operate as a secret informant and investigate specific targets, he refused, even though the agents offered to grant him legal residency in the United States (he had been in the United States on a student visa) and to pay him for his services.[130] While nothing came of this initial exchange, an FBI agent renewed the agency's request that Farahi become an informant in 2007, and again he refused.[131] Several months later, the government claimed it had evidence of his involvement in terrorist activities.[132] Farahi claims he was given an ultimatum: either drop his application for political asylum in the United States and leave the country or be charged as a terrorist.[133] After agreeing to leave the country voluntarily, Farahi changed his mind and sought to reinstate his political asylum claim once he realized the government fabricated terrorism links to pressure him to become an informant.[134] Farahi's is one of several reported cases of individuals who refused to become informants for the FBI in national security investigations and suffered either criminal or immigration prosecution as a result.[135]

The entrapment defense is notoriously vague, but it is perhaps the only tool available to defendants tarred by the terrorism brush. When one considers the stigmatizing effect of the label attached to Arabs and Muslims as presumed terrorists, separating predisposition from entrapment becomes ever more difficult, and limits the effectiveness of the already weakened entrapment defense. Indeed, since September 11, 2001, it appears that there is not one recorded instance of a successful entrapment defense in a terrorism trial.[136]

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See* REPORT CARD 2010, *supra* note 2, at 20 ("As of September 2010, the entrapment defense has never been used successfully in a post-9/11 federal terrorism trial.").

III. INFORMANT USE IN TERRORISM PROSECUTIONS

A. History of Use in the Pre-9/11 Terrorism Prosecution

1. Before the First World Trade Center Bombing in 1993

The concept of a terrorism prosecution involving what has come to be called international terrorism has not developed until relatively recently. As a result, there are not many examples of terrorism prosecutions in the period before the first World Trade Center bombing in February 1993, let alone the documented use of informants in such prosecutions. Two early cases involving allegations of international terrorism and featuring informants were tried to juries in federal court in Brooklyn in 1982–83.[137] Both cases involved several individuals of Irish descent charged with supplying the Provisional Irish Republican Army with weapons for its fight against British security forces in Northern Ireland.[138] In both cases, the defendants claimed entrapment by a government informant; the informants in each case said they were employed by the Central Intelligence Agency and thus were officially vested with the authority to deliver the weapons to Ireland, effectively legalizing the weapons distribution.[139] In the first case, the jury credited the defendants' contention that the agent had entrapped them,[140] and acquitted all five defendants despite the evidence and hostile stance taken by at least one defendant.[141] In the second case, four defendants were convicted and sentenced to terms ranging from two to seven years in prison,[142] penalties that seem incredibly light for activities directly connected to violence, especially when compared to typical penalties imposed in connection with the War on Drugs and the War on Terrorism. Perhaps even more incredible than the light sentences was the fact that the men

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137. United States v. Duggan, 743 F.2d 59 (2d Cir. 1984); Robert D. McFadden, *Five Are Acquitted in Brooklyn in Plot to Run Guns to I.R.A.*, N.Y. TIMES, Nov. 6, 1982, at L31.

138. *Duggan*, 743 F.2d at 65; McFadden, *supra* note 137, at L31 (noting weapons allegedly smuggled were "a 20-millimeter cannon, a flame thrower, 47 machine guns, and 11 automatic rifles").

139. McFadden, *supra* note 137; *Duggan*, 743 F.2d at 68–69, 84–85.

140. McFadden, *supra* note 137.

141. Joyce Wadler, *Unbowed, and Unashamed of His I.R.A Role*, N.Y. TIMES, Mar. 16, 2000, at B2 ("This is the legend of Mr. Harrison. At his 1982 trial on weapons charges, when the prosecutor asserts that he has been running guns for six months, Mr. Harrison, in a grand heroic stance, orders his lawyer to set the record straight. 'Mr. Harrison is insulted,' his lawyer says. 'He wants the court to know that there has not been a weapon sent to Northern Ireland in the last 25 years without Mr. Harrison.'").

142. *Duggan*, 743 F.2d at 64 n.2.

were convicted at all, given the result of the first trial and a federal jury's willingness to recognize an entrapment defense in such circumstances.

2. The First World Trade Center Bombing and Beyond

The first World Trade Center bombing and the plot to blow up landmarks around New York City underscored the difficulty in using an informant, a difficulty that is inherent in any wide-ranging and complex multi-defendant conspiracy. In the wake of the first World Trade Center bombing in February 1993, it came to light that the FBI had been using an informant, a former Egyptian army officer by the name of Emad Salem, who had managed to penetrate the conspiracy.[143] The agency claimed to have dropped Salem as an informant after his refusal to wear a body recorder, but re-hired him after the attack.[144] Unknown to the FBI, Salem had made secret recordings of his telephone calls with FBI agents,[145] and in one exchange implied that he had given the agency information on the bomb used in the plot, but the FBI failed to intervene and thwart the attack.[146] In continuing his work for the FBI after the blast, Salem managed to infiltrate a large-scale conspiracy to blow up several landmarks in the New York City area, headed by the leader of the Egyptian Islamic Group (al-Gama'a al-Islamiyya), Sheikh Omar Abdel Rahman, for whom he worked as a bodyguard.[147] While Salem ultimately testified at length in the landmarks case,[148] which resulted in convictions of the various defendants on charges of seditious conspiracy,[149] his relationship with the government was strained, and the defense aggressively pursued an entrapment defense based on his conduct.[150] Though the record in the case also included information

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143. Ralph Blumenthal, *Tapes in Bombing Plot Show Informer and F.B.I. at Odds*, N.Y. TIMES, Oct. 27, 1993, at A1.

144. *Id.*

145. Ralph Blumenthal, *Tapes Depict Proposal to Thwart Bomb Used in Trade Center Blast*, N.Y. TIMES, Oct. 28, 1993, at A1.

146. Richard Bernstein with Ralph Blumenthal, *Bomb Informer's Tapes Give Rare Glimpse of F.B.I. Dealings*, N.Y. TIMES, Oct. 31, 1993, at L44.

147. *Id.*

148. United States v. Rahman, 189 F.3d 88, 106 n.4 (2d Cir. 1999) ("Salem was one of the Government's key witnesses at trial. The Government acknowledges that Salem is a braggart who often told tall tales of his past. However, by 1993 Salem was regularly tape recording his conversations with the group members and those tapes served to corroborate much of his testimony at trial.").

149. *Id.* at 103.

150. *Id.* at 131, 142; Joseph P. Fried, *Muslim Cleric Was Framed by Top Informer, Defense Says*, N.Y. TIMES, Sept. 8, 1995, at B3; Joseph P. Fried, *Defense Challenges F.B.I. over Bomb Plot*

about his contacts with Egyptian military intelligence, it appeared that his cooperation with the FBI was entirely unrelated to his past work in the Egyptian army.[151]

Emad Salem was a particularly difficult witness, admitting on the stand to lying repeatedly, which fueled defense counsel's efforts to argue that their clients had been entrapped by a clever provocateur.[152] However, despite the highly inchoate nature of the crimes that were the object of the landmarks conspiracy, Salem's testimony allowed the government to obtain convictions in what can retrospectively be termed a preventive prosecution. What role the defendants' racial, ideological, and religious beliefs played in crediting his testimony, which was ostensibly undermined by his fabrications and questionable behavior, is anyone's guess.

The use of informants in the period between the first World Trade Center bombing and 9/11 did not yield a large number of prosecutions generated by informants, which is understandable, given the relative novelty of the criminal terrorist prosecution.[153] When a terrorist prosecution did feature an informant's tip, it was typically not part of the government's strategy to have an informant infiltrate a given plot. The case of Lafi Khalil and Gazi Ibrahim Abu Mezer,[154] two Palestinians of Jordanian nationality,[155] is illustrative. Their roommate, an Egyptian named Abdelrahman Mossabah, approached the police in Brooklyn to

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Informer, N.Y. TIMES, July 6, 1995, at B5. The defendants also unsuccessfully attempted to argue that they were the victims of "[g]overnment [o]verinvolvement," essentially an outrageous-government-conduct charge. *Rahman*, 189 F.3d at 131.

151. United States v. Salameh, 54 F. Supp. 2d 236, 268–69 (S.D.N.Y. 1999).

152. James C. McKinley, Jr., *Key Witness in Bomb-Plot Trial Admits Lying About His Exploits*, N.Y. TIMES, Mar. 8, 1995, at A1.

153. The star witness in the prosecution of the individuals responsible for the August 1998 bombings of United States embassies in Kenya and Tanzania was a former al-Qaeda operative who approached an unnamed U.S. embassy abroad and essentially defected. *See* United States v. Bin Laden, 397 F. Supp. 2d 465, 474–75 (S.D.N.Y. 2005), *aff'd sub nom. In re* Terrorist Bombings of U.S. Embassies in East Afr., 552 F.3d 93 (2d Cir. 2008); LAWRENCE WRIGHT, THE LOOMING TOWER 5 (2006). It is difficult to describe this witness as an informant under the definition adhered to in this Article, given that he did intend to aid his terrorist coconspirators. However, he does not exactly fit the definition of a cooperator—someone who "conspired with terrorists at one point but [was] induced to cooperate with law enforcement," REPORT CARD 2009, *supra* note 1, at 43—because his motivation in approaching the government was rooted in his theft of over $100,000 of Bin Laden's money. WRIGHT, *supra* at 5. Clearly, the government did not induce him to cooperate, as he turned himself over at a U.S. consulate abroad. *Id.* However, he later pleaded guilty to felony conspiracy charges in 1997, entered witness protection, and had not been sentenced as of 2005. *Id.*

154. United States v. Khalil, 214 F.3d 111 (2d Cir. 2000).

155. John Kifner, *Arrested Men Often Seen, Little Known in Park Slope*, N.Y. TIMES, Aug. 1, 1997, at B4.

pass on that the two men had a cache of pipe bombs they intended to detonate on the New York City subway.[156] Mossabah provided the police with a diagram of the apartment's interior and a key to the front door, which facilitated Khalil and Abu Mezer's capture and arrest.[157] While ultimately Khalil was convicted only of possessing a fraudulent green card and sentenced to thirty-six months in prison, Abu Mezer was given two life sentences plus thirty years as a result of his being convicted on charges of possessing and threatening to use a weapon of mass destruction.[158] Moassabah's actions were fortuitous and represent the most straightforward manner in which informing for the police can protect society's larger interests in safety and security.

B. Post-9/11 and the Preventive Focus

The period after 9/11 has witnessed the government's efforts to engage in so-called preventive prosecution of terrorists—arrests and prosecutions that occur before any dangerous plot can come to fruition.[159] Preventive prosecution contrasts with terrorist prosecutions pre-9/11, which focused mainly on punishing those individuals implicated in cases involving violent attacks that had already occurred.[160] The cases discussed below highlight, in rough chronological order, the preventive focus of the post-9/11 terrorism prosecution but also evidence the central role informants have played in bringing charges, often in questionable circumstances. Despite the questionable circumstances, all the prosecutions below resulted in convictions against the charged defendants, their respective claims of entrapment notwithstanding.

1. United States v. Siraj

In May 2006, a twenty-four-year-old Pakistani immigrant named Shahawar Matin Siraj was convicted on several conspiracy counts stemming from an alleged 2003 plot to blow up the 34th Street subway station in New York City.[161] The chief witnesses against him at trial

156. *Khalil*, 214 F.3d at 115; Kifner, *supra* note 155.

157. *Khalil*, 214 F.3d at 115.

158. *Id.*

159. DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE 26–28, 102 (2007); Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Threat of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 430 (2006).

160. Chesney, *supra* note 159.

161. United States v. Siraj, 468 F. Supp. 2d 408, 413 (E.D.N.Y. 2007), *aff'd*, 533 F.3d 99 (2d Cir.

were his co-conspirator, a nineteen-year-old schizophrenic who by then was cooperating with the government; an undercover police officer who had many encounters with Siraj; a confidential informant; and the informant's police handler.[162] Siraj's entrapment defense was the main issue of legal significance litigated during the trial, based in large part on what his lawyer characterized as the informant's repeated efforts to push him to plan and carry out the bombing plot.[163] The informant, Osama Eldawoody, a fifty-one-year-old Egyptian immigrant, had been recruited by the New York City Police Department to work as an informant in the wake of 9/11.[164] Over the course of his tenure as an informant, Eldawoody attended 575 prayer services at New York mosques, sometimes as many as four to five times a day, and also wrote down license plate numbers of various congregants.[165] Evidently, police surveillance of mosques in New York City was a key part of its strategy for investigating terrorist activity.[166]

At trial, it emerged that Eldawoody, who reported he found Siraj to be "impressionable," suggested the method to create the bomb, recommended they use the Russian mafia to obtain nuclear material, and invented a fictitious organization—"the Brotherhood"—that he claimed would supply the explosives necessary to carry out the plan.[167] Siraj argued that Eldawoody constantly talked to him about the war in Iraq, the Abu Ghraib scandal, and the American government's treatment of Muslims to inflame his passions, but the court allowed the testimony of the undercover police officer to rebut these arguments.[168] Specifically, Siraj's attempt to establish that he had been entrapped by Eldawoody

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2008); Robin Shulman, *The Informer: Behind the Scenes, or Setting the Stage?*, WASH. POST, May 29, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/05/28/AR2007052801401.html.

162. *Siraj*, 468 F. Supp. 2d at 415; Shulman, *supra* note 161.

163. *Siraj*, 468 F. Supp. 2d at 414.

164. Shulman, *supra* note 161.

165. *Id.*

166. William K. Rashbaum, *Window Opens on City Tactics Among Muslims*, N.Y. TIMES, May 28, 2006, at A29.

167. Shulman, *supra* note 161. The evidence was subject to various interpretations, as the following section shows:

> The very beginning started when he asked me if I could design a nuclear bomb," Eldawoody says in an interview. "I told him yes." But Martin R. Stolar, Siraj's lawyer, referring in court to police notes from Dec. 23, 2003, suggested that Siraj had simply asked why Eldawoody didn't work as a nuclear engineer—and Eldawoody told Siraj that he was capable of creating a dirty bomb.

Id.

168. *Siraj*, 468 F. Supp. 2d at 415.

hinged on the construction of his predisposition to carry out the bombing attack.[169] He tried to argue Eldawoody goaded him into the plan by seeking to incite him and that he had always been a nonviolent person.[170] In rebuttal to Siraj's entrapment defense, the undercover officer testified about Siraj's praise of Osama Bin Laden and support for further bombings in the United States.[171] Further, the trial saw the admission of evidence of Siraj's support for al-Qaeda, Hamas, Hamas leaders, violence against Jews, and books and videos endorsing and praising so-called violent jihad, which bolstered the government's predisposition argument.[172]

On the issue of political opinions and religious belief being elicited to show predisposition, the court had this to say:

> Defendant also argues that allowing the undercover officer's testimony raises "considerable First Amendment concerns" by criminalizing legitimate political discourse. However, even if the undercover officer testified to statements made by defendant that may be described as reflecting defendant's political views, those statements were properly admitted as discussed above. That defendant's statements contain political expression does not insulate defendant from their use at trial where the statements also rebut his testimony and prove predisposition.[173]

Of course, this statement makes perfect sense if one tends to equate certain beliefs and sentiments, however objectionable, with a propensity to engage in dangerous and violent activity. Certainly the New York City Police Department thought so because it was actively investigating terror without an apparent articulable suspicion, but focused instead on mosque surveillance. The court and jury agreed that Siraj was predisposed to committing the crimes with which he was charged,

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169. *Id.* at 414.

170. *Id.* at 419. Naturally, this type of claim is not unusual in cases involving informants and arises in terrorism prosecutions as well. *See* United States v. El-Hindi, 2009 WL 1373268 (N.D. Ohio May 15, 2009); United States v. Amawi, 552 F. Supp. 2d 669 (N.D. Ohio 2008); United States v. Mazloum, 2007 WL 2778731 (N.D. Ohio Sept. 4, 2007). The three cited decisions stem from a single prosecution of three individuals convicted of conspiring to provide material support to terrorists on the basis of their alleged plot to receive training from a government informant, a former Special Forces officer, to fight American forces in the Middle East. *Amawi*, 552 F. Supp. 2d at 671 ("The defendants claimed that the informant dominated the discussion and frequently raised the topic of fighting American troops abroad.").

171. *Siraj*, 468 F. Supp. 2d at 419. On appeal, the Second Circuit held that the government's failure to turn over reports of the undercover officer detailing statements Siraj made to him was not prejudicial. United States v. Siraj, 533 F.3d 99, 100–02 (2d Cir. 2008).

172. *Siraj*, 468 F. Supp. 2d at 422–23.

173. *Id.* at 420.

thereby viewing his words as evidence of his intention to carry out the bombing. Notwithstanding Eldawoody's role in the case, the verdict, which was upheld by the Second Circuit,[174] also suggests something about the powerful effect evidence of support for Bin Laden and al-Qaeda can have against a Muslim defendant in a terrorist case. After all, when Eldawoody asked Siraj to plant the bomb at the subway station, he balked, saying that he would need his mother's permission to do so; at trial, she testified that he never asked her the question.[175] Ultimately, Siraj's prosecution raised, but in retrospect did not conclusively answer, the question of whether he was being punished for his protected speech and political views as much as for his actual intent to cause harm.

2. United States v. Hayat

In April 2006, Hamid Hayat, a Pakistani-American, was convicted by a jury in the Eastern District of California of three counts of making false statements to FBI agents and one count of providing material support to terrorists, based on his alleged attendance at a terrorist training camp in Pakistan and subsequent denials that he did so.[176] A large part of the government's case was built on the testimony of its confidential informant, Naseem Khan, codenamed "Wildcat," who befriended Hayat and frequently referenced politically and religiously charged topics.[177] Khan, who had earlier mistakenly identified al-Qaeda leader Ayman al-Zawahiri as having visited the California mosque Hayat frequented, managed to elicit from Hayat statements calling al-Qaeda "tough" and praising the murder of former Wall Street Journal reporter Daniel Pearl.[178] His attempts to encourage Hayat to attend a terrorist training camp were rebuffed, albeit in a manner that demonstrated Hayat's sympathy for the cause.[179] Despite Khan's

174. United States v. Siraj, slip op., No. 07-0224-CR, 2008 WL 2675826, at *1 (2d Cir. July 9, 2008).

175. Shulman, *supra* note 161, at C2.

176. United States v. Hayat, 2007 WL 1454280, at *1, 11 (E.D. Cal. May 17, 2007).

177. Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. TIMES, May 28, 2006, at I16. Apparently, Khan was initially engaged in investigating the activities of two imams working at the mosque Hayat attended in Lodi, California. However, rather than actively engaging in terrorist activity, the worst thing the imams did was make anti-American statements. The two imams were ultimately deported from the United States without ever being charged with a crime. *Id.*

178. *Id*. ("They killed him. So I'm pleased about that. They cut him into pieces and sent him back. That was a good job they did. Now they can't send one Jewish person to Pakistan.").

179. *Id*. ("I'm ready, I swear. My father tells me, 'Man, what a better task than this.' But when does my mother permit it? Where is a mother's heart? She said, 'I kept you separated for 10 years. I won't let you be separated from me again.'").

extensive direct testimony regarding his conversations with Hayat about extremist groups, the court curtailed defense counsel's ability to cross examine him on these topics, as well as whether Hayat told him he had been lying about attending a camp.[180] For his efforts as an informant, Khan received over $225,000 from the FBI.[181]

In addition to Khan's testimony, Hayat's recorded confession to the FBI that he attended a training camp and his possession of a religious supplication were the critical pieces of evidence in securing his conviction. But the confession, delivered in broken English as a result of a series of leading questions, was far from clear-cut.[182] In fact, the FBI's interrogation was so deficient that one former veteran agent volunteered to testify for the defense, although the court disallowed the testimony.[183]

In other words, the prosecution of Hamid Hayat can be seen as the racialization of a young Muslim-American as a terrorist based on evidence of his political views and religious beliefs. As for the supplication, the jury heard testimony from the government's expert witness that a supplication Hayat carried on his person was evidence of

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180. *Hayat*, 2007 WL 1454280, at *13–14.

181. *Id*.

182. Arax, *supra* note 177. In relevant part, Hayat's confession was as follows:

"So jihad means that you fight and you assault something?"
"Uh-huh."
"Give me an example of a target. A building?"
"I'll say no buildings. I'll say people."
"OK, people. Yeah. Fair enough. People in buildings . . . I'm trying to get details about plans over here."
"They didn't give us no plans."
"Did they give you money?"
"No money."
"Guns?"
"No."
"Targets in the U.S?" the agent asked again.
"You mean like buildings?"
"Yeah, buildings," the agent nodded. "Sacramento or San Francisco?"
"I'll say Los Angeles and San Francisco."
"Financial, commercial?"
"I'll say finance and things like that."
"Hospitals?" the agent suggested.
"Maybe, I'm sure."
"Who ran the camp?"
"Maybe my grandfather."
"Al Qaeda? Al Qaeda runs?"
"I'll say they run the camp. . . . Yeah, that's what I'll say."

183. *Hayat*, 2007 WL 1454280, at *13–14, 19–24.

his being engaged in violent jihad against the enemies of Islam.[184] Even the translation that the government offered was controversial and disputed by the defense, because it was used as evidence of Hayat's propensity to engage in religiously motivated violence against the United States.[185] Although the jury heard testimony that carrying a supplication was a common practice in Pakistani culture engaged in mainly by individuals seeking protection while traveling, the court precluded the defense expert from testifying that what was in Hayat's pocket was such a supplication.[186] As one commentator argued, "the prosecution's focus on—and narrow interpretation of—a prayer known to and used by millions of Muslims seemed to border on criminalizing a religious practice."[187]

3. United States v. Lakhani

Hemant Lakhani, a British citizen of Indian descent, was convicted of multiple counts stemming from his role, as an arms trader, in trying to obtain shoulder-fired missiles for a terrorist group.[188] The government had engaged a professional Pakistani informant named Muhammed Habib Ur Rehman, who had earned some $400,000 over nineteen years in this capacity, to approach Lakhani about purchasing the missiles.[189] In upholding Lakhani's convictions and forty-seven-year prison sentence, the Third Circuit remarked that the facts of the case represented a tedious "22-month odyssey spanning oceans and continents,"[190] which one foreign witness described as "incomprehensible."[191] Apparently, Rehman was referred to Lakhani by Abdul Qayyum, whom the court described as "a suspected terrorist now living in Dubai, U.A.E. . . . believed to have been involved in a series of 1993 bombings in India known as the 'Mumbai blasts.'"[192] Rehman secretly recorded his

184. Amy Waldman, *Prophetic Justice*, THE ATLANTIC (Oct. 2006), http://www.theatlantic.com/magazine/archive/2006/10/prophetic-justice/5234/.

185. *Id.*; *Hayat*, 2007 WL 1454280, at *17–19.

186. *Hayat*, 2007 WL 1454280, at *17–19; Waldman, *supra* note 184, at 90.

187. Waldman, *supra* note 184 ("No wonder many Muslims (and non-Muslims) I spoke to argued that the upshot of these cases was to redefine for one class of Americans what constitutes permissible speech, association, or belief—to ask Muslims to prove their Americanness by denying their texts, history, and religion.").

188. United States v. Lakhani, 480 F.3d 171, 174 (3d Cir. 2007).

189. *Id.* at 174–75.

190. *Id.* at 175.

191. *Id.* at 175 n.4.

192. *Id.* at 175.

conversations with Lakhani, in which he made clear his intention to use the missiles against civilian U.S. targets—a sentiment Lakhani seemed to appreciate.[193] Even though the government previously stopped using Rehman as an informant, deeming him "untrustworthy,"[194] the jury apparently credited his testimony,[195] given that Lakhani secured the purchase of a missile and delivered it to Rehman in the United States.[196]

Lakhani's entrapment and related due process defenses failed because his statements over a lengthy period indicated his predisposition to commit the crime; he was an arms dealer, among other professions, and seemed to have no qualms about engaging in the transaction despite its potential to bring serious harm to civilians.[197] What is notable about Lakhani's prosecution is that his links to terrorism, to the extent they existed, were not ideological but financial in nature. While there is no mention of the Indian-born Lakhani's religious background in the Third Circuit's opinion, Hemant Lakhani is not a Muslim name, and his lawyer argued at trial that his client had no sympathy for Islamic fundamentalists.[198] Although the court noted his links to an individual implicated in the 1993 Mumbai bomb attacks, in fact those bombings, however horrible and destructive they may have been, were the work of Indian organized crime gangs operating in the city, not Islamic fundamentalists.[199] Abdul Qayyum, the "terrorist" who was finally deported to India from the United Arab Emirates in 2007 to face criminal charges for his role in the bombings, was actually known in India as a "gangster" with longstanding ties to the most notorious figures in the Mumbai underworld.[200] Lakhani's prosecution and conviction represent a case where the government used an informant to target an arms dealer who would transact with terrorists, regardless of motivation. Although the informant's persistence may have induced the transaction, Lakhani was likely predisposed to commit the type of crime for which

193. *Id.* at 175, 175 n.6.

194. *Id.* at 174.

195. *Id.* at 174 n.2.

196. *Id.* at 176–77 (noting that American and Russian law enforcement agencies worked together to deliver a missile that functioned electronically, but was not armed with a warhead).

197. *Id.* at 177.

198. Robert Hanley, *Jury Hears 2 Views of Man Accused in Missile Scheme*, N.Y. TIMES, Jan. 5, 2005, at B5.

199. *See* MISHA GLENNY, MCMAFIA: A JOURNEY THROUGH THE GLOBAL CRIMINAL UNDERWORLD 123–24 (2009).

200. *1993 Blasts: Charges Against Abdul Qayyum*, ONEINDIA (Mar. 3, 2008), http://news.oneindia.in/2008/03/03/charges-framed-against-93-blast-accused-abdul-qayyum-1204551510.html.

he was charged.[201] However, his prosecution demonstrates the extent—perhaps necessary, perhaps not—to which the government will make use of an informant to target terrorist activity.

4. The Fort Dix Prosecution

In December 2008, five young Muslim residents of southern New Jersey were convicted of conspiring to attack the United States Army base at Fort Dix; four of the defendants were given life sentences and the fifth was sentenced to thirty-three years in prison.[202] The investigation into the alleged plot was triggered by a clerk at a local Circuit City store reporting to the authorities that he had been asked to digitally transfer a videotape containing footage of the defendants shooting firearms in the woods while shouting in Arabic.[203] The government responded by hiring informants to investigate the matter.[204] The centerpiece of the government's case against the men—three ethnic Albanian brothers, a naturalized citizen of Jordanian origin, and a Turk—was hundreds of hours of conversations the men engaged in with the two government informants.[205] Of the twenty-three days of trial, seventeen were taken up with the informants' testimony.[206] The key issue in the case was whether the defendants actually intended to attack the base or merely engaged in harmless talk without intending to act.[207] The prosecution also

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201. In this respect, Lakhani's case is remarkably similar to the government's prosecution of Monzer Al Kassar, a Spanish arms dealer of Syrian origin who was most probably entrapped into agreeing to sell weapons to U.S. agents posing as representatives of the FARC, a Colombian FTO. *See* Patrick Radden Keefe, *The Trafficker*, NEW YORKER, Feb. 8, 2010, at 42 ("Rather than try Kassar for a crime he'd committed in the past, they would use the strong conspiracy laws in the United States to prosecute him for something that he intended to do in the future. They would infiltrate Kassar's organization and set him up in a sting. Many European countries have 'agent provocateur' laws to guard against entrapment, but in an American court it would be difficult for a trafficker with Kassar's history to protest that he was in no way predisposed to clandestine weapons deals."); *see also* United States v. Al Kassar, 582 F. Supp. 2d 488 (S.D.N.Y. 2008).

202. Superseding Indictment, United States v. Shnewer, No. 07-459 (RBK) (D.N.J. Jan. 15, 2008); Troy Graham, *Convicted Fort Dix Plotters Are Innocent, Family Members Say*, PHILA. INQUIRER, May 3, 2009, at B1; *5th Plotter in Fort Dix Case Gets 33-Year Term*, THE TIMES (Trenton, N.J.), Apr. 30, 2009, http://www.nj.com/south/index.ssf/2009/04/5th_fort_dix_plotter_gets_33ye.html; *see also* United States v. Abdullahu, 488 F. Supp. 2d 433 (D.N.J. 2007).

203. Kevin Coyne, *Informer Appears at Trial, but His Recordings Talk*, N.Y. TIMES, Oct. 31, 2008, at NJ1.

204. *Id*.

205. *See* John P. Martin, *Unknown to Each Other, 2 Spies Worked Fort Dix Case*, STAR LEDGER (Newark, N.J.), Dec. 7, 2008, at 17.

206. *Id*.

207. *See* John P. Martin, *Terror or Talk? Fort Dix Jury Hears Closing Arguments*, THE TIMES (Trenton, N.J.), Dec. 16, 2008, at A09.

introduced evidence showing that the defendants had repeatedly watched al-Qaeda videos and downloaded lectures that spoke in favor of Islamist violence, in addition to their firing weapons in the woods on several occasions.[208]

The main informant, an Egyptian named Mahmoud Omar, testified at length regarding the conversations he had taped with the defendants.[209] It emerged that Omar's tactics in insinuating himself into the alleged plot were aggressive; at one point, he urged one of the defendants to go ahead with the plan to attack the base.[210] One defendant reacted to Omar's request for a map of Fort Dix by contacting the police to warn them of his suspicions.[211] Another defendant told Omar that jihad would have to wait, because he had to go get a haircut.[212] These and other interactions prompted Omar to vent his frustration with the defendants, telling one that "You talk but you don't do nothing."[213]

Omar's background was also highly suspect. He entered the United States illegally, was subsequently convicted of bank fraud, and then served time in prison.[214] While being investigated for his role in another fraud case, the FBI asked him to work as an informant, and he apparently tried to escape to Canada.[215] Instead, he was caught and then agreed to work for the FBI.[216] In exchange for his services, Omar was paid over $240,000, not including rent and assorted expenses, and given relief from his legal troubles.[217] The government's other informant, an Albanian named Besnik Bakalli, agreed to work in that capacity after facing deportation from the United States.[218] He also had a criminal

208. *See id.*

209. Martin, *supra* note 205.

210. Allison Steele, *Dix Terror Informant Says He Urged Attack Plan*, PHILA. INQUIRER, Nov. 13, 2008, at B1.

211. Geoff Mulvihill, *Jury in Fort Dix Trial Still Undecided*, THE TIMES (Trenton, N.J.), Dec. 21, 2008, at B01.

212. George Anastasia, *Haircut Trumped Jihad, Fort Dix Witness Says*, PHILA. INQUIRER, Nov. 14, 2008, at B01.

213. David Porter, *Fort Dix Suspect All Talk, Little Action*, ASSOCIATED PRESS, Nov. 14, 2008.

214. Martin, *supra* note 205.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*; George Anastasia, *Emotional Families Question Fort Dix Verdicts*, PHILA. INQUIRER, Dec. 23, 2008, at A01 (noting Bakalli's earning $15,000 for his work on the case).

record in Albania, where he was convicted on a weapons charge after shooting a man who had threatened his sister.[219]

The Fort Dix defendants were apprehended before they came at all close to carrying out the alleged plot, so it certainly can be viewed as a successful preventive prosecution. However, given the informants' backgrounds, motivations, and compensation, the families of the defendants were justified in contesting the jury verdict because there was no real movement toward carrying out the alleged attack. Further, any attempts to argue that the defendants were entrapped were offset by extrinsic evidence of the defendants' religious beliefs and political positions, rendering the possibility of a more serious predisposition analysis fruitless.[220] The government's use of these types of otherwise protected statements as evidence of an intent to carry out acts of terrorism, when coupled with an informant's machinations, are seen as particularly controversial.[221] The Fort Dix case is indicative of this trend and raises the issues most starkly of (1) whether the defendants would have really done anything but for the informants' actions and (2) the limits of the entrapment defense when a jury is presented with evidence of anti-American views expressed from an Islamist perspective.

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219. *Id.* (noting that the two informants were unaware of each other's role as a government agent, and that they actively disliked each other).

220. *See Did Informant's Actions Aid Fort Dix Plotters?*, MSNBC.COM, May 10, 2007, http://www.msnbc.msn.com/id/18601345/ns/us_news-security ("'In the post-9/11 era, the entrapment defense is basically useless,' Klingeman said. 'For a defendant, merely saying he wishes he could do harm to America, the jury has heard enough.'").

221. *See The War and Peace Report: Entrapment or Foiling Terror? FBI's Reliance on Paid Informants Raises Questions about Validity of Terrorism Cases* (Democracy Now! television broadcast Oct. 6, 2010), *available at* http://www.democracynow.org/2010/10/6/entrapment_or_foiling_terror_fbis_reliance (quoting Karen Greenberg, Executive Director of Center on Law and Security, New York University School of Law: "When you're dealing with informants, you're dealing with people who have been convicted of or threatened with conviction or found in the act of some kind of criminality. And there is everything in their interest to make sure that they do what the FBI wants," which involves "preying upon people's vulnerabilities."); Daphne Eviatar, *Terrorism Cases Hinge on Paid Informants*, WASH. INDEP., Dec. 19, 2008, http://washingtonindependent.com/22674/terrorism-cases-hinge-on-paid-informants ("'The government has used an extraordinary amount of resources to find people who have an antipathy to US policies as it relates to the Middle East and see which ones can get motivated, or angry enough, to follow the leadership of a confidential informant,' says Sam Schmidt, a lawyer who represented one of the men accused in the 1998 bombings of US embassies in Africa. 'Many of these cases appear to be the informant who is either working off a case to avoid going to jail or being deported or is seeking remuneration, approaching some people and getting them excited, getting them angry and persuading them to join in what has been described as terrorism conspiracies.'").

5. Seas of David Prosecution

In May 2009, after two mistrials, five of the seven defendants in the prosecution known as the "Seas of David" case were convicted in federal court in Miami for providing material support to terrorists in an alleged plot to blow up the Sears Tower in Chicago and the FBI building in Miami.[222] The government alleged that the men were members of a radical Islamic group called the Moorland Organization, which sought al-Qaeda's help in arranging to blow up their targets.[223] The case began when an FBI informant of Yemeni extraction tipped off the authorities that he had met an individual who articulated his desire to create an Islamic state in America.[224] This tip led the FBI to send in another informant, Elie Assad, a Lebanese man with a dubious history of being denied entry in Mexico, Syria, and Yemen, to gauge the defendants' intentions.[225] Posing as an al-Qaeda financier, Assad asked Narseal Batiste, the alleged leader of the group, what he needed to make his plot operational.[226] Curiously, the list included expensive equipment and $50,000 cash, but no explosives—surprising for an alleged conspiracy to blow up large buildings.[227] At Assad's urging, the group conducted a reconnaissance mission of the FBI building in Miami.[228] When members of the group started to doubt Assad and withdraw from the plot, Assad conceived of a plan to swear them into al-Qaeda, orchestrating a swearing-in ceremony that the FBI observed in its entirety.[229] Ultimately, in a plot that the FBI deputy director called "more aspirational than operational,"[230] the informants were paid more than

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222. Damien Cave & Carmen Gentile, *Five Convicted in Plot to Blow Up Sears Tower*, N.Y. TIMES, May 12, 2009, at A19.

223. United States v. Batiste, No. 06-20373-CR, 2007 WL 2412837, at *2 (S.D. Fla. Aug. 21, 2007). Interestingly, the Council on American Islamic Relations (CAIR), "America's largest Islamic civil liberties group," issued a statement shortly after the indictment was announced calling on the media not to refer to the defendants as Muslims due to the radical and unorthodox nature of their beliefs. Mohammad Sabry, *US Terror Suspects Not Muslims: CAIR*, ISLAMONLINE.NET (June 24, 2006), http://www.islamonline.net/English/News/2006-06/24/02.shtml.

224. Eric Umansky, *Department of Pre-Crime*, MOTHER JONES (Feb. 29, 2008, 1:00 AM), http://motherjones.com/politics/2008/02/department-pre-crime (noting that the informant, Abbas al-Saidi, had been bailed out by the FBI in a case in which he had assaulted his girlfriend).

225. Carol J. Williams, *A Case of Terror or Entrapment?*, L.A. TIMES, Nov. 30, 2007, at A15.

226. Umansky, *supra* note 224.

227. *See id.*

228. *Id*.

229. *Id*.

230. John O'Neil, *Terror Plot Was in 'Earliest Stages,' Gonzales Says*, N.Y. TIMES, June 23, 2006, http://www.nytimes.com/2006/06/23/us/22cnd-indict.html.

$120,000 for their assistance, and Assad was granted political asylum in the United States.[231]

The facts underlying the Seas of David prosecution were undisputed, but the defendants tried to argue that they were desperate for money and saw an opportunity to potentially scam Assad out of $50,000.[232] Defense counsel questioned the government's need to fabricate a crime when so many real criminal acts went uninvestigated or unpunished.[233] Perhaps the most remarkable aspect of the whole case was the government's insistence on repeat prosecution of the defendants despite two earlier mistrials.[234] This fact speaks to the powerful impact the terrorist imprimatur can have on a case, in that it can allow the government to insist on victory, even if the threat being thwarted was of its own making and therefore not necessarily a threat to national security.

6. Yassin Aref and Mohammed Hossain

Yassin Aref and Mohammed Hossain were convicted of multiple counts of terrorism-related crimes stemming from their role in laundering $50,000 connected to a fictitious plot to attack a Pakistani diplomat in New York.[235] Aref was an Iraqi Kurdish refugee and imam at an Albany, New York mosque, and Hossain was a naturalized U.S. citizen of Bangladeshi origin and proprietor of a pizzeria in the Albany area.[236] The plot was the product of an FBI informant named Shahed Hussain, codenamed Malik, a Pakistani resident of the Albany area who ingratiated himself with Hossain before discussing the transaction.[237] When Malik became an informant, he was facing criminal fraud charges

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231. Umansky, *supra* note 224.

232. *Id.* (noting Batiste's statement while being secretly recorded: "I'm exhausted financially. We have nothing.").

233. Williams, *supra* note 225.

234. Cave & Gentile, *supra* note 222. Additionally, the government moved to deport Lyglenson Lemorin, a Haitian national and longtime United States legal permanent resident who was acquitted after the first Seas of David trial, mere days after the jury's verdict on essentially the same charges that failed in the criminal prosecution. *See* Jay Weaver, *Florida Defendants Face 'Double Jeopardy' in Immigration Court*, MIAMI HERALD, Aug. 31, 2009, at 4B. He was ordered deported by an immigration judge and is currently appealing the order. *See* Joel Millman, *Haitian Found Not Guilty of Terrorism Is Not Free, Either*, WALL ST. J., July 6, 2010, at A4.

235. United States v. Aref, No. 04-CR-402, 2007 WL 603508, at *2–4 (N.D.N.Y. Feb. 22, 2007), *aff'd*, 285 F. App'x 784 (2d Cir. 2008) (upholding conviction and denying motion for a new trial); Michael Wilson, *Jury Convicts 2 Albany Men in Missile Sting*, N.Y. TIMES, Oct. 11, 2006, at B1.

236. *Aref*, 2007 WL 603508, at *2–4; Wilson, *supra* note 235, at B1.

237. Graham Rayman, *The Alarming Record of the F.B.I.'s Informant in the Bronx Bomb Plot*, VILLAGE VOICE (July 8, 2009), http://www.villagevoice.com/2009-07-08/news/the-alarming-record-of-the-f-b-i-s-informant-in-the-bronx-bomb-plot/.

for taking DMV written tests on behalf of other immigrants for a fee; he had recently declared bankruptcy; and a fire destroyed an uninsured building he owned.[238] Malik began cooperating with the FBI after the government agreed to drop criminal charges and not to deport him.[239]

Malik initially approached Hossain at his pizzeria, bringing gifts for the owner's children and eventually divulging the details of the plot.[240] He would help Hossain, who was experiencing financial difficulties, renovate his pizzeria with a $50,000 loan.[241] He later told Hossain that he received the money for his efforts in procuring a surface-to-air missile for a terrorist group as part of its plan to shoot down the plane of a Pakistani diplomat.[242] Hossain was to pay back the loan in small increments, effectively laundering the proceeds of the sale for Malik and the terrorist group.[243] Although Aref had come to the attention of law enforcement because his name was found among papers of suspected terrorists in Iraq and he was associated with the leader of a Kurdish Islamic terrorist group, he was brought into the scheme only when Hossain asked him to be a witness to the transaction with Malik, per Islamic custom.[244]

In addition to the familiar claim that the defendants would not have even contemplated the crime but for the informant, there was a more troubling aspect to the investigation and prosecution. Specifically, throughout the investigation, Malik misrepresented the nature and content of his conversations with the defendants, a fact that was borne out when the FBI's reports of those conversations were compared to the actual transcripts.[245] On one occasion, the FBI report from Malik stated that Hossain supported the plan to bring the missile to the United States

238. *Id.*

239. *Id.*

240. Wilson, *supra* note 235.

241. *Id.*

242. Rayman, *supra* note 237.

243. *Id*.; Wilson, *supra* note 235.

244. Rayman, *supra* note 237; Wilson, *supra* note 235.

245. Rayman, *supra* note 237 ("But in each case, the question remains: Would either set of defendants have done anything remotely like plant bombs or launder money for terrorists if not for the prodding and plotting and encouragement of Malik and the FBI? And there's a more troubling question: When Malik tells his FBI handlers that the defendants are saying menacing things about America, is he actually telling the whole truth? Translations from the Albany case transcripts suggest that Malik routinely exaggerated and, in some cases, wholly fabricated the words of the defendants. When they talked about Islam being a religion of peace and of jihad being a way of inspiring fealty to Islam, Malik instead told his handlers that they had talked about Islam inspiring them to kill. Those exaggerated reports became the basis for the FBI's case against Hossain and Aref, who were both convicted and sentenced to 15 years in prison.").

and that, were it not for his family, Hossain would be taking up arms in the fight.[246] The transcript actually recorded Hossain as saying: "I don't believe in your method—that's why I don't take that path."[247] Malik's duplicity was exacerbated by the fact that the conversations were in broken English and vague to the point of raising the issue of whether Aref and Hossain understood what was going on.[248]

7. The New York Synagogue Plot

The prosecutions of Aref and Hossain were not the only high-profile prosecutions in which Malik served as an informant breaking up an alleged terrorism plot. In June 2009, local police and the FBI arrested four men in Newburgh, New York on suspicion of plotting to blow up a Bronx synagogue and community church in an al-Qaeda-inspired plot by so-called "home-grown terrorists."[249] Far from being careful and thorough planners, the defendants were small-time crooks with extensive criminal records; one of the defendants "was arrested in a crack house surrounded by bottles of his own urine; his lawyer describes him as 'mildly retarded.'"[250] As for the plot, Malik had been approaching young men at a Newburgh mosque with gifts and offers of jobs, and ended up meeting James Cromitie.[251] After telling Cromitie that he was a representative of a Pakistani terrorist organization with ties to al-Qaeda, he directed Cromitie in recruiting three other men to engage in the plot.[252] Lawyers for the defendants moved unsuccessfully to have the indictment dismissed on the grounds that Malik, who used aggressive and provocative tactics to keep Cromitie interested in the plot, essentially entrapped them, with promises that their participation could yield them up to $250,000.[253] The charges against the men were

246. *Id*.

247. *Id*.

248. Petra Bartosiewicz, *Experts in Terror*, THE NATION, Feb. 4, 2008, at 18.

249. *See* Indictment at 2, United States v. Cromitie, No. 09-CR-558 (S.D.N.Y. June 2, 2009); Rayman, *supra* note 237.

250. Rayman, *supra* note 237.

251. A.G. Sulzberger, *Defense Cites Entrapment in Terror Case*, N.Y. TIMES, Mar. 18, 2010, at A22.

252. *Id.*

253. United States v. Cromitie, 2010 WL 3025670, at *1, 4, 9 (S.D.N.Y. July 28, 2010); Sulzberger, *supra* note 251 ("'But for government's money and supplies and Hussain's indefatigable efforts, there is not the slightest chance that the crimes charged would or even could have occurred,' Susanne Brody, a federal defender, wrote in one of two filings in United States District Court.").

announced with great fanfare at a news conference by New York City Mayor Michael Bloomberg and Police Commissioner Raymond Kelly.[254] After a lengthy trial, the jury convicted the defendants of all charges, rejecting their contention that they had been entrapped by the government's informant.[255] The use of Malik in this case was perhaps even more surprising than in the prosecutions of Aref and Hossain, given that it demonstrates that not only was the government not initially troubled by Malik's actions, it was actually willing to use him again in a similar capacity, no matter how tenuous the plot may have been.[256] These cases highlight the fact that law enforcement does not merely allow a paid informant to troll houses of worship looking for recruits by promising them money, but seems to overtly approve of such activity.

8. United States v. Al-Moayad*: A Cautionary Tale*

The prosecution of the Yemeni sheikh Mohammed al-Moayad and his personal assistant Mohammed Zayed represents the rare instance where defendants charged with terrorist crimes in a prosecution driven by an informant managed to obtain relief from a federal court of appeals. Its details are revealing. In November 2001, a Yemeni named Mohammed al-Anssi approached the FBI and offered, in exchange for money and immigration status for his family in Yemen, to aid the agency in investigating a number of individuals he claimed were involved in terrorism.[257] Al-Anssi claimed to have known al-Moayad from their days in Yemen as neighbors, and asserted that the sheikh had told him in the mid-1990s of being involved in financing and supporting terrorist activities.[258]

Based on this proffer, the government sent al-Anssi on three trips to Yemen to investigate al-Moayad's activities.[259] During the second trip, al-Anssi claimed that the sheikh had given him information on his relationship with Osama Bin Laden, and the third trip included attending

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254. *See* Rayman, *supra* note 237.

255. Kareem Fahim, *4 Convicted of Attempting to Blow Up 2 Synagogues*, N.Y. TIMES, Oct. 19, 2010, at A21.

256. *Cf.* Sulzberger, *supra* note 251. At trial, Malik testified that he entered the United States on a forged British passport, and ultimately received asylum here as a result of his being subjected to torture in Pakistan on the basis of "politically motivated" charges against him, which included murder. Kareem Fahim, *Informant Says Defendant Wanted to Be a Martyr*, N.Y. TIMES, Aug. 27, 2010, at A17.

257. United States v. Al-Moayad, 545 F.3d 139, 146 (2d Cir. 2008).

258. *Id*.

259. *Id.*

a wedding presided over by the sheikh at which a leader of the FTO Hamas praised a recent suicide bombing carried out by that group on the very same day.[260] The fruit of these trips, during which al-Anssi took notes on his interactions with al-Moayad, was an elaborate sting operation in which the sheikh and Zayed were lured to Germany for a meeting that was to be secretly observed and videotaped.[261] Al-Anssi and another informant repeatedly insisted on having al-Moayad help them with funding violent jihad and referred to the legitimate charities that the sheikh ran as being codes for other things.[262] Video surveillance of al-Moayad and Zayed revealed that when the two were alone, they expressed reservations about working with the informants, and disavowed any knowledge of an impending terrorist attack, which al-Anssi's partner had asked about.[263]

Afterwards al-Moayad and Zayed were arrested and transferred to the United States to face charges of providing and conspiring to provide material support to FTOs in violation of 18 U.S.C. § 2339B. Prior to their trial date, however, al-Anssi set himself on fire in front of the White House to protest what he perceived as the FBI's poor treatment of him.[264] Apparently, he felt that the $100,000 he received for his work as an informant was insufficient and attempted to extort more out of the FBI by setting himself on fire.[265] In addition to al-Moayad's prosecution, al-Anssi played a central role in some twenty terrorism prosecutions, at times leaving bitterness in his wake after being revealed as an informant.[266] The government chose not to call al-Anssi to testify against al-Moayad and Zayed, who in turn called him to testify as part of their effort to establish an entrapment defense.[267] Defense counsel brought out the fact that al-Anssi was experiencing financial difficulties, and had recently been convicted of felony bank fraud.[268]

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260. *Id.* at 147.

261. *Id.* at 148.

262. *Id.* at 149.

263. *Id.* at 150.

264. *Id.* at 146.

265. *Id.*

266. William Glaberson, *Behind Scenes, Informer's Path Led U.S. to 20 Terror Cases*, N.Y. TIMES, Nov. 18, 2004, at B1.

267. *See Al-Moayad*, 545 F.3d at 153–55.

268. *Id.* at 154. Al-Anssi received five years' probation after pleading guilty, even though he continued to write bad checks while working for the FBI on al-Moayad's case. *See* William Glaberson, *FBI Informer Sentenced*, N.Y. TIMES, Apr. 19, 2005, at B2.

Critically, however, after the sheikh's lawyer pressed al-Anssi to admit that he did not have any documentary or audiovisual evidence linking his client to violent jihad prior to the sting operation in Germany, the government successfully moved to introduce al-Anssi's notes of his meetings with al-Moayad in Yemen as rebuttal evidence.[269] These notes purported to show al-Moayad's role in sending young men to engage in violent jihad in several conflict-ridden zones, as well as facilitating millions of dollars in funding to Osama Bin Laden and Hamas, respectively.[270] The district court also allowed the government to introduce a videotape of the speech by the Hamas official praising the suicide bombing; previously, the court refused to admit it due to its prejudicial nature.[271] Earlier in the trial, the court had permitted extensive testimony by a survivor of the actual attack; a defense attempt to have the court instruct the jury that neither defendant had anything to do with the attack was denied.[272]

The government was given wide latitude by the district court to rebut the entrapment argument. Without stating any reasoning for its ruling, the district court allowed, over defense objection, the introduction of a form signed by an "Abu Jihad" purporting to be an application to train at an al-Qaeda military camp in Afghanistan to which he claimed that he was recommended by al-Moayad.[273] The government introduced the testimony of a Yemeni-American who had pleaded guilty to attending such a training camp.[274] However, the scope of his testimony far exceeded what the government had proffered and he testified extensively as to his experience of undergoing military training at the camp and being addressed there by Bin Laden.[275] Finally, the court allowed the government to introduce documents seized by Croatian intelligence that allegedly showed a connection between two mujahideen fighters from Yemen headed to Afghanistan and the sheikh, because his name was in their address books.[276]

Even though the jury convicted the defendants on the material support conspiracy charges, and the district court imposed a sentence of seventy-five years on al-Moayad and forty-five for Zayed, the Second Circuit

269. *Al-Moayad*, 545 F.3d at 154–55.

270. *Id.*

271. *Id.* at 147, 155.

272. *Id.* at 147, 152–53.

273. *Id.* at 156.

274. *Id.* at 156–57.

275. *Id.*

276. *Id.* at 157.

reversed the convictions.[277] In stating its reasoning, the court of appeals found specifically that:

> The district court's cumulated errors in admitting Al-Anssi's notes and the testimony of Gideon Black and Yahya Goba 'cast such a serious doubt on the fairness of the trial' as to warrant reversal of the defendants' convictions. That doubt is especially grave when we also take into account the district court's erroneous admission of the mujahidin form, the wedding video, and the Croatian last will and testament . . . .[278]

Although the subjective entrapment defense was not successful at trial, the prosecution of al-Moayad and Zayed was the rare one in which the court of appeals decreed that the government went too far given the government's inflammatory tactics. Ultimately, the case was resolved when al-Moayad and Zayed pleaded guilty to conspiring to provide material support to Hamas, were sentenced to time served (six years), and were ordered deported to Yemen.[279]

IV. CREATING THE TERRORIST ACCORDING TO A CONSTRUCT

The above cases share certain characteristics—an informant engaging in provocative behavior that leads to the arguable commission of a terrorism-related crime. There is a genuine question as to whether the defendants would have committed those crimes but for the informants' actions. None of the post-9/11 examples involve pre-existing conspiracies to engage in violent behavior, but rather a collection of individuals who exhibited varying degrees of willingness to go along with plans suggested by an informant. When the main legal mechanism available to defendants combating terrorism charges is the entrapment defense, it is inevitable that the predisposition analysis delves into matters of an individual's political and religious beliefs. If, based on an individual's religious or ethnic background, society is predisposed to view the individual as a terrorist, then the entrapment defense is no defense at all. The cases cited above bear witness to that fact, as no defendant was acquitted on the basis of entrapment.

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277. *Id.* at 145, 178–79.

278. *Id.* at 178–79 (instructing also that the case be remanded to a different district judge).

279. *See* Spencer S. Hsu, *Cleric Convicted of Terrorism-Financing Charge to be Deported*, WASH. POST, Aug. 8, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/08/07/AR2009080703415.html; *Ash-Shaykh al-Muayyad ya'udu ila Sana' (Sheikh al-Moayad Returns to Sana'a)*, ALJAZEERA ONLINE, *available at* http://www.aljazeera.net/NR/exeres/818696E4-3795-4375-8CA2-0CB3C838F512.htm.

Informant use in terrorism prosecutions must be placed in its proper context. That context is one in which the government has allocated tremendous resources to combat terrorism, but terrorism of the al-Qaeda or anti-American variety occurs relatively infrequently, especially on U.S. soil.[280] Based on resource allocation alone, under a preventive model of combating terrorism, the FBI is under considerable pressure to deliver tangible results.[281] This is an unsustainable model; attendant pressures might see FBI agents use informants to construct a plot where none might have existed. This dynamic can serve to ensnare unfairly those of a certain ethnic or religious background, particularly in light of the fact that the overwhelming majority of Muslims abroad—and presumably American Muslims as well—have a decidedly negative view of al-Qaeda.[282]

When an informant plays a central role in advancing a plot—leaving entrapment as the only viable line of defense—the above cases demonstrate how otherwise protected speech serves as evidence of predisposition. For example, the jury was permitted to hear about Hamid Hayat's highly inflammatory remarks in praise of the murder of former Wall Street Journal reporter Daniel Pearl.[283] The Fort Dix, Lakhani, and Siraj prosecutions all featured admission of remarks by the defendants praising al-Qaeda or the 9/11 attacks in some way.[284] In the Aref/Hossain prosecution, even opinions expressing doubt that Muslims were responsible for 9/11 were admitted against the defendants.[285] While there are no doubt legitimate uses for this type of evidence, which may

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280. *Cf.* Petra Bartosiewicz, *The Intelligence Factory: How America Makes its Enemies Disappear*, HARPER'S, Nov. 2009, at 42–43. ("Because this war, by definition, has no physical or temporal boundaries, the demand for such intelligence has no limit. But the world contains a relatively small number of terrorists and an even smaller number of terrorist plots. Our demand for intelligence far outstrips the supply of prisoners.").

281. *See id.*

282. A recent poll "found that support for Al Qaeda-conceived attacks against American civilians in the U.S. homeland, such as the attack attempted aboard Flight 253, is virtually negligible in a diverse array of heavily populated Muslim-majority countries." Steve Coll, *House Testimony: The Paradoxes of Al Qaeda*, NEW YORKER (Jan. 27, 2010), http://www.newyorker.com/online/blogs/stevecoll/2010/01/house-testimony-the-paradoxes-of-al-qaeda.html#entry-more.
Another poll suggested "that citizens of Islamic countries, as elsewhere, overwhelmingly disapprove of all indiscriminate violence against civilians, no matter who carries it out, and no matter what the cause—attitudes that encompass strong disapproval of Al Qaeda's tactics and indiscriminate aerial bombardment by U.S. forces alike." *Id.*

283. Sherman, *supra* note 63, at 1505.

284. *See* Sherman, *supra* note 63, at 1495 (Lakhani); *id.* at 1505 (Siraj); Graham, *supra* note 202 (Fort Dix defendants).

285. Rayman, *supra* note 237, at 7 (acknowledging Aref's claim that of 14 million Saudis, only about 400 follow Bin Laden).

have been properly admitted in the cases analyzed above, it must be noted that for many Americans such opinions can easily color their view of a defendant as a terrorist, given the likelihood that they might already disproportionally associate Arabs or Muslims with being terrorists. There is thus no real possibility of highlighting the positive aspects of a defendant's character to mitigate the general perception that society identifies these defendants as terrorists. In other words, unlike the defendants in *Sorrells*[286] and *Jacobson*,[287] both of whom had served in the United States armed forces, the above mentioned terrorism defendants are of foreign origin; both their presence here and their religion are suspect. There is little that they could do to disprove their already suspect status the way a native-born veteran, farmer, or former soldier could, even before any negative statements had been admitted against them.

The government's use of informants reflects a debate within the FBI about the benefits of cooperating with, as opposed to spying on, the American Muslim community.[288] That significant sections of the nation's main law enforcement agency responsible for prosecuting terrorism in U.S. courts view an entire community, encompassing many nationalities and ethnic groups, as irredeemably loyal to the nebulous concept of "terrorism" at the expense of their loyalty to the United States, is factually incorrect[289] and speaks volumes about how difficult it is for a terrorism suspect to disprove predisposition to commit a crime. Viewing Arab- and Muslim-Americans as presumptively disloyal, at a time when the United States is embroiled in two wars in Muslim-

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286. Sorrells v. United States, 287 U.S. 435, 441 (1932) (noting that "defendant had no previous disposition to commit it, but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War").

287. Jacobson v. United States, 503 U.S. 540, 542, 543 (1992) (noting defendant was "a 56-year-old veteran-turned-farmer who supported his elderly father in Nebraska").

288. *See* Vitello & Semple, *supra* note 124 ("[There are] differing views within the bureau about the effectiveness of community outreach, said Michael Rolince, a former director of counterterrorism in the F.B.I.'s Washington field office. Some factions within the agency, he said, have always been leery of Islamic and Arab-American organizations, considering their loyalties to be divided. 'There are some people in the bureau who believe, as I do, that the relationship with the Muslim community is crucial and must be developed with consistency,' Mr. Rolince said. 'And there are those who don't.'").

289. Tom Tyler et al., *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, LAW & SOC'Y REV. 24 (forthcoming 2010) (manuscript at 24), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559923 (finding that ninety-six percent of Muslim Americans surveyed agreed with the statement "I am proud to be an American" and ninety-seven percent agreed with the statement "What America stands for is important for me").

majority countries, enhances the perception in the Muslim world that the war on terrorism is a war on Islam.[290]

All of the above analysis underscores the ineffectiveness of the entrapment defense in its current guise in a terrorism case involving an informant. Some scholars advocate that courts should apply the objective test in cases involving informant-driven stings.[291] In a recent article analyzing several of the prosecutions discussed here, Jon Sherman makes a series of sensible recommendations on how to reform the entrapment defense.[292] He first proposes to alter the definition of entrapment to require the government to demonstrate that the defendant initiated the contact with the informant. Sherman goes on to argue that some acts should be complete bars to prosecution: constant government persuasion to commit the felony over the defendant's hesitance; misrepresenting the illegality of the conduct; the only connection to the jihadist organization being the informant's cover story; and government incitement of religious fervor.[293] He argues that evidence of a defendant's political and religious views should be allowed only when it is probative of the defendant actually committing the crime in question.[294] He concludes with a series of policy arguments supporting his recommendations, which essentially state that informant use is inefficient, of dubious constitutionality, and risks alienating the Muslim community, whose assistance is crucial to investigating terrorism in the United States.[295]

Unfortunately, important segments of the Muslim community in the United States feel alienated already and their future cooperation with the FBI is in jeopardy.[296] Not only is the FBI not scaling back its use of

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290. However, recent press reports indicate that President Obama is aware of the perception that the United States' war on terrorism is perceived as a war on Islam and is making efforts to change that perception. *See* Matt Apuzzo, *Obama Talks Less of Terror in Outreach to Muslims*, SEATTLE TIMES, Apr. 7, 2010, http://seattletimes.nwsource.com/html/politics/2011541571_apusterrorismrhetoric.html?syndication=rs.

291. *See, e.g.*, Peter Margulies, *Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11*, 43 GONZ. L. REV. 513, 556 (2008) (arguing for the adoption of the objective standard in terrorism conspiracy prosecutions).

292. Sherman, *supra* note 63, at 1499–510.

293. *Id.* at 1500, 1502–04.

294. *See id*. at 1506.

295. *See id*. at 1508–10 (adding that Sherman's recommendations would be more protective of a defendant's First Amendment rights).

296. *See* Matthew Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism*, 3 J. NAT'L SECURITY L. & POL'Y 377, 399 n.107 (2009); Gil Ronen & Maayana Miskin, *U.S. Muslim Coalitions Warn They Will Boycott F.B.I.*, ISRAELNATIONALNEWS.COM, (Mar. 24, 2009) http://www.israelnationalnews.com/SendMail.aspx?print=print&type=0&item=130596.

informants, as the prosecution of those individuals charged with plotting to blow up New York-area synagogues reveals,[297] the agency continues to make use of informants rather liberally.[298] Arab- and Muslim-Americans are already subject to a kind of racial profiling that has been rejected elsewhere, and the gaps in how the FBI and the community understand terrorism are quite wide.[299] Nowhere was this difference in perception more stark than in the al-Moayad case, prior to the Second Circuit's opinion reversing the convictions. The sheikh's lead prosecutor wrote an op-ed in the New York Times touting the prosecution as a vindication of the government's preventive approach and the effectiveness of trying terrorists in federal court.[300] At sentencing, the sheikh, hobbled with Hepatitis B and C, asthma, diabetes, and high blood pressure, and incredulous as to his fate, was left muttering "Your honor, what have I done?"[301]

Perhaps the main difficulty with trying to reform the entrapment defense to curtail informant excesses is that many informant-driven prosecutions reflect entrenched institutional and societal prejudices. The time has almost certainly come to call for not merely a curative or more objective version of entrapment doctrine, but rather a halt to the policy of using informants to investigate terrorism-related cases where no articulable suspicion exists. That is not to say that informants cannot play a role in helping create that legally required suspicion, but rather that it is both dangerous and unjust to allow them to play the same role as an undercover officer[302] without providing genuine oversight by agents who have some understanding of the language, culture, and motivations of the community from which a suspect originates. None of

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297. *See supra* Part III.B.6.

298. *See* FBI – Chicago, *Chicago Man Arrested in Attempted Bombing Plot*, September 20, 2010, available at http://chicago.fbi.gov/pressrel/pressrel10/cg092010.htm (discussing allegations against Sami Samir Hassoun, a Lebanese citizen charged with plotting to plant a bomb in Chicago); Michael Tarm, *Sami Samir Hassoun, Chicago Terror Suspect, Could Claim Entrapment*, HUFFINGTON POST, Sept. 22, 2010, http://www.huffingtonpost.com/2010/09/22/sami-samir-hassoun-chicag_n_734639.html (remarking on the role played by a confidential informant, who worked for over a year with the defendant before he agreed to the plot).

299. *See* Juan Cole, *The FBI's Plan to "Profile" Muslims*, SALON.COM (July 10, 2008), http://www.salon.com/news/opinion/feature/2008/07/10/muslim_profiling.

300. *See* Kelly Anne Moore, Editorial, *Take Al-Qaeda to Court*, N.Y. TIMES, Aug. 21, 2007, at A19.

301. Robert F. Worth, *Yemeni Cleric Is Sentenced to 75 Years in Terrorism Case*, N.Y. TIMES, July 29, 2005, at B3.

302. This is not to say that undercover policing is without its own problems. *See* Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155 (2009).

the prosecutions discussed here involved a supervising agent who seemed to have had any linguistic, cultural, or regional expertise that the agent could have used to challenge an informant's version of events. Even in cases where a defendant's links to or knowledge of terrorism exist independently of the informant, the discretionless use of informants is too problematic to justify its existence.[303]

Given that informant use preys on groups that have been racialized as terrorists, the use of informants in its current form should end, much like what happened to the FBI's COINTELPRO operation, which featured similar use of informants to spy on dissident groups within the United States in the 1960s and 1970s.[304] Then, as now, informants often acted as provocateurs who drummed up prosecutions for crimes that would not have existed but for their involvement. The use of cooperators, however controversial in its own right, involves, at least in theory, a criminal conspiracy already in existence, not one that an informant created. Stated differently, there is a vast difference between 1) sending someone who has no law enforcement training to look for people from the Arab and Muslim community to see if they would be interested in a vaguely defined terrorist plot (especially when the informant offers money in return) and 2) enlisting an individual who was once part of a conspiracy or group to offer inside information (even if for money). The former operates in the hopes that focusing on a particular community will uncover terrorism, based on a general stereotype that that community has a propensity to engage in such activity. Theoretically, the latter at the very least has some inside information that would reflect the existence of terrorist activity.

Calling for an end to the use of informants in terrorism prosecutions should not be perceived as drastic. The vast majority of Arabs and Muslims in the United States are not terrorists and the law generally disfavors guilt by association.[305] Furthermore, a recent study indicates that Muslim-Americans are eager to cooperate with law enforcement

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303. In the *al-Moayad* case, where the informant clearly was not the defendant's only tie to terrorist groups, it was certainly questionable that the FBI relied so heavily on an individual who had an easily discoverable record of bad debts, family problems, and being fired from a position at the U.S. embassy in Yemen. *See* William Glaberson, *Terror Case Hinges on a Wobbly Key Player*, N.Y. TIMES, Nov. 27, 2004, at A1.

304. Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 139–40 (2007); Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939, 952 (2009).

305. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 976 (2002) ("[T]he vast majority of persons who appear Arab and Muslim—probably well over 99.9 percent—have no involvement with terrorism.").

when they perceive the police to be a legitimate authority whose practices are imbued with fairness and procedural justice.[306] It is axiomatic that voluntary cooperation from the Muslim community with law enforcement to combat suspicious activity would be far superior to the current informant-driven practice. Eliminating informant use would certainly go a long way toward enhancing law enforcement's legitimacy in the eyes of the Arab and Muslim communities, but will require a hard look at the preconceived notions fueling the phenomenon.

CONCLUSION

The use of informants in federal terrorist prosecutions has been an overall failure, despite its successes in procuring convictions in the courtroom. Individuals have been prosecuted where they did not represent a threat and the informant's behavior could very well have prompted, as opposed to discovered, the criminal activity. When placed in the context of the racialization of Arabs and Muslims as terrorists, such results are understandable but not justifiable. Informant use, which has involved the informant playing a role akin to an undercover officer, should therefore cease in cases where there is no articulable suspicion of criminal wrongdoing.

306. Tyler et al., *supra* note 289, at 2–3.