

PEER REVIEW ARTICLE†

WHY THE FBI AND THE COURTS ARE
WRONG ABOUT ENTRAPMENT AND
TERRORISM

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I believe beyond a shadow of a doubt . . . that there would have been no crime here except [that] the government instigated it, planned it, and brought it to fruition.

U.S. District Court Judge Colleen McMahon
*United States v. Cromitie*¹

Aggressive FBI field offices, via sting operations, set up many people targeted on non-specific indicators and arrest them. . . . [T]he odds are that these men would never have turned to violence on their own, without FBI intervention: they were simply false alarms. Nevertheless, it is very difficult to teach special agents, prosecutors, defense attorneys, judges, and juries about Bayesian probability, base rate neglect, and the insights of social psychology. . . . [S]pecial agents and juries cannot fully appreciate the ramifications of introducing older and authoritative FBI agents provocateurs that influence impressionable young men to do things such as detonating bombs that they would never have done on their own. The result is that these young men are invariably convicted in the present atmosphere of terrorism hysteria and the Department of Justice points to these convictions as justification for their sting operations Academics would easily point out the flaws in such circular and self-serving reasoning that sends young men to prison for life.

Marc Sageman
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INTRODUCTION

This Article contends that the FBI's practice of inducing otherwise law-abiding individuals to commit terrorist offenses is virtually incapable of preventing real terrorist attacks. This inducement strategy is thus almost entirely a waste of time and money, diverting resources from more effective counterterrorism

¹ Joshua L. Dratel, *The Literal Third Way in Approaching "Material Support for Terrorism": Whatever Happened to 18 U.S.C. § 2339B(c) and the Civil Injunctive Option?*, 57 WAYNE L. REV. 11, 67 n.220 (2011).

² Marc Sageman, *The Stagnation in Terrorism Research*, 26 TERRORISM & POL. VIOLENCE 565, 575 (2014).

policies.³ To illustrate, if the FBI had, as this Article recommends, focused more on the passive surveillance of potential suspects identified through intelligence networks than on generating fake terrorist plots, it is conceivable that the Boston Marathon bombings could have been prevented.⁴

Even though a number of journalists and legal scholars have raised serious concerns about possible entrapment in many post-9/11 terrorism cases, there is no sign that the FBI has shifted its tactics to reduce the risk of entrapment.⁵ Neither have courts indicated a willingness to block the convictions of terrorism defendants, even in the most egregious cases of alleged entrapment, in which it was clear to the judge (and virtually everyone else) that the defendant would have never committed

³ Precise information about the allocation of the FBI's counterterrorism funds is not publicly available. Yet logically, all the time and money spent on an ineffective counterterrorism technique reduces the amount of human and financial resources available for more effective strategies.

⁴ The FBI failed to place the Tsarnaev brothers under surveillance, even after Russian intelligence warned them about their radical Islamist activities. They were also mistakenly allowed to board a plane to Russia, due to government confusion about the spelling of their last name. It is possible that allocating more funding and human resources to surveillance and improving the use of available intelligence, instead of focusing on terrorism sting operations, could have prevented these missteps, allowing the government to prevent the attacks. See Trevor Aaronson, *How the FBI in Boston May Have Pursued the Wrong "Terrorist"*, MOTHER JONES (Apr. 23, 2013, 6:00 AM), <http://www.motherjones.com/politics/2013/04/fbi-boston-tamerlan-tsarnaev-sting-operations> (suggesting that the FBI's focus on sting operations may have deflected attention from genuine threats such as the Tsarnaev brothers).

⁵ See Rick Perlstein, *How FBI Entrapment Is Inventing "Terrorists"—and Letting Bad Guys off the Hook*, ROLLING STONE (May 15, 2012), <http://www.rollingstone.com/politics/news/how-fbi-entrapment-is-inventing-terrorists-and-letting-bad-guys-off-the-hook-20120515>; Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 450 (2012); Sabrina Rubin Erdely, *The Plot Against Occupy*, ROLLING STONE (Sept. 26, 2012), <http://www.rollingstone.com/culture/news/the-plot-against-occupy-20120926>; Jon Sherman, "A Person Otherwise Innocent": *Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475, 1489-99 (2009); Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 715-32 (2010); CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, TARGETED AND ENTRAPPED: MANUFACTURING THE "HOMEGROWN THREAT" IN THE UNITED STATES 14 (2011). See generally TREVOR AARONSON, THE TERROR FACTORY: INSIDE THE FBI'S MANUFACTURED WAR ON TERRORISM (2013); Joshua Holland, *Only 1 Percent of "Terrorists" Caught by the FBI Are Real*, SALON (July 10, 2013, 1:30 PM), http://www.salon.com/2013/07/10/only_1_percent_of_terrorists_caught_by_fbi_are_real_partner/.

any terrorism offense without government prompting.⁶ In *Cromitie*, for example, despite Judge Colleen McMahon's strong belief that the defendant would have never engaged in terrorism without the government's strenuous efforts to recruit him, she sentenced him to twenty-five years in prison, rejecting Cromitie's entrapment claim.⁷ The purpose of this Article is to provide the FBI, courts, and other policymakers with a strong argument, based on various sources of statistical and social-scientific evidence, for reforming current practices regarding terrorism sting operations.

In short, the FBI is wrong to place so many of its counterterrorism eggs in this entrapment-prone basket, and the courts are wrong to tolerate these tactics. However, the Article does not assert that the government should never engage in sting operations in terrorism cases. For example, if the suspect has already begun planning to commit a terrorist offense or has an unambiguous intention of doing so in the near future, this tactic may have a reasonable likelihood of preventing a terrorist offense.

This Article develops four arguments against the government's inducement practices in terrorism cases, and against courts' failure to block these practices. The first argument focuses on probability, demonstrating that given the significant levels of pro-terrorist sympathy and the miniscule number of terror attacks, the typical target of terrorism sting operations has an infinitesimally small chance of engaging in terrorism without government inducement.⁸

The second argument shows that current terrorism research does not provide a reliable basis for predicting whether a particular individual will become a terrorist.⁹ Inducing individuals who have not already begun planning for an attack is thus unlikely to prevent terrorism.

The third argument concerns the well-documented cognitive errors (together with strong institutional pressures) that plague

⁶ See *supra* note 1 and accompanying text; *United States v. Cromitie*, 727 F.3d 194, 210 (2d Cir. 2013) (citing sentencing transcript).

⁷ See *United States v. Cromitie*, No. 09-CR-558(CM), 2011 WL 1842219, at *15-16 (S.D.N.Y. May 10, 2011); *Cromitie*, 727 F.3d at 227.

⁸ See *infra* Part II.A.

⁹ See *infra* Part II.B.

law enforcement, jury, and judicial decision-making. These distortions are so magnified in the context of terrorism sting operations that decision-makers are simply not equipped to make rational decisions about targeting suspects for inducement or the existence of entrapment.¹⁰

The fourth argument casts doubt on the ability of widespread inducement by informers to have a deterrent effect on would-be terrorists. Even if such a deterrent effect exists, its effect is likely cancelled out by raising the risk of terrorism in several ways.¹¹

The Article recommends that law enforcement agencies focus on intelligence-gathering and the passive surveillance of suspects, while reserving inducement (if it must be used at all) to the small number of cases in which there are reliable indicia that the suspect will engage in an attack without government involvement.¹² The Article suggests that more extensive internal administrative requirements regarding the decision to induce suspects might help confine the tactic to the rare case in which it would prevent an attack.¹³

The Article also contends that courts should refrain from allowing juries to find predisposition on the basis of pro-terrorist sympathies alone, and advocates interpreting entrapment precedents to block a conviction unless the defendant was likely to commit a similar offense independent of government inducement.¹⁴ In addition, the Article explores the implications of this interpretation of entrapment doctrine for current predisposition jurisprudence, and recommends inquiring into the government's initial targeting decision, as well as taking other steps to reduce the impact of cognitive biases.

This Article focuses on instrumental reasons to avoid entrapment, contending that aggressive sting operations do not prevent terrorism and divert resources from effective counterterrorism strategies. Yet it bears mentioning that a strong ethical case could be made against these practices as well, based on concerns about civil liberties and racial, religious, or ethnic

¹⁰ See *infra* Part II.C.

¹¹ See *infra* Part II.D.

¹² See *infra* Part III.A.

¹³ See *infra* Part III.A.

¹⁴ See *infra* Part III.B.

profiling. Prevailing notions of personal autonomy and privacy might seem to preclude the state from inducing law-abiding people to commit heinous crimes. Likewise, concerns about discrimination against minorities should perhaps prevent authorities from targeting nonviolent members of a particular minority religious group for highly intrusive and deceptive forms of virtue testing. This Article does not dwell on such arguments, however, since policymakers are unlikely to be sympathetic to them if they believe sting operations actually prevent terrorism, and are a necessary part of any strategy to combat terrorism. Because ethical or constitutional arguments depend on a realistic understanding of the effectiveness of controversial tactics, this is what this Article concentrates on providing.

In Part I, the Article describes the policy context in which terrorism-related entrapment claims have arisen, discusses examples of possible cases of entrapment in terrorism prosecutions, reviews previous research on terrorism and entrapment, and outlines the entrapment and outrageous government conduct defenses. Part II presents the four arguments described above. Part III offers recommendations for what the government and courts should do differently. The Conclusion provides an overview of the Article's arguments, and briefly discusses a potential course of further research.

I. BACKGROUND

A. The Post-9/11 Emergence of Terrorism Entrapment Cases

In reaction to the terrorist attacks of September 11, 2001, the government transferred a large proportion of the FBI's funding to counterterrorism.¹⁵ The FBI, widely criticized for failing to

¹⁵ Eric Lichtblau, David Johnston & Ron Nixon, *F.B.I. Struggles to Handle Financial Fraud Cases*, N.Y. TIMES (Oct. 18, 2008), <http://www.nytimes.com/2008/10/19/washington/19fbi.html>.

The bureau slashed its criminal investigative work force to expand its national security role after the Sept. 11 attacks, shifting more than 1,800 agents, or nearly one-third of all agents in criminal programs, to terrorism and intelligence duties. Current and former officials say the cutbacks have left the bureau seriously exposed in investigating areas like white-collar crime, which has taken on urgent importance in recent weeks because of the nation's economic woes.

prevent the attacks, adopted a more aggressive counterterrorism philosophy, including “preventative prosecutions” aimed at eliminating security risks at the earliest possible stage.¹⁶

In practice, many of these preventative prosecutions have involved FBI informants going to extraordinary lengths to persuade law-abiding Muslims to participate in some terrorist offense.¹⁷ In some cases, informants—typically paid or offered leniency in criminal or immigration proceedings¹⁸—have attempted to radicalize defendants; repeatedly pressured reluctant defendants to join in a terrorist scheme; offered them hundreds of thousands of dollars to participate in terrorism; provided defendants with illegal drugs and alcohol, perhaps to get them talking about potential plans; and supplied destitute defendants with jobs, money, or a place to stay, to enable them to participate in the informant’s fake terrorist plan.¹⁹ One informant even threatened to kill himself or murder the defendant if the defendant would not agree to commit a terrorist offense.²⁰ Numerous defendants were provided with bombs and logistical support they would have been unable to procure on their own.²¹

Some of the informants had several previous convictions for fraud, and a history of dishonesty or manipulating others, and repeatedly lied to the government about the case.²² Others became

Id.

¹⁶ Paul J. McNulty, Deputy Attorney Gen., Prepared Remarks at the American Enterprise Institute (May 24, 2006), *available at* http://www.justice.gov/archive/dag/speeches/2006/dag_speech_060524.html.

¹⁷ *See generally* AARONSON, *supra* note 5; Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY (forthcoming 2015) (manuscript at 110) (on file with authors).

¹⁸ *See* AARONSON, *supra* note 5, at 44 (noting that the government claims it has 15,000 informants, and that there are as many as three informants working off the books for every informant officially on the list of 15,000).

¹⁹ *See* Norris & Grol-Prokopczyk, *supra* note 17, at 110.

²⁰ *See* United States v. Shareef, No. 10-C-7860, 2011 WL 488877, at *5 (N.D. Ill. Oct. 11, 2011) (describing the informant’s threats to kill the defendant, and kill himself); *infra* note 29 and accompanying text (describing inducements and pressure in the *Cromitie* case); Norris & Grol-Prokopczyk, *supra* note 17, at 121 (describing an informant’s attempt at radicalizing Siraj); Erdely, *supra* note 5 (describing the informant’s offer of a job to the defendants).

²¹ *See generally* AARONSON, *supra* note 5.

²² *See* United States v. Cromitie, No. 09-CR-558(CM), 2011 WL 1842219, at *25 (S.D.N.Y. May 10, 2011), *aff’d*, 727 F.3d 194 (2d Cir. 2013).

close friends with the defendants, and even moved in with them, in their protracted attempts to induce defendants to commit terrorist crimes.²³

In some cases, the defendants were selected for inducement attempts for no valid reason.²⁴ Several of those targeted had no prior sympathy for terrorism, and some were selected for inducement solely on the basis of speech protected by the First Amendment.²⁵ Others were chosen because of faulty translations, or because the FBI believed lies told to them by informants already known to be untrustworthy.²⁶ Several of the defendants were passive underachievers with little intelligence or personal initiative, who appeared to be selected for inducement because they were impressionable, not because they posed any security threat.²⁷

The case of James Cromitie, which involved a plot to bomb synagogues and shoot down military planes, was described by one analyst as the single worst example of entrapment in terrorism cases.²⁸ Cromitie was offered hundreds of thousands of dollars,

During the trial, Hussain was cross examined for hours about dozens of flat out misstatement and inconsistent statements he has made on multiple subjects dating back 15 or more years. By the end of the trial, the jury knew that Hussain had lied about his finances to at least two courts (the Northern District of New York and the Northern District Bankruptcy Court), lied to the Immigration and Naturalization Service, lied to the Town of Colonie and its school district about his residence, lied to potential customers of his motel, and lied to the IRS about his income at tax time. It even became apparent that Hussain had lied to his FBI handlers—or at a minimum omitted to tell them about certain matters that were germane to this case. The most significant and glaring example of Hussain's lies to his handlers relates to his offer to give Cromitie \$250,000; Agent Fuller testified that Hussain told him the \$250,000 was to pay for the cost of the operation. (Tr. 425).

Id.; see also William Glaberson, *Terror Case Hinges on a Wobbly Key Player*, N.Y. TIMES (Nov. 27, 2004), <http://www.nytimes.com/2004/11/27/nyregion/27terror.html> (discussing Alanssi's fraud conviction); Erdely, *supra* note 5 (discussing Azir's history of fraud).

²³ See Jeff Barnard, *Friends Unaware of FBI Informant*, SPOKESMAN-REV. (Apr. 16, 2006), <http://www.spokesman.com/stories/2006/apr/16/friends-unaware-of-fbi-informant>.

²⁴ See Norris & Grol-Prokopczyk, *supra* note 17, at 134-35.

²⁵ See *id.* at 135-38.

²⁶ See *id.* at 135.

²⁷ See *id.* at 136.

²⁸ See Karen Greenberg, *How Terrorist 'Entrapment' Ensnare Us All*, GUARDIAN (Dec. 12, 2011, 12:45 AM), <http://www.theguardian.com/commentisfree/cifamerica/2011/dec/12/how-terrorist-entrapment-ensnares-us-all> (describing the *Cromitie* case as

and various other perks—such as a new car and an all-expenses paid vacation—for participating in terrorist attacks that he could never have designed or implemented on his own.²⁹ Moreover, Cromitie was extremely reluctant, and only agreed to participate after what Chief Judge of the Second Circuit Dennis Jacobs described as a “dogged and year-long campaign of nagging, pursuit, and temptation.”³⁰ The trial court judge, U.S. District Court Judge Colleen McMahon, was remarkably scathing in her description of the government’s role in the case:

[T]he essence of what occurred here is that a government . . . came upon a man both bigoted and suggestible, one who was incapable of committing an act of terrorism on his own, created acts of terrorism out of his fantasies of bravado and bigotry, and made those fantasies come true [R]eal terrorists would not have bothered themselves with a person who was so utterly inept . . . [O]nly the government could have made a terrorist out of Mr. Cromitie, a man whose buffoonery is positively Shakespearian in its scope.³¹

However, Judge McMahon rejected the defendant’s entrapment defense, and sentenced him to twenty-five years in prison.³² The conviction was upheld on appeal, with two of three judges on the Second Circuit panel voting to defeat the entrapment claim, though only over the strenuous dissent of Chief Judge Dennis Jacobs.³³ They reasoned that Cromitie’s vague statements to the informant that he would like to commit an act of terrorism constituted an “already-formed design,” even though Cromitie was well-known for cheap talk and spinning outrageous lies.³⁴

the “most egregious example” of government involvement in creating terrorism offenses).

²⁹ See *supra* note 1 and accompanying text; *United States v. Cromitie*, No. 09-CR-558(CM), 2011 WL 1842219 (S.D.N.Y. May 10, 2011), *aff’d*, 727 F.3d 194 (2d Cir. 2013).

³⁰ *United States v. Cromitie*, 727 F.3d 194, 227 (2d Cir. 2013) (Jacobs, C.J., concurring in part and dissenting in part).

³¹ See *supra* note 1 and accompanying text.

³² *Cromitie*, 2011 WL 1842219, at *15-16; *Cromitie*, 727 F.3d at 204 (majority opinion).

³³ See *supra* note 29 and accompanying text.

³⁴ See *supra* note 29 and accompanying text.

While Cromitie's case is certainly disturbing and egregious, other cases appear even more so to this author. Yassin Aref and Mohammed Hossain, hard-working immigrants with no record of sympathy for terrorism, were targeted for inducement with no discernible justification.³⁵ Hossain was eventually lured into taking a business loan from the informant, which was construed as terrorist money laundering, and Aref was prosecuted for merely witnessing the fake loan.³⁶ Sami Hassoun, a young immigrant from Lebanon who never sympathized with jihadi terrorism, was persuaded by an informant to carry out a terrorist attack by promises of millions of dollars (though it seems that a desire to please the informant, who became close friends with him, was also an important motivation).³⁷ In another case, an informant gave several aimless left-wing activists associated with Occupy Cleveland the idea of bombing a bridge, and provided them with jobs (along with plenty of alcohol and illegal drugs) so that they could afford the materials for the bombing.³⁸

While there are some cases in which defendants had no sympathy for terrorism before the informant approached them,³⁹ there are many more cases in which the defendant had some sympathy for terrorism, but had never indicated a desire to commit any terrorist offense.⁴⁰ Only in a small handful of terrorism stings does it seem that the defendants already had the intention of becoming personally involved in terrorism.⁴¹

Despite the extreme features of some of these cases, in not a single case since 9/11 has a judge or jury blocked a terrorism conviction on entrapment or outrageous government conduct grounds.⁴² Typically, juries and judges have found that the

³⁵ See Norris & Grol-Prokopczyk, *supra* note 17, at 120, 135, 137; Aziz, *supra* note 5, at 445-46.

³⁶ See Aziz, *supra* note 5, at 445-46.

³⁷ See Norris & Grol-Prokopczyk, *supra* note 17, at 137.

³⁸ See *id.* at 123, 132. See generally Erdely, *supra* note 5.

³⁹ This would include Hossain, Aref, and Hassoun, and potentially others as well.

⁴⁰ This includes, among others, the Cleveland Five, the Fort Dix Six, the Liberty City Seven, Siraj, Khan, Cromitie, Hayat, and Shareef.

⁴¹ These include Mohamud, Nafis and El-Khalifi.

⁴² See Francesca Laguardia, *Terrorists, Informants, and Buffoons: The Case for Downward Departure as a Response to Entrapment*, 17 LEWIS & CLARK L. REV. 171 (2013) (noting the "universal failure" of the entrapment defense in terrorism cases);

defendant's expressions of sympathy for terrorism, or their readiness to participate in the proposed crime, suffice to prove that they were "predisposed" to engage in terrorism.⁴³ That said, only in a small number of cases has the entrapment or outrageous government conduct defense been fully litigated, as some defendants, even in what seem to be the most egregious cases, have pled guilty.⁴⁴

*B. The Entrapment and Outrageous Government Conduct
Defenses*

Under the most widespread formulation of the entrapment defense, entrapment serves as a complete defense if the government induced a defendant to commit an offense (which must be more than just providing an opportunity to commit a crime).⁴⁵ However, if the government can prove beyond a reasonable doubt that the defendant was "predisposed" to commit the crime, the defense does not apply.⁴⁶

If the defendant can produce evidence of inducement, the burden then shifts to the state, to either rebut the inducement evidence, or prove beyond a reasonable doubt that the defendant was predisposed to commit the offense prior to the informant's influence.⁴⁷ However, courts frequently admit predisposition evidence from after the defendant's first contact with the government, if the defendant's behavior is deemed "independent" of government influence.⁴⁸

Lacking a precise definition of predisposition, a variety of approaches have arisen for determining predisposition.⁴⁹ Some courts, for example, consider the following in the predisposition inquiry:

Richard Bernstein, *A Defense that Could Be Obsolete*, N.Y. TIMES (Dec. 1, 2010), <http://www.nytimes.com/2010/12/02/us/02iht-letter.html>.

⁴³ Sherman, *supra* note 5, at 1498.

⁴⁴ For example, Sami Hassoun pled guilty.

⁴⁵ See *Jacobson v. United States*, 503 U.S. 540 (1992).

⁴⁶ *Id.*

⁴⁷ See *United States v. Burkley*, 591 F.2d 903, 914-15 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979); *Jacobson*, 503 U.S. at 553.

⁴⁸ *Jacobson*, 503 U.S. at 550; *United States v. Silva*, 846 F.2d 352, 356 (6th Cir. 1988).

⁴⁹ *United States v. Hall*, 608 F.3d 340, 343 (7th Cir. 2010).

(1) the defendant's character or reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the criminal activity for profit; (4) whether the defendant evidenced a reluctance to commit the offense that was overcome by government persuasion; and (5) the nature of the inducement or persuasion by the government.⁵⁰

In any case, most courts hold that when the government agent or informant merely provides "the opportunity to commit a crime . . . the ready commission of the criminal act amply demonstrates the defendant's predisposition."⁵¹ In *Jacobson v. United States*, the leading entrapment case, the Supreme Court found that the government's action went far beyond this, since the defendant only committed the offense of ordering child pornography after "he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations."⁵²

A minority of jurisdictions employs an "objective" version of the entrapment defense. Under one version of the objective entrapment defense, it operates as a complete defense if the government induced the offense either by falsely representing that the conduct was legal, or by employing persuasion methods that create a substantial risk that the offense would be committed by someone otherwise not ready to do so.⁵³

The "outrageous government conduct" defense, which is rarely employed by any courts, requires the government behavior to have been "so grossly shocking as to violate the universal sense of justice."⁵⁴ Unlike the entrapment defense, the outrageous government conduct doctrine is based on the Due Process Clause.⁵⁵ It is difficult to find more than a small handful of cases in which this defense has been successful.

⁵⁰ *Id.*

⁵¹ *Jacobson*, 503 U.S. at 550.

⁵² *Id.*

⁵³ See HAW. REV. STAT. § 702-237 (West 2014); MODEL PENAL CODE § 2.13 (1962).

⁵⁴ *United States v. Bonanno*, 852 F.2d 434, 437 (9th Cir. 1988).

⁵⁵ See *id.*

C. Previous Scholarship and Commentary

Relatively few legal scholars have addressed entrapment in terrorism cases, and academics from other disciplines have largely ignored the topic.⁵⁶ Professor Dru Stevenson argued for a weakened entrapment defense for terrorism cases, based in part on the idea that any defendant capable of being convinced to commit a terrorist act must have been predisposed, regardless of the nature of the inducement.⁵⁷

Other legal scholars have taken a more critical approach. Jon Sherman, based on his analysis of several problematic cases, argues for excluding most evidence of defendants' ideology or religious views, and for a bar on prosecuting defendants radicalized or pressured by informants.⁵⁸ Professor Wadie Said also criticized several of these prosecutions, and called for the government to cease inducing individuals into terrorist crimes absent "articulable suspicion" of involvement in terrorism.⁵⁹ Professor Francesca Laguardia criticized the Cromitie prosecution, and called for downward departure in sentencing as an alternative to dismissal in response to entrapment.⁶⁰ T. Ward Frampton advocated returning entrapment doctrine to its positivist roots, in part to facilitate the application of the doctrine to problematic terrorism cases.⁶¹ Professor Sahar Aziz also critically analyzed some terrorism entrapment cases, as part of a larger critique of the government's treatment of Muslims in

⁵⁶ See generally AMITAVA KUMAR, *A FOREIGNER CARRYING IN THE CROOK OF HIS ARM A TINY BOMB* (2010); ARUN KUNDNANI, *THE MUSLIMS ARE COMING!: ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR* (2014); Sageman, *supra* note 2.

⁵⁷ See Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 188 (2008); L. Gordon Crovitz, *Stopping 'Predisposed' Terrorists*, WALL ST. J. (Oct. 28, 2012, 6:13 PM), <http://online.wsj.com/news/articles/SB10001424052970203922804578081114066270392>.

⁵⁸ See Sherman, *supra* note 5, at 1499-1508.

⁵⁹ Said, *supra* note 5, at 691; see also Wadie E. Said, *The Message and Means of Modern Terrorism Prosecution*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 175, 193 (2012).

⁶⁰ See Laguardia, *supra* note 42, at 205-14.

⁶¹ See T. Ward Frampton, *Predisposition and Positivism: The Forgotten Foundations of the Entrapment Doctrine*, 103 J. CRIM. L. & CRIMINOLOGY 111, 146 (2013) (arguing that *Hollingsworth* was true to the positivist origins of the doctrine, because it focused on "the actual threat (or lack thereof) posed by the ensnared defendant").

domestic counterterrorism policy.⁶² Professor Peter Margulies has argued that an objective entrapment standard, instead of the prevailing subjective standard, would more effectively redress entrapment abuses in the terrorism context.⁶³

Professor Aziz Huq, without focusing on entrapment, argued against relying on religion as a “signaling function” in initiating counterterrorism investigations, since it is a poor predictor of terrorist involvement. Instead, Professor Huq recommended focusing on insular pro-terrorist groups.⁶⁴ Professor Lawrence Rosenthal, in a critique of Professor Huq’s article, argues, among other things, that religious pro-terrorist speech may signal terrorist plans, and notes that the cost of beginning investigations is relatively low, compared to the potential effects of an attack.⁶⁵ This Article’s argument is somewhat analogous to Professor Huq’s, since it argues that the signaling function of sympathy for terrorism is so weak that stings targeted at individuals on that basis are virtually incapable of preventing real attacks. At the same time, this author agrees with Professor Rosenthal that religious speech regarding terrorism is a potentially valid basis for initiating investigations, at least if it suggests an intention to engage in terrorism.⁶⁶

Professor Huq and counterterrorism expert Marc Sageman have briefly noted that terrorism stings risk “false positives”—that is, successfully inducing people who would have otherwise never engaged in terrorism—and thus promote poor resource-allocation, taking up resources that could be used for more effective anti-terror policies.⁶⁷ This Article builds on these arguments, which have never been set forth in detail.

⁶² See Aziz, *supra* note 5, at 444, 447-48. David Smith also discusses entrapment allegations in his article on the First Amendment implications of race-based intelligence gathering. See David Smith, *Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment*, 11 UCLA J. ISLAMIC & NEAR E. L. 85, 102-06 (2012).

⁶³ See Peter Margulies, *Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11*, 43 GONZ. L. REV. 513, 556 (2008).

⁶⁴ Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833 (2011).

⁶⁵ See Lawrence Rosenthal, *The Law Professor as Counterterrorist Tactician*, 89 TEX. L. REV. 113 (2010).

⁶⁶ See *id.* at 120-21.

⁶⁷ Huq, *supra* note 64, at 895; Sageman, *supra* note 2, at 575.

Many journalists and other social critics have critically analyzed terrorism sting operations. Most notably, journalist Trevor Aaronson, building on a report for *Mother Jones*, wrote a well-received full-length book on the subject.⁶⁸ Human Rights Watch, a leading international human-rights organization, recently published a report criticizing several aspects of current U.S. counter-terrorism policy, including the questionable use of sting operations.⁶⁹ Two attorneys involved in representing Yassin Aref published a detailed report critiquing numerous cases of “preemptive prosecution.”⁷⁰

In addition to the journalists, legal scholars and human rights activists who have questioned terrorism sting operations, two former FBI agents have become prominent critics. Michael German is a sixteen-year veteran of the FBI, who went on to work for the ACLU and the NYU School of Law’s Brennan Center for Justice. He has argued that, feeling pressure to produce convictions, informants and agents are “manufacturing terrorism,” giving rise to convictions with no public safety value.⁷¹ Strikingly, German writes that, before 9/11,

if an agent had suggested opening a terrorism case against someone who was not a member of a terrorist group, who had not attempted to acquire weapons, and who didn’t have the means to obtain them, he would have been gently encouraged to look for a more serious threat. An agent who suggested giving such a person a stinger missile or a car full of military-grade plastic explosives would have been sent to counseling. Yet . . . such techniques are now becoming commonplace.⁷²

⁶⁸ See generally AARONSON, *supra* note 5.

⁶⁹ See HUMAN RIGHTS WATCH, *ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS* (2014), available at <http://www.hrw.org/reports/2014/07/21/illusion-justice>.

⁷⁰ STEPHEN DOWNS & KATHY MANLEY, *INVENTING TERRORISTS: THE LAWFARE OF PREEMPTIVE PROSECUTION* (2014).

⁷¹ Michael German, *Manufacturing Terrorists: How FBI Sting Operations Make Jihadists out of Hapless Malcontents*, REASON (Mar. 15, 2013), <http://reason.com/archives/2013/03/15/manufacturing-terrorists>.

⁷² *Id.*

James Wedick, who served as an FBI agent for thirty-five years, has also become an ardent critic of the FBI's practices.⁷³ He has assisted the defense in several terrorism cases potentially involving entrapment, and has argued that informants or agents in terrorism cases intentionally leave important conversations unrecorded to undermine potential entrapment defenses. Wedick described FBI sting operations as "bureau theatre" intended mainly to give the public a false sense of safety, estimating that "90 percent of the [terrorism] cases that you see that have occurred in the last 10 years are garbage."⁷⁴

This author's own previous work sought to estimate the prevalence of entrapment by constructing a database of post-9/11 terrorism prosecutions, and coding each case for the presence of twenty indicators of potential entrapment.⁷⁵ The results showed that a significant proportion of cases had several indicators of entrapment, and that entrapment indicators were distributed widely among the cases.⁷⁶ While this demonstrates that entrapment concerns are not concentrated mainly among a handful of egregious cases, it does not directly address potential justifications for inducing law-abiding citizens into terrorist crimes. Thus, what is missing from the literature, and what this Article seeks to provide, is a comprehensive, evidence-based argument against the claim that prevailing inducement tactics are useful in preventing terrorism.

II. FOUR ARGUMENTS AGAINST CURRENT TERRORISM STING OPERATIONS

This part develops four arguments against the government's practice of hiring informants to induce otherwise law-abiding individuals into artificial terrorist schemes. This includes a

⁷³ See Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. TIMES (May 28, 2006), <http://articles.latimes.com/2006/may/28/magazine/tm-wedick22/8>; AARONSON, *supra* note 5, at 181-99.

⁷⁴ See Omar Karmi, *FBI Accused of Entrapping the 'Foolhardy'*, NAT'L (Mar. 21, 2012), <http://www.thenational.ae/news/world/americas/fbi-accused-of-entrapping-the-foolhardy>; Seth Freed Wessler, *Report: FBI's Paying for Bad Terrorism Information*, COLORLINES (Oct. 11, 2010, 3:46 PM), http://colorlines.com/archives/2010/10/a_week_after_faisal_shahzad.html.

⁷⁵ See Norris & Grol-Prokopczyk, *supra* note 17, at 141-44.

⁷⁶ See *id.* at 144-50.

statistical argument, a prediction argument, an argument focusing on cognitive and institutional mechanisms, and a deterrence argument.

A. Argument 1: The Low Probability of Individual Terrorist Involvement

It's my opinion that while the bureau busies itself with these nonsense cases, they could have been expending these resources catching real bad guys. And that's the problem.

James Wedick
35-year veteran of the FBI⁷⁷

In short, the statistical or probability argument against terrorism sting operations is as follows: given the significant number of people in the United States who sympathize with terrorism and the small number of attacks or attempts, trying to induce sympathizers into terrorist crimes is a strategy that is exceedingly unlikely to prevent real terrorist attacks.⁷⁸ In many (but not all) terrorism cases with possible entrapment claims, the informant selected the defendant for inducement after the defendant expressed ideological support for terrorism. This argument applies mainly to such cases, and not to the few cases in which informants may have chosen their inducement targets based on more concrete indicators of readiness to commit attacks.⁷⁹

⁷⁷ *Entrapment or Foiling Terror? FBI's Reliance on Paid Informants Raises Questions About Validity of Terrorism Cases*, DEMOCRACY NOW! (Oct. 6, 2010), http://www.democracynow.org/2010/10/6/entrapment_or_foiling_terror_fbis_reliance.

⁷⁸ It should be noted that not all of the suspects in terrorism cases with potential entrapment claims were sympathetic to terrorism when the informant first met the defendant, or even afterward. *See supra* note 37 and accompanying text. It should go without saying that the chance that a particular person not sympathetic to terrorism would commit a terrorist attack is infinitesimally small. *See Norris & Grol-Prokopczyk, supra* note 17, at 137.

⁷⁹ *See supra* notes 35-36 and accompanying text. Information about informants' particular reasons for targeting defendants for inducement, and the statements of the defendants before or immediately after meeting the informants, are difficult to obtain. Consequently, it is not possible to document with any certainty the proportion of cases in which informants targeted suspects based mainly on their pro-terrorist sympathies. Even so, from my review of the post-9/11 cases it appears that only a small handful of cases involved defendants who appear relatively likely to have been at least interested

This argument will proceed in three steps. First, it will review polls of Muslims, and general demographic data, to show that while the proportion of U.S. Muslims approving of any terrorism is rather small, the overall number of individuals is significant, likely including tens of thousands, or even hundreds of thousands, of individuals. Second, it will show that the incidence of terrorist attacks or attempts (which were not the product of government inducement) is extraordinarily low, with an average of less than one occurring each year. Finally, it will discuss the implications of this analysis, by estimating the likelihood that a particular person sympathizing with terrorism would commit an attack.

1. Muslim-American Attitudes Towards Terrorism

A 2011 poll of Muslim Americans showed that about twenty percent believed that there was a great deal of support for extremism among Muslims in the United States.⁸⁰ About one percent surveyed in the poll said that suicide bombing is often justified, while seven percent believed that it was sometimes justified, five percent said it was rarely justified, and eighty-one percent thought it was never justified.⁸¹ In the same poll, there were significant variations within the Muslim populations studied. For example, forty percent of African-American Muslims believed there was significant support for terrorism among fellow Muslim Americans, and ten percent of native-born Muslims, but only three percent of foreign-born Muslims, had a favorable view of Al Qaeda.⁸² Another poll, from 2007, showed that fifteen

in actively pursuing terrorist activity (as opposed to passively approving of it) before the informant gave them the opportunity. For example, a previous article by this author estimated that only eight percent of terrorism cases were at least somewhat likely to have prevented a real terrorist attack. See Norris & Grol-Prokopczyk, *supra* note 17, at 155. For this reason, this argument suggests that most of the government's terrorism stings were a waste of time and resources, and maintains that the government should not waste time inducing suspects who show no history or present intention of terrorist involvement.

⁸⁰ See *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism*, PEW RES. CENTER (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism/>.

⁸¹ See *id.*

⁸² See *id.*

percent of U.S. Muslims under the age of thirty believe that suicide terrorism can often or sometimes be justified.⁸³ A 2007 poll, which appears to be an outlier, found that twenty-six percent of young American Muslims thought suicide bombings were at least rarely justified.⁸⁴

Due to the presence in the United States of recent immigrants from various Muslim-majority countries, a brief review of international terrorism polling may be useful. International polls of Muslims have had varying results, but in some countries, support for terrorism is significantly higher than in the United States. To illustrate, a 2011 Pew survey found that twenty-six percent of Muslims in Indonesia, twenty-two percent of Egyptian Muslims, and thirteen percent of Jordanian Muslims expressed confidence in Osama bin Laden.⁸⁵ These levels of support were far reduced from previous years: in 2003, fifty-six percent of Jordanians and fifty-nine percent of Indonesians supported Bin Laden.⁸⁶ A 2004 poll of Pakistanis found that forty-one percent believed that suicide bombing was often or sometimes justified.⁸⁷

Hundreds of thousands of people from predominantly Muslim countries with far higher levels of support for terrorism than in the United States appear to have settled in the United States during this general time period. For example, from 2000 to 2010, about 157,000 Pakistanis, about 60,000 Jordanians, and about 90,000 Egyptians became U.S. permanent residents.⁸⁸ Of course, it may be that those most opposed to terrorism emigrated, or they

⁸³ *Little Support for Terrorism Among Muslim Americans*, PEW RES. CENTER (Dec. 17, 2009), <http://www.pewforum.org/2009/12/17/little-support-for-terrorism-among-muslim-americans/>.

⁸⁴ See David Morgan, *Poll Finds Some U.S. Muslim Support for Suicide Attacks*, REUTERS (May 22, 2007, 3:20 PM), <http://www.reuters.com/article/2007/05/22/us-usa-muslims-poll-idUSN2244293620070522>.

⁸⁵ *Osama bin Laden Largely Discredited Among Muslim Publics in Recent Years*, PEW RES. CENTER (May 2, 2011), <http://www.pewglobal.org/2011/05/02/osama-bin-laden-largely-discredited-among-muslim-publics-in-recent-years/>.

⁸⁶ *Id.*

⁸⁷ Richard Wike, *View from Pakistan*, PEW RES. CENTER (Dec. 28, 2007), <http://www.pewglobal.org/2007/12/28/the-view-from-pakistan/>.

⁸⁸ See OFFICE OF IMMIGRATION STATISTICS, 2010 YEARBOOK OF IMMIGRATION STATISTICS tbls.2 & 3, at 10-11, 14 (2011), available at https://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf.

may have changed their attitudes after arriving in the United States.⁸⁹ It is also possible that those who supported terrorism in these polls had specific kinds of terrorism in mind, and would not approve of terrorism against the United States.⁹⁰ However, these polls indicate that it is possible that tens of thousands of recent arrivals to the United States were sympathetic to at least some kinds of terrorism.

It should be made clear that, in reviewing this polling data, this author does not intend to suggest that extremism is widespread in the American Muslim community, or to foster alarmism on this issue. Overall support for terrorism appears rather low. Moreover, the fact that there have been so few attacks or attempts by American Muslims, and that these attempts have largely been carried out by individuals acting alone, suggests that the American Muslim community is far from a hotbed for terrorist recruitment. Interestingly, one Gallup poll actually found that American Muslims are significantly less supportive of attacks on civilians than are American non-Muslims.⁹¹

Indeed, there are indications that non-Muslim Americans may ideologically approve of terrorism at similar rates to Muslim-Americans. For example, a 2005 survey of attendees at a large environmental conference found that twelve-and-a-half percent supported property destruction, including arson, as a means of effecting environmental change.⁹² Ironically, even Peter King, a member of Congress considered by some to be Islamophobic because of his hearings on Muslim radicalization, was once well-known as a supporter of the Irish Republican Army, a terrorist group responsible for killing a total of nearly 2,000 people.⁹³

⁸⁹ Many of the permanent residents may have also arrived in the United States years earlier, when average levels of support for terrorism in some of their home countries may have been considerably lower. For this reason, these statistics should be interpreted with caution.

⁹⁰ See *infra* notes 98-100 and accompanying text.

⁹¹ See ABU DHABI GALLUP CENTER, MUSLIM AMERICANS: FAITH, FREEDOM, AND THE FUTURE 2, 5-7 (2011), available at <http://www.gallup.com/poll/148931/presentation-muslim-americans-faith-freedom-future.aspx>.

⁹² See DONALD R. LIDDICK, ECO-TERRORISM: RADICAL ENVIRONMENTAL AND ANIMAL LIBERATION MOVEMENTS 110 (2006).

⁹³ See Scott Shane, *For Lawmaker Examining Terror, a Pro-I.R.A. Past*, N.Y. TIMES (Mar. 8, 2011), <http://www.nytimes.com/2011/03/09/us/politics/09king.html>; Brian Lavery, *I.R.A. Apologizes for Civilian Deaths in Its 30-Year Campaign*, N.Y. TIMES

A recent poll finding significant support for violent revolution among non-Muslim Americans is significant to note as well, since revolution would necessarily involve terrorism, as the term is legally defined.⁹⁴ A 2013 poll found that twenty-nine percent of Americans thought that “[i]n the next few years, an armed revolution might be necessary in order to protect our liberties.”⁹⁵ Forty-four percent of the Republicans polled thought revolutionary violence against the government might soon be needed, while eighteen percent of Democrats thought so, and twenty-seven percent of Independents.⁹⁶ Although this poll was speculative, in that it asked only future possible support for ideologically-motivated violence, it seems to indicate that tens of millions of non-Muslim Americans are open to considering violent means to enact their policy preferences.⁹⁷ Yet despite such polling results, no one seriously believes that millions of non-Muslim Americans are potential terrorists. Likewise, policymakers should not consider Muslims a threat because of their (rather small) levels of approval for terrorism in the available polls.

(July 17, 2002), <http://www.nytimes.com/2002/07/17/world/ira-apologizes-for-civilian-deaths-in-its-30-year-campaign.html>.

⁹⁴ See 18 U.S.C. § 2331 (2012).

⁹⁵ PUB. MIND POLL, BELIEFS ABOUT SANDY HOOK COVER-UP, COMING REVOLUTION UNDERLIE DIVIDE ON GUN CONTROL 3 (2013), available at <http://publicmind.fdu.edu/2013/guncontrol/>.

⁹⁶ Any attempt to violently overthrow the government would most likely qualify as terrorism under federal law, since intimidating or coercing the government, and/or the civilian population, would be a necessary part of doing so. See 18 U.S.C. § 2331 (2012).

⁹⁷ There also seems to be significant public support for rancher Cliven Bundy and his armed supporters, who likely qualify as domestic terrorists (as pointed out by Senate Majority Leader Harry Reid), since they used the threat of force to intimidate the government and influence its behavior. See Brad Knickerbocker, *Harry Reid: Cliven Bundy's Armed Supporters Are 'Domestic Terrorists'*, CHRISTIAN SCI. MONITOR (Apr. 19, 2014), <http://www.csmonitor.com/USA/2014/0419/Harry-Reid-Cliven-Bundy-s-armed-supporters-are-domestic-terrorists-video>; Caitlin Dickson, *The Cliven Bundy Copycat Militia Movement*, DAILY BEAST (July 10, 2014, 5:45 AM), <http://www.the-dailybeast.com/articles/2014/07/10/the-cliven-bundy-copycat-militia-movement.html>; Scott Sonner, *Report: Nevada Ranch Battle Spurs Radical Right*, TALKING POINTS MEMO (July 10, 2014, 2:32 PM), <http://talkingpointsmemo.com/news/bundy-spurs-radical-right--2>. In a poll of over 12,000 registered voters, Bundy came in second (at fourteen percent) in a straw poll of possible contenders for the Republican nomination for president. See *Cliven Bundy 2016? GOP Poll Shows Strong Support*, NAT'L REP. (Apr. 28, 2014), <http://nationalreport.net/cliven-bundy-2016-gop-poll-shows-strong-support/>.

It is also worth mentioning that some Muslims' approval of terrorism in these surveys may reflect sympathy towards terrorism in very specific contexts, rather than approval of terrorism in general. This may be particularly the case when the polls ask about suicide bombing, which is a tactic especially associated with Israel (though it has certainly been used widely elsewhere, such as in Iraq).

On this topic, it is important to point out that sympathy for terrorism against Israel is not confined to Muslim Americans. One poll found, for example, that sixteen percent of Americans, after being read brief arguments for and against Palestinian suicide bombings, believed that such bombings were justified.⁹⁸ Another poll found that six percent of the public considered Hamas and Hezbollah "freedom fighters" rather than terrorists.⁹⁹ More recently, a Gallup poll found that fourteen percent of Americans thought Hamas's actions were mostly justified.¹⁰⁰ If this is an accurate gauge of American attitudes, this would mean that tens of millions of Americans approve of at least one form of terrorism. (Hamas is officially designated as a terrorist organization by the U.S. government.¹⁰¹) It is possible that much of the Muslim support for terrorism detected by surveys simply reflects levels of sympathy for Palestinian terrorism more or less equivalent to those in the non-Muslim U.S. population.

Estimates of the number of American Muslims vary from two to six million.¹⁰² To avoid suspicions of playing with numbers to minimize terrorism risks, Pew's lower estimate of 1.8 million Muslim adults will be employed. If that figure is correct, and the 2011 poll cited above is accurate, then as many as about thirteen percent, or about 230,000 American Muslims, think terrorism is

⁹⁸ See *American Public Opinion Polls: Opinion Towards Terrorism*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/jsource/US-Israel/poterror.html> (last visited June 5, 2015).

⁹⁹ See *id.*

¹⁰⁰ See Frank Newport, *Middle East Update: U.S. Support for Israel, Hamas Is Stable*, GALLUP (Aug. 5, 2014), <http://www.gallup.com/poll/174305/middle-east-update-support-israel-hamas-stable.aspx>.

¹⁰¹ *Foreign Terrorist Organizations*, U.S. DEPT ST., <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited June 5, 2015).

¹⁰² See Sahar F. Aziz, *Sticks and Stones, the Words that Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 45 (2009) (listing the various estimates).

justified in at least some instances. In the same poll, one percent reported believing that suicide terrorism is often justified. This would amount to about 18,000 American Muslims who believe terrorism is frequently justified. Thus, under this analysis, it seems that there are probably tens of thousands of American Muslims who have relatively strong pro-terrorist beliefs, and hundreds of thousands with at least some sympathy for some types of terrorism. As suggested earlier, it is unclear whether these sympathies extend only to terrorism in particular national contexts, as opposed to terrorism targeting Americans.

The focus on Muslims in this argument is not meant to imply that terrorism is primarily a “Muslim problem.” Indeed, right-wing domestic terrorism has caused more fatalities since 9/11 than jihadi terrorism.¹⁰³ There have been over two hundred prosecutions of non-jihadi terrorism since 9/11, and both left- and right-wing terrorism cases have featured viable entrapment claims in recent years.¹⁰⁴ Yet since the vast majority of strong entrapment claims in terrorism cases since 9/11 have been in jihadi cases, this Article focuses on this topic.

2. The Prevalence of Terrorism in the United States Since 9/11

A review of terrorism events and convictions shows that the incidence of terrorist attacks or attempts in the United States is extraordinarily low. For the purposes of this argument I will include cases that have not been universally labeled as terrorism, due to a lack of clarity regarding either the motives of the individuals involved, or the proper definition of terrorism. This is done to prevent criticisms that the count of terrorist events was unduly restricted.¹⁰⁵

¹⁰³ See *Deadly Attacks Since 9/11*, INT'L SECURITY, <http://securitydata.newamerica.net/extremists/deadly-attacks.html> (last visited June 10, 2015); KUNDNANI, *supra* note 56, at 200.

¹⁰⁴ See generally Jesse J. Norris, *Entrapment and Terrorism on the Left: An Analysis of Post-9/11 Cases*, NEW CRIM. L. REV. (forthcoming 2015) (manuscript) (on file with author).

¹⁰⁵ This list does not include attacks in which a government informant initiated or heavily supported the plot. Although, as noted above, there is a small handful of cases in which the target of a sting operation may have had a preexisting desire to become involved in terrorism. But in none of these cases was the defendant remotely close to planning or carrying out any attack.

Since 9/11, there have been a small handful of successful terrorist attacks apparently motivated by ideologies associated with Islam, as well as a few failed attempts at such attacks.¹⁰⁶ Nidal Hassan's shooting attack at Fort Hood cost thirteen lives, and the Boston Marathon bombings killed three. Hesham Hadayet killed two at a Los Angeles airport, and Carlos Bledsoe murdered two at an Arkansas army recruiting station. Naveed Afzal Haq killed one at a Seattle Jewish center. In July 2014, Ali Muhammad Brown was arrested for allegedly committing four separate murders, which he described as revenge for U.S. government attacks on Muslims overseas.¹⁰⁷

Unsuccessful attacks have included the shoe bomber, the underwear bomber, and Faisal Shazhad (all of whom attempted to detonate bombs). Najibullah Zazi, who appeared close to carrying out an attack when apprehended, might also reasonably be listed among the unsuccessful attacks. This amounts to a total of ten completed or attempted attacks in the thirteen years since 9/11, an average of less than one per year.

In addition to these cases, a small number of the other terrorism arrests since 9/11 may have also prevented real jihadi attacks (though in no case were the defendants, unassisted by informants, nearly ready to commit an attack). Counting domestic attacks only, this amounts to about eleven additional attacks which might have otherwise occurred during this time period.¹⁰⁸ Overall, this constitutes twenty-one successful, failed or possibly thwarted Islamist terrorist attacks (involving about thirty-three

¹⁰⁶ The Hadayet and Haq attacks appeared to be motivated by Palestinian nationalism. That is, they seem to have been carried out to protest against Israeli policy against Palestinians, and/or against the U.S. government's relationship towards these policies. Since Palestinian nationalism includes relatively secular ideologies as well as Islamist or jihadist ones, it is unclear whether it is appropriate to group such attacks with those of clearly jihadist motivation. However, for the sake of simplicity, attacks motivated by Palestinian nationalism are grouped together with the other attacks associated with jihadi ideologies.

¹⁰⁷ See Christine Clarridge, *Defendant Calls Four Slayings Justified, Charging Papers Say*, SEATTLE TIMES (Aug. 21, 2014, 3:25 PM), <http://www.seattletimes.com/seattle-news/defendant-calls-four-slayings-justified-charging-papers-say/>.

¹⁰⁸ See Norris & Grol-Prokopczyk, *supra* note 17, at 152-56. This list does not include most terrorism stings, because in the available documentation related to those cases there is no specific information indicating that the defendants had, prior to contact with the informant, taken any steps toward engaging in terrorism or expressed any concrete desire to do so.

defendants total) in the thirteen years since 9/11. This amounts to an average of 1.6 attacks (and 2.5 defendants) per year.

3. The Probability of Particular Individuals Participating in Terrorism

As established above, in the thirteen years since 9/11, an average of about 2.5 individuals per year have been involved in successful, attempted, or potentially thwarted jihadi terrorist attacks in the United States. Thus, of the estimated 230,000 American Muslims who approve of at least some terrorism, only about one in 100,000 per year, or 0.001 percent, were involved in committing, attempting to commit, or plotting a terrorist attack each year. If one considers only the smaller group who believe that suicide attacks are frequently justified, this would mean that only 2.5 in 18,000, or about 0.014 percent were involved in terrorism. That is, even among those with strong pro-terrorist beliefs, only one in 7,000 engages in terrorism in any given year.

Similar results are obtained if higher estimates of terrorist activities are used, including minor terrorist-related crimes as well as attacks, attempts or plots. Professor Charles Kurzman found that 175 Muslim-Americans were involved in terrorism in the ten years since 9/11.¹⁰⁹ This amounts to about eighteen people per year. This would mean that the risk is about seven times higher than estimated above.¹¹⁰ (This still represents a tiny proportion of supporters, about one in a thousand or less.)

This author's database of post-9/11 terrorism prosecutions includes 340 jihadi defendants, but nearly sixty percent of these cases involved an informant, and a large proportion of those cases had several indicators of potential entrapment. Moreover, most of these offenses involved crimes other than plotting or attempting an attack, such as sending money to legally designated terrorist groups. If one roughly estimates that about half of the 340 crimes would not have happened without government involvement, then

¹⁰⁹ His list includes cases this author would not include, such as shootings by Muslim-Americans that are not believed by authorities to have any connection to terrorism, and may also include cases in which the idea for the crime originated with government informants or agents.

¹¹⁰ That is, using his estimates, seven per 100,000 sympathizers, or one in a thousand more enthusiastic sympathizers were involved in a terrorist offense per year.

the number of convictions (170) is about the same as Kurzman's estimate.¹¹¹

The upshot of this analysis is that even among the small minority of American Muslims with pro-terrorist attitudes, only a tiny percentage, as little as one in 100,000 and as much as about one in 1,000, act on these beliefs in any given year. Given the small number of attacks, attempts and possibly thwarted attacks, the vast majority of strong believers in terrorism will not commit any terror offense in their lifetimes. For this reason, if an informant or agent finds a Muslim-American who believes in terrorism, but has not even begun to plan a specific terrorist offense, it is extremely unlikely that that individual would ever actually engage in terrorism on his or her own. Thus, government attempts to induce such individuals are virtually incapable of preventing attacks, and are therefore a waste of counterterrorism resources. Indeed, if this analysis is correct, thousands of sting operations would likely have to be carried out to prevent a single attack. As discussed in more detail in the following argument, terrorism research supports this analysis, with pyramid models in which terrorists constitute a tiny proportion of passive sympathizers.¹¹²

4. Implications

Creating an elaborate scheme to induce a law-abiding individual with pro-terrorist sympathies to commit a terrorist offense is thus an extremely inefficient use of resources, and likely a complete waste of time, squandering resources that could be

¹¹¹ See Clark McCauley & Sophia Moskalenko, *Toward a Profile of Lone Wolf Terrorists: What Moves an Individual from Radical Opinion to Radical Action*, 26 *TERRORISM & POL. VIOLENCE* 69, 72 (2014) (estimating that one in one hundred in the United Kingdom and the United States become involved in terrorism, based on higher estimates of the number of convictions and much lower estimates of the U.S. Muslim population, than used in this Article); David H. Schanzer, *No Easy Day: Government Roadblocks and the Unsolvably Problem of Political Violence: A Response to Marc Sageman's "The Stagnation in Terrorism Research"*, 26 *TERRORISM & POL. VIOLENCE* 596, 598 (2014) (noting a "very low incidence of violent extremism"); Huq, *supra* note 64, at 876-77 (noting the tiny proportion of American Muslims involved in terrorism); BRIAN MICHAEL JENKINS, *STRAY DOGS AND VIRTUAL ARMIES: RADICALIZATION AND RECRUITMENT TO JIHADIST TERRORISM IN THE UNITED STATES SINCE 9/11*, at 4-7, 8-10 (2011).

¹¹² See *infra* note 138 and accompanying text.

used on strategies with a less remote possibility of preventing an attack. Depending on the case, a sting operation targeting a law-abiding terror sympathizer could easily cost millions of dollars. These expenses could include paid informants (some of whom have been paid hundreds of thousands of dollars) working for months to persuade and groom the defendant, the need to procure fake bombs and other equipment, and extensive supervision by FBI and/or other law enforcement. A single case could potentially require hundreds of hours of work time from government agents.

In short, support for some terrorist actions, taken alone, is an extremely weak predictor of actual terrorist activity. Even statements of one's intention to engage in an attack may be a rather weak predictor as well, if such statements were imaginative macho posturing, a part of a pattern of lies and exaggerations, or otherwise unlikely to lead to action. For example, viewed in the context of Cromitie's penchant for boasting about daring exploits which had never occurred, his statements about terrorism were not indicative of future action (as the judge in the case herself strongly believed).¹¹³

In contrast, specific statements of one's intentions to carry out an attack in the near future, or any indication of real planning or preparation for a terrorist attack, would more realistically indicate that the individual is least somewhat likely to engage in a real attack. In any case, the government should rely on evidence-based assessments of previous terrorist attacks to ascertain signs that distinguish a real attacker from a passive yet big-talking sympathizer.

If the government identified thousands of terror sympathizers and tried to induce them all, prosecuting only those few who willingly went along with the plan without hesitation and persuasion, then there might be less concern about entrapment—though civil liberties concerns would certainly arise from this mass speech-based targeting. Yet there is no indication that this is what the government is doing. If this was indeed occurring, there would likely be reports by those who had been unsuccessfully targeted for inducement by informants. (There have only been one or two such cases.)

¹¹³ See *supra* note 1 and accompanying text; *infra* note 230 and accompanying text.

Rather, it seems that whenever an informant has managed to induce a defendant, the government encourages the informant to continue. There is no record of any case in which the government initiated an attempt to induce an individual, but called off the operation, or decided against prosecution, because authorities concluded that the defendant was unable or unlikely to carry out an offense on his own. Indeed, in at least one case, the FBI was concerned that the informant was entrapping an individual, but continued the case nonetheless (and failed to reveal its concerns until after the defendant's guilty plea).¹¹⁴

B. Argument 2: The Difficulty of Predicting Terrorist Involvement

The government does not understand how terrorist groups operate When I was undercover, there were plenty of people who may have been sympathetic to a group but were very clear they didn't want to break the law or get involved in violence. And we didn't go after them.

Michael German
Former FBI agent¹¹⁵

This section demonstrates that, given the current state of empirical terrorism research, it is not possible to reliably predict whether a particular individual with some sympathy for terrorism will personally commit a terrorist offense. This supports the policy argument of this Article that the government should not waste time and money attempting to induce terror sympathizers who have not already begun to engage in or plan terrorist activity.¹¹⁶ Instead, when appropriate, hard-core terror sympathizers of particular concern might be placed under surveillance, watching

¹¹⁴ See *infra* note 212 and accompanying text. In other cases, off-the-record FBI agents have criticized other terrorism operations led by other authorities (such as the NYPD), because of the over-involvement of the informant in the defense. See William K. Rashbaum & Joseph Goldstein, *Informer's Role in Terror Case Is Said to Have Deterred F.B.I.*, N.Y. TIMES (Nov. 21, 2011), <http://www.nytimes.com/2011/11/22/nyregion/for-jose-pimentel-bomb-plot-suspect-an-online-trail.html>.

¹¹⁵ Eric Umansky, *Department of Pre-Crime*, MOTHER JONES (Feb. 29, 2008, 4:00 AM), <http://www.motherjones.com/politics/2008/02/department-pre-crime>.

¹¹⁶ See *infra* Part III.A.

for signs of moving beyond talk to action.¹¹⁷ This section's argument also undermines the claim, implied even in one U.S. Court of Appeals decision, that anyone induced by informants is dangerous because he or she is more vulnerable to recruitment attempts by real terrorists.¹¹⁸

1. What We Do Know About Why Someone Becomes a Terrorist

The study of terrorism—in particular, the question of why a particular individual become a terrorist—is widely acknowledged to be empirically under-developed. As one recent review notes, “the number of [terrorism] studies based on systematic empirical analysis is surprisingly limited.”¹¹⁹ In 1988, one researcher remarked that “[t]here are probably few areas in the social science literature in which so much is written on the basis of so little research.”¹²⁰ A study a decade later drew similar conclusions, finding that eighty percent of terrorism articles were based on previous data.¹²¹ One recent article noted that “[s]tatistical study of lone wolf terrorists has barely begun.”¹²² This is significant,

¹¹⁷ A detailed discussion of the nature of and the legal bases for such surveillance is beyond the scope of this Article. In some cases, informants might be hired to keep an eye on the suspect, without trying to induce an offense. In other cases, surveillance of phone calls or electronic communications may be warranted. The question of under which circumstances these options would be legal or desirable is a complex one, and merits careful consideration. Some may argue that inducing law-abiding suspects is necessary because long-term surveillance is too expensive or intrusive, or because that is the only way to prevent them from carrying out attacks. Yet this ignores the fact that spending resources on sting operations means that fewer resources will be available to keep other suspects (who may be just as, or more, likely to one day commit an attack) under surveillance.

¹¹⁸ See *United States v. Cromitie*, 727 F.3d 194, 207-08 (2d Cir. 2013).

¹¹⁹ Gary LaFree & Laura Dugan, *Research on Terrorism and Countering Terrorism*, 38 CRIME & JUST. 413, 414 (2009).

¹²⁰ ALEX P. SCHMID & ALBERT J. JONGMAN, *POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATA BASES, THEORIES AND LITERATURE* 179 (2d ed. 1988).

¹²¹ See Andrew Silke, *The Devil You Know: Continuing Problems with Research on Terrorism*, 13 TERRORISM & POL. VIOLENCE 1 (2001).

¹²² McCauley & Moskalenko, *supra* note 111, at 81. More generally, terrorism expert Jeffrey Simon recently warned his readers to “[b]e skeptical of statistics on lone wolf terrorism,” since, “[a]s misleading as statistics can be for overall terrorism, it is worse for lone wolf terrorism,” due to the small size of the available databases. JEFFREY D. SIMON, *LONE WOLF TERRORISM: UNDERSTANDING THE GROWING THREAT* 239 (2013).

given that a large proportion of post 9/11 terrorist attacks in the United States have been the work of individuals acting alone.

Marc Sageman, a leading terrorism researcher who was a CIA agent for twelve years, wrote in 2014 that “[d]espite over a decade of government funding and thousands of newcomers to the field of terrorist research, we are no closer to answering the simple question of ‘What leads a person to turn to political violence?’”¹²³ He makes clear that those within government do not have access to more accurate predictive models than those in academia. Indeed, Sageman notes that “[t]he major request from [the intelligence community] is help to distinguish the very few true positives that will turn to violence from the vast majority of false positives—young people who brag and pretend that they are tough and dangerous, but, in fact, just talk, talk, talk, and do nothing.”¹²⁴ Sageman reports that the search for such distinguishing indicators has so far been largely fruitless. Some scholars suggest that the quest to discover what exactly explains why one individual and not another turns to terrorism is ultimately quixotic, due to the inherent difficulty of predicting individual life choices.¹²⁵

In explaining why an individual engages in terrorism, contemporary researchers tend to note that no regular pattern prevails; instead, a complex interplay of factors is involved in each instance.¹²⁶ Personality traits alone are not reliable predictors of terrorist activity.¹²⁷ Nor do terrorists frequently suffer from particular mental illnesses or psychological disorders (though certain disorders may be somewhat more common among some types of terrorists).¹²⁸ One researcher claims that “[w]hat limited data we have on individual terrorists . . . suggest that the

¹²³ Sageman, *supra* note 2, at 565.

¹²⁴ *Id.* at 575.

¹²⁵ See Jessica Stern, *Response to Marc Sageman’s “The Stagnation in Terrorism Research”*, 26 TERRORISM & POL. VIOLENCE 607, 607 (2014) (“It is difficult to make gross generalizations about what leads individuals to do what they do in any area of life; difficulty in answering this question is not unique to terrorism experts.”); Schanzer, *supra* note 111, at 598; RAFFAELLO PANTUCCI, A TYPOLOGY OF LONE WOLVES: PRELIMINARY ANALYSIS OF LONE ISLAMIST TERRORISTS 6-7 (2011).

¹²⁶ See RAMÓN SPAALJ, UNDERSTANDING LONE WOLF TERRORISM: GLOBAL PATTERNS, MOTIVATIONS AND PREVENTION 49 (2012).

¹²⁷ *See id.*

¹²⁸ *See id.*

outstanding common characteristic of terrorists is their normality.”¹²⁹ Attempts to create a standard terrorist profile have failed.¹³⁰ Beyond the fact that jihadi terrorists are overwhelmingly young and male, and somewhat more likely than the general Muslim population to be converts and middle-class, few generalizations are possible.¹³¹

Scholars and government entities have elaborated various models charting the typical steps of terrorist radicalization, but these models have not been empirically validated in any rigorous way.¹³² In fact, critics have noted that the models tend to falsely imply that anyone with certain beliefs or behaviors will eventually progress into terrorist involvement. These flawed models (sometimes supplemented by Islamophobic stereotypes) may have served to justify the government’s policy of inducing passive sympathizers with no apparent signs of capacity or inclination for real terrorist activity.¹³³ As summarized by former FBI agent Michael German: “FBI agents have been inundated with bigoted training materials that falsely portray Arabs and Muslims as inherently violent. The FBI also has embraced an unfounded theory of ‘radicalization’ that alleges a direct progression from adopting certain beliefs, or expressing opposition to U.S. policies, to becoming a terrorist.”¹³⁴

Taking this “conveyor belt” model of radicalization to absurd extremes, best-selling atheist author Sam Harris has actually

¹²⁹ Martha Crenshaw, *The Causes of Terrorism*, 13 COMP. POL. 379, 390 (1981).

¹³⁰ See Paul Gill, John Horgan & Paige Deckert, *Bombing Alone: Tracing the Motivations and Antecedent Behaviors of Lone-Actor Terrorists*, 59 J. FORENSIC SCI. 425, 433 (2014).

¹³¹ See *id.*

¹³² See Michael King & Donald M. Taylor, *The Radicalization of Homegrown Jihadists: A Review of Theoretical Models and Social Psychological Evidence*, 23 TERRORISM & POL. VIOLENCE 602, 615 (2011).

Considering the discrepancies and the commonalities among the five models, and the lack of empirical research verifying the factors and processes within these models, no one model can be distinguished as being more accurate than any other. This conclusion does not only apply to the models reviewed in this article, but can be generalized to most descriptions of radicalization in the broader field of terrorism studies.

Id.

¹³³ See KUNDNANI, *supra* note 56, at 115-52.

¹³⁴ German, *supra* note 71.

suggested that the government kill those with pro-terrorist ideologies, since “[s]ome propositions are so dangerous that it may even be ethical to kill people for believing them.”¹³⁵

To be sure, certain advances in terrorism research over the last few decades have increased our understanding of why people become terrorists. Yet while these findings may identify features that increase the likelihood of eventual terrorist involvement, they do not enable officials to accurately predict whether a particular individual will become a terrorist. This is due to the rarity of terrorist crimes (which provides a limited number of empirical data points), the larger pool of fellow-travelers who will never act, and the incredible variety of personal pathways toward terrorism.

In most cases, even if a particular individual exhibits characteristics or warning signs associated with terrorism (beyond sympathy for terrorism alone), it would still probably be a waste of time and resources to draw the individual into an elaborate sting operation. This is because often the risk factor (such as social isolation, or visiting pro-terrorist websites) may be prevalent enough in the general non-terrorist population as to be only very weakly predictive of real terrorist activity.

For example, one study of lone terrorists found that about half were described as socially isolated.¹³⁶ While this is a higher rate of isolation than in the general population, most socially-isolated people (even those with pro-jihadist ideologies) will never engage in terrorism, and many terrorists will not be loners. For example, Nidal Hassan, the post-9/11 terrorist who caused the most deaths, was a prime example of a loner, as was the Unabomber. Yet neither of the Boston bombers was a typical loner: Tamerlan Tsarnaev had married and fathered a child, and Dzhokhar was outgoing and popular. Whether a particular terrorism sympathizer is a loner probably has negligible value in predicting whether the individual will act.

In some cases, however, the presence of particularly strong indicators, or multiple risk factors, might reasonably lead to a higher level of surveillance, or even a sting operation. Certainly,

¹³⁵ SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* 52-53 (1st ed. 2004).

¹³⁶ See Gill, Horgan & Deckert, *supra* note 130, at 434 (“53% were characterized as socially isolated by sources within the coded open-source accounts.”).

studies have shown that terrorists tend to tell others, in particular family members, about their plans to commit terrorist attacks, and any such statements of intention call for a response. This could include, for example, arrest, the initiation of a sting operation, or simply more intensive surveillance. It is important to understand, however, as noted above, that the presence of certain characteristics or behaviors associated with terrorism will still be a relatively poor predictor of terrorist involvement, since many people will share these characteristics and yet fail to engage in any terrorist offense.¹³⁷ Focusing unduly on these characteristics will prevent the identification of real terrorists, as many of them do not exhibit these characteristics.

The “pyramid” model developed by McCauley and Moskalenko illustrates well the rarity of terrorist action within a much larger field of terrorist sympathy.¹³⁸ They posit that a relatively large proportion of Muslims may believe that Islam is under attack from Western crusaders, but only a certain proportion of them think that jihadis are actually defending against this attack, and only some of the people who regard jihadis as defending Islam believe their actions to be just. Finally, only a small proportion of those who consider violent jihad to be just think that Muslims have a duty to support or become jihadists. While it is unclear whether all the layers of the pyramid model have empirical support, their broader insight, that jihadis arise from a much larger pool of those ideological supportive of terrorism, is undoubtedly valid.

¹³⁷ See *id.* at 433.

Thus, no clear profile emerged from the data. Even if such a profile were evident, however, an over-reliance on the use of such a profile would be unwarranted because many more people who do not engage in lone-actor terrorism would share these characteristics, while others might not but would still engage in lone-actor terrorism.

Id.

¹³⁸ Clark McCauley & Sophia Moskalenko, *Mechanisms of Political Radicalization: Pathways Toward Terrorism*, 20 *TERRORISM & POL. VIOLENCE* 415, 416-17 (2008); see also JORDAN ELLENBERG, *HOW NOT TO BE WRONG: THE POWER OF MATHEMATICAL THINKING* 166-71 (2014) (discussing the dangers of interpreting algorithms for identifying terrorists, since they could easily flag large numbers of innocent people as terrorists).

2. The Recruitment Question

Just as no one can reliably predict which individual of the large pool of passive terrorism sympathizers will become a terrorist, no one can reliably predict who is likely to be recruited by terrorists. One scholar—Professor Dru Stevenson—and one Court of Appeals decision appear to suggest that any person capable of being persuaded by an informant to commit a terrorist offense must be dangerous and worthy of prosecution, because such an individual might be recruited by real terrorists.¹³⁹ In other words, they appear to believe that successful inducement into terrorism by an informant should be seen as a predictor of real terrorist involvement, justifying the inducement, regardless of its content. The research on terrorism provides reason to discount this argument.

Yet before reviewing this research, it may be useful to point out that this logic would never be used in other areas of law. No one would think to set up sting operations to see if the government can convince law-abiding young people to join a violent street gang, reasoning that if the government informant can convince them, a real gang should be able to convince them as well. This is despite the fact that there are about two thousand gang-related homicides in the United States every year, many times the average number of terrorism deaths per year since 9/11.¹⁴⁰ The reasons that this would be an absurd policy—such as the fact that most teens will never experience gang recruitment attempts—apply equally to the terrorism context.¹⁴¹

Indeed, there is no evidence of widespread terrorist recruiting efforts in the United States. Marc Sageman claims that not a single recruiter has been found in the United States since 9/11.¹⁴² This is only a slight overstatement. No more than a small handful of genuine face-to-face recruitment attempts have been

¹³⁹ See Stevenson, *supra* note 57, at 143-44.

¹⁴⁰ See *National Youth Gang Survey Analysis*, NAT'L GANG CENTER, <http://www.nationalgangcenter.gov/survey-analysis/measuring-the-extent-of-gang-problems> (last visited June 5, 2015).

¹⁴¹ The main difference is the potential for mass casualties from a terrorist attack, as evidenced by 9/11.

¹⁴² See Sageman, *supra* note 2, at 567.

identified.¹⁴³ The chance that a particular American Muslim, or a particular terror sympathizer, would be physically approached by a terrorist recruiter is thus incredibly small.

Internet recruitment may be a somewhat different matter. Since 9/11, some individuals, most notably Nidal Hassan, committed terrorism offenses after online exposure to jihadist ideology, or electronic communication with terrorists. However, it is unclear whether this involved individuals who were self-radicalized and then sought out terrorist connections, as opposed to being actively recruited by terrorists. More recently, a handful of people have communicated with ISIS terrorists online, and tried to travel to the region. Because several of the ISIS-related prosecutions have resulted from government informant investigations, it is unclear whether they represent true cases of ISIS recruitment. The government is reportedly monitoring about a dozen Americans who have traveled to the region and may have joined ISIS.¹⁴⁴

Thus, since the emergence of ISIS, the threat of recruitment—primarily through social media—may have increased. However, this does not mean that sting operations against previously law-abiding Muslims will prevent recruitment. The pool of people who could conceivably be recruited is quite large, because it includes anyone either already sympathetic to terrorism, or who is impressionable enough to be manipulated by pro-terrorist websites and personal communication. Yet only a tiny proportion of this group will actually attempt to join ISIS or engage in other terrorist activity. It is extremely unlikely that government informant attempts to recruit such individuals will succeed in catching the very same individuals who would have become self-radicalized or recruited into terrorist involvement. Only if the suspect is already in contact with real recruiters, or actively reaching out to jihadi groups with an intent to participate

¹⁴³ To describe these cases briefly, several Somali American youths in Minnesota were recently recruited into Al-Shabaab, a few Yemeni-Americans from the Buffalo area were recruited briefly into a terrorist training camp, and a Virginia imam convinced a few followers to attend a terrorist training camp.

¹⁴⁴ See Dina Temple-Raston, *Court Order May Signal New Approach to Preventing Radicalization*, NPR (Jan. 29, 2015, 5:03 AM), <http://www.npr.org/2015/01/29/382326933/court-order-may-signal-new-approach-to-preventing-radicalization>.

in terrorism, could a sting operation realistically prevent terrorism.¹⁴⁵

Research on terrorism recruitment (based necessarily on foreign examples) has shown that recruitment overwhelmingly occurs within existing social networks of families and friends.¹⁴⁶ Summarizing his own research, Sageman explains that “joining al Qaeda was based on pre-existing friendship and kinship, and that the evolving group of future perpetrators seemed more akin to a ‘bunch of guys’ than a formal ‘terrorist cell,’ with well-defined hierarchy and division of labor.”¹⁴⁷ The existence of terrorists within one’s immediate social network may be the only highly predictive risk factor for recruitment into terrorism.¹⁴⁸

In rejecting Cromitie’s outrageous government conduct argument, the Court of Appeals for the Second Circuit noted that the defendant failed to offer any evidence that “\$250,000 (plus assorted other benefits) was more than might plausibly be required to purchase the services of a person willing to recruit and lead a team to launch Stinger missiles at an air force base and bomb synagogues.”¹⁴⁹ The court further opined, without further explanation, that “[w]hatever the going rate for such terrorist activities, only an offer significantly higher would require us to consider whether due process limits had been exceeded.”¹⁵⁰

The problem with this is that the Court of Appeals assumed there is a “going rate” for that kind of activity. Yet there is no evidence that terrorists recruit by offering large sums of money to potential participants.¹⁵¹ Nor is there any record of terrorists

¹⁴⁵ In such cases conspiracy or material support charges might often be successfully prosecuted even without a sting operation.

¹⁴⁶ See Sageman, *supra* note 2, at 567.

¹⁴⁷ *Id.*; see also Huq, *supra* note 64, at 886.

¹⁴⁸ See Huq, *supra* note 64, at 886; Anja Dalgaard-Nielsen, *Violent Radicalization in Europe: What We Know and What We Do Not Know*, 33 *STUD. IN CONFLICT & TERRORISM* 797, 801 (2010) (“Their key contention is that violent radicalization is about who you know—radical ideas are transmitted by social networks and violent radicalization takes place within smaller groups, where bonding, peer pressure, and indoctrination gradually changes the individual’s view of the world.”).

¹⁴⁹ *United States v. Cromitie*, 727 F.3d 194, 221 (2d Cir. 2013).

¹⁵⁰ *Id.*

¹⁵¹ The only partial exception does not involve giving money directly to terrorists. It is an established practice for Palestinian terrorist groups to promise suicide bombers that their families will receive stipends after their death. See JIMMY GURULÉ,

fixating on a particular reluctant individual and offering inducement after inducement until he or she finally caves in. If Cromitie had offered a review of the literature showing that this is simply not how terrorists have ever been recruited, that should have sufficed as proof that the inducement was outrageous government conduct.

My reasoning for that claim is as follows. Terrorism rulings should be evidence-based, rooted in a realistic understanding of how terrorism works.¹⁵² Luring people into terrorism in ways never attempted by real terrorists, absent evidence that the individual was truly likely to engage in terrorism on his or her own, should qualify as outrageous government conduct or entrapment. If it does not, these doctrines cannot fulfill their function of stopping law enforcement from prosecuting people for crimes they would have never committed on their own.

The argument that anyone successfully induced by informants is predisposed to terrorism fails to recognize how impressionable people are in general. In some of the most compelling cases of entrapment, the informant was a charismatic man with a history of fraud and manipulating others, who befriends a passive, underachieving (often much younger) defendant with little personal initiative.¹⁵³ It is not difficult to imagine that such scenarios may lead young men to agree to do things they never would have done on their own. As the Milgram experiments demonstrated, perfectly normal people are willing to give near-lethal, or even lethal, shocks to strangers if strongly encouraged to do so.¹⁵⁴

Perhaps among those with pro-terrorist attitudes, a significant percentage would commit some terrorist crime, given the right incentive or a sufficiently charismatic informant. Even if true, such operations would still be a waste of time, given the tiny probability that any terror sympathizer will ever participate in

UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM 26 (2008).

¹⁵² See Avidan Y. Cover, *Presumed Imminence: Judicial Risk Assessment in the Post-9/11 World*, 35 CARDOZO L. REV. 1415 (2014).

¹⁵³ See Norris & Grol-Prokopczyk, *supra* note 17, at 131, 135-37.

¹⁵⁴ See Kevin A. Smith, Note, *Psychology, Factfinding, and Entrapment*, 103 MICH. L. REV. 759, 772-74 (2005); Anders Kaye, *Does Situationist Psychology Have Radical Implications for Criminal Responsibility?*, 59 ALA. L. REV. 611, 617 (2008).

terrorism. In Judge Posner's terms, these sympathizers capable of being induced are "objectively harmless," since they are not in the position to actually carry out a terrorist attack, and are unlikely ever to do so.¹⁵⁵

Going further, it may be that some of the "weak-minded" people convinced by government informants to engage in terrorism are actually less likely to become terrorists than others. As noted above, such a person would be unlikely to ever be approached by a real terrorist recruiter, given the small numbers of recruiters. Even if they had been, some of them are probably so inept or otherwise unimpressive that (as Judge Colleen McMahon said of James Cromitie) no "real terrorists" would have "bothered themselves" with them.¹⁵⁶ Consequently, the only feasible possibility is that such a person would become a solo terrorist (since in that case, no recruitment is necessary). Yet a weak-minded, impressionable, and passive individual would normally lack the initiative to do something as bold and independent as single-handedly plan and execute a terrorist attack.

Indeed, many of the individuals induced by government agents, such as Hamid Hayat, James Cromitie, and Jose Pimentel, were considered to be under-achieving losers.¹⁵⁷ Hayat was so passive that he seemed willing to confess to whatever contradictory schemes the FBI interrogators suggested, leading to what one veteran FBI agent believes was a false confession.¹⁵⁸ Christopher Cornell, who was recently arrested in a terror sting, was described as a "mama's boy" who "never left the house."¹⁵⁹

¹⁵⁵ *United States v. Hollingsworth*, 27 F.3d 1196, 1202 (7th Cir. 1994). In theory, anyone can get a gun and start shooting people, but in practice, even the most hardcore sympathizers are either not particularly eager to carry out an attack, or prefer to carry out something on a larger scale, which few people could do without technical expertise in bomb-making. *See generally* JOHN MUELLER & MARK G. STEWART, *TERROR, SECURITY, AND MONEY: BALANCING THE RISKS, BENEFITS, AND COSTS OF HOMELAND SECURITY* (2011) (arguing that, given how easy it is to commit a terror attack, the small number of attacks means there are virtually no American Muslims with an interest in committing them).

¹⁵⁶ *See supra* note 31 and accompanying text.

¹⁵⁷ *See* Norris & Grol-Prokopczyk, *supra* note 17, at 101, 127.

¹⁵⁸ *See* Arax, *supra* note 73.

¹⁵⁹ Kimball Perry & Patrick Brennan, *Father of Ohio Terror Suspect Defends 'Mama's Boy'*, USA TODAY (Jan. 16, 2015, 10:22 AM), <http://www.usatoday.com/story/news/nation/2015/01/15/terror-suspects-dad-defends-son/21799743/>.

In contrast, some real lone wolf terrorists, such as Nidal Hasan, the Tsarnaev brothers, and the Norwegian right-wing terrorist Anders Breivik, took the initiative to plan their attacks extensively. Tamerlan Tsarnaev, the architect of the Boston Marathon bombings, was an accomplished, action-oriented individual, who had trained for years as a boxer, and was considered by local observers to be one of the best boxers—or even the best boxer—in Boston. A growing literature within psychology has shown that some individuals are more “action-oriented,” while others exhibit a more passive “state-oriented” response in times of threat.¹⁶⁰ Although this research has not yet been applied to terrorism, it may be that some of the passive individuals successfully induced by informants are more “state-oriented,” and thus unlikely to act on their own. Relatedly, one terrorism researcher theorized that terrorists were “action-oriented, aggressive people who are stimulus-hungry and seek excitement.”¹⁶¹

In sum, the current state of terrorism research does not enable the government to accurately predict which individuals will become real terrorists, whether on their own or as recruits. This provides an additional reason for the FBI and other law enforcement agencies to refrain from attempting to induce individuals who have no prior involvement or current concrete plans to engage in terrorism.

¹⁶⁰ Michael D. Robinson, Brandon J. Schmeichel & Michael Inzlicht, *A Cognitive Control Perspective of Self-Control Strength and Its Depletion*, 4 SOC. & PERSONALITY PSYCHOL. COMPASS 189, 195 (2010).

¹⁶¹ Jerrold M. Post, *Terrorist Psycho-Logic: Terrorist Behavior as a Product of Psychological Forces*, in ORIGINS OF TERRORISM: PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATES OF MIND 25, 27 (Walter Reich ed., 1998).

C. Argument 3: The Distorting Effects of Cognitive Biases and Institutional Pressures

We're not being asked, 'Did the defendant commit the crime?'—whether it's larceny, murder, whatever. Now you're being asked, 'Is the defendant capable of doing a crime?' And I don't think that that is in the . . . level of understanding of the juror.

Jury Foreman
*United States v. Hamid Hayat*¹⁶²

[Y]ou can't depend on your eyes when your imagination is out of focus.

Mark Twain¹⁶³

This section argues that the cognitive errors known to infect criminal-justice decision-making are likely to be uniquely powerful in the context of terrorism stings and ensuing entrapment claims, to the extent that rational decision-making by informants, agents, prosecutors, juries and judges is nearly impossible. The cognitive errors blighting these processes are compounded by strong institutional pressures as well, which give informants, agents and prosecutors powerful incentives to go forward with even the most questionable cases. In short, it is extremely unlikely that agents and informants can make reasonable decisions regarding which law-abiding defendants to target for inducement, or that judges and juries can make even-handed decisions about whether to apply the entrapment or outrageous government conduct defenses.

The combination of these cognitive and institutional mechanisms means that, as the system currently operates, prosecutions of highly dubious public safety value will likely continue, resulting in a sub-optimal resource allocation that limits the funds available to more worthy counterterrorism strategies. This supports the policy argument in Part III that law enforcement agencies should make conscious efforts to limit the

¹⁶² See Amy Waldman, *Prophetic Justice*, ATLANTIC, Oct. 2006, at 82, 93, available at <http://www.theatlantic.com/magazine/archive/2006/10/prophetic-justice/305234/>.

¹⁶³ MARK TWAIN, A CONNECTICUT YANKEE IN KING ARTHUR'S COURT 436 (Bernard L. Stein ed., 1984).

use of terrorism stings, if they must be used at all, to the small proportion of cases in which they would likely prevent attacks.

Different cognitive mechanisms and institutional pressures are relevant at each stage. The initial targeting decision may be distorted by law enforcement inability to detect informant dishonesty, probability neglect, the availability heuristic, the representative bias, and the alarmist bias. The decision to continue the operation may be affected by the egocentric and confirmation biases and the sunk cost fallacy, and the decision whether to apply the entrapment defense will often be distorted by the fundamental attribution error or system justification. As for institutional pressures, the pressure to generate convictions may drive agent decision-making, and the fear of being held responsible if a person not targeted or convicted eventually commits an attack (even though such a result is extremely unlikely) may distort the judgment of jurors, judges and agents.

1. The Initial Targeting Decision

The initial decision about whether to target an individual for inducement is likely to be distorted by several cognitive biases and errors. First, in deciding whether to approve an individual's targeting, the FBI agent has to rely on the statements of the informant. Few FBI agents would have time to review all the recordings the informant had made of a potential target. Even if they did, the information may be incomplete, since informants often neglect to record particularly important conversations, and some recording attempts fail for technical reasons.¹⁶⁴

The problem with relying on informants is that they are frequently dishonest and feed the FBI with false, self-serving information. For example, the operation targeting failed businessman Hemant Lakhani, a practicing Hindu from India with no previous involvement in terrorism, began after an informant told the FBI fantastic lies about Lakhani's extensive illegal arms sales and great wealth.¹⁶⁵ In fact, Lakhani was anything but wealthy, and had only participated in a few minor,

¹⁶⁴ See AARONSON, *supra* note 5, at 139, 148, 181-99.

¹⁶⁵ See KUMAR, *supra* note 56, at 38.

and perfectly legal, weapons transactions.¹⁶⁶ Moreover, the government had previously labeled the informant as “untrustworthy,” but relied on his unsubstantiated claims anyway.¹⁶⁷ In the *Cromitie* case, the informant repeatedly lied to the government during the course of the investigation, and frequently committed perjury during the trial.¹⁶⁸

Psychological research shows that people are notoriously bad at judging whether others are telling the truth.¹⁶⁹ Studies focusing specifically on law enforcement have found that they are no better than anyone else at determining others’ truthfulness.¹⁷⁰ Thus, FBI agents, and other law enforcement handlers of informants, are likely to believe even blatant lies by informants.¹⁷¹ Since most informants have a criminal record, and many have been convicted for fraud, the potential for abuse is high.¹⁷² Unfortunately, in the course of litigating entrapment and outrageous government conduct claims, the government is never obligated to disclose its original reasons for targeting a defendant. In many cases, if this reason (or lack thereof) were known, the judge and jury would likely be more skeptical of the resultant case, motivated by the unfairness of targeting an individual for no legitimate reason.¹⁷³

The second reason that initial targeting decisions are prone to cognitive error has to do with inherent cognitive problems in accurately responding to probabilities. Studies of probability neglect show that, particularly when strong emotions are in play, people tend to fixate on the possibility of a potential event,

¹⁶⁶ See *id.*

¹⁶⁷ *United States v. Lakhani*, 480 F.3d 171, 174, 176 (3d Cir. 2007).

¹⁶⁸ See *supra* note 22 and accompanying text.

¹⁶⁹ See generally Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214 (2006).

¹⁷⁰ See generally Aldert Vrij, *Nonverbal Dominance Versus Verbal Accuracy in Lie Detection: A Plea to Change Police Practice*, 35 CRIM. JUST. & BEHAV. 1323 (2008).

¹⁷¹ Saul M. Kassin, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187, 188 (2003) (“[E]xperts’ who make [lie detection] judgments for a living—such as psychiatrists, police investigators, judges, customs inspectors, and polygraphers for the FBI, CIA, and military—are highly prone to error.”) (citations omitted).

¹⁷² See Norris & Grol-Prokopczyk, *supra* note 17, at 131.

¹⁷³ See *supra* note 20 and accompanying text.

disregarding its low probability of actually occurring.¹⁷⁴ Numerous empirical tests have found that people do not react differently even to extreme differences in probability.¹⁷⁵

As Professor Cass Sunstein has argued, because of the primal fear associated with terrorism, there is a “severe risk of probability neglect” in terrorism-related decisions.¹⁷⁶ For example, even though flying is statistically a safer mode of travel than driving, so many people opted for driving after 9/11 that an estimated 1,600 Americans died in car accidents in the year after 9/11 who would otherwise not have died.¹⁷⁷ More generally, experimental studies provide considerable evidence that individuals give undue weight to unlikely events, particularly when the potential outcomes are highly negative and evoke strong emotions.¹⁷⁸

What this means for terrorism and entrapment is that even if informants and agents know, or should know, that the likelihood of a particular individual becoming a terrorist is exceedingly low, they may overestimate the likelihood that the individual will become a terrorist, and thus decide to induce him or her, unconsciously influenced by terrorism fears.¹⁷⁹

A related cognitive mechanism is the availability heuristic. Studies of this phenomenon have found that people intuitively estimate the probability of an action occurring based on whether it easily comes to mind.¹⁸⁰ Since 9/11, given its large scale and the

¹⁷⁴ See CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* 79 (2005).

¹⁷⁵ See *id.* at 71.

¹⁷⁶ Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 *YALE L.J.* 61, 100 (2002).

¹⁷⁷ See James Ball, *September 11's Indirect Toll: Road Deaths Linked to Fearful Flyers*, *GUARDIAN* (Sept. 5, 2011, 5:54 AM), <http://www.theguardian.com/world/2011/sep/05/september-11-road-deaths>.

¹⁷⁸ See Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 *MICH. L. REV.* 1408, 1415 (2003).

¹⁷⁹ This assumes that the informants and agents would not decide to induce someone if they did not believe he was reasonably likely to become a terrorist, but this is not necessarily the case. It may be that these sting operations are meant to deter other plots, or are motivated simply by a need for terrorism-related convictions, as a result of the institutional pressures discussed below.

¹⁸⁰ See Thorsten Pachur, Ralph Hertwig & Florian Steinmann, *How Do People Judge Risks: Availability Heuristic, Affect Heuristic, or Both?*, 18 *J. EXPERIMENTAL PSYCHOL.: APPLIED* 314, 326 (2012).

enormous amount of media coverage it received, terrorism is cognitively available to most people, causing people to overestimate the likelihood of a terrorist attack.¹⁸¹ Emotionally vivid images come more easily to mind, making this effect especially powerful for terrorism.¹⁸² Informants and their law enforcement handlers may be even more likely to fall prey to this cognitive bias, and overestimate the likelihood of terrorist attacks, since terrorism should come more easily to mind to those who think about terrorism as an integral part of their daily activities.

In a similar vein, the representativeness bias causes people to think that a particular one-time event is “representative” and thus likely to recur, even if the event is in fact extraordinarily rare.¹⁸³ People cannot help but worry about a plane crash, even if they know they hardly ever occur, because imagining a single plane crash can trick their minds into thinking the event is likely. This has similar effects as the availability heuristic, causing people to overestimate the likelihood of rare events.

The “alarmist bias” may also be relevant in the terrorism-sting targeting decision. Studies have demonstrated that when people are presented with different views of a situation, they tend to find the more alarmist one more credible.¹⁸⁴ Even if someone (such as another FBI agent) suggests that a target is a run-of-the-mill terrorism sympathizer with no significant risk of actual

¹⁸¹ Cover, *supra* note 152, at 1435-36.

Though the majority did not refer to the 9/11 attacks as a factor in its decision, Judge Kermit Lipez, in his concurring opinion, felt compelled to acknowledge its influence:

“Inevitably, the events of 9/11 and the constant reminders in the popular media of security alerts color perceptions of the risks around us, including the perceptions of judges. The risks of violence and the dire consequences of that violence seem more probable and more substantial than they were before 9/11. When judges are asked to assess these risks in the First Amendment balance, we must candidly acknowledge that they may weigh more than they once did.”

Id. (quoting *Bl(a)ck Tea Soc’y v. Boston*, 378 F.3d 8, 19 (1st Cir. 2004) (Lipez, J., concurring)) (footnotes omitted).

¹⁸² See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1040 (2003).

¹⁸³ Ian Weinstein, *Don’t Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783, 809 (2003).

¹⁸⁴ See Sunstein, *supra* note 176, at 82 (quoting W. Kip Viscusi, *Alarmist Decisions with Divergent Risk Information*, 107 ECON. J. 1657, 1657-59, 1666, 1668 (1997)).

terrorist involvement, the contrary views of others may be more convincing to agents, leading them to approve questionable operations.

As Professor Andrew Taslitz argues, the individualized suspicion mandate (operative in *Terry* stops, for example) requires a certain amount of deliberation, which may correct for some cognitive biases.¹⁸⁵ To illustrate the potential power of this effect, consider the case of the hospital that asked doctors to voluntarily explain their reasons behind each C-section delivery, with no chance of being sanctioned regardless of their answer.¹⁸⁶ This requirement alone cut C-section rates from 17.5% to 11.5%, without any increase of risk to mothers or infants.¹⁸⁷ The lesson is that when people have an opportunity to stop and think about their action and report to others why they are doing something, this affects their likelihood of action. In the case of entrapment, since no finding of reasonable suspicion is required before the government decides to try to induce someone into committing a crime, there seems to be no institutional or discursive obstacle to the operation of these biases.

2. The Decision to Complete the Sting Operation

Once the informant and agent have chosen to induce an individual, a separate set of cognitive biases will work to prevent them from changing their minds and discontinuing the operation, even if it becomes clear that the suspect is reluctant or incompetent, or otherwise unlikely to independently engage in terrorism. These mechanisms overlap with those generally found responsible for convictions of the innocent.¹⁸⁸

Studies inspired by mindset theory show that once actors choose a particular course of action, they immediately begin to evaluate their actions in a less objective manner, exaggerating

¹⁸⁵ See Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 64 (2010).

¹⁸⁶ See Stephen A. Myers & Norbert Gleicher, *A Successful Program to Lower Cesarean-Section Rates*, 319 NEW ENG. J. MED. 1511, 1513-14 (1988).

¹⁸⁷ See *id.*

¹⁸⁸ See Barbara O'Brien & Keith Findley, *Psychological Perspectives: Cognition and Decision Making*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 35 (Allison D. Redlich et al. eds., 2014).

their chances of success, and disregarding information that casts doubt on the appropriateness of their actions.¹⁸⁹

Similarly, to avoid cognitive dissonance, people make every effort to interpret their actions as correct or fair, regardless of the facts. Remarkably, prosecutors tend to stick to their beliefs about a defendant's guilt even after DNA evidence proves that person was innocent and the person is freed by the courts.¹⁹⁰ This "egocentric bias," among other things, causes people to interpret evidence to avoid harming their own self-image.¹⁹¹

With similar effects, the well-documented confirmation bias influences people to seek or interpret evidence to support their already-held beliefs or hypotheses. Studies on confirmation bias have found that people tend to give more weight to confirming evidence and less weight to contrary evidence.¹⁹²

The sunk cost fallacy also likely contributes to government decisions to complete questionable sting operations. This fallacy influences individuals to continue a particular course of action, even though it is not the optimal use of resources, because of a desire to avoid wasting the resources already invested in that course of action.¹⁹³ Thus, once the government has expended resources on a particular informant operation, the reluctance to "waste" this effort may influence agents to continue an operation, even if the operation objectively lacks any public safety value.

3. Prosecutorial, Judicial, and Jury Decision-Making

The cognitive biases that could affect the judgments of prosecutors, judges and juries are somewhat different. Like the agents and informants deciding whether to induce the individual, these actors are likely to overestimate the likelihood that a particular person would commit an attack, because of the

¹⁸⁹ See *id.*

¹⁹⁰ See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 315.

¹⁹¹ Daniel S. Medwed, *The Good Fight: The Egocentric Bias, the Aversion to Cognitive Dissonance, and American Criminal Law*, 22 J.L. & POL'Y 135, 136 (2013).

¹⁹² See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

¹⁹³ See generally Marijke van Putten, Marcel Zeelenberg & Eric van Dijk, *Who Throws Good Money After Bad? Action vs. State Orientation Moderates the Sunk Cost Fallacy*, 5 JUDGMENT & DECISION MAKING 33 (2010).

mechanisms noted above. In addition to the effects of these biases, the fundamental attribution error and system justification will cause them to believe the individual is dangerous or at least deserves to be punished. This means that the prosecutor will be unlikely to decline to prosecute due to entrapment concerns, that the judge would be unlikely to apply the entrapment or outrageous government conduct defense, and that the jury would be more likely to find that the defendant was predisposed to commit the crime, defeating the entrapment defense.

Theoretically, a prosecutor might review a case and decide not to prosecute it, due to his or her judgment that the defendant was entrapped and thus does not deserve to be prosecuted. However, it is extremely rare for a prosecutor to decline to prosecute a case on entrapment grounds.¹⁹⁴ Even if there were a significant chance of prosecutors dropping charges for this reason, the cognitive biases discussed below would likely prevent them from doing so.

In practice, the judge and the jury are the most important actors in determining whether a defendant is punished for participation in a staged terrorist offense.¹⁹⁵ The judge decides what kinds of evidence may be introduced to support or oppose an entrapment or outrageous government conduct defense, decides on entrapment if it is a bench trial or if entrapment is found as a matter of law, and determines the defendant's sentence upon conviction. In many cases, the jury will decide on the specific questions of whether the informant induced the defendant, and whether the government has proven the defendant's predisposition.

The most significant cognitive bias influencing the decision-making of prosecutors, judges and juries is probably the fundamental attribution error. Numerous studies have

¹⁹⁴ *But see* Megan O'Matz & John Maines, *Cops. Cash. Cocaine. How Sunrise Police Make Millions Selling Drugs*, SUN-SENTINEL (Sept. 29, 2014, 10:08 AM), <http://www.sun-sentinel.com/news/interactive/sfl-cops-cash-cocaine-htmlstory.html>.

¹⁹⁵ Few terrorism cases go to a jury trial, since, as in other criminal cases, terrorism defendants are under intense pressure to accept plea deals in order to avoid the chance of a longer sentence. For this reason, the most important decision in the prosecution of the defendant (at least other than the sentence chosen by the judge) is ultimately whether to target the defendant for inducement, since no other actor in the decision-making chain of the criminal justice system is likely to put a stop to the prosecution.

demonstrated that people ascribe others' actions to their personal characteristics, rather than their situation, even when the situation is known to be the dominant factor.¹⁹⁶ Even faced with the fact that the vast majority of people would respond in the same way to a particular situation, people persist in believing that the person acted the way they did because of their character—which, in legal terms, translates into their predisposition.¹⁹⁷ Although ideally, predisposition would not be defined in a circular manner—he did it because he was predisposed, and he was predisposed because he did it—the fundamental attribution error influences jurors to interpret predisposition in this way.¹⁹⁸ Even when extreme inducements are provided, jurors may have difficulty finding entrapment.

Interviews with jurors in the trial of Hamid Hayat provide evidence that the jury could not bring itself to follow the law and make a finding of entrapment. In the wake of the trial, one juror said that she thought Hayat had been entrapped, but was intimidated by the foreman to vote against entrapment.¹⁹⁹ According to the foreman, only one juror thought Hayat would have carried out any act of terrorism on his own.²⁰⁰ That should have been sufficient to prevent a finding of predisposition.

Yet as the foreman described the jury's decision in an interview, the jury did not "want to see the government lose its case," given "what we know of how people of his background have acted in the past."²⁰¹ The reference to his background appears to relate solely to his Pakistani or Muslim origins. Ultimately, the foreman thought such questions were not suited to juries. As he presciently observed, "We're not being asked, 'Did the defendant commit the crime?'—whether it's larceny, murder, whatever. Now you're being asked, 'Is the defendant capable of doing a crime?'"

¹⁹⁶ See Smith, *supra* note 154, at 764.

¹⁹⁷ See *id.* at 761.

¹⁹⁸ See *id.*

¹⁹⁹ See Demian Bulwa, *Juror Tells of Pressure to Convict Terrorism Suspect*, S.F. GATE (Apr. 28, 2006, 4:00 AM), <http://www.sfgate.com/bayarea/article/SACRAMENTO-Juror-tells-of-pressure-to-convict-2536440.php>.

²⁰⁰ See Waldman, *supra* note 162, at 92.

²⁰¹ *Id.* at 93.

And I don't think that that is in the . . . level of understanding of the juror."²⁰²

There is no reason to believe that judges are less likely to be influenced by cognitive biases. Several studies examining judges' decision-making for cognitive errors have found that judges are just as likely as non-judges to be affected by these biases.²⁰³ For example, one study demonstrated that judges tended to make intuitive, rather than deliberative, decisions, at levels on par with those by undergraduates.²⁰⁴ Another experiment found that viewing a confession judges considered to have been coerced increased their likelihood of convicting a suspect, an effect also exhibited by undergraduates.²⁰⁵ Other studies have shown that judges are also affected by the egocentric bias, and by racial biases as well.²⁰⁶

Another cognitive mechanism relevant to entrapment claims is system justification. Most people believe that the social order is basically just, and prefer to interpret situations in ways that support this belief. Scholars have identified "an amorphous but widespread belief that those who are charged with crimes are probably guilty of something, regardless of the outcome of the trial."²⁰⁷ This mechanism makes it difficult for judges or juries to believe that the government unfairly induced someone who would not have committed an offense on his or her own.

²⁰² *Id.*

²⁰³ See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19 (2007) ("In recent years, however, we have conducted several studies involving hundreds of federal and state trial judges around the nation, and we have found that judges commonly encounter stimuli on the job that induce intuitive reactions, though they occasionally demonstrate an ability to override those intuitive responses."); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

²⁰⁴ See Guthrie et al., *supra* note 203, at 17.

²⁰⁵ See D. Brian Wallace & Saul M. Kassin, *Harmless Error Analysis: How Do Judges Respond to Confession Errors?*, 36 LAW & HUM. BEHAV. 151, 152-53 (2012).

²⁰⁶ See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 JUDICATURE 44, 50 (2002).

²⁰⁷ Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1304 (2000).

4. Institutional Pressures

Powerful institutional factors—in particular, the pressure to generate convictions and the fear of being individually held responsible for an attack—also probably increase the likelihood that individuals will be selected for entrapment, and then successfully prosecuted and sentenced to prison, even though they would never have committed a terrorist offense on their own. Informants are under enormous pressure to facilitate convictions for their law enforcement handlers, lest they be deported for immigration violations, convicted of a crime, or deprived of expected payments for their work. FBI agents are also under considerable pressure to generate convictions, and now that terrorism is such a large proportion of the FBI’s budget, there is likely specific pressure to achieve terrorism convictions.²⁰⁸

This pressure might be effective even if individual FBI agents are well aware that a particular suspect is harmless. Research on the FBI during COINTELPRO²⁰⁹ showed that central FBI authorities put repeated pressure on regional agents to take action to “expose, disrupt, misdirect, discredit, or otherwise neutralize” certain social movements and activists, even if the activists were not involved in protest activities at the time, and posed no apparent threat to anyone.²¹⁰ This demonstrates that the FBI has a history of pressuring its agents to carry out policies that had no public safety value and violated citizens’ constitutional rights.²¹¹ The fact that the FBI engaged in such practices decades

²⁰⁸ See AARONSON, *supra* note 5, at 234.

²⁰⁹ Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1080 (2002) (providing an overview of the history of COINTELPRO).

²¹⁰ *Id.* at 1094 (quoting a 1967 memorandum from J. Edgar Hoover); see also David Cunningham & Barb Browning, *The Emergence of Worthy Targets: Official Frames and Deviance Narratives Within the FBI*, 19 SOC. F. 347, 350 (2004).

²¹¹ See Holland, *supra* note 5.

The FBI can’t exactly spend \$3 billion and say, Hey; you know what? We spent your money and we didn’t find any terrorists. Even though the truth is that there’s a lot of money for counter-terrorism and just not a lot of terrorists going around today. What happens is that these sting operations are a very convenient mechanism for the FBI to say, Hey look at us. We’re keeping you safe.

From the highest levels of the FBI, there’s pressure to build counter-terrorism cases because they just received \$3 billion from Congress and that

ago does not mean it will do so again, but it should make reoccurrences less surprising.

In the entrapment and terrorism context, there has been at least one case in which the FBI was concerned that the informant was entrapping the individual, but went ahead with the case anyway. As mentioned earlier, Sami Hassoun never showed any sympathy for jihadi terrorism—not even after he was recruited by the informant—and only invented a terrorist scheme because the informant told him he would pay him millions of dollars to carry one out. When questioned by the judge about his motives, Hassoun could think of nothing to say, aside from a vague desire that the bombing embarrass the mayor of Chicago. The FBI's memo expressing concern that Hassoun was being entrapped was only released after Hassoun's guilty plea.²¹²

Juries, judges and agents are also likely influenced by the reality that, if they do not secure the conviction of even a seemingly harmless individual, they might be held individually responsible if that individual somehow ends up actually committing a terrorist attack. These actors might feel so afraid of the consequences of being blamed for an attack that they are willing to waste considerable taxpayer money (and misapply the law, in the case of judges and juries) to avoid such an outcome.²¹³

In contrast, the cost of ignoring other, worthier leads, or failing to invest in effective counterterrorism strategies is less likely to be individualized.²¹⁴ If the FBI had not been spending so many resources on inducing so many people into fake terrorism offenses, more resources would have been available for other activities. This might have enabled the FBI to prevent the Boston Marathon attacks. Russian intelligence warned the FBI about the Tsarnaev brothers' radical contacts in Russia, but the FBI never

pressure then flows down to the field offices, which then, in turn, put pressure on individual agents to build counter-terrorism cases and those individual agents then incentivize informants who can make hundreds of thousands of dollars per case.

Id.

²¹² See *FBI: Informant Close to Entrapping Would-Be Bomber*, ASSOCIATED PRESS (Feb. 4, 2013, 8:39 PM), <http://bigstory.ap.org/article/fbi-informant-close-entrapping-would-be-bomber>.

²¹³ See IAN S. LUSTICK, TRAPPED IN THE WAR ON TERROR 88 (2006).

²¹⁴ See Huq, *supra* note 64, at 873.

managed to put them under any ongoing surveillance. In the case of the “underwear bomber,” who failed in his Christmas day attack only because his bomb did not detonate properly, the bomber’s father (a Nigerian public official) informed the U.S. government that his son was involved in terrorism. Yet no one ever followed up on this information. The diffusion of responsibility (“the problem of many hands”) often prevents individuals from being held accountable for failing to make a decision that could have been made by any number of different people.²¹⁵

5. Discussion

A critic might point out that many of the same cognitive errors and institutional pressures are present in many other areas of law as well. This raises the question of why they matter so much in this context, that they make the inducement of law-abiding individuals into terrorist offenses inadvisable. There are four reasons why these mechanisms have an even stronger effect in terrorism cases than in others, making it particularly difficult for actors to make rational decisions about targeting and prosecuting each suspect.

First, the unique threat associated with terrorism—with each attack theoretically capable of killing large numbers of people—likely magnifies several cognitive mechanisms. When strong emotions are involved, people tend to make intuitive judgments rather than deliberative ones.

Second, as reviewed previously, the fact that terrorism is so rare, even among terrorism sympathizers, makes it particularly difficult to align decision-making with the true probabilities of events. Few other areas of law involve such extensive efforts to eliminate such rare behaviors. For example, there were over 16,000 non-terrorist murders in the United States in 2010. Since 9/11, there have been only an average of two jihadi terrorism deaths per year.²¹⁶ The slim chance of any particular law-abiding

²¹⁵ Jesse J. Norris, *Rethinking Accountability in New Governance*, 27 INNOVATION: THE EUR. J. OF SOC. SCI. RES. 199, 217 (2014).

²¹⁶ According to one count, there have been twenty-six deaths from jihadi terrorism in the thirteen years since 9/11. See *Deadly Attacks Since 9/11*, *supra* note 103. Only

person becoming a terrorist makes the predisposition decision entirely different from a more typical entrapment case presented to a jury, in which people involved in repeated (often addictive) behaviors are provided with an opportunity to commit the behaviors again. Only in terrorism-related entrapment cases are juries and judges tasked with making decisions involving such minute probabilities.

Finally, the institutional pressures involved are rather strong as well, with informants often dependent on FBI money or desperate to avoid deportation or criminal prosecution, law enforcement agents focused overwhelmingly on terrorism yet with few major convictions (other than stings) to show for all their work, and juries, judges and agents fearful of blame for future attacks.²¹⁷ Since a single attack could potentially kill thousands of people, this fear of being held responsible may be considerably magnified.

The distorting effect of these cognitive and institutional mechanisms suggest that sting operations should not be used in terrorism at all. Yet even if this tactic is not completely abandoned, limiting it to a much smaller number of cases will reduce the overall scale of potential error and injustice.

D. Argument 4: The Low Probability of Deterrence

One possible justification for terrorism stings, even those targeted at individuals with little chance of independently committing terrorist acts, is that they will have a deterrent effect. The reasoning is that terrorists will be more wary of engaging in terrorist conspiracies, since one of their co-conspirators may well be a government informant.²¹⁸ Admittedly, it is possible, if somewhat doubtful, that widespread infiltration would decrease the frequency of terrorist conspiracies. Yet it is also appears likely that terrorism sting operations increase the risk of terrorism in other ways, potentially cancelling out any deterrent effect.

Current academic analyses of deterrence and terrorism have concluded that organized terrorists are the most vulnerable to

jihadi terrorism is mentioned here, because of this Article's focus on the inducement of Muslims.

²¹⁷ See LUSTICK, *supra* note 213, at 44.

²¹⁸ See Stevenson, *supra* note 57, at 182-83.

deterrence, since they make decisions in a top-down fashion.²¹⁹ More decentralized terrorist cells are considered to be relatively poor candidates for any deterrence strategy.²²⁰ Yet such “leaderless jihad” now predominates in domestic terrorism.

Regardless, general deterrence of crime is not particularly well-supported empirically. Studies tend to find that general deterrence works only when certain specific conditions are present, and effects tend to be small.²²¹ Still, it is possible that the widespread knowledge of the infiltration of FBI informants in the U.S. Muslim community reduces the incidence of terrorist conspiracies, or renders such conspiracies less successful, due to mutual suspicion about potential informants.

1. Increasing the Risk of Lone-Wolf Attacks

Even if this is true, the FBI’s terrorism stings could also increase the risk of terrorism by encouraging informant-wary terrorists to operate alone, carrying out “lone wolf” attacks, which are inherently more difficult to detect. Lone wolf attacks, especially those involving shootings rather than explosives, are easy to plan and execute, given the wide availability of firearms in this country, and are likely to produce as many casualties as most bomb attacks.²²²

Of course, the government should make every effort to infiltrate any real terrorist conspiracies, despite the possible effect of making terrorists opt for the less detection-prone solo route. Yet there appear to be very few real conspiracies. If they are detected and infiltrated, this will not necessarily have the same effect as a much larger number of conspiracy convictions, inflated by the artifice of protracted attempts at inducing law-abiding people into terrorism crimes. The larger the number of publicized cases of

²¹⁹ Gregory D. Miller, *Terrorist Decision Making and the Deterrence Problem*, 36 *STUD. IN CONFLICT & TERRORISM* 132, 133 (2013) (“Deterrence is least effective when terrorist movements are fragmented, when terrorist groups are decentralized, and when individual terrorists are willing to engage in self-sacrifice.”).

²²⁰ *See id.*

²²¹ *See* Robert Apel & Daniel S. Nagin, *General Deterrence: A Review of Recent Evidence*, in *CRIME AND PUBLIC POLICY* 411 (James Q. Wilson & Joan Petersilia eds., 2011).

²²² The deadliest terrorist bombing since 9/11 (the Boston Marathon bombing) killed only three, while the deadliest terrorist shooting (Nidal Hassan) killed thirteen.

government infiltration of supposed plots, the more likely it is that they will prompt aspiring terrorists to adopt a lone-wolf strategy.

2. Decreasing Confidence in the FBI

Moreover, reacting to reports of the often inept, foolish and even mentally-ill people targeted by the FBI, potential terrorists may overestimate their ability to successfully conspire and carry out an attack, emboldening them to move from talk to action.²²³ While the mainstream media rarely criticizes terrorism prosecutions, Muslim and other alternative media sources have carried numerous stories ridiculing these convictions, and decrying them as violations of Muslims' human rights. This hardly can be expected to lead to a high level of confidence in the FBI's ability to stop genuine terrorist plots.

3. Consequences for Muslim Community Cooperation with Authorities

The prevalence of sting operations targeting previously law-abiding Muslims may decrease the cooperation of the Muslim community with the FBI, making it more difficult for the government to acquire useful intelligence and prevent attacks. For example, Muslim parents concerned about the radicalization of their children might inform the FBI if they thought the FBI would simply put them under surveillance, or perhaps try to influence them positively. But parents who know about the FBI's practice of hiring informants to persuade terror sympathizers to commit terrorist acts may be more hesitant to bring their child to the FBI's attention.²²⁴

Relatedly, observers have noted that Muslims with terrorist-related tips for the government are afraid to directly contact the government, out of an apparently reasonable fear that they may be strongly pressured or coerced into becoming government informants. Instead, some American Muslims have adopted the

²²³ See Norris & Grol-Prokopczyk, *supra* note 17, at 138-41.

²²⁴ This does not apply to parents of children who actually say they are, or otherwise appear, ready to commit an attack. In that case, the parents would probably expect the FBI to arrest them, or would not be concerned about the unfairness of government inducement.

practice of relaying their information to the government through Muslim advocacy organizations, such as the Council on American-Islamic Relations. While this may work well in some cases, it may also reduce the quantity, flow or usefulness of information.

4. Contributing to Radicalization

It is possible that sting operations targeted at people who would have been unlikely to become terrorists on their own will foster a sense of injustice among American Muslims, fostering the radicalization of at least some individuals. At least one terrorist (from the Netherlands) has indicated that an important part of his own radicalization into terrorism was the perception that his fellow Muslims were being targeted by the government simply for their radical beliefs.²²⁵ Studies have shown that the feeling that Muslims are under attack is an important motivator of many terrorists. (It is widely believed, for example, that the American invasion and occupation of Iraq raised the risk of domestic terrorism.) Engaging in what can easily be portrayed as a blatant violation of American Muslims' civil rights is likely to fuel such perceptions.²²⁶ Arguably, the cases of potential entrapment may have a more powerful effect than other perceived domestic injustices, such as widespread surveillance, because they have the concrete effect of dramatically affecting ("ruining," as many would say) individuals' lives.

Another related possibility is that the plots dreamed up by agents, informants and defendants could give real terrorists ideas about potential attacks. This may seem far-fetched, but

²²⁵ See MARIEKE SLOOTMAN & JEAN TILLIE, PROCESSES OF RADICALISATION: WHY SOME AMSTERDAM MUSLIMS BECOME RADICALS 89 (2006), available at <http://dare.uva.nl/document/2/80473>.

²²⁶ See LUSTICK, *supra* note 213, at 138; MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY 154-55 (2008).

"What the framers recognized is that you don't create the perception of repression if you allow people legitimate means for fostering change. The material-support laws criminalize conduct that in and of itself isn't typically criminal, isn't illegal." When you have cases based on such sweeping laws, argues German, "you're ostensibly hurting terrorist organizations, when in fact you're helping them. You're giving people more of a reason to become militant."

Umansky, *supra* note 115.

apparently after the sting inducing Farooque Ahmed was completed, additional security was deemed necessary for the D.C. subway, since officials worried that real terrorists might imitate the plot.²²⁷ Such a scenario may be realistic, given the prevalence of the copycat phenomenon, as seen in the recent Copenhagen attack (which closely mirrored the Charlie Hebdo/HyperCasher killings), and the domestic beheading attempts following highly-publicized ISIS beheadings.

5. Fostering Cynicism

Another potential negative effect of inducing law-abiding Muslims into committing terrorist offenses is that these operations foster cynicism and conspiracy theories among the general population. Some people, particularly in reaction to the most egregious examples of potential entrapment, may have adopted a conspiratorial view of the War on Terror, according to which there is no real threat, but only government-concocted artificial crimes. This lack of trust may reduce the cooperation and vigilance of the general public with regard to terrorism and counterterrorism efforts. One senior intelligence analyst has voiced concern that juries may become unwilling to convict even highly dangerous defendants, if high-profile entrapment cases make them cynical about the role of informants in terror convictions.²²⁸

6. Damaging Accountability

More generally, the illusion of success in fighting terrorism caused by the proliferation of stings may interfere with the process of holding counterterrorism authorities accountable. If policymakers base their views of sting operations on government press releases and mainstream media reports, they will probably believe that sting operations have been preventing real terror attacks. Even if real attacks occur (or fail only because of fortuitous detonation problems, as has happened in several cases), policymakers may be less critical and less insistent on change, if they perceive this as being counterbalanced by successful sting

²²⁷ See KUNDNANI, *supra* note 56, at 201.

²²⁸ See GREGORY F. TREVERTON, INTELLIGENCE FOR AN AGE OF TERROR 73 (2009).

operations. This distortion of accountability relations could prevent closer scrutiny of counterterrorism spending, and thus make the government less capable of preventing real attacks.²²⁹

7. Discussion

While none of these possibilities is certain, several of them are reasonably likely. For example, it seems probable that misdirected terrorism stings contribute significantly toward eroding Muslim-American trust of the government. Given the modest chance that stings aimed at law-abiding Muslims will deter true terrorists (or prevent a real terrorist attack), stings may offer no net public safety benefit, and may even harm public safety. Even if the deterrent effect of widespread sting operations is deemed to outweigh any negative counter-effects, the same deterrent effect could probably be achieved through infiltration by passive informants.

III. WHAT SHOULD THE FBI AND COURTS DO?

[A]fter reviewing the record yet again, I am left with the firm conviction that if the Government had simply kept an eye on Cromitie, and moved on to other investigations, nothing like the events of May 9, 2009 would ever have occurred.

Judge Colleen McMahon
*United States v. Cromitie*²³⁰

This author argues in another article that the government should abandon most or all terrorism stings, opting instead for passive surveillance of suspects, and shift at least some of its resources toward right-wing terrorism.²³¹ The article also contended that courts should interpret predisposition as the realistic likelihood of the defendant committing the crime without

²²⁹ In addition, one terrorism scholar notes that inducing suspects creates a risk that the person will engage in a terror attack on his own, with the knowledge gained from the informant. Greenberg, *supra* note 28 (“Aside from questions of justice, this is not a risk-free strategy: once federal agents teach someone how to commit to jihad, build a bomb or surveil a target, they cannot fully control whom that individual may relay these lessons prior to his arrest—or even afterward in a prison environment.”).

²³⁰ *United States v. Cromitie*, 781 F. Supp. 2d 211, 226 (S.D.N.Y. 2011).

²³¹ *See Norris & Grol-Prokopczyk, supra* note 17, at 166.

inducement, and refrain from permitting expressions of sympathy for terrorism to suffice in proving predisposition.²³² Legislatures or courts should ideally require reasonable suspicion of criminal activity (or plans to engage in crime) before inducing a suspect.²³³

This Part adds to these arguments by discussing when sting operations may be appropriate, and recommending the creation of administrative requirements to document and explain inducement decisions. Moreover, it analyzes in more detail how this author's proposal for interpreting entrapment doctrine will affect current predisposition analysis, and encourages courts to inquire into the original decision to target a suspect, as well as engaging in other efforts to correct for cognitive biases.

A. The FBI's Policy on Inducements

Terrorism sting operations are of no value unless the defendant is relatively likely to commit a terrorist offense without government prompting. Certainly, absent evidence that the individual had sympathy for terrorism before being approached by the informant, attempts to induce such an individual are inappropriate.²³⁴ At a minimum, there should be solid evidence, supported by relevant research, that a particular individual is far more likely than the average passive terrorism sympathizer to actually engage in terrorism.²³⁵

For anyone who has taken concrete steps to plan an attack, such as acquiring explosives or making detailed operational plans, a sting operation would certainly be one valid way to stop the individual from committing an attack. However, in such cases it is unclear why a sting operation would be needed. If more than one person has already begun planning for a terrorist act, the government should be able to arrest and prosecute them for conspiracy. If there is not yet admissible or convincing evidence of terror plans, the government can put the individuals under close surveillance and wait until enough evidence is available. In the

²³² *See id.* at 161.

²³³ *See id.* at 159.

²³⁴ *See supra* notes 25, 29, 35, 37 and accompanying text.

²³⁵ For example, someone who has told friends and family he or she intends to commit an act of terrorism in the near future would presumably be much more likely than the average passive sympathizer to commit a real attack.

case of Zazi, the government had been watching him for some time, and knew of his terrorist plans, but waited to arrest him until the last feasible moment (when he was alerted by a confidential source of the government's surveillance). The Zazi arrest is widely considered to be a prime example of good police work. Perhaps this case demonstrates that potential terrorists can simply be watched until they get close to action, rather than inducing them into crimes before they take any action.

Similarly, based on anecdotal reports from a former member the intelligence community, a significant number of people may sound like they are talking seriously about terrorism but are in fact talking idly, without ever formulating real plans or engaging in concrete action.²³⁶ Trying to induce any person who talks as if he may engage in terrorism is likely to be a wasteful strategy. Keeping particularly militant adherents to terrorist ideologies under surveillance (through passive informants or electronic means), and using stings only in relatively rare unique circumstances (when a person seems highly likely to commit an attack), may be the best policy. Ideally, due to the inherent difficulty of predicting who will really carry out an attack, nearly all inducements of those not already engaged in terrorism would cease.

Obviously, government insiders have more access to human intelligence about terrorist threats, and may better understand the practical or legal limitations of passive surveillance by informants or electronic methods. The analyses here are not meant as authoritative statements on the subject, but rather to provide reasons to believe that stings may only be useful in rare circumstances. Government officials need a wide degree of flexibility in deciding how to deal with potential terrorism suspects.

Even so, some kind of formal fact-finding requirement before engaging in a sting may be a useful stimulus for strategic deliberation about the appropriateness of attempted inducement in a given instance.²³⁷ Realistically, it is hard to imagine the courts requiring a reasonable suspicion requirement before a

²³⁶ See Sageman, *supra* note 2, at 575.

²³⁷ See Taslitz, *supra* note 185, at 64.

suspect is induced. Legislatures could impose such requirements, but have rarely shown any inclination to do so. However, if the FBI or other law enforcement agencies were to require (in the interest of efficient resource allocation) that a certain procedure be followed before approving any inducement, this could have similar effects.

Even if reasonable suspicion were not required, but instead, simply a reasoned explanation of why a sting was appropriate in this particular case (to be reviewed and approved by supervisors), with reference to the available evidence about terrorist behavior, then this might have the effect of confining stings to a smaller number of more worthy cases.²³⁸ Making the terrorist radicalization modeling employed by law enforcement agencies more evidence-based could enable this decision-making process to have an optimal impact on public safety.

In addition, if agents required their informants to have the inducements they offer to suspects pre-approved, and agents were required to keep their supervisors informed about the inducements offered in each sting, this could reduce the abuses in the current system. Agents should prevent informants from promising monetary awards, for example, or for threatening or otherwise coercing suspects. Agents should also ban their informants from attempting to radicalize suspects. Finally, informants should be required to record all their conversations with defendants, to reduce their ability to mislead their handlers or the courts.

Another administrative requirement could include a mid-operation report explaining why the agent has decided to continue the operation, rather than abandoning it. If an agent authorized an informant to attempt the inducement of a suspect, believing that the suspect was likely to actually engage in terrorism, but then the suspect rebuffs the informant's efforts, or gives other signs indicating an inability or unwillingness to commit terror attacks, the agent should have an opportunity to articulate his or her decision whether to continue the operation. Otherwise, even the most questionable operations may continue, with increasingly extreme inducements and informant behaviors (such as the

²³⁸ *See id.*

suicide and death threats in the *Shareef* case²³⁹), until the defendant finally agrees to participate.

Some sort of administrative procedure regarding the approval of sting operations is probably already in place at the FBI and other counterterrorism agencies.²⁴⁰ Such procedures have not been successful, however, in preventing a large numbers of sting operations that either constituted entrapment, or violated the policy concerns underlying the doctrine. Whatever policies and procedures do exist should be revised in order to better identify whether cases are likely to prevent a real terrorist attack, and to eliminate as much as possible the perverse effect of cognitive biases.

Finally, the FBI and other law enforcement agencies should also ensure that they have methods of evaluating agent performance and determining advancement, which do not in practice depend on the generation of convictions. If local agents feel pressure to engage in certain tactics, even those with marginal or negative public safety impacts, they may do so, reducing the government's effectiveness in preventing terrorism. Incentives and pressures need to be aligned with true public safety value, rather than with extraneous factors such as the need to produce results for public or legislative consumption.

B. The Courts' Role

This section argues that courts can decrease entrapment abuses by adopting a more realistic conception of predisposition, focused on whether a defendant would have likely committed a similar crime without government prompting, and by inquiring into the initial government decision to target an individual for inducement. Entrapment doctrine as it is now has drifted far from its realistic origins, to the extent that is unable to prevent or redress the abuses it was designed to confront.

Predisposition is a notoriously vague concept. In the context of the historical development of entrapment doctrine, it should be clear that being "predisposed" to engage in a certain crime, such

²³⁹ See *supra* note 20 and accompanying text.

²⁴⁰ See Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 176-77 (2009).

as alcohol bootlegging or drug-dealing, meant that the person was already engaged in that activity. This was in line with what one scholar has called the “positivist” roots of the entrapment doctrine, which sought to prevent the police from pushing people into committing crimes they would not have otherwise committed.²⁴¹ In terrorism cases, predisposition has begun to mean something completely different: not one’s habitual engagement in a certain crime, or even one’s realistic likelihood of actually committing it, but rather an internal disposition, a malady or weakness of the soul perhaps, that indicates what a person is potentially capable of (even under completely artificial circumstances orchestrated by the government).

As this author has argued elsewhere, courts should return the entrapment doctrine to its realist roots, and enable it to fulfill its intended function, by blocking the conviction of individuals induced by the government unless the government can prove beyond a reasonable doubt that the person was likely to have committed the same kind of crime without government prompting. This is in line with Judge Richard Posner’s understanding of the doctrine, as presented in *United States v. Hollingsworth*. The leading academic authority on the entrapment defense, entrapment treatise author Paul Marcus, believes that *Hollingsworth* represents what the Supreme Court really meant in *Jacobson*. So far, however, only the Seventh Circuit has adopted this “positional” predisposition analysis.²⁴²

In the case of terrorism, whether one is in a “position” to commit the crime (with the right equipment and technical expertise, for example) is often at issue. Yet the question is sometimes more broadly whether the person would have committed any similar crime on their own (regardless of whether someone technically has the ability). This caveat is necessary because, theoretically, any person capable of obtaining access to and operating a firearm could commit a terrorist attack by shooting people in service of some ideological goal. This somewhat broader interpretation is still consistent with Judge Posner’s holding in *Hollingsworth*, and with both the Supreme Court’s

²⁴¹ See Frampton, *supra* note 61, at 146.

²⁴² See Sherman, *supra* note 5, at 1481; *United States v. Reyes*, 239 F.3d 722, 739 (5th Cir. 2001); *United States v. Wise*, 221 F.3d 140, 155-56 (5th Cir. 2000).

current entrapment doctrine in *Jacobson* and the reasoning behind the foundational entrapment cases.²⁴³ As this author argued previously, following *Hollingsworth* would “return[] the [entrapment] doctrine to its roots in realism, as opposed to the circularity, and the undisciplined inquiry into the soul, characteristic of current predisposition analysis.”²⁴⁴

1. Relevance to Specific Predisposition Factors

In practice, focusing entrapment doctrine on a defendant’s realistic likelihood of committing an offense without government prompting would mean that courts would put less emphasis on the defendant’s “ready response” to inducement, or the existence of an “already formed design” to commit a similar crime. These two factors have played a role in some courts’ decisions denying terrorism defendants’ entrapment claims (along with their admission of the defendants’ statements sympathetic to terrorism). Certainly, if a defendant already has a concrete plan to engage in terrorism and shows an intention to implement it, this would appear to be reasonable grounds for beginning an investigation, including a sting operation, if necessary.

Yet the presence of any design needs to be understood in the context of the person’s capabilities and personality. Although *Cromitie* said something about wanting to engage in terrorism after meeting the informant, a review of the evidence about *Cromitie*’s behavior (who was prone to outrageous lies and grandiose talk, while in practice doing nothing) would disqualify those statements as sufficient evidence to support the jury’s predisposition finding. In other words, simply saying that one is

²⁴³ See *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994) (“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; only then does a sting or other arranged crime take a dangerous person out of circulation.”).

²⁴⁴ *Norris & Grol-Prokopczyk*, *supra* note 17, at 162. More specifically, this author has argued for replacing the term predisposition with more unambiguous language, so that the doctrine is as follows: “a case must be dismissed on the basis of entrapment if the government induced the defendant to commit the crime, and the prosecution cannot prove beyond a reasonable doubt that the defendant was likely to have committed the same type of crime without the government inducement.” *Id.* at 161.

interested in engaging in terrorism may not be a particularly good predictor of future terrorist activity in many cases.

Whether such a vague expression of desire to become involved in terrorism constitutes an already formed design, and thus is sufficient to prove predisposition, is unclear. In the *Cromitie* case, the Second Circuit Court of Appeals ruled that his initial statements to the informant qualified as an already formed design. Chief Judge Dennis Jacobs, however, forcefully objected in his dissent, demonstrating convincingly that *Cromitie's* statements were “several critical steps removed from” an actual design to engage in terrorism.²⁴⁵

As for the “ready response” category, it is first important to point out that there is no standard definition of what kind of response qualifies as “ready.” This enables courts to label even relatively reluctant defendants as readily responding to inducements. More importantly, while it certainly makes sense that those who respond quickly to inducements would be more willing recruits than those who are more reluctant or take their time to respond, this still does not mean that the individual is likely to engage in any terrorist activity without government prompting. As reviewed above, terrorist recruitment is not a widespread phenomenon in the United States, and lone wolf terrorists are rare and difficult to predict by any measure.

The questionable relevance of the “ready response” finding to the terrorism sting context may relate to the fundamental difference between terrorism and other crimes more typically the subject of stings and entrapment claims. Drug crimes and prostitution are common and oft-repeated behaviors, while terrorism is exceedingly rare and terrorists (at least in the United States) rarely strike twice. Drug and prostitution stings are meant to ensnare people who have already habitually engaged in these crimes but have eluded detection. Terrorism stings, in contrast, are meant to stop people who would have engaged in terrorism in the future.

This makes all the difference. In the drug context, for example, a defendant's immediate willingness to sell drugs to an

²⁴⁵ United States v. *Cromitie*, 727 F.3d 194, 228 (2d Cir. 2013) (Jacobs, C.J., concurring in part and dissenting in part).

undercover informant is a strong indicator that he was in the habit of selling drugs. This is particularly the case if he has previous convictions for drug dealing. In the case of terrorism, however, as reviewed above, the chance that a particular person, even one who holds robustly pro-terrorist views, will commit a terrorist attack is extraordinarily low. A ready response to an inducement might indicate a slightly increased likelihood that the person may have eventually done something on his own or been recruited, but the likelihood of either of these is still extremely low.²⁴⁶

For example, consider the case of Antonio Martinez, a young convert to Islam who was approached by an informant posing as a terrorist, after Martinez made vaguely militant-sounding posts about non-believers on Facebook. While he may have readily agreed to take part in a terrorist scheme, there is no indication from his prior behavior that he was capable of, or likely to, formulate and implement a terrorist scheme on his own, without the technical know-how, resources, or initiative to acquire them. Indeed, he barely knew how to drive, and had to practice extensively in the informant's car before he was ready to participate in the plot.²⁴⁷

2. The Initial Targeting Decision

Ideally, courts should inquire into the original decision of whether to induce a suspect. If the person was simply a law-abiding Muslim who was sympathetic to terrorism, but had never indicated a desire or plan to personally participate in terrorism, and his pro-terrorist views are the only evidence of predisposition, the court should rule as a matter of law that the prosecution cannot carry its burden of proving that the person was predisposed beyond a reasonable doubt. Approval of some terrorist actions is such a poor predictor of terrorist involvement (since less than one out of 1,000 sympathizers ever act) that it is unclear whether it qualifies as predisposition evidence at all. It certainly should not be sufficient for a reasonable factfinder to conclude

²⁴⁶ This assumes that there were no strong pre-inducement indicators of real terrorist plans, such as contacts with real terrorists or credible statements of intention to engage in terrorism.

²⁴⁷ See KUNDNANI, *supra* note 56, at 187.

beyond a reasonable doubt that the suspect was likely to engage in an attack.

There are three reasons for the court to specifically inquire into the initial targeting decision. First, predisposition is supposed to represent a person's propensity to commit a certain type of crime before the person was approached by an informant. Yet since the government has been able to conceal the circumstances of the original targeting decision in many cases, courts have no choice but to rely on later statements and actions in evaluating a defendant's predisposition. This runs the risk of determining predisposition based on statements or actions of the defendant that would not have taken place without the encouragement of the informant.

Second, although predisposition doctrine is not founded on due process concerns, the outrageous government conduct doctrine is. It is hard to understand how a court may holistically evaluate the due process issues involved in a case without knowing the initial circumstances of the suspect's targeting by the government. In order to implement this doctrine properly, the court must know the grounds on which the government decided to induce a particular person.²⁴⁸ The same inducement may be considered more outrageous when offered to a completely law-abiding person disinterested in terrorism than to a hardcore terrorism supporter who had long dreamed of personally committing an attack. For example, if the jury was aware of the apparent absence of any legitimate reason for targeting Hossain or Aref in the money-laundering loan mentioned earlier, it would have been more likely to apply the defense.²⁴⁹

²⁴⁸ This same argument could apply to the entrapment defense as well, which is grounded in the Supreme Court's belief that the legislature could not have intended its laws to be enforced via entrapment. Arguably, a legislature passing a law against terrorism could not have intended that the law be used to prosecute people who would never have committed the offense on their own. Thus, knowledge of the context of the original targeting decision should be seen as critical for correctly applying the entrapment defense as well.

²⁴⁹ Remarkably, the judge told the jury that the government had a "good reason" for targeting Aref, but it seems likely that this was a charitable way of characterizing the FBI's mistake in thinking he was a commander because of the confusion between the Kurdish and Arabic meaning of the word "kak." AARONSON, *supra* note 5, at 121. In addition, the FBI seems to have confused Aref with an Al-Qaeda member named Mohammed Yassin. See DOWNS & MANLEY, *supra* note 70, at B-7. If the government

Third, understanding the initial targeting context might potentially dampen the effect of the cognitive mechanisms reviewed above. Judges and juries, like other people, are inclined to view others' personal behavior as a product of their characteristics rather than their situation. Yet if the judge or jury learns that the person was essentially harmless, living a completely law-abiding life, then this could affect their understanding of the situational influence on his behavior. This would particularly be the case if the suspect apparently had no terrorist sympathies before being targeted.

Moreover, if the judge or jury were presented (by defense counsel, for example, or through jury instructions) with information on the rarity of terrorist involvement even by terrorist sympathizers, even evidence of prior pro-terrorist beliefs might not unduly sway them toward a finding of predisposition.²⁵⁰ That is to say, knowledge of the defendant's behavior before being approached by the government, of the basis (if any) for the inducement decision, and of the relevant underlying base rates, may help factfinders make decisions more consistent with the defendant's real likelihood of offending. More generally, courts should seek to reduce the power of potential cognitive biases that, in practice, cause juries to disregard the law in favor of guilty verdicts.²⁵¹

had information that Aref was truly involved in any way in terrorism prior to his targeting by the FBI, it is hard to understand why this information would not be made public, or at least provided to the jury, especially given the bad press the case generated.

²⁵⁰ It is admittedly unclear whether such statistics could or would be admitted. If the entrapment defense were reformed, as this Article recommends, to hinge on the likelihood of the defendant committing a similar crime without government involvement, such statistics would potentially be relevant evidence for that inquiry. In addition, it is worth noting that in New Jersey, jury instructions have in some cases included explanations of the unreliability of eyewitness testimony, based on the considerable statistical evidence for this fact. *See State v. Henderson*, 27 A.3d 872, 891 (N.J. 2011). Perhaps the evidence for the rarity of terrorist attacks even among sympathizers might eventually be well-recognized enough to merit regular inclusion of jury instructions.

²⁵¹ *See supra* Part II.C.3.

CONCLUSION

This Article contends that by carrying out and tolerating sting operations against otherwise law-abiding Muslims who would have never committed terrorism on their own, the FBI and the courts may be increasing terrorism risks, by wasting resources better spent on tactics that are reasonably likely to prevent terrorism. More specifically, it has made four arguments, building on available statistical data and other social-scientific evidence, against the government's and courts' current handling of terrorism sting operations.

First, given the rarity of terrorist attacks, the large size of the Muslim community, and its levels of support for terrorism, the chance that a particular Muslim, even a Muslim with terrorist sympathies, would ever commit an attack is extraordinarily small. With only a handful of potential exceptions, the targets of sting operations have not had any preexisting plans or intention to engage in terrorism. Nor did most of them have access to the explosives or related expertise needed to carry out an attack. This means that it is very unlikely that terrorism stings prevent real terrorist attacks.

Second, current social-scientific theories and evidence do not enable an accurate prediction of whether a particular individual will engage in terrorism. Thus, only in rare circumstances, when an individual is already planning an attack or shows reliable indicia of being willing and able to commit an act of terrorism, will a sting operation be likely to prevent terrorism. Part of the blame for misdirected sting operations may lie in the deeply flawed radicalization models employed by the FBI and NYPD, which imply that anyone with radical beliefs is bound to progress into an operational terrorist.

Third, powerful cognitive biases and institutional pressures likely have such a strong impact on all the actors involved, from informants and agents to judges and juries, as to make it nearly impossible for rational decisions about stings to be made. For this reason, stings should be limited to rare cases (if they are needed at all), and subject to strict controls and reporting requirements.

Fourth, there is no reason to assume that terrorism stings will deter real terrorists from committing attacks, and there are several reasons to be concerned that they could actually harm

public safety, aside from decreasing the effectiveness of the counterterrorism apparatus though sub-optimal resource allocation.

For these reasons, this Article argues that the FBI and other law enforcement agencies should sharply curtail their practice of inducing law-abiding citizens into terrorist crimes, and the courts should be less tolerant of these tactics. The government should instead reserve sting operations for rare cases, relying more heavily on surveillance and intelligence gathering. To assist the government in using stings in an evidence-based manner (i.e., only when they are likely to prevent attacks), agencies should institute administrative requirements to justify the initial decision to induce a suspect, and the mid-operation decision of whether to continue.

The courts should adopt a more realist conception of the entrapment doctrine, drawing on Judge Posner's decision in *Hollingsworth*, which would preclude the conviction of defendants who would have been unlikely to commit a similar crime on their own. The Article also argues that courts should inquire into the initial decision to target the suspect, and strive to make its entrapment-related procedures (such as its jury instructions) more evidence-based, and geared toward overcoming prevalent cognitive biases.

One promising avenue of further research, which could build on this paper's arguments, would involve systematically analyzing initial targeting decisions in terrorism stings, based on publicly-available information, as well as Freedom of Information Act requests, and interviews with defendants, informants, and agents. Shedding light on the defendants' activities and beliefs prior to targeting may enable a more fine-grained documentation of both the resource allocation and constitutional issues at stake.

