ARTICLES

Race, Entrapment, and Manufacturing "Homegrown Terrorism"

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At what point does offensive speech cross the line from being constitutionally protected to criminal? Rarely—would be the response of a free speech purist. Indeed, the First Amendment is intended to protect unpopular, offensive, and even subversive speech. Although this lesson may be taught to American schoolchildren, it is not the lived experience of Muslim dissidents, especially at the more extreme end of the political spectrum. And yet, the white extremists whose racist and anti-government hate speech has skyrocketed since the election of President Obama have not received attention commensurate to their growing influence.[1] Only after they seized the United States Capitol in January 2021 did the government shift its domestic security priorities to meaningfully address the threat posed by far-right-wing groups.

Such disparate treatment of political extremists of different racial and religious identities prompts the question: Is the problem one of law or of law enforcement? This Article argues that selective counterterrorism

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1. *See Confronting White Supremacy (Part I): The Consequences of Inaction: Hearing Before the Subcomm. on C.R. & C.L. of the H. Comm. on Oversight & Reform*, 116th Cong. 9–19 (2019) (statements of Susan Bro, President/Board Chair, Heather Heyer Foundation; George Selim, Senior Vice President of Programs, Anti-Defamation League; Michael German, Fellow, Brennan Center for Justice; Omar Ricci, Chairperson, Islamic Center of Southern California; Roy L. Austin, Partner, Harris, Wiltshire & Grannis, LLP; and Robby Soave, Associate Editor, Reason Magazine); *Confronting Violent White Supremacy (Part II): Adequacy of the Federal Response: Hearing Before the Subcomm. on C.R. & C.L. of the H. Comm. on Oversight & Reform*, 116th Cong. 20–30 (2019); EXTREMISM & RADICALIZATION BRANCH, DHS, RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT (2009). This Department of Homeland Security report led to the marginalization of its author Daryl Johnson, who was removed from his post shortly after its publication due to backlash from his colleagues. *See* Lois Beckett, *'Blood on Their Hands': The Intelligence Officer Whose Warning Over White Supremacy Was Ignored*, GUARDIAN (Aug. 8, 2019, 1:00 PM), https://www.theguardian.com/us-news/2019/aug/07/white-supremacist-terrorism-intelligence-analyst [https://perma.cc/Y8LW-FWXF].

enforcement allocates disproportionate resources targeting Muslim communities; all the while, entrapment law fails to protect these communities from predatory sting operations. The extent to which otherwise First Amendment-protected activities are criminalized is most glaring in post-9/11 terrorism prosecutions in which Muslim defendants ensnared in sting operations have raised an entrapment defense. Specifically, a defendant's social media posts—prior to the sting operations—are used as evidence of his predisposition to commit a terrorist act, notwithstanding that the plot was developed and led by an informant or undercover agent. Offensive speech is bootstrapped into showing a defendant's willingness to commit a crime. Although numerous journalists and lawyers have come to this conclusion, the empirical basis is underdeveloped.

This Article empirically tests, based on the author's database of 646 federal terrorism-related cases brought against Muslims between 2001 and 2021,[2] the normative claim that the Federal Bureau of Investigation (FBI) is manufacturing a "homegrown terrorism" threat through aggressive sting operations that prey on young Muslim men who are vulnerable for myriad psychological, economic, and political reasons.[3] The analysis reveals a criminalization of religious and dissident Muslims who have engaged in extremist speech but who have not engaged in violence without government ensnarement, while far-right supremacist groups are simultaneously granted license to plan politically motivated violence, culminating in a siege on the U.S. Capitol.[4]

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2. The database of federal terrorism-related cases brought against Muslims between 2001 and 2021 is on file with the author.

3. This normative claim is made by others, including investigative journalist Trevor Aaronson and the Coalition on Civil Freedoms. *See generally* TREVOR AARONSON, THE TERROR FACTORY: INSIDE THE FBI'S MANUFACTURED WAR ON TERRORISM (2013); COAL. FOR CIV. FREEDOMS, THE TERROR TRAP: THE IMPACT OF THE WAR ON TERROR ON MUSLIM COMMUNITIES SINCE 9/11 (2021), https://uploads-ssl.webflow.com/614ac1d8e9f8db7ee5ba75b3/615fe1c9d2db9c6a0a2627f5_THE%20TERROR%20TRAP%20-%20FINAL.pdf [https://perma.cc/LL38-M4N4]. However, this Article is the first test of the normative claim in an empirical study of 646 federal terrorism-related prosecutions against Muslim defendants from 2001 to 2021.

4. *See* Mark Mazzetti, Helene Cooper, Jennifer Steinhauer, Zolan Kanno-Youngs & Luke Broadwater, *Inside a Deadly Siege: How a String of Failures Led to a Dark Day at the Capitol*, N.Y. TIMES (June 8, 2021), https://www.nytimes.com/2021/01/10/us/politics/capitol-siege-security.html; *see also* Andrew Selsky, *Capitol Attack Reflects US Extremist Evolution Over Decades*, AP NEWS (Jan. 23, 2021), https://apnews.com/article/capitol-siege-riots-coronavirus-pandemic-b7123f0a223c6ed8098a03b459120c83 [https://perma.cc/PA3B-LXN6]; Ryan Devereaux, *Capitol Attack Was Culmination of Generations of Far-Right Extremism*, INTERCEPT (Jan. 23, 2021, 8:00 AM), https://theintercept.com/2021/01/23/capitol-riot-far-right-extremism/ [https://perma.cc/M6BK-LNTT].

INTRODUCTION

Informants and undercover agents are staple investigative tools for state and federal law enforcement.[5] If managed correctly in sting operations, they can effectively infiltrate organized crime, terrorist groups, gangs, and drug cartels to stop ongoing or future crime. But informants and government agents can also be abusively deployed against disfavored or unpopular groups to manufacture crimes. Instead of taking criminals off the street, sting operations may induce people who otherwise would not or could not have committed the offense but for the informant or agent's inducement, planning, funding, and implementation of the crime. Hence, the judicial entrapment doctrine's intended beneficiary is the "unwary innocent" unlawfully induced by the government.[6]

The risk of entrapment is especially high in the counterterrorism context. A deep dive into the anatomy of a post-9/11 counterterrorism sting operation demonstrates how informants and undercover agents are effectively manufacturing fake terrorist plots *and* how entrapment law fails to protect the almost exclusively male Muslim targets.[7]

What the cases show is that all the government needs to do to manufacture "homegrown terrorism" is find a vulnerable young Muslim male who expresses extremist views on social media, send informants or undercover agents to coerce or manipulate him into a government-led fake plot, and then point to his political views and speech as evidence of his criminality.[8] Following the script of unsubstantiated theories of radicalization as the blueprint for their sting operations, the government creates a fake group of friends with "informants and undercover agents that push the Muslim target from extreme words to illegal action."[9] The consequence is a "loss of liberty for hundreds of Muslim men" and "accolades for FBI agents and national security prosecutors."[10]

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5. *See generally* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009).

6. *See* Sherman v. United States, 356 U.S. 369, 372, 376–78 (1958); United States v. Russell, 411 U.S. 423, 433–36 (1973); Mathews v. United States, 485 U.S. 58, 63 (1988).

7. *See infra* Part II.

8. *See infra* Part IV.

9. *See* Sahar F. Aziz, *State Sponsored Radicalization*, 27 MICH. J. RACE & L. 125, 129 (2021).

10. *Id.*; *see also* Press Release, FBI, FBI Boston Division Announces Retirement of Special Agent in Charge Richard DesLauriers (June 11, 2013) (available at https://archives.fbi.gov/archives/boston/

The racial politics of counterterrorism defines success not by the prevention of real terrorist plots but rather by the number of Muslim men the government can put in jail regardless of how inept, young, mentally ill, or otherwise incompetent they may be. Considering the broader systemic racism in the criminal justice system, which has been incarcerating Black and brown people for generations, this outcome should come as no surprise.[11] Counterterrorism is implemented by the same law enforcement agencies. For these reasons, the government's stated goal of protecting national security should be met with skepticism and rigorous analysis of the underlying facts of each case.

This Article is the second in a trilogy that critiques the myriad ways in which domestic counterterrorism enforcement is racialized based on stereotypes that Islam is a violent political ideology, and that Muslims are therefore more prone to become terrorists.[12] The analysis and conclusions of the trilogy are based on the author's database of the 646 federal terrorism-related cases brought against Muslims between 2001 and 2021, of which at least 290 cases involve sting operations.[13] Only 36 cases raise an entrapment defense before or during the trial—unsuccessfully in every case.[14] Eight of these entrapment cases are described in detail in Part IV to illustrate the extent to which religious and political beliefs can

press-releases/2013/fbi-boston-division-announces-retirement-of-special-agent-in-charge-richard-deslauriers [https://perma.cc/4LT5-QWL2]) (praising work on terrorism-related cases); Press Release, U.S. Att'y's Off. for the Dist. of N.J., U.S. Attorney General Recognizes New Jersey U.S. Attorney's Office with Two Director's Awards (Sept. 26, 2013) (available at https://www.justice.gov/archive/usao/nj/Press/files/2013%20Directors%20Award%20News%20Release.html [https://perma.cc/FVA5-GAFT]) (same); *MCAO Prosecutors Receive FBI Director's Award for Prosecuting Terrorism Case*, NEWS FROM THE MARICOPA CNTY. ATT'Y'S OFF. (Maricopa Cnty. Att'y's Off., Phoenix, Ariz.), Feb. 2020, https://www.maricopacountyattorney.org/390/MCAO-Prosecutors-Receive-FBI-Directors-A [https://perma.cc/TV46-2XVS] (same); Press Release, FBI, Raleigh-Durham Joint Terrorism Task Force Receives FBI Director's Award (Sept. 10, 2012) (available at https://archives.fbi.gov/archives/charlotte/press-releases/2012/raleigh-durham-joint-terrorism-task-force-receives-fbi-directors-award [https://perma.cc/9EQB-R548]) (same).

11. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012) (explaining the American criminal justice system's destructive impact on communities of color).

12. The first article, *State Sponsored Radicalization*, shows how the pseudoscience of unsubstantiated radicalization theories provides the blueprint for FBI sting operations targeting vulnerable Muslim men who are often young, indigent, inept, and socially isolated. *See* Aziz, *supra* note 9, at 131. The third (forthcoming) article examines the free speech implications of racialized domestic counterterrorism enforcement by empirically comparing the government's treatment of whites and Muslims, focusing on investigative techniques, prosecution, and sentencing.

13. In addition to the 646 federal terrorism cases, there are 19 state cases charging defendants with terrorism-related charges. The database also contains 11 cases where the subject died before cases could be brought against him. The database of 676 cases brought between 2001 and 2021 against Muslim defendants is on file with the author.

14. *See, e.g.*, United States v. Lakhani, 480 F.3d 171, 174 (3d Cir. 2007) (conviction); United States v. Al-Moayad, 545 F.3d 139, 145, 153 (2d Cir. 2008) (including co-defendant Zayed; conviction); United States v. Aref, 04-cr-00402, 2007 U.S. Dist. LEXIS 12228, at *1, *12 (N.D.N.Y. Feb. 22, 2007) (including co-defendant Hossain; conviction); United States v. Siraj, No. 07-0224-cr, 2008 WL 2675826, at *1 (2d Cir. July 9, 2008) (conviction); Defendant's Proposed Entrapment Instruction, United States v. Shah, No. 06-cr-00428, 2007 WL 3351178, at *1 (S.D. Tex. May 22, 2007) (conviction); Tatar v. United States, No. 13-cv-03317, 2017 WL 945015, at *7 (D.N.J. Mar. 10, 2017) (underlying case including co-defendants Shnewer, Dritan Duka, Eljvir Duka, and Shain Duka, together

persuade a jury that an otherwise incompetent, indigent, or mentally unstable Muslim defendant is predisposed to commit a fake terrorist plot that is planned, led, and implemented by government operatives. The entrapment doctrine's undue emphasis on the defendant's predisposition has allowed prosecutors to use purportedly extremist speech and beliefs—First Amendment-protected activity—of Muslims targeted in sting operations as evidence of their alleged predisposition to conduct terrorism.

Such abuses of power raise two questions: (1) would these vulnerable Muslim men have committed terrorism-related crimes had they been left alone or merely surveilled by the government; and (2) should entrapment law more robustly protect dissident speech and religious expression from serving as the basis for proving predisposition in government sting operations? The first causal question, though outside the scope of this Article, is especially salient in light of that same offensive and dissident speech by white right-wing extremists failing to trigger similar heightened attention by law enforcement for more than a decade—that is, not until an insurgency on January 6, 2021.[15] As these right-wing extremists armed themselves and planned the insurgency in plain sight, the FBI continued to manufacture Muslim terrorists.

The second question falls squarely within the purview of law. When public policy and government practices fail to protect vulnerable communities, who are

known as the "Fort Dix 5"; conviction); United States v. Cromitie, 727 F.3d 194, 199 (2d Cir. 2013) (including co-defendants Payen, David Williams, and Onta Williams; conviction); United States v. Mohamud, 843 F.3d 420, 430 (9th Cir. 2016) (conviction); United States v. Hammadi, No. 11-cr-00013, 2017 WL 3065116, at *1, *4–5 (W.D. Ky. July 19, 2017) (including co-defendant Alwan; plea); United States v. Osmakac, 868 F.3d 937, 941, 951 (11th Cir. 2017) (conviction); United States v. DeLeon, No. 12-cr-00092, slip op. at 11 (C.D. Cal. Sept. 15, 2014) (conviction); United States v. Loewen, No. 13-cr-10200, slip op. at 3–4 (D. Kan. Mar. 6, 2015) (plea); Motion of Entrapment by Estoppel, United States v. Cornell, No. 15-cr-00012 (S.D. Ohio Mar. 23, 2018) (plea); Defendant's Sentencing Memorandum & Request for a Downward Variance from the Sentencing Guideline Range & Request for Recommendation to BOP Regarding Placement at 1, 5, United States v. Suarez, No. 15-cr-10009 (S.D. Fla. Apr. 1, 2017) (conviction); United States v. Hamzeh, 420 F. Supp. 3d 828, 830 (E.D. Wis. 2019) (plea); United States v. Young, 916 F.3d 368, 373, 375, 389 (4th Cir. 2019) (conviction); United States v. Jones, No. 17-cr-00236, slip op. at 4 (N.D. Ill. May 25, 2019) (including co-defendant Schimenti; conviction); Defendant's Proposed Jury Instruction, United States v. Smith, No. 17-cr-00182 (W.D.N.C. Mar. 21, 2019) (conviction); United States v. Haji, 19-cr-00025, slip op. at 1 (W.D. Mich. June 17, 2020) (including co-defendants Muse; plea); Jury Instructions at 25–26, United States v. Domingo, No. 19-cr-00313 (C.D. Cal. Aug. 12, 2021) (conviction); United States v. Hossain, No. 19-cr-00606, 2021 WL 4272827, at *6 (S.D.N.Y. Sept. 21, 2021) (conviction); *see also* Memorandum in Support of Motion to Dismiss Due to Entrapment as a Matter of Law at 1, United States v. Carpenter, No. 21-cr-00038 (E.D. Tenn. Feb. 22, 2022) (awaiting trial).

15. *Cf.* MICHAEL GERMAN, BRENNAN CTR. FOR JUST., HIDDEN IN PLAIN SIGHT: RACISM, WHITE SUPREMACY, AND FAR-RIGHT MILITANCY IN LAW ENFORCEMENT (2020), https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law [https://perma.cc/M7UH-4KAX] (explaining white supremacist and far-right influences within American law enforcement). *See generally* NAT'L SEC. COUNCIL, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM (2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf [https://perma.cc/48MP-6DVK] (discussing the challenges of monitoring the current domestic terrorism threat landscape).

often racial and religious minorities, entrapment law should be a safeguard of last resort. As the doctrinal analysis in Part III makes clear, entrapment law's shortcomings are numerous. They range from inconsistent factor tests across circuits to heavy, if not exclusive, reliance on a Muslim defendant's "extremist" speech as evidence of predisposition. Entrapment law thus no longer offers the protections envisioned by its judicial architects.[16] Considering the overt anti-Muslim bias in American society, it comes as no surprise that juries have rejected Muslim defendants' entrapment defenses in every case.[17] For these reasons, Part V offers some legislative prescriptions.

Notwithstanding the sociopolitical underpinnings of counterterrorism policy, law can and should restrain law enforcement overreach. Entrapment law, though intended to do just that, has proven ineffectual in protecting individuals subject to aggressive sting operations that not only manufacture crimes but also radicalize otherwise incompetent, bombastic individuals into joining informants and undercover agents in fake terrorist plots.[18] Such doctrinal failure calls for a federal legislative solution to standardize the currently unwieldy and inconsistent entrapment doctrine across federal circuits. Absent legal reforms, minority communities will continue to face the simultaneous harms of being more vulnerable to government abuse yet less likely to be believed when alleging entrapment. The identity-based double standards are more glaring when prosecutions of Muslims are compared to the leniency afforded to the tens of thousands of white far-right extremists engaging in similar bombastic, extremist rhetoric against Blacks, Latinos, immigrants, Jews, and Muslims—the topic of the final article in the trilogy.[19]

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16. *See infra* Part III.

17. *See* Carissa Prevratil, *Creating Terrorists: Issues with Counterterrorism Tactics and the Entrapment Defense*, 5 RAMAPO J. L. & SOC'Y 40, 40, 42, 54 (2020). Not a single entrapment defense, standing alone, has been successful in all post-9/11 terrorism prosecutions. *See* Jesse J. Norris, *Accounting for the (Almost Complete) Failure of the Entrapment Defense in Post-9/11 US Terrorism Cases*, 45 L. & SOC. INQUIRY 194, 195 (2020) ("Yet in no US case have judges or juries acquitted terrorism defendants solely on entrapment grounds." (citation omitted)).

18. *See* Norris, *supra* note 17, at 194; Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J. L. & PUB. POL'Y 1, 36 (2005); Jesse J. Norris, *Why the FBI and the Courts Are Wrong About Entrapment and Terrorism*, 84 MISS. L.J. 1257, 1319–20 (2015); Jesse J. Norris, *Explaining the Emergence of Entrapment in Post-9/11 Terrorism Investigations*, 27 CRITICAL CRIMINOLOGY 467, 468 (2019) [hereinafter, *Explaining the Emergence of Entrapment Post-9/11*]; Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609, 610 (2015). *See generally* Jon Sherman, *"A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475 (2009) (examining the entrapment defense, material support charges, and the use of informants to argue that counterterrorism efforts must safeguard First Amendment rights).

19. *See* Janet Reitman, *U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now They Don't Know How to Stop It.*, N.Y. TIMES MAG. (Nov. 3, 2018), https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html; Trevor Aaronson, *Terrorism's Double Standard: Violent Far-Right Extremists Are Rarely Prosecuted as Terrorists*, INTERCEPT (Mar. 23, 2019, 8:34 AM), https://theintercept.com/2019/03/23/domestic-terrorism-fbi-prosecutions/ [https://perma.cc/2KJX-TQMV]; Sebastian Rotella, *Domestic Terrorism: A More Urgent Threat, but Weaker Laws*, PROPUBLICA (Jan. 7, 2021, 11:30 PM), https://www.propublica.org/article/domestic-terrorism-a-more-urgent-threat-but-weaker-laws [https://perma.cc/A9WR-GZQX].

Accordingly, this Article begins in Parts I and II with the blueprint for federal sting operations that systematically manufactures "homegrown terrorism" to purportedly take Muslim radicals off the street and put them in jail. Part III surveys entrapment law across all federal circuits to show how entrapment doctrine has failed to protect defendants from government overreach in sting operations. Part IV takes a deep dive into the facts of eight cases wherein the Muslim defendant invoked an entrapment defense. The facts of these cases demonstrate the lengths to which the government will go to ensnare vulnerable, and often young, Muslim men into fake terrorist plots that are concocted, led, and executed by informants or undercover agents. This Article concludes in Part V with a legislative prescription intended to unify the inconsistent predisposition tests across the circuits, as well as return the entrapment doctrine back to the judiciary's original intent—protecting unwary innocents, notwithstanding the offensiveness of their political beliefs, from government-manufactured crime.

I. THE ROADMAP OF MANUFACTURING (MUSLIM) HOMEGROWN TERRORISM

Three preliminary themes can be gleaned from an analysis of the federal terrorism-related prosecutions of Muslim defendants. First, the systematic and aggressive use of sting operations in counterterrorism cases—regardless of whether a case ultimately pleads out or goes to trial—disproportionately targets defendants who are (1) young, with an average age of thirty-two;[20] (2) low-income or unemployed; (3) bombastic blowhards who "talk, talk, talk, and do nothing";[21] and (4) unsophisticated, lacking the skills or knowledge to conduct a terrorist attack. In at least 155 of the 646 federal cases, there is evidence that the defendant suffers from mental illness, which is sometimes not diagnosed until after their arrest and detention.[22] Second, many of the Muslim defendants are vulnerable due to their indigence, recent release from prison, or social isolation. They are easy targets for unscrupulous informants or sophisticated undercover agents who design, plan, and execute fake terrorist plots.[23]

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20. The mean age is 32.7 years. However, when the lowest and highest 10% of the ages are excluded, the mean age is 31.4 years, and the median age is 30 years.

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

22. *See, e.g.*, Brief and Special Appendix for Defendant-Appellant at 97–98, United States v. Siraj, No. 07-0224-cr, 2007 WL 6449740 (2d Cir. Oct. 1, 2007); Transcript of Competency Hearing at 9, United States v. Osmakac, No. 12-cr-00045 (M.D. Fla. Nov. 13, 2013). Although 155 defendants suffered from demonstrable mental health illnesses, the actual number is likely higher due to a lack of access to healthcare for diagnoses and the stigma of admitting mental illness.

23. *See, e.g.*, Sentencing Memorandum at 1–7, United States v. Shareef, No. 06-cr-00919 (N.D. Ill. Sept. 26, 2008) (plea); United States v. Ahmad, No. 07-cr-20859, slip op. at 1 (S.D. Fla. May 13, 2008) (acquitted); United States v. Omar, No. 09-cr-00242 (D. Minn. filed Aug. 20, 2009) (convicted); Government's Sentencing Memorandum at 5, United States v. Damache, No. 11-cr-00420 (E.D. Pa. Oct. 23, 2018) (plea) (including co-defendant Mohammad Hassan Khalid, a fifteen-year-old boy who recently moved to the U.S.); Defendant's Sentencing Memorandum at 1–5, United States v. Nafis, No. 12-cr-00720 (E.D.N.Y. Aug. 7, 2013) (plea); Affidavit in Support of Criminal Complaint and Arrest Warrant at 3, United States v. Ismail, No. 18-cr-60352 (S.D. Fla. Dec. 14, 2018) (plea); *see also* David Hanners, *Minneapolis Man on Trial, Accused of Aiding Somali Terrorists*, PIONEER PRESS (Nov. 10,

Meanwhile, the government has a 100% success rate in defeating an entrapment defense based on a jury's factual determination that the defendant was predisposed to commit a terrorism act before the government ensnared him into a fake plot.[24] Yet, other empirical studies of counterterrorism cases find that despite prosecutors' success in court, the percentage of cases against Muslim defendants that represent real security threats is less than 9%.[25] These numbers are attributed to coercive and manipulative tactics by informants and undercover agents leading a target from nonviolent extremist speech to a (fake) terrorist plot.

Third, and perhaps the most alarming theme, is the U.S. government's deliberate replication in sting operations of the so-called "radicalization" process proffered by terrorism experts in academic and policy literature.[26] Despite scholarly consensus that there is no theoretical model, much less empirical support, that accurately predicts whether a person will engage in political violence, law enforcement still unduly relies on dubious radicalization theories.[27] Attempting to explain why and how a person becomes a terrorist, scholars and policymakers offer a hodgepodge of unproven theories that effectively profile Muslims who hold political or religious beliefs outside prevailing norms as potential terrorists.[28] This Article builds on the author's critique in *State Sponsored Radicalization* of the literature on radicalization theory to show why the legal doctrine of entrapment has failed to protect defendants from the FBI's predatory and abusive

2015, 5:57 AM), https://www.twincities.com/2012/09/29/minneapolis-man-on-trial-accused-of-aiding-somali-terrorists/ [https://perma.cc/WS7K-KZ6W] (noting that Mahamud Said Omar "usually was flat broke, . . . was in ill health, both physically and mentally . . . [and] he is of the wrong religion").

24. *See generally* Norris & Grol-Prokopczyk, *supra* note 18 (reviewing 580 terrorism cases between 2001 and 2015 and finding that none of the defendants who raised an entrapment defense were successful). Further research is needed to examine the role of anti-Muslim jury bias in anti-terrorism cases, regardless of whether an entrapment defense is raised. *See* Sheryll Cashin, *To Be Muslim or "Muslim-Looking" in America: A Comparative Exploration of Racial and Religious Prejudice in the 21st Century*, 2 DUKE F. FOR L. & SOC. CHANGE 125, 126 (2010) ("[T]hose who are not Arab or Muslim tend to show higher rates of implicit bias against Arab-Muslims than do Muslims.").

25. *See* Norris & Grol-Prokopczyk, *supra* note 18, at 616 (estimating that 9% of the 580 so-called "jihadi" cases analyzed involved genuine security threats).

26. *See* Sageman, *supra* note 21 (noting that "[n]eo-jihadi terrorist attacks are extremely rare on their own—without sting operations").

27. *See generally* Robin L. Thompson, *Radicalization and the Use of Social Media*, 4 J. STRATEGIC SEC. 167 (2011) (considering the role of social media in radicalization and its impact on national security policy); Randy Borum, *Radicalization into Violent Extremism I: A Review of Social Science Theories*, 4 J. STRATEGIC SEC. 7 (2011) (noting that radical beliefs are not a proxy for terrorism); Randy Borum, *Radicalization into Violent Extremism II: A Review of Conceptual Models and Empirical Research*, 4 J. STRATEGIC SEC. 37 (2011) (reviewing conceptual models of the radicalization process); Amna Akbar, *Policing "Radicalization,"* 3 U.C. IRVINE L. REV. 809 (2013) (criticizing law enforcement's focus on predicting terrorism); JOHN HORGAN, THE PSYCHOLOGY OF TERRORISM 7, 33 (2d ed. 2014) (noting that despite the increase in publications on terrorism over the past twenty years, few of the articles are rigorous and research-based and are instead narrative or prescriptive); Arun Kundnani, *Radicalisation: The Journey of a Concept*, 54 RACE & CLASS 3 (2012) (discussing the misguided concept of radicalization and the resulting industry of counter-radicalization).

28. *See* MIKE GERMAN, DISRUPT, DISCREDIT, AND DIVIDE: HOW THE NEW FBI DAMAGES DEMOCRACY 111–12 (2019); Jamie Bartlett & Carl Miller, *The Edge of Violence: Towards Telling the Difference Between Violent and Non-Violent Radicalization*, 24 TERRORISM & POL. VIOLENCE 1, 3 (2012).

counterterrorism practices.[29] Entrapment law remains firmly in favor of prosecutors, even more so when the defendant is Muslim, subject to the bias of jurors exposed to a steady stream of media depicting Muslim men as terrorists.[30]

The FBI adopts radicalization theories as its blueprint by deploying informants and undercover agents to befriend Muslim men who have posted videos and articles on social media glorifying terrorism, Al Qaeda, Osama Bin Laden, Anwar al-Awlaki, the Islamic State of Iraq and Syria (ISIS), and other terrorists. Before the ubiquity of social media, the government fished for its targets through physical surveillance at mosques, businesses frequented by Muslim customers, online chat rooms, Muslim student associations, and Muslim community organizations.[31] The database of cases demonstrates that starting in 2007, agents and informants shifted their search for sting operation targets to social media and websites promoting political violence against civilians and Western military forces.

Because the number of real terrorists in the United States is sparse, the FBI resorts to directing its formidable resources toward creating fake terrorists out of bombastic and hapless men who spew extremist rhetoric.[32] The government uses each fake terrorist it creates to justify demands for additional public funds to combat the supposed homegrown terrorist threat, one inflated by the same entity requesting the funding.[33] Part IV examines eight case studies to demonstrate how

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29. *See* Aziz, *supra* note 9, at 129–31.

30. *See generally* CHRISTIAN KOLMER & ROLAND SCHATZ, MEDIA TENOR, OPENNESS FOR DIALOGUE REACHED A NEW LOW: ANNUAL DIALOGUE REPORT ON RELIGION AND VALUES (2015), http://us.mediatenor.com/images/library/reports/ADR_2015_LR_WEB_PREVIEW.pdf [https://perma.cc/8MRJ-Q33K] (showing how media portrayal of violent groups has dominated coverage of Islam); MEDIA TENOR, COVERAGE OF AMERICAN MUSLIMS GETS WORSE: MUSLIMS FRAMED MOSTLY AS CRIMINALS: NEWS ANALYSIS OF U.S. TV NEWS AND INTERNATIONAL BUSINESS PAPERS 2007-2013 (2013), http://us.mediatenor.com/en/library/speeches/260/coverage-of-american-muslims-gets-worse [https://perma.cc/L4UD-N63V] (demonstrating that while coverage of Islam decreased overall following 2010, media portrayed Islam as a source of violence); EVELYN ALSULTANY, ARABS AND MUSLIMS IN THE MEDIA: RACE AND REPRESENTATION AFTER 9/11 (2012) (discussing sympathetic and seemingly positive media representations of Arabs and Muslims); BRIGITTE L. NACOS & OSCAR TORRES-REYNA, FUELING OUR FEARS: STEREOTYPING, MEDIA COVERAGE, AND PUBLIC OPINION OF MUSLIM AMERICANS 26–28 (2007) (discussing the shift toward increasingly negative portrayals of Arabs and Muslims in the anniversary period following 9/11).

31. *See* COUNTERTERRORISM DIV., FBI, THE RADICALIZATION PROCESS: FROM CONVERSION TO JIHAD 6–7 (2006), https://hope-radproject.org/wp-content/uploads/2021/12/FBI-2006-The-radicalization-process-From-conversion-to-Jihad.pdf [https://perma.cc/A4YT-XPNF].

32. *See Explaining the Emergence of Entrapment Post-9/11*, *supra* note 18, at 470–71, 474–75.

33. *See* Michael Hirsh, *Inside the FBI's Secret Muslim Network*, POLITICO MAG. (Mar. 24, 2016), https://www.politico.com/magazine/story/2016/03/fbi-muslim-outreach-terrorism-213765/ [https://perma.cc/S8QG-H76L] (describing the FBI's new "Shared Responsibility Committees" aimed at developing interventions to prevent Muslim youth from becoming radicalized); Cora Currier & Murtaza Hussain, *Letter Details FBI Plan for Secretive Anti-Radicalization Committees*, INTERCEPT (Apr. 28, 2016, 1:02 PM), https://theintercept.com/2016/04/28/letter-details-fbi-plan-for-secretive-anti-radicalization-committees/ [https://perma.cc/U5UQ-PH6Z] (reporting on the FBI's attempts through "Shared Responsibility Committees" to "enlist counselors, social workers, religious figures, and other community members to intervene with people the FBI thinks are in danger of radicalizing"); Norris, *supra* note 17, at 217.

sting operations effectively entrap Muslim men who are hapless, psychologically unstable, and bombastic into fake terrorist plots. When the government fails to entrap the Muslim man into a terrorist act, it charges him with a pretextual false statement, gun charge, or other crime unrelated to terrorism.

Before diving into the substantive analysis of the cases, a description of the data collection methodology is warranted. The author followed a four-step process to create a database of 646 federal terrorism cases against Muslim defendants. First, the author collected all the cases in existing terrorism-related databases produced by the Center on National Security at Fordham Law, the George Washington University Program on Extremism, the Intercept, and the think tank New America.[34] Second, an extensive search of news sources and U.S. Department of Justice (DOJ) press releases found additional cases that were either missing from the existing databases or filed after such databases were compiled. Third, the author conducted a thorough review of the relevant academic literature to identify additional cases not found through the first two search methods. Finally, the author conducted thorough searches on PACER and collected all substantive filings for each of the 646 federal terrorism cases.[35]

The selection criteria for including a case in the database was based on the types of charges brought,[36] the underlying facts, the defendant's Muslim identity,

34. *See Terrorism Prosecution Database*, CTR. ON NAT'L SEC. AT FORDHAM L., https://www.centeronnationalsecurity.org/terrorism-database [https://perma.cc/LVA3-437V] (last visited Jan. 6, 2022); GEORGE WASHINGTON UNIV. PROGRAM ON EXTREMISM, GW EXTREMISM TRACKER: TERRORISM IN THE UNITED STATES (2022), https://extremism.gwu.edu/gw-extremism-tracker [https://perma.cc/P6H4-H9SD]; Trevor Aaronson & Margot Williams, *Trial and Terror*, INTERCEPT, https://trial-and-terror.theintercept.com/ [https://perma.cc/2MUC-GNC4] (Nov. 14, 2022); Peter Bergen & David Sterman, *Terrorism in America After 9/11*, NEW AM. (Sept. 10, 2021), https://www.newamerica.org/international-security/reports/terrorism-in-america/ [https://perma.cc/E9L8-6B2G].

35. The Public Access to Court Electronic Records (PACER) system is administered by the Administrative Office of the U.S. Courts on behalf of the Federal Judiciary, providing electronic access to court filings in all federal courts across the country via https://pacer.uscourts.gov/. The author identified an additional nineteen state terrorism-related cases, but they are not part of this Article's analysis of federal entrapment law. *See* State v. Taheri-Azar, No. 06CRS51266 (N.C. Super. Ct. filed Mar. 4, 2006); State v. Haq, No. 06-1-06658-4 (Wash. Super. Ct. filed Aug. 1, 2006); People v. Zorkot, No. 2007722578 (Mich. 19th Dist. Ct. filed Sept. 11, 2007); State v. Muhammad, No. 60CR-09-2626 (Ark. Cir. Ct. filed July 21, 2009); People v. Ferhani, 966 N.Y.S.2d 348 (N.Y. Sup. Ct. 2012) (including co-defendant Mamdouh); People v. Pimentel, 53 N.Y.S.3d 262 (App. Div. 2017); People v. Nabi, No. Q13800646 (N.Y. Crim. Ct. filed Oct. 10, 2013) (including co-defendant Alsarabbi); People v. Alsarabbi, No. Q13800647 (N.Y. Crim. Ct. filed Oct. 10, 2013) (including co-defendant Nabi); Commonwealth v. Archer, No. CP-51-CR-0002618-2016 (Pa. Ct. Com. Pl. filed Jan. 2016); State v. Khan, No. CR2016-005270-001 (Ariz. Super. Ct. filed July 6, 2016); State v. Bastian, No. CR2016-148530-001 (Ariz. Super. Ct. filed Oct. 18, 2016); State v. Bastian, No. CR2016-148530-002 (Ariz. Super. Ct. filed Oct. 18, 2016); State v. Thompson, No. CR2016-159174-001 (Ariz. Super. Ct. filed Dec. 21, 2016); People v. Forrest, No. GJ #1A-15 (N.Y. Sup. Ct. filed Feb. 22, 2017); Beese v. State, No. 5D18-3201 (Fla. Dist. Ct. App. Sept. 24, 2019) (per curiam) (lower case number unavailable); State v. Azizi-Yarand, No. 18045858 (Tex. Cnty. Ct. filed Apr. 30, 2018); State v. Hamed, No. CR2019-101866-001 (Ariz. Super. Ct. filed Jan. 15, 2019); State v. Abdiraham, No. 27-CR-17-28647 (Minn. Dist. Ct. filed Nov. 14, 2017).

36. The following comprises the list of all charges brought against Muslim defendants across the 646 federal cases in the database: 18 U.S.C. § 2; 18 U.S.C. § 32; 18 U.S.C. § 33; 18 U.S.C. § 37; 18 U.S.C. § 111; 18 U.S.C. § 115; 18 U.S.C. § 157; 18 U.S.C. § 371; 18 U.S.C. § 373; 18 U.S.C. § 401; 18 U.S.C.

and the government's description of the case as terrorism-related. Only federal cases filed against Muslim defendants between 2001 and 2021 are included in the database, although an additional nineteen terrorism cases have been brought in state courts during the same period. Upon compiling the substantive court filings, news articles, and government press releases, the author coded each case by thirty-five categories, including whether the government conducted a sting operation using informants or undercover agents, the defendant claimed entrapment, there was evidence of mental illness, the charges were pretextual, and the case went to trial.[37]

This methodology has multiple limitations. When examining the impact of sting operations in incarcerating hapless, mentally ill, or socially isolated people, the empirical project, as structured, cannot determine how many sting operations did not result in prosecutors bringing charges, creating a form of selection bias. This limitation arises from the government's nondisclosure of terrorism-related investigations that do not result in prosecution. Moreover, any analysis of discriminatory treatment of Muslims requires a comparison with other racial or religious groups engaged in political or religious extremist speech or actions. The forthcoming third Article in the trilogy will conduct this comparative analysis based on a separate database of cases against whites who subscribe to far-right extremist ideas or join right-wing extremist organizations. Finally, a substantial

§ 473; 18 U.S.C. § 511; 18 U.S.C. § 542; 18 U.S.C. § 793; 18 U.S.C. § 841; 18 U.S.C. § 842; 18 U.S.C. § 844; 18 U.S.C. § 846; 18 U.S.C. § 853; 18 U.S.C. § 871; 18 U.S.C. § 875; 18 U.S.C. § 876; 18 U.S.C. § 922; 18 U.S.C. § 924; 18 U.S.C. § 931; 18 U.S.C. § 956; 18 U.S.C. § 960; 18 U.S.C. § 981; 18 U.S.C. § 982; 18 U.S.C. § 1001; 18 U.S.C. § 1014; 18 U.S.C. § 1015; 18 U.S.C. § 1028; 18 U.S.C. § 1030; 18 U.S.C. § 1073; 18 U.S.C. § 1111; 18 U.S.C. § 1113; 18 U.S.C. § 1114; 18 U.S.C. § 1117; 18 U.S.C. § 1201; 18 U.S.C. § 1324; 18 U.S.C. § 1325; 18 U.S.C. § 1341; 18 U.S.C. § 1343; 18 U.S.C. § 1344; 18 U.S.C. § 1349; 18 U.S.C. § 1361; 18 U.S.C. § 1366; 18 U.S.C. § 1425; 18 U.S.C. § 1503; 18 U.S.C. § 1505; 18 U.S.C. § 1512; 18 U.S.C. § 1519; 18 U.S.C. § 1542; 18 U.S.C. § 1543; 18 U.S.C. § 1544; 18 U.S.C. § 1546; 18 U.S.C. § 1571; 18 U.S.C. § 1621; 18 U.S.C. § 1623; 18 U.S.C. § 1701; 18 U.S.C. § 1705; 18 U.S.C. § 1951; 18 U.S.C. § 1952; 18 U.S.C. § 1956; 18 U.S.C. § 1958; 18 U.S.C. § 1959; 18 U.S.C. § 1960; 18 U.S.C. § 1962; 18 U.S.C. § 1992; 18 U.S.C. § 1993; 18 U.S.C. § 2261; 18 U.S.C. § 2312; 18 U.S.C. § 2314; 18 U.S.C. § 2320; 18 U.S.C. § 2332; 18 U.S.C. § 2339; 18 U.S.C. § 2384; 18 U.S.C. § 2461; 18 U.S.C. § 3147; 18 U.S.C. § 3238; 18 U.S.C. § 3291; 18 U.S.C. § 3551; 18 U.S.C. § 5371; 21 U.S.C. § 844; 21 U.S.C. § 846; 21 U.S.C. § 853; 21 U.S.C. § 863; 21 U.S.C. § 959; 21 U.S.C. § 963; 22 U.S.C. § 2778; 26 U.S.C. § 5841; 26 U.S.C. § 5845; 26 U.S.C. § 5861; 26 U.S.C. § 5871; 26 U.S.C. § 7206; 26 U.S.C. § 7212; 28 U.S.C. § 2461; 31 U.S.C. § 5313; 31 U.S.C. § 5316; 31 U.S.C. § 5322; 31 U.S.C. § 5324; 42 U.S.C. § 408; 49 U.S.C. § 46502; 49 U.S.C. § 46506; 50 U.S.C. §§ 1701–1706.

37. The 35 categories for case coding are: case name, federal district or state, federal circuit, complaint or death date, indictment year, presidential administration when case filed, terrorism-related actions of defendant, presence of informant, presence of undercover agent, sting operation, length of sting operation, entrapment defense raised, defendant attempted to withdraw, selection of defendant (through social media, chat room, informant, predicate act, or other), sentence in months, time served, initial charges brought, charges sentenced, actual attack plot, financing of a foreign terrorist organization, travel to join a foreign terrorist organization, disposition of case, material support charges, immigration charges, gun charges, false statement charges, defendant's age, evidence of mental illness, prior criminal conviction, race/ethnicity, likely legitimacy, First Amendment-related activity, case number, bond acceptance, and bond amount.

number of cases involved sealed documents unavailable to the public. This limited the number of details that could be collected about some cases.

II. RADICALIZATION AS DE JURE PREDISPOSITION TO COMMIT (FAKE) TERRORISM

The FBI used sting operations in at least 290 of the 646 federal counterterrorism cases filed against Muslim defendants between 2001 and 2021. The sting operations averaged ten months in duration, with at least 103 lasting twelve months or more, 99 lasting between five and eleven months, and 87 sting operations lasting four months or less.[38] Of the 290 sting operations, 253 (or 87.5%) resulted in convictions or plea agreements, while only 4 defendants (1.4%) were acquitted, 2 defendants (0.6%) had their charges dismissed, and 1 defendant (0.6%) had his charges dropped.[39] Another 18 defendants (6.2%) are awaiting trial and 12 defendants (4.2%) are fugitives. Caution should be taken in interpreting these numbers as indicia of enhanced national security. Many of the Muslim targets were hapless, incompetent, gullible, or mentally unstable, and could not be protected against predatory investigative practices by weak entrapment law. Section IV describe seven cases that offer a window into the vulnerability of the Muslim targets.

Section II.A describes the anatomy of counterterrorism sting operations and how government tactics have evolved over the past twenty years. Section II.B then shows how the FBI uses radicalization theory as a blueprint to structure its sting operations.[40] Notably, in cases where an entrapment defense is raised, the government relies primarily on extremist speech and expression as evidence of a target's predisposition for terrorism. The consequences of the criminalization of Muslims with offensive political views reach beyond harming their individual liberty interests to normalizing the chilling of dissent in Muslim communities.[41]

A. THE ANATOMY OF A STING OPERATION

Of the various radicalization theories circulating within national security policy circles, the most influential is the lone wolf pack, also known as the "bunch of

38. 128 sting operations lasted ten months or more, and 74 lasted between five and nine months.

39. Of the thirty-six defendants who presented an entrapment defense, twenty-seven (75%) were convicted, eight (22.2%) pleaded guilty, and an additional case is awaiting trial.

40. For a full exposition of the flaws of radicalization theory literature, see Aziz, *supra* note 9.

41. *See generally* Gina Roussos & John F. Dovidio, *Tolerating Hate: Racial Bias, Freedom of Speech, and Responses to Hate Crimes* (considering systemic factors affecting how bias motivated acts are perceived as hate crimes), *in* PERSPECTIVES ON HATE: HOW IT ORIGINATES, DEVELOPS, MANIFESTS, AND SPREADS 225 (Robert J. Sternberg ed., 2020). Substantial research has shown that similar rhetoric from purveyors of homegrown far-right ideologies, namely white nationalism, is subject to protections regardless of its immediate impacts. *See* LEE EPSTEIN, ANDREW D. MARTIN & KEVIN QUINN, 6+ DECADES OF FREEDOM OF EXPRESSION IN THE U.S. SUPREME COURT 14 (2018), https://static1.squarespace.com/static/60188505fb790b33c3d33a61/t/6050e2cb7018917f3e9e9566/1615913676838/FreedomOfExpression.pdf [https://perma.cc/G9ZJ-RXXT] (finding that the Court consistently "favors conservative over liberal expression"). For instance, courts even dismissed charges against neo-Nazi William White after he published the addresses of Elie Wiesel and a juror in the trial of another neo-Nazi online, relying on free speech grounds. *See* United States v. White, 638 F. Supp. 2d 935, 937–38, 958 (N.D. Ill. 2009).

guys" radicalization theory proffered by Marc Sageman.[42] The FBI uses this theory as a blueprint for sting operations, starting with informants or undercover agents befriending a Muslim target online. After a period of online correspondence, the government operative meets the target in person. Persistent communication aims to create a social network of a small number of people (usually other government operatives) who criticize the U.S. government, glorify ISIS and Al Qaeda, and exchange bombastic, extremist ideas.[43] Following Sageman's theory that a person's proclivity toward engagement with terrorism is "the power of the group, the content and process of ideology (or ideological control), the influence of a particular leader and feedback from experiences both inside and outside the movement," informants and undercover agents comprise the influential group or leader that in turn manipulates, coerces, or tricks the Muslim male targets.[44]

Left to their own devices, most of these inept, indigent, and socially marginalized Muslim men would merely post extremist content and spew extremist speech on social media accounts that are then shut down by the digital host companies.[45] Instead, the sting operations induce the men into fake plots that range from outright terrorist attacks on U.S. soil to providing material or financial assistance to government operatives pretending to be members of ISIS or Al Qaeda. Prior to the ubiquitous use of social media, informants and undercover agents identified Muslim targets by infiltrating mosques, Muslim student association meetings, and Muslim-owned businesses—hence the importance of the government's community outreach programs and initiatives designed to counter violent extremism.[46] Since 2008, after social media use climbed sharply, government operatives have predominantly identified their targets online through a covert surveillance unit.[47] In most cases, the sting operation is comprised exclusively of

42. MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY 66 (2008).

43. *See generally* Norris & Grol-Prokopczyk, *supra* note 18 (describing various methods of pressure used by government agents, including extremist and conspiratorial communications).

44. *See* JOHN HORGAN, WALKING AWAY FROM TERRORISM: ACCOUNTS OF DISENGAGEMENT FROM RADICAL AND EXTREMIST MOVEMENTS 13 (2009).

45. *See, e.g.*, Criminal Complaint at 7–8, United States v. Xie, No. 19-mj-03676 (D.N.J. May 21, 2019) (noting the defendant's extensive lists of anti-American and anti-Semitic videos on social media); Criminal Complaint at 15–20, United States v. Jones, No. 17-cr-00236 (N.D. Ill. Apr. 11, 2017) (noting that co-defendant Schimenti's social media accounts had numerous posts "in support of ISIS and violent jihad"); *see also, e.g.*, sources cited *infra* note 171 (noting further defendants whose social media accounts were repeatedly shut down for extremist content).

46. *See generally* Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT'L SEC. J. 147 (2014) [hereinafter Aziz, *Policing Terrorists*] (critiquing the use of community policing in counterterrorism efforts); Sahar F. Aziz, *Losing the "War of Ideas:" A Critique of Countering Violent Extremism Programs*, 52 TEX. INT'L L.J. 255 (2017) [hereinafter Aziz, *Losing the War*] (critiquing the Countering Violent Extremism program implemented by the Obama Administration in 2011, in particular the program's "securitization" of Muslim communities—the perception of Muslims through a security lens).

47. *See, e.g.*, Criminal Complaint at 8–9, United States v. Edmonds, No. 15-cr-00149 (N.D. Ill. Mar. 25, 2015) (where an FBI agent, acting in his role as an undercover agent, sent the defendant a Facebook "friend" request).

government operatives and the target, as opposed to a preexisting group of co-conspirators.[48]

The sting operations aim to mimic what the government believes are recruitment tactics of legitimate terrorists.[49] Bona fide terrorists spread their political message via the Internet and social media platforms.[50] Al Qaeda set up its video production arm Al Sahab in 2004 and published the English online magazine *Inspire* as recruitment tools to persuade young men living in Western countries to carry out domestic attacks.[51] It set up chat rooms to spread propaganda portraying Al Qaeda members as freedom fighters, share training videos (often produced by its sympathizers), and trigger conversations in support of Al Qaeda's political ideology.[52] ISIS followed a similar strategy, using YouTube, Facebook, Twitter, and Instagram to disseminate horrific videos of executions and beheadings, which went viral worldwide.[53] Their objective was twofold: (1) to encourage young men to travel to Iraq and Syria to fight on behalf of ISIS against the Iraqi, Syrian, and American militaries and (2) to conduct a propaganda campaign to humiliate their state-actor enemies.[54] However, as Anne Stenersen notes, Al Qaeda members are cognizant that law enforcement agencies monitor the chat rooms and websites.[55] Thus, they rarely offer specific advice to readers on how to partake in terrorism, but rather limit the content to general calls to fight for justice in defense of Muslims under attack by the United States.[56]

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48. In approximately 185 cases, the sting consisted exclusively of government operatives and the target, while in 106 cases, the government infiltrated a preexisting plot or targeted someone with actual connections to foreign terrorist organizations (FTOs).

49. *See* Seth G. Jones, *Awlaki's Death Hits al-Qaeda's Social Media Strategy*, RAND BLOG (Sept. 30, 2011), https://www.rand.org/blog/2011/09/awlakis-death-hits-al-qaedas-social-media-strategy.html [https://perma.cc/3N5E-7556]; Max Boot, Opinion, *Why Social Media and Terrorism Make a Perfect Fit*, WASH. POST. (Mar. 16, 2019, 7:00 AM), https://www.washingtonpost.com/opinions/2019/03/16/why-social-media-terrorism-make-perfect-fit/.

50. *See* ARIE W. KRUGLANSKI, JOCELYN J. BÉLANGER & ROHAN GUNARATNA, THE THREE PILLARS OF RADICALIZATION: NEEDS, NARRATIVES, AND NETWORKS 80–81 (2019); Thompson, *supra* note 27, at 168–72; RAFFAELLO PANTUCCI, INT'L CTR. FOR THE STUDY OF RADICALISATION & POL. VIOLENCE, A TYPOLOGY OF LONE WOLVES: PRELIMINARY ANALYSIS OF LONE ISLAMIST TERRORISTS 6, 11, 34 (2011), https://icsr.info/wp-content/uploads/2011/04/1302002992ICSRPaper_ATypologyofLoneWolves_Pantucci.pdf [https://perma.cc/4664-JSYH]; SAGEMAN, *supra* note 42, at 109–10.

51. *See* Thompson, *supra* note 27, at 168, 172; SAGEMAN, *supra* note 42, at 130; KRUGLANSKI ET AL., *supra* note 50, at 80.

52. *See* Thompson, *supra* note 27, at 177; KRUGLANSKI ET AL., *supra* note 50, at 80; Anne Stenersen, *The Internet: A Virtual Training Camp?*, 20 TERRORISM & POL. VIOLENCE 215, 230 (2008) (noting that much of the online training materials produced and distributed on the Internet are created by Al Qaeda sympathizers, not Al Qaeda central); Craig Whitlock, *Al-Qaeda's Growing Online Offensive*, WASH. POST (June 24, 2008), https://www.washingtonpost.com/wp-dyn/content/article/2008/06/23/AR2008062302135.html.

53. *See* KRUGLANSKI ET AL., *supra* note 50, at 81.

54. *See id.*

55. *See* Stenersen, *supra* note 52, at 228.

56. *See id.* at 229–30.

In response to the online recruitment efforts of terrorist groups, the FBI increasingly monitored social media postings and chat rooms, fishing for terrorists.[57] Undercover agents or informants search for comments on social media expressing support for jihad, ISIS, Al Qaeda, terrorism, Hamas, Hezbollah, or another designated terrorist group. They identify sting operation targets based on social media posts or in-person conversations. The government operative then declares online or at in-person gatherings that he wants to conduct jihad and travel to Iraq, Syria, Somalia, or Afghanistan in pursuit of martyrdom. This declaration is intended to attract disaffected young Muslim men to contact them. Informants and undercover agents then proceed to probe the target's inclinations toward various offenses.[58] After weeks or months of ingratiation to gain the trust of the target, the informant or agent steers the conversation toward a concrete plan, applying varying degrees of pressure. These efforts include introducing the target to other undercover agents or informants posing as members of terrorist groups. When targets hesitate or show reluctance to continue, informants and agents employ psychological manipulation and coercion and allege weapons of faith. In some cases, the recordings of targets attempting to withdraw from the plot or expressing reluctance to proceed are suspiciously missing due to supposed recorder malfunctions, which can be fatal to a defendant's prospective entrapment defense.[59]

These tactics prompted former FBI agent Michael German to critique post-9/11 counterterrorism:

> Today's terrorism sting operations reflect a significant departure from past practice. When the FBI undercover agent or informant is the only purported link to a real terrorist group, supplies the motive, designs the plot and provides all the weapons, one has to question whether they are combatting terrorism or creating it. Aggrandizing the terrorist threat with these theatrical productions only spreads public fear and divides communities, which doesn't make anyone safer.[60]

The government justifies these predatory practices pursuant to a preventative strategy of getting purported Muslim radicals off the street and into prison.

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57. *See, e.g.*, Criminal Complaint at 23, United States v. Daoud, No. 12-cr-00723 (N.D. Ill. Sept. 15, 2012) (noting the chat room and social media conversations that the defendant had with others online); Statement of Facts at 7–9, United States v. Chesser, No. 10-cr-00395 (E.D. Va. Oct. 20, 2010) (noting the defendant's extremist views on social media); Criminal Complaint at 7–8, United States v. Xie, No. 19-mj-03676 (D.N.J. May 21, 2019) (noting the defendant's extensive lists of anti-American and anti-Semitic videos on social media).

58. *See* Eric Lichtblau, *F.B.I. Steps Up Use of Stings in ISIS Cases*, N.Y. TIMES (June 7, 2016), https://www.nytimes.com/2016/06/08/us/fbi-isis-terrorism-stings.html.

59. *See* AARONSON, *supra* note 3, at 190.

60. Timothy McGrath, *The FBI is Entrapping Americans and Charging Them as Terrorists, According to a New Report*, WORLD (July 21, 2014, 12:47 PM), https://theworld.org/stories/2014-07-21/fbi-entrapping-americans-and-charging-them-terrorists-according-new-report [https://perma.cc/HVD3-XB7T].

B. RATIONALE FOR STING OPERATIONS: GETTING MUSLIM RADICALS OFF THE STREETS

In August 2016, undercover agents identified Robert Lorenzo Hester, Jr. on Facebook after seeing posts about his "conversion to Islam, his hatred for the United States[,]" and his belief that the mistreatment of Muslims by the U.S. government had to end.[61] Subsequently, an undercover agent contacted Hester in October 2016.[62] Over the course of several months, Hester and the undercover agent exchanged numerous online messages that enabled the agent to gain his trust, meet in person, and eventually persuade Hester to plan a (fake) attack on several public transportation facilities.[63] Hester was later arrested and charged with "actively attempt[ing] to plot a mass casualty attack with others that he believed were acting on behalf of ISIS" and sentenced to nineteen years in prison.[64] As shown in the cases described in Part IV, Hester's case is the norm, not the exception.

For better or for worse, the Internet offers an equal opportunity both for terrorists to reach audiences across the world and for the government to surveil and identify those same audiences.[65] The government's strategy, however, reaches far beyond looking for actual terrorism recruits; it extends to ensnaring individuals whose only apparent wrongdoing is posting anti-American or ideologically deviant content on social media—a First Amendment-protected activity.

A cadre of undercover agents is assigned to comb social media pages and chat rooms looking for evidence of sympathy for terrorists.[66] This greater reach has facilitated a higher volume of sting operations than previously feasible.[67] When ISIS gained power around 2014, its propaganda was distributed primarily through social media to draw Muslim male recruits from across the world.[68] ISIS also encouraged followers to commit lone-wolf attacks abroad.[69] These factors, coupled with media coverage of ISIS atrocities, prompted U.S. counterterrorism

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61. Criminal Complaint at 4–5, United States v. Hester, No. 17-cr-00064 (W.D. Mo. Feb. 19, 2017).

62. *See id.* at 7. Robert Lorenzo Hester, Jr. was a 25-year-old man from Columbia, Missouri when he was indicted in February 2017 in Kansas City for participating in an Islamic State plan to "deploy bombs and guns" in an attack designed to cause mass casualties. *See* Indictment, United States v. Hester, No. 17-cr-00064 (W.D. Mo. Feb. 23, 2017); Press Release, DOJ, Missouri Man Sentenced to 19 Years for Attempting to Provide Material Support to ISIS (Mar. 4, 2020) (available at https://www.justice.gov/opa/pr/missouri-man-sentenced-19-years-attempting-provide-material-support-isis [https://perma.cc/F7NS-Y5QW]).

63. *See* Criminal Complaint at 23, *Hester*, No. 17-cr-00064 (describing how the undercover agent informed Hester that the attack would target "buses, trains, and a train station in Kansas City, Missouri").

64. *See* Press Release, *supra* note 62.

65. *See* David C. Benson, *Why the Internet Is Not Increasing Terrorism*, 23 SEC. STUD. 293, 303 (2014).

66. *See* Cora Currier, *Undercover FBI Agents Swarm the Internet Seeking Contact with Terrorists*, INTERCEPT (Jan. 31, 2017, 7:12 AM), https://theintercept.com/2017/01/31/undercover-fbi-agents-swarm-the-internet-seeking-contact-with-terrorists/ [https://perma.cc/XQ23-U44P].

67. *See id.*

68. *See* KRUGLANSKI ET AL., *supra* note 50, at 80–81.

69. *See* Barak Mendelsohn, *ISIS' Lone-Wolf Strategy: And How the West Should Respond*, FOREIGN AFFS. (Aug. 25, 2016), https://www.foreignaffairs.com/isis-lone-wolf-strategy.

officials to double down on Muslim men. Although an estimated 250 disaffected Muslim youth in the United States (out of millions) were sufficiently attracted by ISIS's messaging to consider traveling to Syria,[70] most of the Muslim men ensnared in FBI sting operations who posted pro-ISIS propaganda appeared to merely be attention-seeking, hapless blowhards.

FBI-designated "online covert employees" monitored "extremist forums" by posing as members of terrorist organizations.[71] In many cases, the monitoring then evolved into sting operations, leading to a Muslim target's prosecution.[72] As a practical matter, real members of transnational terrorist groups cannot recruit individuals to carry out the kinds of terrorist acts on American soil involved in sting operations because successful recruitment requires local networks that assist the target in identifying, researching, preparing, and planning a terrorist attack—all of which would attract government attention.[73] In the absence of terrorist plots, the government uses its informants and undercover agents to do what cannot be done by actual terrorists. When confronted with criticism that sting operations are predatory and manufactured, law enforcement officials contend that targets are given opportunities to withdraw from the illegal plots. However, the FBI orchestrates sting operations anticipating a potential entrapment defense.[74] Thus, evidence is meticulously gathered to demonstrate a defendant's predisposition, while evidence of a defendant's hesitation or attempt to withdraw from the operation is allegedly not recorded.[75] In cases where these conversations are recorded, opportunities for withdrawal typically amount to the informant or undercover agents questioning the defendant's commitment to the manufactured plot.[76] Furthermore, courts tend to give minimal weight to a defendant's reluctance or hesitancy about moving forward in the terrorist plot because their extremist

70. *See* Richard Engel, Ben Plesser, Tracy Connor & Jon Schuppe, *The Americans: 15 Who Left the United States to Join ISIS*, NBC NEWS (May 15, 2016, 12:13 PM), https://www.nbcnews.com/storyline/isis-uncovered/americans-15-who-left-united-states-join-isis-n573611 [https://perma.cc/8U6H-VBJA] (estimating that 250 Americans tried to join ISIS).

71. *See* COUNTERTERRORISM DIV., FBI, COUNTERTERRORISM POLICY DIRECTIVE AND POLICY GUIDE 52–53 (2015), https://s3.documentcloud.org/documents/3423189/CT-Excerpt.pdf [https://perma.cc/2E3M-FALK].

72. *See* Currier, *supra* note 66.

73. *See* Benson, *supra* note 65, at 297, 323.

74. *See* DOJ, THE ATTORNEY GENERAL'S GUIDELINES ON FEDERAL BUREAU OF INVESTIGATION UNDERCOVER OPERATIONS 16–17 (2002), https://www.justice.gov/sites/default/files/ag/legacy/2013/09/24/undercover-fbi-operations.pdf [https://perma.cc/DWU8-WVL6].

75. *See, e.g.*, Criminal Complaint at 13, United States v. Martinez, No. 10-cr-00798 (D. Md. Dec. 8, 2010); Criminal Complaint at 7–25, United States v. Shnewer, No. 07-cr-00459 (D.N.J. May 7, 2007).

76. *See, e.g.*, United States v. Hamzeh, 420 F. Supp. 3d 828, 840–41 (E.D. Wis. 2019) (describing the informant's continued pressure on defendant to purchase guns to carry out an attack and referring to allegedly nonrecorded conversations supporting an entrapment defense); Criminal Complaint at 4, United States v. Smadi, No. 09-cr-00294 (N.D. Tex. Sept. 24, 2009) (quoting the undercover confidential employee: "Therefore, tell me if you have any hesitation, doubt, or fear. If that is the case, we would depart now as friends and brothers in Islam without any anger at all. In this case, you may perform Jihad in a less dangerous way, such as Jihad using your money or in training yourself to avoid sins, indignities, and desires"); *see also* Lichtblau, *supra* note 58.

speech and online posts are deemed sufficient to prove predisposition. That is, radicalization is de jure predisposition.

Evidence of defendants' terrorist plots is controlled by the informant's ability to determine when conversations should be recorded.[77] The informant's mandate revolves around making fictitious connections to international terrorism "legible" to relevant authorities.[78] These connections are based on a narrative thoroughly imbued with language symbolic of Islam—such as jihad, Allahu Akbar, mujahideen, and shaheed—that are then erroneously used as evidence of predisposition at trial.[79] Statements about future violence, regardless of their connection to any actual plans, fit neatly into popular narratives that portray Muslim defendants as dangerous and inherently inclined toward terrorism, making it easy for prosecutors to persuade juries to convict.[80]

Sting operations produce convictions of a variety of offenses, including the government's lynchpin charge of material support to terrorism under 18 U.S.C. §§ 2339A and 2339B.[81] The broad definition of "material support or resources," which includes expert advice, training, goods, personnel, or weapons, tends to result in high conviction rates for nonviolent activities.[82] At least 432 cases out of the 646 total cases (67%) involve a material support to terrorism charge. Sting operations may also yield convictions by setting the target up to make a material false statement to a federal agent under 18 U.S.C. § 1001.[83]

Targets who rebuke undercover agents' attempts to lure them into a terrorist act or provide material support to terrorism may find themselves ensnared in a false statement sting. Such a case begins with a self-identified FBI or DHS agent questioning the target about connections to terrorists, fully knowing that the target is in contact with an informant or undercover agent who has represented himself as a terrorist and that their conversations are recorded. When the target lies about his associations, his travels abroad, or his actions to the federal agents, he is charged with a false statement pursuant to 18 U.S.C. § 1001 and faces a maximum eight-year sentence that includes a three-year enhancement for terrorism cases.[84] At least 108 defendants (16.7%) were charged with a false statement in

77. *See* Piotr M. Szpunar, *Premediating Predisposition: Informants, Entrapment, and Connectivity in Counterterrorism*, 34 CRITICAL STUD. MEDIA COMMC'N 371, 377 (2017).

78. *See id*. at 376, 382.

79. *See id*. at 380.

80. *See id*. at 382–83.

81. 18 U.S.C. § 2339A refers generically to "terrorists," while § 2339B refers to "foreign terrorist organizations." *See* Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 459–61 (2011).

82. *See* 18 U.S.C. §§ 2339A(b)(1)–(3), 2339B(g)(4). In *Holder v. Humanitarian Law Project*, the Supreme Court held that the material support statute is constitutional and that it did not violate the Fifth Amendment for vagueness or the First Amendment for suppressing freedom of speech and association. *See* 561 U.S. 1, 7–8 (2010).

83. 18 U.S.C. § 1001(a)(2).

84. 18 U.S.C. § 1001(a) ("[I]f the offense involves international or domestic terrorism (as defined in [18 U.S.C. §] 2331), imprisoned not more than 8 years, or both."); *see, e.g*., The Government's Memorandum of Law in Opposition to the Defendant's Motion for Release from Custody at 3, United States v. Shehadeh, No. 10-cr-01020 (E.D.N.Y. May 8, 2020) (sentenced to thirteen years); Sentencing

federal terrorism-related cases. At least thirty-four of those Muslim defendants were sentenced for false statements alone because the Government could not prove that they had violated any other law.[85]

Another common tactic when the sting operation fails is charging a suspect with possession of a firearm by a convicted felon, which, when coupled with terrorism enhancements, can result in a hefty prison sentence.[86] Charging defendants with these lesser offenses is not unique to the counterterrorism context. Indeed, law enforcement calls it the "Al Capone approach," where suspected criminals are taken "off the streets" on minor offenses, much as the famous gangster was finally imprisoned for tax evasion.[87] Pretextual charges inflate terrorism convictions, further facilitating the exaggeration of an "Islamic terrorism" threat in the public discourse.[88] As politicians pressure law enforcement to produce results in the form of convictions, funding for sting operations rises, which in turn increases convictions, resulting in a feedback loop.[89]

A defendant's only legal recourse—an entrapment defense—has proven futile.[90] Of the 646 federal terrorism-related cases involving Muslim men, only 27 out of the 152 defendants who went to trial raised an entrapment defense, and only 10 out of the 152 defendants were acquitted and 2 cases were dismissed.[91]

Memorandum of the United States at 2–3, United States v. Rockwood, No. 10-cr-00061 (D. Alaska Aug. 16, 2010) (sentenced to eight years); Judgment in a Criminal Case at 1–2, United States v. Smith, No. 17-cr-00182 (W.D.N.C. Aug. 11, 2020) (sentenced to five years); Judgment in a Criminal Case at 1–2, United States v. Abood, No. 15-cr-00256 (N.D. Tex. May 25, 2016) (sentenced to four years).

85. In thirty cases, the defendant was *initially* charged only with a false statement. In some of those cases, additional charges were eventually added to the indictment.

86. *See* 18 U.S.C. § 922(g)(1).

87. *See* JEROME P. BJELOPERA, CONG. RSCH. SERV., R41780, THE FEDERAL BUREAU OF INVESTIGATION AND TERRORISM INVESTIGATIONS 19–20 (2013); *see also* Affidavit for Criminal Complaint at 5, United States v. Al-Akili, No. 12-mj-00196 (W.D. Pa. Mar. 14, 2012) (defendant charged with being a felon in possession of a firearm); Indictment at 4–9, United States v. Rahim, No. 17-cr-00169 (N.D. Tex. Mar. 21, 2017) (defendant charged with six counts of making a false statement to a federal agency); Criminal Complaint, United States v. Ghoul, No. 17-cr-00312, 2017 WL 9991925 (E.D.N.C. July 27, 2017) (defendant charged with attempted unlawful procurement of citizenship or naturalization and filing a false tax return); Criminal Complaint at 1, United States v. Alameti, No. 19-cr-00013 (D. Mont. Apr. 4, 2019) (defendant charged with possession of a firearm by an unlawful user of a controlled substance and making false statements). Gun charges have not proven particularly effective in prosecuting Muslims, with only 105 defendants charged.

88. *See* Norris & Grol-Prokopczyk, *supra* note 18, at 619 ("This results, in their view, in convictions that ostensibly justify the FBI's vast counterterrorism budget, but which in fact do nothing to advance public safety.").

89. *See id.* at 665–66; Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 690, 733 (2010).

90. Scholars and lawyers agree there has yet to be a successful entrapment defense in a terrorism case since 9/11. *See* CTR. ON L. & SEC., N.Y.U. SCH. OF L., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001 – SEPTEMBER 11, 2011 26 (2011); Said, *supra* note 89, at 711; *see also* Francesca Laguardia, *Terrorists, Informants, and Buffoons: The Case for Downward Departure As a Response to Entrapment*, 17 LEWIS & CLARK L. REV. 171, 205 & n.174 (2013).

91. *See* United States v. Hammoudeh, No. 03-cr-00077 (M.D. Fla. filed Feb. 19, 2003) (acquitted); United States v. Benkahla, No. 06-cr-00009 (E.D. Va. filed Feb. 9, 2006) (acquitted); United States v. Abdur-Raheem, No. 03-cr-00296 (E.D. Va. filed June 25, 2003) (acquitted); United States v. Megahed, No. 07-cr-00342 (M.D. Fla. filed Oct. 25, 2007) (acquitted); United States v. Ahmad, No. 07-cr-20859

The small number of de jure entrapment claims is unsurprising in a criminal justice system where 97% of federal defendants enter plea bargains.[92] The few entrapment claims, therefore, mask the substantial amount of de facto entrapment experienced by hundreds of Muslim male targets. Weak entrapment law combined with the prevalence of plea bargaining in the American criminal justice system explain the low numbers of entrapment claims.

III. THE PAPER TIGER OF ENTRAPMENT LAW

Counterterrorism sting operations after 9/11 shifted from physical to online target identification, due in large part to the proliferation of propaganda published online by foreign terrorist organizations.[93] In the case of Al Qaeda, its leaders have published magazines, created websites, drafted bomb construction manuals, and produced videos for the purpose of encouraging Muslims in the United States and Western Europe to engage in domestic terrorism.[94] The heightened security measures in the United States, coupled with Al Qaeda's defensive posture in the face of military attacks in Afghanistan, Iraq, and Yemen, made online recruitment a necessary alternative.[95] In a 2011 House Judiciary Committee hearing, FBI Director Robert Mueller declared,

> We also confront the increasing use of the Internet for spreading extremist propaganda, and for terrorist recruiting, training, and planning . . . . Thousands of extremist websites promote violence to an online worldwide audience predisposed to the extremist message. They are posting videos on how to build

(S.D. Fla. filed Oct. 23, 2007) (acquitted); United States v. Herrera, No. 06-cr-20373 (S.D. Fla. filed June 22, 2006) (acquitted); United States v. Lemorin, No. 06-cr-20373 (S.D. Fla. filed June, 22 2006) (acquitted); United States v. Abassi, No. 13-cr-00304 (S.D.N.Y. filed Apr. 22, 2013) (acquitted); United States v. Izhar Khan, No. 11-cr-20331 (S.D. Fla. filed May, 25 2011) (acquitted); United States v. Salman, No. 17-cr-00018 (M.D. Fla. filed Jan. 12, 2017) (acquitted). Of thirty-six defendants who invoked an entrapment defense, twenty-seven went to trial and eight pleaded guilty. One case is still awaiting trial. *See* United States v. Carpenter, No. 21-cr-00038 (E.D. Tenn. 2021). All of the defendants who went to trial were convicted.

92. *See* RICK JONES, GERALD B. LEFCOURT, BARRY J. POLLACK, NORMAN L. REIMER & KYLE O'DOWD, NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 14 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/VZM6-XSCH]; *see also, e.g.*, United States v. Hamzeh, 420 F. Supp. 3d 828 (E.D. Wis. 2019) (plea); United States v. Loewen, No. 13-cr-10200 (D. Kan. 2015) (plea); United States v. Cornell, No. 15-cr-00012 (S.D. Ohio 2016) (plea); United States v. Hammadi, No. 11-cr-00013 (W.D. Ky. 2017) (plea); United States v. Muse, No. 19-cr-00025 (W.D. Mich. 2020) (plea) (including co-defendant Haji); *Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 25 (2011) (testimony of Robert S. Mueller, III, Director, FBI).

93. *See* Currier, *supra* note 66.

94. *See generally* ROBERT J. BUNKER & PAMELA LIGOURI BUNKER, RADICAL ISLAMIST ENGLISH-LANGUAGE ONLINE MAGAZINES: RESEARCH GUIDE, STRATEGIC INSIGHTS, AND POLICY RESPONSE (2018) (describing various propaganda resources used by Al Qaeda and other terrorist groups); Anne Stenersen, *'Bomb-Making for Beginners': Inside an Al-Qaeda E-Learning Course*, 7 PERSPS. ON TERRORISM 25 (2013) (examining Al Qaeda's use of online courses on bomb making).

95. *See* Stenersen, *supra* note 94, at 28–30.

> backpack bombs and bio-weapons. They are using social networking to link terrorist plotters and those seeking to carry out these plans.[96]

Fortunately, the terrorists' efforts have been a massive failure because implementing instructions on how to build a bomb requires expertise and access to high explosives or blasting caps, which are nearly impossible to attain in the United States without government detection.[97] Mueller's comments reflected the FBI's shift from primarily physical surveillance to electronic surveillance of Muslims' social media content in search of potential terrorists based on extremist speech.

Although the efforts of real terrorists to persuade Muslims to commit so-called lone-wolf terrorist attacks should be foiled by law enforcement, the government's response has been an overreaching counterterrorism regime that categorically treats Muslims' political dissent as a security threat. Opposition to America's occupation of Iraq, drone strikes in Afghanistan, and U.S. foreign policies on Palestine–Israel have triggered thousands of investigatory visits by FBI agents to targets' workplaces, homes, and mosques.[98] Ironically, the systemic targeting of Muslims has served Al Qaeda and ISIS's recruitment narrative that the Christian West is at war with Islam and Muslims.[99] The more the U.S. government imputes a criminal connotation to the term "Islamist," the more members of foreign terrorist organizations believe their violent acts are a form of legitimate revolt against

96. *Hearing Before the H. Comm. on the Judiciary*, *supra* note 92, at 8–9.

97. *See* Benson, *supra* note 65, at 306.

98. *See, e.g.*, Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, HARPER'S MAG., Aug. 2011, https://harpers.org/archive/2011/08/to-catch-a-terrorist/ ("In November 2001, the Department of Justice began conducting 'voluntary interviews' with 5,000 Middle Eastern non-citizens. Hundreds of FBI agents were dispatched across the country to conduct the interviews, with standard questions like 'Are you aware of anybody who reacted in a surprising way about the terrorist attacks?'"); Mary Beth Sheridan, *Interviews of Muslims to Broaden*, NBC NEWS (July 16, 2004, 11:33 PM), https://www.nbcnews.com/id/wbna5454797 [https://perma.cc/5T7H-63JG]; Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41, 41–42, 50–51, 56 (2011) (discussing "voluntary" interviews and their consequences for interviewees); Opinion, *ADC Requests DHS Civil Liberties Investigation Into: Operation Frontline Targeting Muslims in the US in 2004*, AL-JAZEERAH: CROSS-CULTURAL UNDERSTANDING (Feb. 28, 2009), http://www.ccun.org/Opinion%20Editorials/2009/February/28%20o/ADC%20Requests%20DHS%20Civil%20Liberties%20Investigation%20into%20Operation%20Frontline%20Targeting%20Muslims%20in%20the%20US%20in%202004.htm [https://perma.cc/2WJX-5YTW]; *see also* Seth Cline, *The 1993 World Trade Center Bombing: A New Threat Emerges*, U.S. NEWS & WORLD REP. (Feb. 26, 2013, 12:55 PM), http://www.usnews.com/news/blogs/press-past/2013/02/26/the-1993-world-trade-center-bombing-a-new-threat-emerges [https://perma.cc/99JW-6W3Y] (finding that only thirty-three of the more than three hundred deaths post-9/11 stemming from political violence and mass shootings were caused by Muslim Americans, according to a Triangle Center on Terrorism and Homeland Security study).

99. *See generally* GARRETT M. GRAFF, THE THREAT MATRIX: THE FBI AT WAR IN THE AGE OF TERROR (2011) (discussing the debate in the U.S. government over how the abuse of Muslim detainees would bolster Al Qaeda's narrative that America is at war with Islam and Muslims).

state oppression.[100] The U.S. government's myopic labeling of terrorism as "Islamist jihad" thus validates terrorist groups' propaganda that America is at war with Islam.[101]

Whatever laws that exist on paper to protect holding and sharing extremist beliefs are voided in practice when sting operations systematically coerce or manipulate Muslims with extremist views into violent action. These practices have become so abusive that by 2014, Marc Sageman, the same scholar who proffered the social network theory emulated by the FBI, concluded: "After over a decade of intense search, there still has been no discovery of any single spotter/recruiter—except for FBI undercover agents."[102] The majority of the cases corroborate the absence of real terrorist recruiters ready to recruit gullible Muslims in the United States. A counterterrorism policy designed to react to general calls by foreign terrorist organizations is grounded in the presumption that Muslims will respond favorably. The facts, however, show this is rarely the case. Out of the 646 cases, only 28 defendants (4.3%) responded to ISIS, Al Qaeda, or another designated terrorist organization's calls for Muslims to conduct terrorism within the United States.[103]

Entrapment doctrine is supposed to protect defendants from crimes manufactured by government officials. Specifically, the entrapment defense "represents an ongoing attempt to strike a balance between criminal predisposition and overzealous law enforcement practices."[104] As it currently stands, however, this

100. *See* FRANÇOIS BURGAT, ISLAMISM IN THE SHADOW OF AL-QAEDA 7–8 (Patrick Hutchinson trans., Univ. of Tex. Press 2008) (2005) (discussing the impact of the American narrative on terror).

101. *See* Aziz, *Losing the War*, *supra* note 46, at 261–62 (describing the recruiting narrative used by Al Qaeda and ISIS of violent American military intervention and support of dictators).

102. Sageman, *supra* note 21, at 567.

103. *See, e.g.*, Indictment at 1–2, United States v. Reid, No. 02-cr-10013 (D. Mass. Jan. 16, 2002); Statement of Facts at 4, United States v. Faris, No. 03-cr-00189 (E.D. Va. May 1, 2003); United States v. Abdi, 342 F.3d 313, 315 (4th Cir. 2003); Plea Agreement at 13–17, United States v. James, No. 05-cr-00214 (C.D. Cal. Dec. 14, 2007); Indictment at 1–2, United States v. Defreitas, No. 07-cr-00543 (E.D. N.Y. June 28, 2007); Indictment at 1, United States v. Zazi, No. 09-cr-00663 (E.D.N.Y. Sept. 23, 2009); Superseding Indictment at 1, United States v. Medunjanin, No. 10-cr-00019 (E.D.N.Y. Feb. 24, 2010); Indictment at 1, United States v. Shahzad, No. 10-cr-00541 (S.D.N.Y. June 17, 2010); Criminal Complaint at 3, United States v. Abdulmutallab, No. 10-cr-20005 (E.D. Mich. Dec. 26, 2009); Superseding Indictment at 1–4, United States v. Abdo, No. 11-cr-00182 (W.D. Tex. Nov. 8, 2011); Factual Basis in Support of Plea at 6–7, United States v. Qazi, No. 12-cr-60298 (S.D. Fla. Mar. 12, 2015); Criminal Complaint at 1, United States v. Tsarnaev, No. 13-cr-10238 (D. Mass. Apr. 21, 2013); Indictment at 2–3, United States v. Saleh, No. 15-cr-00393 (E.D.N.Y. Aug. 10, 2015); Sealed Complaint at 1–2, United States v. Haroon, No. 16-mj-06132 (S.D.N.Y. Sept. 27, 2016); Sealed Indictment at 1–4, United States v. El Bahnasawy, No. 16-cr-00376 (S.D.N.Y. June 1, 2016); Indictment at 1–4, United States v. Rahimi, No. 16-cr-00760 (S.D.N.Y. Nov. 16, 2016); Criminal Complaint at 2, United States v. Ftouhi, No. 17-cr-20456 (E.D. Mich. June 21, 2017); Complaint at 6, United States v. Ullah, No. 18-cr-00016 (S.D.N.Y. Dec. 12, 2017); Motion for Detention Pending Trial at 3–5, United States v. Henry, No. 19-cr-00181 (D. Md. Apr. 8, 2019); Indictment at 1–2, United States v. Camovic, No. 20-cr-00326 (E.D.N.Y. Aug. 26, 2020); Sealed Indictment at 2, United States v. Abdullah, No. 20-cr-00677 (S.D.N.Y. Dec. 10, 2020). If one counts individuals who died during their attacks, the number goes up to thirty-eight (Elton Simpson, Nadir Soofi, Tamerlan Tsarnaev, Omar Mateen, Rizwan Farook, Tashfeen Malik, Nidal Malik Hassan, Faisal Mohammad, Mohammed Saeed Alshamrani, and Abdul Artan).

104. PAUL MARCUS, THE ENTRAPMENT DEFENSE § 1.01 (5th ed. 2021).

common law doctrine has evolved into dead-letter law for the hundreds of Muslim defendants ensnared in government-manufactured terrorist plots.[105]

A. EVOLUTION OF ENTRAPMENT LAW IN THE U.S. SUPREME COURT

In establishing the common law entrapment doctrine, the U.S. Supreme Court made clear that the objective is to protect "unwary innocent" individuals from government inducement to commit a criminal act because "[t]he function of law enforcement is the prevention of crime and . . . that function does not include the manufacturing of crime."[106] In practice, however, the law makes it easy for the government to persuade juries that a racial minority who holds politically extreme views can never be an "unwary innocent." The doctrine's failure is due in part to the different tests across the federal circuits that effectively favor government sting operations. Beyond establishing the two elements of government inducement and a defendant's lack of predisposition to commit the criminal offense, the Supreme Court cases squarely addressing entrapment provide little guidance to lower courts.[107]

Proving entrapment is a two-step process. First, the defendant must prove by a preponderance of the evidence that the government used fraudulent representation, persuasion, force, threats, or repeated suggestions to create the risk that an otherwise unwilling person would commit a crime.[108] The burden of proof then shifts to the government to prove the defendant was already predisposed to commit the offense such that its informants or agents merely provided the defendant with the means and opportunity to do so. Some courts apply a "unitary approach" to entrapment wherein "a defendant who claims he was entrapped must produce evidence to the judge both of government persuasion and of his own 'non-predisposition.'"[109] Other jurisdictions follow the "bifurcated approach," where "the jury, not the judge, decides whether the defendant has carried his burden of proving inducement, not just producing evidence of it."[110] If the defendant meets his

105. *See* Said, *supra* note 89, at 692–98; *see generally* Norris & Grol-Prokopczyk, *supra* note 18 (studying more than 500 terrorism cases between 2001 and 2015 and finding that all entrapment defenses were unsuccessful); Eric Schmitt & Charlie Savage, *In U.S. Sting Operations, Questions of Entrapment*, N.Y. TIMES (Nov. 29, 2010), https://www.nytimes.com/2010/11/30/us/politics/30fbi.html (studying fifty of the most significant terrorism cases since 2001 and finding that all entrapment defenses were unsuccessful).

106. Sherman v. United States, 356 U.S. 369, 372, 376–78 (1958); United States v. Russell, 411 U.S. 423, 433–36 (1973).

107. *See* Sorrells v. United States, 287 U.S. 435, 457 (1932); Sherman v. United States, 356 U.S. 369, 376 (1958); United States v. Russell, 411 U.S. 423, 436 (1973); Mathews v. United States, 485 U.S. 58, 62 (1988); Jacobson v. United States, 503 U.S. 540, 548–50 (1992).

108. *See* United States v. Joost, 92 F.3d 7, 12 (1st Cir. 1996); United States v. Fedroff, 874 F.2d 178, 183–85 (3d Cir. 1989) (noting that inducement requires something more than mere solicitation, such as persuasion, fraudulent representation, or coercion, but that "oppressive inducement" goes beyond what a defendant must show to be entitled to an entrapment defense).

109. United States v. Whoie, 925 F.2d 1481, 1483 (D.C. Cir. 1991) (citing United States v. El-Gawli, 837 F.2d 142, 145 (3d Cir. 1988)).

110. *Id.*

burden, the jury proceeds to "decide whether the government has met its burden of proving predisposition."[111]

Although predisposition is the crux of an entrapment defense regardless of jurisdiction, there are three different legal tests and a fourth case-by-case analysis across the twelve federal circuits. Regardless of the test applied, the emphasis on predisposition allows jurors to act on their implicit (or explicit) biases of Muslims as presumptive terrorists by virtue of their religious identity and dissident political beliefs.[112] In light of high rates of anti-Muslim prejudice in American society, such biases may have been factors in the conviction of all twenty-six Muslim defendants who went to trial and claimed entrapment.[113]

This Section reviews the evolution of the entrapment doctrine from its original purpose of protecting individuals from government abuse to shielding the government from accountability for abusive investigative practices. The first mention of the entrapment doctrine occurred in a case before New York's highest court in 1904.[114] The defendant in *People v. Mills* was convicted of attempting to steal six indictments filed by the grand jury against another person.[115] In assessing the entrapment defense, New York Court of Appeals Judge Irving G. Vann wrote: "We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers and held out a bait."[116] Although the court in *Mills* recognized entrapment as a legally cognizable defense, it affirmed the defendant's conviction because it found the defendant had already developed a plan to bribe the district attorney to give him the indictments prior to the government's sting operation.[117]

Eleven years later, in 1915, the Ninth Circuit in *Woo Wai v. United States* reversed the conviction of a Chinese man charged with conspiring to unlawfully bring Chinese persons into the United States from Mexico.[118] An immigration official had employed a detective to approach Woo Wai and suggest a scheme to

111. *Id.* (citing United States v. Rivera, 778 F.2d 591, 600–01 (10th Cir. 1985)).

112. *See* JOHN SIDES & DALIA MOGAHED, DEMOCRACY FUND VOTER STUDY GRP., MUSLIMS IN AMERICA: PUBLIC PERCEPTIONS IN THE TRUMP ERA 9 fig.3 (2018), www.voterstudygroup.org/publication/muslims-in-america [https://perma.cc/4UL9-XKH5]; *see generally* Cashin, *supra* note 24 (comparing the experience of prejudice between Muslims and African-Americans, and considering implicit and explicit biases against Muslims); Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 523–40 (2018) (examining how courts fail to consider evidence of explicit bias in discrimination cases).

113. *See generally* Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM L. & CRIMINOLOGY 107 (2005) (examining the entrapment defense and judicial regulation of undercover operations). *See infra* note 230 for the list of twenty-six cases. Another eight defendants raised an entrapment defense but ultimately pleaded guilty before trial. The defendant in United States v. Carpenter has raised an entrapment defense. His case is still pending. *See* Memorandum in Support of Motion to Dismiss Due to Entrapment as a Matter of Law at 12, United States v. Carpenter, No. 21-cr-00038 (E.D. Tenn. Feb. 22, 2022).

114. *See* People v. Mills, 70 N.E. 786, 798–99 (N.Y. 1904) (Bartlett, J., dissenting).

115. *See id.* at 792 (O'Brien, J., dissenting).

116. *Id.* at 791 (majority opinion).

117. *Id.*

118. *See* 223 F. 412, 413–16 (9th Cir. 1915).

make money.[119] Without telling Woo Wai what this scheme entailed, the detective introduced him to other immigration officials who told Woo Wai that the scheme involved bringing Chinese persons across the border.[120] Although Woo Wai was reluctant because of the illegality of the scheme, the officials assured him they would not arrest him.[121] For two years the government officials pestered Woo Wai to partake in the scheme, to which he remained reluctant until finally agreeing in 1910.[122] The Ninth Circuit accepted Woo Wai's entrapment defense because it found no evidence that he was engaged in any such scheme until he was approached by these officials. The court stated:

> The purpose for which the detective was employed, and the object of the scheme of entrapment, was not to punish men who were suspected of crime; but the whole purpose was to place Woo Wai in a position where he might be compelled to disclose facts of which he was suspected to have knowledge . . . .[123]

The Supreme Court's first ruling on entrapment was issued in 1932 in *Sorrells v. United States*.[124] Prior to *Sorrells*, lower courts applied an objective test that focused on whether the government had "baited" the defendant into a criminal act.[125] *Sorrells*, however, held that inducement, or "baiting," alone would no longer be sufficient to uphold an entrapment defense.[126] Instead, courts must also look to "a defendant's state of mind."[127] Specifically, entrapment occurs "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[128] To overcome the defense of entrapment, the government thus would only have to prove the defendant was predisposed to commit the crime—a subjective test—after the defendant proved government inducement—an objective test. Since *Sorrells*, entrapment jurisprudence has transformed into a flimsy buffer against government overreach in sting operations. Only the most egregious cases of government abuse have resulted in acquittal.[129]

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119. *See id.* at 413.

120. *Id.*

121. *See id.* (Woo Wai told the detective and the immigration officials: "This is in violation of the law. It could not be done.").

122. *See id.* at 414.

123. *Id. But see* Lucadamo v. United States, 280 F. 653, 658 (2d Cir. 1922) (affirming the lower court's denial of defendants' entrapment defense because government agents merely purchased illegal drugs that defendants were already selling prior to interacting with the agents).

124. 287 U.S. 435 (1932).

125. *See Lucadamo*, 280 F. at 657–58; United States v. Wray, 8 F.2d 429, 430 (N.D. Ga. 1925).

126. *See* 287 U.S. at 451.

127. United States v. Cromitie, 727 F.3d 194, 205 (2d Cir. 2013) (citing *Sorrells*, 287 U.S. at 445).

128. *Sorrells*, 287 U.S. at 442.

129. *See* Molly F. Spakowski, Comment, *Crafted from Whole Cloth: Reverse Stash-House Stings and the Sentencing Factor Manipulation Claim*, 67 BUFF. L. REV. 451, 470–72 (2019); *but see* Jesse J. Norris, *How Entrapment Still Matters: Partial Successes of Entrapment Claims in Terrorism Prosecutions* (arguing that "entrapment claims have influenced hung juries, embarrassing prosecutors

Procedurally, a defendant claiming entrapment files two separate motions. First, a motion is made for the court to find the defendant was entrapped as a matter of law, which if granted, results in the dismissal of the criminal charges. If the motion is denied, then the defendant files a motion in limine requesting that an entrapment defense be included in the jury instructions, which places application of the relevant doctrinal test squarely within the jury's purview. Courts have used language in such instructions as broad as "any evidence" or "more than a scintilla," but generally they have agreed that in order to include entrapment in the jury instructions, "the evidence ought, at the least, provide a basis for a reasonable doubt on the ultimate jury entrapment issue of whether criminal intent originated with the government."[130]

In the twenty-six terrorism trials examined where the Muslim defendant raised an entrapment defense, none received a judicial finding of entrapment as a matter of law.[131] In thirteen cases, the judge denied the defendant's motion to allow the jury to consider an entrapment defense, effectively rejecting an entrapment defense as a matter of law.[132] And in the remaining thirteen cases, where Muslim defendants were permitted a jury instruction, the jury rejected the defendant's claim that he was entrapped and found him guilty.[133]

When an entrapment defense is included in jury instructions, the jury must determine beyond a reasonable doubt that the defendant possessed the predisposition to commit the criminal offense prior to the government's inducement.[134] The government bears the burden of proof to show the "defendant was disposed to commit the criminal act prior to first being approached by Government agents."[135] For example, in a drug

and lowering expectations for subsequent trials" and even leading to unexpectedly lenient sentences), *in* 82 STUDIES IN LAW, POLITICS, AND SOCIETY 141, 156–57 (Austin Sarat ed., 2020).

130. United States v. Nations, 764 F.2d 1073, 1080 (5th Cir. 1985).

131. *See infra* note 230 for a list of the twenty-six cases where Muslim defendants claimed they were entrapped by the government.

132. *See* United States v. Al-Moayad, 545 F.3d 139, 145, 157–58 (2d Cir. 2008) (including co-defendant Zayed); Tatar v. United States, No. 13-cv-03317, 2017 WL 945015, at *7 (D.N.J. Mar. 10, 2017) (underlying case including co-defendants Shnewer, Dritan Duka, Eljvir Duka, and Shain Duka, together known as the "Fort Dix Five"); *Cromitie*, 727 F.3d at 199 (including co-defendants Payen, David Williams, and Onta Williams); United States v. DeLeon, No. 12-cr-00092, slip op. at 3 (C.D. Cal. Sept. 15, 2014); Defendant's Proposed Jury Instruction, United States v. Smith, No. 17-cr-00182 (W.D. N.C. Mar. 21, 2019).

133. United States v. Lakhani, 480 F.3d 171, 174 (3d Cir. 2007); United States v. Aref, No. 04-cr-00402, 2007 U.S. Dist. LEXIS 12228, at *1, *12 (N.D.N.Y. Feb. 22, 2007) (including co-defendant Hossain); United States v. Siraj, No. 07-0224-cr, 2008 WL 2675826, at *1 (2d Cir. July 9, 2008); United States v. Shah, No. 06-cr-00428, 2015 WL 1505840, at *1 (S.D. Tex. Mar. 31, 2015); United States v. Mohamud, 843 F.3d 420, 430 (9th Cir. 2016); United States v. Osmakac, 868 F.3d 937, 941, 951 (11th Cir. 2017); United States v. Suarez, No. 15-cr-10009 (S.D. Fla. Apr. 20, 2017); United States v. Young, 916 F.3d 368, 373, 375 (4th Cir. 2019); United States v. Jones, No. 17-cr-00236, slip op. at 4 (N.D. Ill. May 25, 2019) (including co-defendant Schimenti); United States v. Domingo, No. 19-cr-00313, slip op. at 13 (C.D. Cal. Aug. 18, 2020); United States v. Hossain, No. 19-cr-00606, 2021 WL 4272827, at *6 (S.D.N.Y. Sept. 21, 2021).

134. *See* Jacobson v. United States, 503 U.S. 540, 553 (1992).

135. *Id*. at 548–49.

case where a government agent offers an individual the opportunity to buy or sell drugs, if that offer is immediately accepted, and the agent then immediately arrests the offeree, the entrapment defense is of little use; although the government induced the crime, the immediacy of the defendant's response is credible evidence that he was predisposed to commit it.[136] However, in a case where government agents invent, plan, fund, and coerce a person into a terrorist plot extending an average of ten months, an entrapment defense is supposed to serve as an important safeguard against government overreach.[137]

In 1988, the Supreme Court in *Mathews v. United States* refined the two primary elements of entrapment to "government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct."[138] The Court further held that "[p]redisposition, 'the principal element in the defense of entrapment,' focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime."[139]

The emphasis on a defendant's predisposition was reaffirmed four years later in *Jacobson v. United States* when the Court stated: "In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to *commit a criminal act*, and then induce commission of the crime so that the Government may prosecute."[140] The Court noted, "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises."[141] However, the Court also reasoned that entrapment occurs "[w]hen the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law."[142]

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, along with Justice Scalia joining in part, authored a dissent noting her disagreement on the time at which a defendant's predisposition should be assessed.[143] While the majority held that predisposition is assessed when the government agent first becomes involved, the dissent reads *Sherman* and *Sorrells* as establishing the

136. *Id.* at 549–50.

137. The average number of months in sting operations against Muslim defendants is approximately twelve. If the highest 10% and the lowest 10% of sting operation lengths are discarded, then the trimmed mean is ten months.

138. 485 U.S. 58, 63 (1988).

139. *Id.* (citation omitted) (first quoting United States v. Russell, 411 U.S. 423, 433, 436 (1973); and then quoting Sherman v. United States, 356 U.S. 369, 372 (1958)).

140. 503 U.S. at 548 (emphasis added).

141. *Id.* (quoting Sorrells v. United States, 287 U.S. 435, 441 (1932)).

142. *Id.* at 553–54.

143. *See id.* at 554–59 (O'Connor, J., dissenting).

time at when the government agent first suggests criminal activity.[144] As a result, the dissent rejected the proposition that "the Government must have a reasonable suspicion of criminal activity before it begins an investigation."[145] Failing to do so opens the floodgates for predatory sting operations, which have led to grave consequences for Muslim defendants' liberty.

In counterterrorism cases, especially after 2008, the factual issue becomes whether a defendant's bluster and bombast on social media, praising ISIS or Al Qaeda or criticizing the United States, makes him "not innocent" such that the government is justified in preying on him in a sting operation. The government points to the defendant's dissident speech, which, although protected by the First Amendment, is used as dispositive evidence to defeat an entrapment defense.[146] The courts' interpretations of *Jacobson* diverge across the federal circuits. The primary difference lies in the various tests used to determine whether a defendant possessed predisposition sufficient to justify the government's inducement. As a result, entrapment jurisprudence falls into four categories: (1) the positionality predisposition test, (2) the five-factor predisposition test, (3) the three-factor predisposition test, and (4) the case-by-case predisposition assessment.[147]

The wide spectrum of factors and tests employed across the circuit courts makes entrapment law ripe for legislative reform to eliminate its current incoherence, inconsistency, and inadequacy in protecting defendants from government overreach. Table 1 shows how anti-terrorism cases between 2001 and 2021 are distributed across federal circuits, including the number of sting operations. Notably, the largest number of cases (139) filed in a single appellate court occurred in the Second Circuit, which applies the three-factor predisposition test. The second largest number of cases (95) were filed in the Fourth Circuit, which applies the case-by-case approach. The high number of cases in the Second and Fourth Circuits arise, in large part, from the significant resources allocated to anti-terrorism investigations in the New York City, Washington, D.C., and Northern Virginia areas, where the 9/11 attacks occurred. There are 268 cases subject to the case-by-case assessment predisposition test and 160 cases subject to the five-factor test based on the jurisdiction's entrapment doctrine. Sections B through E assess the flaws and inconsistencies of the various predisposition tests across the federal circuits.

144. *Id.* at 556–57.
145. *Id.* at 557.
146. *See* MARCUS, *supra* note 104, at § 1.04.
147. *See infra* Sections III.B–III.E for a summary of the different circuit tests on predisposition.

Table 1: Number of Terrorism-Related Cases and Sting Operations Against Muslims Within Each Federal Circuit (2001–2021)

Circuit	Number of Cases	Entrapment Claims	Sting Operations	Predisposition Test
First	18	0	3	5-factor
Second	139	10	76	3-factor
Third	40	7	24	Positionality Test
Fourth	95	2	38	Case-by-Case
Fifth	42	1	16	Case-by-Case
Sixth	60	7	30	5-factor
Seventh	39	3	20	Positionality Test
Eighth	58	0	10	Case-by-Case
Ninth	69	3	26	5-factor
Tenth	13	1	3	5-factor
Eleventh	67	2	40	Case-by-Case
District of Columbia[148]	6	0	4	Case-by-Case
Total	646	36	290	

B. THE SEVENTH CIRCUIT AND JUDGE POSNER'S ROBUST POSITIONALITY TEST

In 1994, two years after the *Jacobson* opinion, then-Chief Judge Posner wrote the en banc Seventh Circuit opinion in *United States v. Hollingsworth*.[149] Judge Posner interpreted *Jacobson* as requiring a positionality test to determine

148. In *United States v. Burkley*, the D.C. Circuit adopted the two-part test for entrapment as follows:

> Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment. And the law, as a matter of policy, forbids his conviction in such a case. On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment.

591 F.2d 903, 907 n.1 (D.C. Cir. 1978). Predisposition is shown when the defendant possesses a "state of mind which readily responds to the opportunity furnished by the officer or his agent to commit the forbidden act for which the accused is charged." *Id.* at 916 (citation omitted); *see also* BAR ASS'N OF THE D.C., CRIMINAL JURY INSTRUCTIONS 333–37 (Henry F. Greene & Thomas A. Guidoboni eds., 3d ed. 1978) (providing a sample jury instruction for entrapment).

149. 27 F.3d 1196 (7th Cir. 1994).

predisposition.[150] Defendants Pickard and Hollingsworth were an orthodontist and a farmer, respectively, and both were charged with money laundering.[151] After Pickard's numerous business ventures had failed, the two developed a new plan to become international financiers by creating a Virgin Islands corporation.[152] Like Pickard's previous ventures, this scheme appeared doomed to fail—that is, until Pickard placed an ad in *USA Today*. The U.S. customs agent Rothrock saw the ad during a seminar on money laundering.[153] Rothrock called the number on the ad, and although the facts hereafter became complex, "the bottom line is that Pickard demonstrated a clear willingness to commit the crime of money laundering, along with wariness about being detected."[154] With Hollingsworth's assistance, Pickard laundered Rothrock's money, which was provided by the U.S. government.[155] The two were eventually arrested and convicted. Judge Posner agreed that if predisposition merely means willingness, then the convictions of the two defendants were justified.[156]

However, Posner found that a mere willingness to break the law was insufficient to show predisposition if the defendants were not able to commit the offense.[157] According to Posner's interpretation of *Jacobson*, the Court did not add a new element to the entrapment defense, such as "'readiness' or 'ability' or 'dangerousness.'"[158] "Rather, the [Supreme] Court clarified the meaning of predisposition."[159] Ultimately, Posner concluded that predisposition has a "positional as well as dispositional force."[160] To be predisposed, 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.[161]

In short, Judge Posner concluded that predisposition is more than just willingness; it also considers the actual ability of the defendant to commit the offense. Thus, if the defendant's existing training, experience, occupation, or acquaintances would allow him to commit the crime, and the government provides the means and opportunity, then no entrapment occurs. Furthermore, "the greater the

150. *See id*. at 1199–1200.
151. *Id*. at 1198; Richard H. McAdams, *Reforming Entrapment Doctrine in* United States v. Hollingsworth, 74 U. CHI. L. REV. 1795, 1798 (2007).
152. *Hollingsworth*, 27 F.3d at 1200; McAdams, *supra* note 151.
153. 27 F.3d at 1200.
154. McAdams, *supra* note 151.
155. *Id*.
156. *Id*.; *see also Hollingsworth*, 27 F.3d at 1210.
157. *See* McAdams, *supra* note 151, at 1798–99.
158. *Hollingsworth*, 27 F.3d at 1199.
159. *Id*. at 1200.
160. *Id*.
161. *Id*. (emphasis added).

inducement, the weaker the inference that in yielding to it the defendant demonstrated that he was predisposed to commit the crime in question."[162]

In 2014, twenty years after *Hollingsworth*, the Seventh Circuit in *United States v. Mayfield* supplemented the positionality test with five additional factors known as the *Mayfield* factors:

> (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.[163]

In counterterrorism cases, the positionality test may not necessarily shield Muslim defendants from anti-Muslim jury bias (a topic outside the scope of this Article) because the prosecution presents a litany of extremist political statements made by the defendant.[164] However, a defendant may receive a more impartial analysis if a judge determines that because the defendant was hapless, young, naïve, socially isolated, and bombastic, he simply could not have committed the offenses but for an FBI operative's leading role, planning, and substantial assistance.[165] If the judge issues jury instructions, the jury must consider if the defendant is in a position to commit the legal act without government inducement.

As the cases in Part IV show, most defendants in counterterrorism cases possess neither "previous training [n]or experience [n]or occupation [n]or acquaintances" to plan, much less execute, a domestic terrorism act.[166] Instead, the government points to the defendants' anti-American statements and ideological support for foreign terrorist groups as evidence of predisposition.[167] For example, some defendants' vague and bombastic statements expressed a desire to blow up buildings. Lacking the expertise and ability to secure illegal explosives, as well as any connections to foreign terrorist organizations or bomb makers, most defendants would meet Judge Posner's positionality test because their real offense is simply holding extremist and offensive political ideas. It is government agents and informants who transform the preposterous ideas into action. Being an ideological extremist, while unsavory, does not axiomatically make one a terrorist; and the entrapment defense is supposed to safeguard this First Amendment principle.

Since *Hollingsworth*, criminal defense attorneys have argued the positionality test before other federal circuits with little success. For example, when the defendant in *United States v. Thickstun* argued for the Seventh Circuit's

162. *Id.* (citing *Hollingsworth*, 9 F.3d at 597).

163. United States v. Mayfield, 771 F.3d 417, 435 (7th Cir. 2014).

164. Out of the 646 federal terrorism-related cases, 39 were filed in the Seventh Circuit.

165. *See Mayfield*, 771 F.3d at 435 (providing factors related to the defendant's character and the government's actions).

166. *Hollingsworth*, 27 F.3d at 1200.

167. *See infra* Part IV.

positionality test, the Ninth Circuit rejected that test.[168] It held that *Jacobson* did not require the government to show positional readiness.[169] Instead, a defendant's willingness to commit the crime is sufficient to show predisposition. That *Thickstun* was a bribery case may have been determinative in the Ninth Circuit's rejection of a positional element. The Court noted that "[a] person is never 'positionally' able to bribe a public official without cooperation from that official."[170] However, this logic does not translate to counterterrorism cases where the only connection between the defendant and the terrorist organization at issue are the actions of the undercover agent or informant. Absent the leading role of government operatives in the sting operation, the defendant would likely be posting offensive content on accounts frequently shut down by social media companies.[171] Although such behavior may arguably warrant monitoring for predicate acts of the most vocal extremists, it does not justify months of aggressive pressure on Muslim defendants to participate in government-led and manufactured terrorist plots for the sole purpose of incarceration.

C. THE SECOND AND THIRD CIRCUITS' THREE-FACTOR PREDISPOSITION TEST

Of the 646 anti-terrorism federal cases against Muslim defendants in the author's database, 139 (21.5%) have been filed in the Second Circuit, likely due to the active FBI counterterrorism units in the Southern and Eastern Districts of New York.[172] As a result, the Second Circuit has an outsized influence in federal entrapment jurisprudence. Under the Second Circuit's entrapment test (also followed by the Third Circuit), a defendant raising the affirmative defense must first prove government inducement by a preponderance of the evidence.[173] Doing so entails showing that the government initiated the crime by "soliciting, proposing, initiating, broaching or suggesting the commission of the offence charged" to demonstrate that "the prosecution . . . set the accused in motion."[174] Defendants

168. *See* 110 F.3d 1394, 1397 (9th Cir. 1997). Other circuits have also rejected the positional predisposition test. *See id*. at 1399 (first citing United States v. McLernon, 746 F.2d 1098, 1109 (6th Cir. 1984); then citing United States v. Beverly, 723 F.2d 11, 12 (3d Cir. 1983) (per curiam); and then citing United States v. Dove, 629 F.2d 325, 329 (4th Cir. 1980)). In applying the different tests, juries overwhelmingly rule in favor of the prosecution.

169. *See id*. at 1398.

170. *Id*.

171. *See, e.g*., Affidavit in Support of Criminal Complaint at 3, 5, United States v. Qamar, No. 16-cr-00227 (E.D. Va. July 7, 2016) (noting defendant operated sixty different Twitter accounts between May 2015 and April 2016, and each was eventually shut down); Affidavit in Support of Criminal Complaint at 3–4, United States v. Coffman, 15-cr-00016 (E.D. Va. Nov. 14, 2014) (noting Facebook accounts of defendant were repeatedly disabled or shut down).

172. *See* GRAFF, *supra* note 99, at 155–93 (providing the history of the FBI New York office as the largest and most experienced in counterterrorism).

173. *See* United States v. Brand, 467 F.3d 179, 189 (2d Cir. 2006); United States v. Gambino, 788 F.2d 938, 943 (3d Cir. 1986); *see also* United States v. Jannotti, 729 F.2d 213, 224 (3d Cir. 1984) ("To be entitled to such a charge, the defendant must first show '(1) evidence that the Government initiated the crime, regardless of the amount of pressure applied to the defendant, and (2) any evidence negating the defendant's propensity to commit the crime.'" (quoting United States v. Watson, 489 F.2d 504, 509 (3d Cir. 1973)).

174. United States v. Sherman, 200 F.2d 880, 883 (2d Cir. 1952).

can easily meet this burden by pointing to the various tactics used by informants or undercover agents in sting operations.[175]

The burden of proof then shifts to the government to establish predisposition by showing beyond a reasonable doubt the accused's ready response to government inducement pursuant to a three-factor test:

> (1) an existing course of criminal conduct similar to the crime for which [the defendant] is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement.[176]

To determine whether a defendant possesses the second factor—an "already formed design"—the Second Circuit looks to the defendant's state of mind, such as whether he was willing to inflict harm on the United States, die like a martyr, or be receptive to informant presentations.[177] The problem in practice is juries' uncritical acceptance of social media content and defendants' speech as the basis for finding an "already formed design." Bombastic, blowhard, extremist rhetoric is not equivalent to an already formed design to commit a crime. Indeed, most defendants have no "previous training or experience or occupation or acquaintances" related to the violent acts they praise on social media.[178]

The third element—the defendant's "ready response to the inducement"—is the most problematic for protecting unwary targets of sting operations. Factors such as youth, psychological instability, emotional fervor, coercion, and manipulation may cause a person with extremist views to fall prey to aggressive sting operations. The government satisfies the third factor with evidence of a defendant's receptivity to an invitation to participate in an act of terrorism by an informant or undercover agent.[179] Recordings of an informant or undercover agent inviting the target to partake in acts of terrorism and of the target's acceptance, even if ambivalent or later withdrawn, are often sufficient to show predisposition.[180] Meanwhile, courts rarely examine what "ready response" means when a sting operation entails an average of twelve months of cajoling, coercing, and

175. *See, e.g.*, United States v. Cromitie, 727 F.3d 194, 211 (2d Cir. 2013).

176. United States v. Salerno, 66 F.3d 544, 547 (2d Cir. 1995) (alteration in original) (quoting United States v. Valencia, 645 F.2d 1158, 1167 (2d Cir. 1980)). The Second Circuit has been hesitant to change what qualifies as defendant predisposition. *See Brand*, 467 F.3d at 192. Of the 646 cases, 139 were tried in the Second Circuit and 40 were tried in the Third Circuit. Both circuits apply the same predisposition test.

177. *See Cromitie*, 727 F.3d at 207–08.

178. United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc).

179. *See Brand*, 467 F.3d at 192 (noting that the "ready response" test preceded *Jacobson* and reaffirming it post-*Jacobson*).

180. In James Cromitie's case, the defendant was critical of American foreign policy. *See* United States v. Cromitie, 781 F. Supp. 2d 211, 215 (S.D.N.Y. 2011). From there, the FBI informant in his case coerced him into attempting to commit an act of terror against the United States by promising a large sum of money, a new car, a barbershop, and a vacation. *See Cromitie*, 727 F.3d at 211. Or, in Emanuel Lutchman's case, the FBI helped push an indigent panhandler into making a "bayah" video, and the FBI

manipulating the Muslim defendant to take action. Nevertheless, the district courts in the Second Circuit, where most manufactured terrorist plots are orchestrated, adopt the least robust jurisprudence on entrapment, with demonstrable liberty harms to hundreds of Muslim sting operation targets.

The Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations follow the Second Circuit's low bar for defeating an entrapment defense.[181] Specifically, the criteria for a lawful sting operation are:

> (1) The illegal nature of the activity is reasonably clear to potential subjects; and
> (2) The nature of any inducement offered is justifiable in view of the character of the illegal transaction in which the individual is invited to engage; and
> (3) There is a reasonable expectation that offering the inducement will reveal illegal activity; and
> (4) One of the two following limitations is met:
> (i) There is reasonable indication that the subject is engaging, has engaged, or *is likely to engage in the illegal activity proposed* or in similar illegal conduct; or
> (ii) The opportunity for illegal activity has been structured so that there is reason to believe that any persons drawn to the opportunity, or brought to it, *are predisposed to engage* in the contemplated illegal conduct.[182]

Facially, the first, second, and third factors are squarely within a legitimate predicate act test that makes an informant or undercover agent tangential to the defendant's intent to violate the law.

The fourth factor is problematic. Because most judges accept the government's speculative reasoning that a Muslim expressing extremist political views is a prospective terrorist, the success of a defendant's entrapment defense centers on meeting the limitation: "The opportunity for illegal activity has been structured so that there is reason to believe that *any persons drawn to the opportunity*, *or brought to it, are predisposed to engage in the contemplated illegal conduct*."[183] So long as the prosecution can show that the defendant was predisposed to committing the illegal act, the entrapment defense will fail.[184] This reasoning leads us back to the First Amendment-protected activities of posting content on social media, messaging in chat rooms, and expressing support for terrorist organizations or opposition to the U.S. government and its policies as the evidence of predisposition—regardless of whether the defendant is young, mentally ill, indigent, naïve, bombastic, or otherwise incapable of acting on his purportedly extremist statements.

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informant fronted the costs for attack supplies. *See* Government's Sentencing Memorandum at 4, 9, United States v. Lutchman, No. 16-cr-06071 (W.D.N.Y. Jan. 23, 2017).

181. *See* DOJ, *supra* note 74.

182. *Id.* at 16 (emphasis added).

183. *Id.* (emphasis added); *see also* Norris & Grol-Prokopczyk, *supra* note 18, at 619; Said, *supra* note 89, at 696–98; Szpunar, *supra* note 77, at 375.

184. *See* Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 136 (2008).

Still, the FBI justifies its predatory tactics on the specious logic that a person who posts content opposing the United States or supporting ISIS, Al Qaeda, or other designated terrorist groups is likely to provide material support to terrorism if given the opportunity to do so by a real terrorist. Extremist dissident speech is sufficient, the government insists, to show the sting operation target is predisposed to engage in terrorism-related activity. Offensive speech is thus bootstrapped into showing a willingness to commit the crime. Not coincidentally, this circular reasoning mirrors the radicalization theories on which most counterterrorism law enforcement training is grounded.[185] Undercover agents and informants are deployed to induce the target into a fake terrorist plot rather than refrain from intervention, unless the target engages in predicate acts in a plot led by the defendant, not the FBI. And Second Circuit entrapment law facilitates this outcome.

Between the Seventh Circuit's most rights-protective positionality test and the Second and Third Circuit's least protective three-factor test lies the five-factor predisposition test adopted by five federal circuits.[186]

D. THE FIRST, SIXTH, SEVENTH, NINTH, AND TENTH CIRCUITS' FIVE-FACTOR PREDISPOSITION TEST

Eighty-two sting operation cases against Muslims were tried in the First, Sixth, Seventh, Ninth, and Tenth Circuits between 2001 and 2021, of which fourteen involved the defendant raising an entrapment defense.[187] What differentiates these circuits' entrapment jurisprudence from the Second Circuit's is two additional factors in the predisposition test: (1) whether the defendant showed a reluctance to commit the offense and (2) whether the government initiated the criminal act.[188] In all of the cases, the government initiated the criminal act, thus shifting the focus to whether the defendant showed reluctance.[189] After the defendant shows government inducement through "persuasion, false statements, or other governmental conduct that creates a risk of causing an otherwise unwilling

185. *See* Aziz, *supra* note 9, at 128–29.

186. The Third Circuit follows the Second Circuit's three-factor predisposition test. *See* United States v. Fedroff, 874 F.2d 178, 183 (3d Cir. 1989).

187. United States v. Mohamud, 843 F.3d 420, 430 (9th Cir. 2016) (conviction); United States v. Hammadi, No. 11-cr-00013, 2017 WL 3065116, at *1, *4–5 (W.D. Ky. July 19, 2017) (including co-defendant Alwan; plea); United States v. DeLeon, No. 12-cr-00092, slip op. at 2 (C.D. Cal. Sept. 15, 2014) (conviction); Motion to Dismiss and Brief at 1, United States v. Loewen, No. 13-cr-10200 (D. Kan. Feb. 2, 2015) (plea); Motion of Entrapment by Estoppel at 1, United States v. Cornell, No. 15-cr-00012 (S.D. Ohio Mar. 23, 2018) (plea); United States v. Hamzeh, 420 F. Supp. 3d 828, 830 (E.D. Wis. 2019) (plea); United States v. Jones, No. 17-cr-00236, slip op. at 1 (N.D. Ill. May 25, 2019) (including co-defendant Schimenti; conviction); United States v. Haji, No. 19-cr-00025, slip op. at 1 (W.D. Mich. June 17, 2020) (including co-defendants Mohamud Abdikadir Muse and Muse Abdikadir Muse; plea); United States v. Domingo, No. 19-cr-00313, slip op. at 1 (C.D. Cal. July 31, 2020) (conviction); Memorandum in Support of Motion to Dismiss Due to Entrapment as a Matter of Law at 1, United States v. Carpenter, No. 21-cr-00038 (E.D. Tenn. Feb. 22, 2022) (awaiting trial).

188. *See, e.g.*, *Mohamud*, 843 F.3d at 432. Among the 646 federal anti-terrorism cases brought against Muslim defendants, 18 were tried in the First Circuit, 60 in the Sixth Circuit, 39 in the Seventh Circuit, 69 in the Ninth Circuit, and 13 in the Tenth Circuit.

189. For a list of all cases that went to trial involving the entrapment defense, see *infra* note 230.

person to commit the crime charged,"[190] the government must establish the defendant's predisposition according to the following five-factor test: (1) the defendant's character or reputation, including any prior criminal record; (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 repeated government persuasion*; and (5) the nature of the inducement or persuasion by the government.[191] The trials in which the five-factor test was applied all resulted in convictions.[192]

The Tenth Circuit applies a similar five-factor test by looking at (1) prior illegal acts; (2) the defendant's desire to profit; (3) his eagerness to participate in the crime; (4) his ready response to the government's inducement offer; and (5) his demonstrated knowledge or experience in criminal activity.[193] The Sixth Circuit emphasizes the question of whether the defendant evidenced a reluctance to commit the offense that was overcome by repeated government persuasion as the "[t]he most important factor in determining the lack of predisposition as a matter of law."[194]

In the First Circuit, when the defendant's indictment arises from a government sting operation, the courts conclude this is not per se improper inducement. An additional line of inquiry asks whether the sting operation combined an ordinary opportunity to commit the crime with "extra elements" so that there was a "risk of catching in the law enforcement net not only those who might well have committed the crime elsewhere (in the absence of the sting), but also those who (in its absence) likely would never have done so."[195] On the question of whether the government initially suggested the criminal activity, the First Circuit looks to whether the government's operation "reflected a psychologically 'graduated' set of responses to [the target's] own noncriminal responses, beginning with innocent

190. United States v. Gamache, 156 F.3d 1, 9 (1st Cir. 1998).

191. *See id.* at 9–10 (emphasis added for the two additional factors) (citing United States v. Busby, 780 F.2d 804, 807 (9th Cir. 1986)); *see also* United States v. Silva, 846 F.2d 352, 355 (6th Cir. 1988) (quoting United States v. McLernon, 746 F.2d 1098, 1112 (6th Cir. 1984)); United States v. Marren, 890 F.2d 924, 930 (7th Cir. 1989). This five-factor test is the same one adopted in the Seventh Circuit in *Mayfield*. *See* United States v. Mayfield, 771 F.3d 417, 435 (7th Cir. 2014).

192. In the Sixth Circuit: *Hamzeh*, 420 F. Supp. 3d at 842–43; *Jones*, slip op. at 2–3 (N.D. Ill. May 25, 2019) (including co-defendant Schimenti; conviction); *Haji*, slip op. at 2–5 (W.D. Mich. June 17, 2020) (including co-defendants Mohamud Abdikadir Muse and Muse Abdikadir Muse; plea); *Domingo*, slip op. at 2 (C.D. Cal. July 31, 2020) (conviction).

In the Ninth Circuit: *Mohamud*, 843 F.3d at 432 (conviction); *DeLeon*, slip op. at 3 (C.D. Cal. Sept. 15, 2014) (conviction).

193. *See* United States v. Nguyen, 413 F.3d 1170, 1178 (10th Cir. 2005) (quoting United States v. Duran, 133 F.3d 1324, 1335 (10th Cir. 1998)).

194. *Silva*, 846 F.2d at 355 (alteration in original) (quoting *McLernon*, 746 F.2d at 1113).

195. United States v. Gendron, 18 F.3d 955, 961 (1st Cir. 1994).

lures and progressing to frank offers."[196] Similarly, the Supreme Court in *Jacobson* examined whether the government's solicitations appealed to alternative motives (such as opposition to government policy), which would suggest that the illicit conduct was "something that [defendant] ought to be allowed to do."[197] Finally, the First Circuit inquires about the length of the sting operation, finding the longer the effort, the more skeptical the court.[198] In *Gendron*, then-Chief Judge Breyer reasoned that "there is less reason to believe that government 'overreaching' . . . could lead an 'otherwise innocent' person to commit the crime."[199]

Adding to the inconsistency in entrapment jurisprudence is the Fourth, Fifth, Eighth, and Eleventh Circuits' case-by-case approach to determining predisposition.

E. CASE-BY-CASE PREDISPOSITION TESTS IN THE FOURTH, FIFTH, EIGHTH, AND ELEVENTH CIRCUITS

Case-by-case assessments of predisposition grant even more discretion to judges and juries to decide whether the facts support a showing of a defendant's predisposition. As a result, defendants prosecuted in the Fourth, Fifth, Eighth, or Eleventh Circuits face increased unpredictability in the outcome of their cases. The Eleventh Circuit, for example, declines to look to any factor-based tests, including the five-factor test followed by the Ninth Circuit.[200] In *United States v. Brown*, where defendants were convicted of conspiracy to possess and smuggle cocaine, the Eleventh Circuit reasoned that a factor test would be insufficient to establish predisposition (or lack thereof) because determining predisposition is such a fact-intensive inquiry.[201] "Any list would necessarily be over and under inclusive by omitting factors which might prove crucial to a predisposition inquiry in one prosecution but are totally irrelevant in another."[202]

In the Fourth Circuit, the predisposition test is simply based on "a defendant's ready response to the inducement offered [by the government]."[203] This determination focuses on the defendant's state of mind when he was initially approached by the government, and more specifically, "the state of mind of a defendant before government agents make any suggestion that he shall commit a crime," though does not require "specific prior contemplation of criminal conduct."[204] Practically, this requires a recording of the first communications between an informant or undercover agent and the Muslim target. Moreover, the Fourth Circuit

196. *Id.* at 963.
197. Jacobson v. United States, 503 U.S. 540, 553 (1992).
198. *Gendron*, 18 F.3d at 963–64.
199. *Id.* at 964 (citation omitted).
200. *See* United States v. Brown, 43 F.3d 618, 625 (11th Cir. 1995).
201. *Id.*
202. *Id.*
203. *See* United States v. Akinseye, 802 F.2d 740, 744 (4th Cir. 1986) (quoting United States v. Hunt, 749 F.2d 1078, 1085 (4th Cir. 1984)).
204. *Hunt*, 749 F.2d at 1085 (quoting United States v. Williams, 705 F.2d 603, 618 (2d Cir. 1983)); *see also* United States v. Blevins, 960 F.2d 1252, 1257–58 (4th Cir. 1992).

explicitly rejects the objective test that focuses exclusively on the government's actions inducing the defendant into committing a criminal offense.[205]

In the Eighth Circuit, to determine whether a defendant is predisposed to commit the charged crime, the court considers "the defendant's personal background, character, and state of mind, as well as the extent to which the government agent instigated or induced the criminal act."[206] These considerations are not seen as a list of factors, but rather as part of a broad "examination of the defendant's personal background to see where he sits on the continuum between the naive first offender and the streetwise habitue."[207] In *United States v. Berg*, for example, the court found that even if the defendant could show that he was induced—which it held that he was not—he was not an "unwary innocent" because he had specialized knowledge in manufacturing methamphetamine which shows a predisposition to commit the charged crime.[208]

In the Eleventh Circuit, a defendant seeking to raise an entrapment defense "must prove more than that the government first solicited him or merely provided the opportunity for the crime."[209] After the defendant meets his burden to show "some evidence that the government induced the defendant to commit the crime, the question of entrapment becomes a factual one for the jury to decide."[210] To show predisposition, the government must prove a defendant's "ready commission of the charged crime" or provide evidence that the defendant was "given opportunities to back out of illegal transactions but failed to do so."[211] Furthermore, "the government is not restricted to using past offenses or reputation evidence."[212] "Evidence of predisposition may also include the readiness or eagerness of the defendant to deal in the proposed transaction, or post-crime statements such as 'if you need more, I'll be here.'"[213] The readiness factor mirrors the inquiry on a defendant's "ready response" to commit a crime considered by the First, Second, Third, Fourth, Fifth, and Tenth Circuits.

The Fifth Circuit merges the two elements of inducement and predisposition "by analyzing government inducement in terms of such obvious predisposition factors as a defendant's eagerness or reluctance to join in the charged criminal conduct."[214] The government's showing of a defendant's eagerness to follow

205. *See Akinseye*, 802 F.2d at 743.

206. United States v. Ford, 918 F.2d 1343, 1347 (8th Cir. 1990) (quoting United States v. King, 803 F.2d 387, 390 (8th Cir. 1986)).

207. United States v. Lard, 734 F.2d 1290, 1293 (8th Cir. 1984) (internal quotation marks and citation omitted).

208. 178 F.3d 976, 980 (8th Cir. 1999).

209. United States v. West, 898 F.2d 1493, 1502 (11th Cir. 1990).

210. United States v. Ryan, 289 F.3d 1339, 1344 (11th Cir. 2002) (quoting United States v. Timberlake, 559 F.2d 1375, 1379 (5th Cir. 1977)).

211. United States v. Brown, 43 F.3d 618, 625 (11th Cir. 1995); *see also* United States v. Ventura, 936 F.2d 1228, 1232 (11th Cir. 1991).

212. United States v. Alston, 895 F.2d 1362, 1368 (11th Cir. 1990).

213. *Id.* (citations omitted).

214. United States v. Nations, 764 F.2d 1073, 1079 (5th Cir. 1985); *see also* United States v. Groessel, 440 F.2d 602, 606 (5th Cir. 1971); Pierce v. United States, 414 F.2d 163, 168–69 (5th Cir. 1969); United States v. Garcia, 546 F.2d 613, 615 (5th Cir. 1977).

through with and continue a criminal act bars submission of an entrapment defense to the jury.[215] Though the Fifth Circuit has made clear there must be evidence of both inducement and predisposition to entitle a defendant to a jury instruction on entrapment, there is less certainty regarding how much evidence is needed.[216] Courts have used language as broad as "any evidence" or "more than a scintilla" but generally agree that "the evidence ought, at the least, provide a basis for a reasonable doubt on the ultimate jury entrapment issue of whether criminal intent originated with the government."[217] In *United States v. Nations*, the Fifth Circuit held that if "the evidence of entrapment is sufficient" to "provide a basis for a reasonable doubt on the ultimate jury entrapment issue of whether criminal intent originated with the government," then the defendant is entitled to a jury instruction.[218] This standard comports with the Supreme Court's "sufficient evidence" standard for an entrapment defense in *Mathews*.[219]

The Fifth Circuit's reasoning in *United States v. Bradfield* is instructive here.[220] The defendant in *Bradfield* worked as a truck driver. During a routine unloading, he overheard two other drivers discussing cocaine and weapons deals. Unbeknownst to the defendant, one of the drivers was a confidential FBI informant. Notably during this first encounter, the defendant did not participate in any part of the conversation; he merely listened. But over the course of the proceeding months, the informant continued to call the defendant—at least eighteen times—until the defendant agreed to purchase cocaine. The defendant was charged with conspiracy to possess and intent to distribute cocaine and was convicted at trial.[221]

The Court acknowledged that the threshold question in determining an entrapment defense is whether the defendant was predisposed to commit the crime, and relatedly, "whether criminal intent originated with the defendant or with the government agents," thereby affirming its holding in *Nations*.[222] To answer these questions, the fact finder must look to whether the defendant was predisposed to commit the offense "*before* first being approached by government agents."[223] Government inducement must be something more than agents giving the defendant an opportunity to commit the crime. In *Bradfield*, the court found that the defendant was entitled to a jury instruction on entrapment because there was no evidence suggesting that the defendant was ever interested in or able to

215. *See* United States v. Ogle, 328 F.3d 182, 185–86 (5th Cir. 2003).

216. *See Nations*, 764 F.2d at 1080.

217. *Id.*; *see also* United States v. Reyes, 645 F.2d 285, 287 (5th Cir. 1981) (finding that there was not "more than a scintilla" of evidence to show lack of predisposition where the defendant was a ready, willing, and extremely cooperative drug seller on three separate occasions).

218. 764 F.2d at 1080–81 (holding that the district court erred in denying the defendant's request to include an entrapment defense in the jury instructions).

219. *See* Mathews v. United States, 485 U.S. 58, 62 (1988).

220. 113 F.3d 515 (5th Cir. 1997).

221. *Id.* at 518–20.

222. *See id.* at 521–22 (finding that evidence in support of an entrapment defense theory must be sufficient for a reasonable jury).

223. *Id.* at 522 (emphasis altered).

participate in a drug deal before meeting and being influenced by the government agent.[224] Because the defendant met the government agent by coincidence and did not initiate any communications with him, the agent had considerable personal incentive to pursue the defendant and see the plan through. As a result, the government subjected the defendant to an "unrelenting campaign" to entice him into the deal.[225] The court therefore found sufficient evidence that the defendant was entitled to a jury instruction on entrapment and that but for the lower court's failure to provide that instruction, it was substantially likely that a jury would have found favorably for the defense.[226]

Coupled with the politics of preventive counterterrorism, the variation in entrapment jurisprudence across federal circuits brings into sharp relief the uphill battle faced by a Muslim defendant alleging that the government entrapped him into a fake terrorist plot.[227] Of the 546 cases that have been resolved, 389 cases (71%) resulted in guilty pleas and 140 cases (26%) resulted in convictions at trial.[228] Only 10 defendants were acquitted.[229] In each of the 26 cases (out of 152 trials) in which defendants raised an entrapment defense at trial, the government was successful in persuading judges and juries that Muslims' purportedly extremist speech was sufficient evidence of predisposition.[230] Neither law nor politics protected the defendants from racialized counterterrorism.

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224. *Id.* at 522–23.

225. *See id.*

226. *Id.* at 524.

227. Among the 646 federal anti-terrorism cases brought against Muslim defendants, 95 were tried in the Fourth Circuit, 42 in the Fifth Circuit, 58 in the Eighth Circuit, and 67 in the Eleventh Circuit.

228. One defendant died before trial. *See* Criminal Complaint at 1, United States v. Abdullah, No. 09-cr-20549 (E.D. Mich. Oct. 27, 2009); *see also* C.R. DIV., DOJ, REPORT RE DEATH OF IMAM LUQMAN AMEEN ABDULLAH 2 (2010); MICH. OFF. OF THE ATT'Y GEN., REPORT ON FBI FATAL SHOOTING OF LUQMAN AMEEN ABDULLAH 1.

229. Six additional cases were either dropped or dismissed.

230. *See* United States v. Al-Moayad, 545 F.3d 139, 145, 154 (2d Cir. 2008) (including co-defendant Zayed); Tatar v. United States, No. 13-cv-03317, 2017 WL 945015, at *7 (D.N.J. Mar. 10, 2017) (underlying case including co-defendants Shnewer, Dritan Duka, Eljvir Duka, and Shain Duka, together known as the "Fort Dix 5"); United States v. Cromitie, 727 F.3d 194, 199, 204 (2d Cir. 2013) (including co-defendants Payen, David Williams, and Onta Williams); United States v. DeLeon, No. 12-cr-00092, slip op. at 3 (C.D. Cal. Sept. 15, 2014); Sentencing Memorandum: Motion for Downward Departure/Variance at 16, United States v. Smith, No. 17-cr-00182 (W.D.N.C. July 24, 2020); United States v. Lakhani, 480 F.3d 171, 174 (3d Cir. 2007); United States v. Aref, No. 04-cr-00402, 2007 U.S. Dist. LEXIS 12228, at *1, *12 (N.D.N.Y. Feb. 22, 2007) (including co-defendant Hossain); United States v. Siraj, No. 07-0224-cr, 2008 WL 2675826, at *1 (2d Cir. July 9, 2008); United States v. Shah, No. 06-cr-00428, 2015 WL 1505840, at *3–4 (S.D. Tex. Mar. 31, 2015); United States v. Mohamud, 843 F.3d 420, 430 (9th Cir. 2016); United States v. Osmakac, 868 F.3d 937, 941, 951 (11th Cir. 2017); Defendant's Sentencing Memorandum & Request for a Downward Variance from the Sentencing Guideline Range & Request for Recommendation to BOP Regarding Placement at 5, United States v. Suarez, No. 15-cr-10009 (S.D. Fla. Apr. 1, 2017); United States v. Young, 916 F.3d 368, 373, 375 (4th Cir. 2019); United States v. Jones, No. 17-cr-00236, 2021 WL 633372, at *1, *7–8 (N.D. Ill. Feb. 18, 2021) (including co-defendant Schimenti); Reporter's Transcript of Proceedings at 12, United States v. Domingo, No. 19-cr-00313 (C.D. Cal. Nov. 19, 2021); United States v. Hossain, No. 19-cr-00606, 2021 WL 4272827, at *6 (S.D.N.Y. Sept. 21, 2021); *see also* United States v. Carpenter, No. 21-cr-00038 (E.D. Tenn. 2021) (awaiting trial).

IV. CASE STUDIES: ENTRAPPING THE INCOMPETENT, BOMBASTIC, MENTALLY ILL, AND INDIGENT

This Part takes a deep dive into eight case studies wherein a Muslim defendant ensnared in a sting operation invoked an entrapment defense. The case studies in Sections A, B, and C are organized according to common fact patterns demonstrating that the Muslims defendants are (A) hapless bombasts, (B) psychologically unstable, or (C) uncooperative blowhards. They highlight the failure of existing predisposition tests to account for the vulnerabilities of the Muslim targets exploited by the government informant or undercover agent to design, lead, and implement fake terrorist actions that are otherwise unlikely to occur but for the sting operations. To support this point, the facts are examined through Posner's Seventh Circuit positionality test. Although not flawless, the positionality test offers a modest rights-protective approach more in line with the U.S. Supreme Court's intent when it developed the judicial doctrine of entrapment.

Not all sting operations create false threats manufactured by the government. As such, Section D examines a case where a sting operation was warranted based on the target's "existing course of criminal conduct similar to the crime for which [the defendant] is charged,"[231] on "an already formed design" to commit the crime charged,[232] or on a determination that the defendant was "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."[233]

The lack of attention to entrapment law in the counterterrorism literature is partially attributed to the dearth of cases where a defendant goes to trial *and* invokes an entrapment defense.[234] Among the 546 federal cases that have been resolved, 140 defendants were convicted at trial (26%) and 389 pleaded guilty (71%), and 10 defendants (0.02%) were acquitted.[235] Among the 152 trials, only 26 defendants

231. United States v. Salerno, 66 F.3d 544, 547 (2d Cir. 1995) (alteration in original) (quoting United States v. Valencia, 645 F.2d 1158, 1167 (2d Cir. 1980)).

232. United States v. Brand, 467 F.3d 179, 191 (2d Cir. 2006).

233. United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc).

234. Only a handful of law review articles address entrapment law in the counterterrorism context. *See, e.g.*, Sherman, *supra* note 18, at 1478; Kent Roach, *Entrapment and Equality in Terrorism Prosecutions: A Comparative Examination of North American and European Approaches*, 80 MISS. L.J. 1455, 1458–59 (2011); Said, *supra* note 89, at 691; Stevenson, *supra* note 184, at 129; Sara Kamali, *Informants, Provocateurs, and Entrapment: Examining the Histories of the FBI's PATCON and the NYPD's Muslim Surveillance Program*, 15 SURVEILLANCE & SOC'Y 68, 69 (2017); Jesse J. Norris & Hanna Grol-Prokopczyk, *Racial and Other Sociodemographic Disparities in Terrorism Sting Operations*, 5 SOCIO. RACE & ETHNICITY 416, 417 (2019); Laguardia, *supra* note 90, at 176; Janet Bauer, *Entrapped: Post-9/11 Challenges of Doing Research in Muslim Communities*, ANTHROPOLOGY NEWS, Jan. 2009, at 19, 19; Erik J. Dahl, *The Plots That Failed: Intelligence Lessons Learned from Unsuccessful Terrorist Attacks Against the United States*, 34 STUD. CONFLICT & TERRORISM 621, 621–22 (2011).

235. Of the 646 federal cases in the database, 41 cases are in the pre-trial phase, 56 cases are pending because the defendant is a fugitive, 2 cases are pending because the defendants cannot be extradited from a foreign country, and 1 case has an unknown disposition. Of the remaining cases, 1 suspect died

raised the entrapment defense, all of whom were convicted.[236]

Multiple reasons explain why defendants rarely proffer an entrapment defense, including the requirement that they admit committing the terrorism-related charge—a risky trial strategy that is compounded by the enormous risk of going to trial in the federal system generally.[237] Moreover, the defendant is often the only witness who can attest to his lack of predisposition. Seasoned defense counsel know all too well that the low rate of success for entrapment cases does not justify the risks of putting the client, especially from a disfavored religious minority, on the stand.[238] The empirical findings further substantiate the futility of raising an entrapment defense, and consequently, the need for a legislative solution.

The case studies also provide factual texture to this Article's normative claim that the FBI's manufacturing of Muslim terrorism further entrenches the racialized politics of counterterrorism. Through an in-depth examination of eight entrapment cases, this Part demonstrates how the FBI exploits the vulnerabilities of young Muslim men who are struggling with poverty, mental illness, family problems, unemployment, or social isolation in predatory sting operations. In most entrapment cases (as well as the hundreds of sting operations that plead out), the Muslim target's speech and religious expression are not only the basis for selection in the sting but are also used as evidence to show predisposition to commit terrorism—notwithstanding that the fake plot is led and planned by the informant or undercover agent.

Because the existing literature critiquing FBI tactics in counterterrorism investigations focuses on cases brought between 2001 and 2007 under the Bush Administration, this Article focuses on eight sting operations conducted during the Obama and Trump Administrations.[239] Although these later cases primarily

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before the trial, 2 were dismissed, and 4 were dropped, thus leaving 539 cases resolved by conviction, plea agreement, or acquittal.

236. When examined by date, 69 defendants were tried during the Bush Administration, 62 under Obama, and 21 under Trump.

237. The risk is especially high for Muslim defendants, who face the taint of discrimination at every step of the trial process. *See, e.g.*, David Masci, *Many Americans See Religious Discrimination in U.S.–Especially Against Muslims*, PEW RSCH. CTR. (May 17, 2019), https://www.pewresearch.org/fact-tank/2019/05/17/many-americans-see-religious-discrimination-in-u-s-especially-against-muslims/ [https://perma.cc/6VW7-G8T2] (finding that a startling 82% of American adults say that Muslims are subject to discrimination in America); *see also, e.g.*, S. ASIAN AMS. LEADING TOGETHER, POWER, PAIN, POTENTIAL: SOUTH ASIAN AMERICANS AT THE FOREFRONT OF GROWTH AND HATE IN THE 2016 ELECTION CYCLE 4 (2017), https://saalt.org/wp-content/uploads/2017/01/SAALT_Power_rpt_final3_lorez.pdf [https://perma.cc/GN6F-V6ZJ]; S. POVERTY L. CTR., AFTER ELECTION DAY: THE TRUMP EFFECT: THE IMPACT OF THE 2016 PRESIDENTIAL ELECTION ON OUR NATION'S SCHOOLS 6 (2016), https://www.splcenter.org/20161128/trump-effect-impact-2016-presidential-election-our-nations-schools [https://perma.cc/B3PB-M69C]; Murtaza Hussain, *Muslims Accused of Plotting Violence Get Seven Times More Media Attention and Four Times Longer Sentences*, INTERCEPT (Apr. 5, 2018, 12:05 AM), https://theintercept.com/2018/04/05/muslims-violence-media-attention-prosecution/ [https://perma.cc/NCY5-H2SY]; Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RSCH. CTR. (Aug. 9, 2017), https://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world [https://perma.cc/R82M-ENYE].

238. *See* Norris & Grol-Prokopczyk, *supra* note 18, at 612–13.

239. *See, e.g.*, Stevenson, *supra* note 184, at 129–30 n.17, 130 n.18. *See generally* Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 MO. L. REV. 387 (2005) (critiquing the functions

rely on undercover agents rather than informants, which were excessively used during the Bush Administration, the predatory and aggressive tactics have not changed. The cases are divided into four categories: the incompetent bombastic defendants, the psychologically unstable defendants, pretextual charges against non-terrorists, and seemingly legitimate cases.

A. THE INCOMPETENT BOMBASTS

Emphasizing a defendant's extremist political beliefs is a common tactic the government deploys to divert the jury's attention away from the essential facts missing from many terrorism cases: predicate acts by the defendant in furtherance of illegal activities before coming into contact with the informant or undercover agent. The cases of Harlem Suarez, Joseph Jones, Edward Schimenti, and Terry Lee Loewen show the intentionality with which government operatives identify and lead a bombastic and inept Muslim target through a fake terrorism plot spanning months. Although the evidence shows the targets hold extremist views, it also shows their utter incapability of planning and executing the plot orchestrated by the government.

1. Harlem Suarez

A high school dropout and alcoholic with an IQ in the 70s who lived in his parents' apartment, Harlem Suarez was prime bait for a government-manufactured terrorism plot.[240] His multiple cognitive deficiencies arose from oxygen deprivation at birth. Born in Cuba, Suarez immigrated to the United States at the age of twelve.[241] When he was fourteen or fifteen, Suarez attempted suicide by cutting his wrists with a shaver.[242] His second suicide attempt occurred shortly after his arrest for terrorism, when he tried to hang himself in jail.[243]

At the age of twenty-four, knowing almost nothing about Islam, Suarez lived in an online fantasy obsessed with ISIS. In 2014, Suarez posted ISIS-related content on his Facebook account, which Facebook frequently shut down.[244] Much of the extremist content was cut and pasted from other sources without direction or contact with any foreign terrorist organizations.[245] He openly posted ISIS propaganda, including calls for Muslims to join ISIS, on his Facebook accounts

of sting operations and their regulation through courts). *But see* AARONSON, *supra* note 3, at 240–41 (cataloguing Obama-era terror traps).

240. Brief of the Appellant Harlem Suarez at 3–4, United States v. Suarez, 893 F.3d 1330 (11th Cir. 2018) (No. 17-11906), 2017 WL 4572081, at *3–4.

241. *See id.* at 3.

242. *See* Defendant's Sentencing Memorandum and Request for a Downward Variance from the Sentencing Guideline Range and Request for Recommendation to BOP Regarding Placement at Exhibit A, United States v. Suarez, No. 15-cr-10009 (S.D. Fla. Apr. 1, 2017) [hereinafter Defendant's Sentencing Memorandum].

243. *See id.*

244. *See* Appellant's Appendix: Volume 4 at 130–31, *Suarez*, 893 F.3d 1330 (No. 17-11906) (day seven trial transcript) (government's cross examination of defendant Suarez).

245. *See id.* at 127; Brief of the Appellant Harlem Suarez at 6–7, *Suarez*, 893 F.3d 1330 (No. 17-11906), 2017 WL 6553570, at *6–7 [hereinafter Reply Brief of the Appellant].

where the government could easily identify him, further evincing his lack of sophistication.[246]

A cook at a restaurant in Key West, Florida, Suarez did not own a car, had few friends, possessed no knowledge about bomb making, and lacked connections to foreign terrorist organizations.[247] In sum, Suarez was a hapless, inept, and bombastic armchair extremist—an offensive, but not illegal, lifestyle. But when he came to the FBI's attention through a private tip, the agency spotted an opportunity for a new sting operation. The FBI assigned an informant to engage Suarez online, representing himself as a member of ISIS. After gaining Suarez's trust through online communications, the informant set up an in-person meeting for the purpose of generating a fake terrorist plot. During their conversations, Suarez spewed ISIS propaganda similar to what he was posting online. Due to his limited English fluency and low IQ, much of his rhetoric was disjointed and merely parroted propaganda he found online.

According to the psychologist who evaluated Suarez after his arrest, Suarez suffered from "significant emotional, cognitive, or behavioral dysfunction."[248] The psychologist further noted that Suarez has a "deflated sense of self-worth," an "expectation of failure and humiliation in the future," and is prone to "impulsive outbursts and chronic moodiness" which serve as reinforcement of his retreat into fantasy.[249] Defense counsel noted the psychologist's initial evaluation that Suarez

> tends to be easily influenced, low intellectual capacity, no prior background of criminal activity that I know of, at least, and basically an individual who, I think, can just kind of go with the flow, and not really modulate and control some of his actions and reactions to certain events.[250]

This combination of social and psychological deficiencies made Suarez an easy target in a sting operation.

The government took this mentally vulnerable loner spewing extremist online bluster from his bedroom and placed him into a fake "bunch of guys"[251] social network composed of an FBI informant and two undercover agents. Their mission was to ensnare Suarez in a fake bomb plot. While Suarez reveled in feeling a sense of belonging with his newfound (fake) ISIS friends, his extreme rhetoric contrasted sharply with his utter ineptitude. For example, when Suarez attempted to legally purchase an AK-47 in response to pressure by the undercover agent, he

246. Reply Brief of the Appellant, *supra* note 245.

247. *See* Appellant's Appendix: Volume 4, *supra* note 244, at 107 (day seven trial transcript) (direct examination of defendant Suarez); Appellant's Appendix: Volume 2 at 152, *Suarez*, 893 F.3d 1330 (No. 17-11906) (day three trial transcript) (government's direct examination of FBI's confidential source); *id.* at 149; *see also* Defendant's Sentencing Memorandum, *supra* note 242, at 4 (describing Suarez's "naïve and amateur attempts to make an explosive device").

248. Defendant's Sentencing Memorandum, *supra* note 242, at Exhibit B.

249. *See id.*

250. Brief of the Appellant, *supra* note 240, at 19.

251. *See* SAGEMAN, *supra* note 42.

incorrectly filled out the requisite Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) form, resulting in a denial of the purchase.[252] Nor did Suarez have any idea about how to build a bomb or even possess the English language proficiency to figure it out on his own.[253]

The FBI's agents and informant, however, skillfully pushed Suarez from an offensive speaker to a purportedly dangerous actor. It took months of persistent harassment and intimidation by all three government operatives, but they eventually caught their prey. Despite the prosecutor's claims that Suarez would have joined real terrorists had the government's agents not nabbed him first,[254] the facts show otherwise.

Most notably, Suarez attempted to withdraw from the plot planned and led by the informant—he stopped responding to the informant for three weeks. The informants' daily, obsessive calls and texts to Suarez went unanswered for three weeks from June 7, 2015, until June 26, 2015.[255] Refusing to allow Suarez to bail on the plot, the informant informed Suarez that he was coming to his house. At this point, Suarez responded out of fear that his family might be in danger from people he believed were real ISIS members. Suarez agreed to meet the informant at another location, but Suarez never showed up and, soon thereafter, stopped responding again.[256]

The informant pressured Suarez to conduct a terrorist bombing attack on July 4, but Suarez demurred because he had to work overtime to help support his family's expenses. From June 30 to July 12, the informant incessantly badgered Suarez with texts trying to push the plot along, which Suarez dodged with excuses that he was too busy working and did not have any money.[257] The informant's intimidation tactics included veiled threats that the other two members of their cell, who in reality were undercover agents posing as ISIS members, were angry with Suarez's lack of responsiveness and commitment to the plot. On July 13, one of the undercover agents called Suarez, commanding him to purchase a cell phone and answer his calls. But Suarez could not even afford to buy a cell phone, causing the informant to buy it for him as he kept pushing Suarez further into the fake plot.[258]

At this point, according to Suarez, he believed he was in too deep with real terrorists who he feared would hurt his family to back out. Therefore, when the undercover agent commanded Suarez to meet with him and the informant on July

252. Appellant's Appendix: Volume 1 at 179, *Suarez*, 893 F.3d 1330 (No. 17-11906) (sentencing hearing transcript) (sentencing judge opining that Suarez's failed AK-47 purchase and issues with ATF form demonstrated Suarez's "ineptness").

253. *See id.*

254. *See* Appellant's Appendix: Volume 2, *supra* note 244, at 10 (day two trial transcript) (government's opening statement thanking the FBI for "thwart[ing]" Suarez's "plan" and "interven [ing]" to stop him).

255. *See id.* at 16–17.

256. *See id.*

257. *See id.* at 17–19.

258. *See id.* at 18–19.

19 with nails and the backpack for the bomb, Suarez showed up; otherwise, the agent had warned, "you'll be shitting on their timeline."[259] Suarez interpreted the statement as a clear threat that ISIS would hurt him if he backed out. At trial, the jury rejected Suarez's entrapment defense.

The Eleventh Circuit, where Suarez was tried, applies a case-by-case, fact-intensive inquiry because "[a]ny list would necessarily be over and under inclusive by omitting factors which might prove crucial to a predisposition inquiry in one prosecution but are totally irrelevant in another."[260] To show predisposition, the government must prove the defendant's "ready commission of the charged crime" or demonstrate "that the defendant was given opportunities to back out of illegal transactions but failed to do so."[261] "Evidence of predisposition may also include the readiness or eagerness of the defendant to deal in the proposed transaction, or post-crime statements such as 'if you need more, I'll be here.'"[262]

Here, the jury was apparently not persuaded that Suarez attempted to withdraw from the plot, neglecting to respond to the government operatives for weeks and only responding after the informant threatened to come to his home. None of these facts were sufficient to show that Suarez lacked predisposition. When faced with the government's expert testimony about the atrocious violence of ISIS abroad and the content of Suarez's extremist social media posts,[263] jurors' minds were already made up, reaching the verdict after a mere forty-seven minutes of deliberation.[264]

Had the Eleventh Circuit applied Judge Posner's positionality test in this case, Suarez may have had a more meaningful opportunity to argue government entrapment. The positionality test in the Seventh Circuit requires more than just willingness, but the actual ability of the defendant to commit the offense, if granted means and opportunity.[265] Furthermore, "the greater the inducement, the weaker the inference that in yielding to it the defendant demonstrated that he was predisposed to commit the crime in question."[266] Suarez's ineptitude, social isolation, alcohol addiction, and unusually low intelligence, coupled with the government operatives' aggressive inducement, would have made it much more difficult for the government to overcome an entrapment defense. At the very least, the more balanced positionality test could have persuaded the judge not to sentence

259. *Id.* at 19; *see also* Appellant's Appendix: Volume 3 at 149, *Suarez*, 893 F.3d 1330 (No. 17-11906) (day five trial transcript) (during cross examination of the government's undercover agent, the agent justified the veiled threat as part of an effort to "make sure that [Suarez] intended to be there").

260. United States v. Brown, 43 F.3d 618, 625 (11th Cir. 1995).

261. *Id.*; *see also* United States v. Ventura, 936 F.2d 1228, 1232 (11th Cir. 1991).

262. United States v. Alston, 895 F.2d 1362, 1368 (11th Cir. 1990) (citations omitted).

263. *See, e.g.*, United States v. Suarez, No. 15-cr-10009, slip op. at 1 (S.D. Fla. Jul. 11, 2016) (order denying defendant's motion to strike government expert); Appellant's Appendix: Volume 3, *supra* note 259, at 166, 168–69 (day five trial transcript) (government's terrorism expert detailing violent terrorist attacks in the United States for which ISIS claimed responsibility, including the 2016 Pulse Nightclub and 2015 San Bernardino mass shootings).

264. *See* Gwen Fiolsa, *Keys Bomb Plotter Suarez Gets Life in Prison*, MIA. HERALD (Apr. 18, 2017, 6:49 PM), https://www.miamiherald.com/news/local/community/florida-keys/article145265609.html.

265. *See* United States v. Hollingsworth, 27 F.3d 1196, 1199–1200 (7th Cir. 1994) (en banc).

266. *Id.* at 1200.

the twenty-four-year-old to prison for the rest of his life without the opportunity for parole.[267]

The case of Harlem Suarez sheds light on how the radicalization literature has effectively provided a blueprint for conducting sting operations targeting young, vulnerable Muslim men.[268] It also reveals the absence of a rehabilitative approach to gullible and inept young men whose psychological problems attract them to extremist online rhetoric. As soon as the FBI saw Suarez's extremist postings on social media, his fate was sealed. Rather than limiting engagement with Suarez to surveillance or redirection to mental health services, the FBI created a cell of purported domestic terrorists wherein the government's informants and agents planned and led a fake plot.

2. Joseph Jones and Edward Schimenti

The sting operation targeting Joseph Jones and Edward Schimenti further demonstrates how the blueprint of an FBI sting operation is informed by the radicalization literature. All the staple components are present: (1) a sting operation triggered by pro-ISIS extremist speech on social media;[269] (2) deployment of numerous government operatives (five in this case) to create a "bunch of guys" social network around the targets;[270] (3) no plans of violent acts by the two Muslim targets before the sting operation;[271] (4) persistent, manipulative tactics that produce no illegal activity for the first seventeen months of an eighteen-month operation;[272] and (5) abuse of the false statement statute to ensnare the target in a lie about his statements to and knowledge of a government informant posing as a violent extremist traveling to join ISIS in Syria.[273]

Despite expending extensive resources, the FBI ultimately failed to persuade Jones or Schimenti to even attempt to travel with the undercover agents and informants to join ISIS.[274] After eighteen months of engaging the targets in conversations about ISIS, all the agents and informants accomplished was inducing Jones to give the informant three cheap cell phones and Schimenti to provide six cheap cell phones and a ride to the airport.[275]

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267. *See* Defendant's Sentencing Memorandum, *supra* note 242, at 5 ("While the jury rejected the defense of entrapment at trial, the evidence did show that the government agents repeatedly attempted to re-engage [Suarez] and press him on moving forward with obtaining the bomb. This is a characteristic of the offense that should not be ignored in determining the appropriate sentence."); *id.* at 8 (arguing against a life-without-parole sentence based in part on Suarez's inability to carry out a terrorist attack on his own).

268. *See* Aziz, *supra* note 9.

269. *See* United States v. Jones, No. 17-cr-00236, 2021 WL 633372, at *2 (N.D. Ill. Feb. 18, 2021).

270. *See id.* at *2–3.

271. *See id.* at *8–9.

272. *See id.* at *2–3.

273. *See id.* at *3.

274. *See id.* at *1. *See generally* Edward Schimenti's and Joseph Jones' Motion to Dismiss Count I of the Superceeding [sic] Indictment as Unconstitutionally Overbroad & Void for Vagueness, *Jones*, No. 17-cr-00236 (N.D. Ill. Oct. 1, 2018) [hereinafter Motion to Dismiss Count 1].

275. *See Jones*, 2021 WL 633372, at *3–5; Transcript of Trial at 2751:20–21, *Jones*, No. 17-cr-00236 (N.D. Ill. June 18, 2019) (closing argument of government attorney).

The FBI began its surveillance in January 2015, when a covert online agent discovered Joseph Jones's pro-ISIS postings on Facebook, and initiated the sting operation by September 2015.[276] Shortly thereafter, the FBI questioned Edward Schimenti about his associations with terrorism after a terrorist attack in Switzerland, although nothing illegal turned up.[277] The FBI developed a scheme to set up an in-person meeting between one of their agents and Jones. It required the cooperation of the local police department, who asked Jones to come into the station to answer some questions to help solve the murder of one of his good friends.[278]

While Jones was waiting in the police station lobby, an undercover agent dressed in traditional Islamic attire and donning a long beard entered the station, stating that he was being investigated for his pro-ISIS political views. Knowing that Jones had posted pro-ISIS propaganda on his Facebook account, the agent savvily portrayed himself as a victim of an anti-Islam American government and ultimately obtained Jones's contact information to set up future meetings.[279] During these subsequent meetings, Jones ranted anti-American, anti-Assad, and pro-ISIS extremist speech, but at no point expressed any interest in joining the agent in taking action.[280]

On October 30, 2015, two undercover agents, knowing that Schimenti and Jones were friends, maneuvered to meet with them together in late December 2015.[281] During this meeting, the agents declared their plans to travel abroad to join ISIS and asked the two men if they wanted to "rock[] it out," which was understood by the men to mean committing a terrorist act.[282] Upon hearing this suggestion, Schimenti became visibly upset and immediately left the gathering. Jones apologized on behalf of his friend, admitted that he had declared his allegiance to ISIS (also known as "bay'ah" in Arabic), and continued his usual bombast and bluster praising ISIS's terrorist acts.[283] Jones did not, however, express an interest in joining the two agents in their travels or terrorist acts.

Over the next five months, the undercover agents conversed with Jones online and met with him multiple times, using each occasion to engage him in pro-ISIS conversations that they secretly recorded.[284] One agent, going by the name Bilal, encouraged Jones to join them on their travels to fight for ISIS. When Jones declined, stating that he had to stay in the United States with his family, Bilal

276. *See* Transcript of Trial, *supra* note 275, at 2773:3–:7, 2776:18–:19, 2788:6–:7 (closing argument of Joseph Jones's attorney).

277. *See id*. at 2815:17–:21 (closing argument of Ed Schimenti's attorney).

278. *See id*. at 2775:2–:7 (closing argument of Joseph Jones's attorney).

279. *See id*. at 2775:13–76:15.

280. *See Jones*, 2021 WL 633372, at *8.

281. *See id*. at *2.

282. *See* United States v. Jones, No. 17-cr-00236, slip op. at 2 (N.D. Ill. May 25, 2019) (order denying government's motion *in limine* to bar evidence of entrapment); Transcript of Trial, *supra* note 276, at 2821:17–:20 (closing argument of Ed Schimenti's attorney).

283. *See* Criminal Complaint: Affidavit at 25–26, *Jones*, No. 17-cr-00236 (N.D. Ill. Apr. 11, 2017).

284. *Jones*, 2021 WL 633372, at *2.

instructed Jones to "[l]eave your family behind. I left my mother behind, don't let family, don't let your concerns about family worry you. Leave your family behind and come join the jihad."[285] Throughout the numerous conversations, the agents exploited Jones's religious beliefs to make him feel as if he was not a good Muslim because he refused to fight for ISIS. Taking ideas directly from ISIS propaganda, the agents proclaimed that Muslims have a religious duty to fight the "kuffar" (meaning "disbelievers" in Arabic).[286] They manipulated a gullible Jones as they asked for his assistance in their fight for ISIS. A sampling of the agents' statements include: (1) "I ask that you do so for Allah's sake. I'm tired of watching the slaughter"; (2) "[I am] putting my fate in the hands of Allah and in your hands, my brother in Allah"; and (3) "I cannot take it any longer. You can help me. May Allah reward you."[287]

After failing to recruit Jones to join them, the agents informed him of their plans to travel abroad to join ISIS on May 20, 2016.[288] In the many conversations meticulously orchestrated by the FBI, Jones neither offered to join them nor made separate plans to travel to join ISIS himself.[289] Jones's extremism was consistently limited to speech and watching ISIS videos. Jones did not even possess an ISIS flag until the first undercover agent obtained one for him in February 2016.[290] When the second undercover agent on the case texted Jones the day before he traveled to say goodbye, Jones wished him safe travels but notably did not offer him a ride to the airport.[291]

At this point, the sting operation should have ended, and the FBI could have limited the investigation to surveillance of Jones to ensure he did not take predicate acts in furtherance of terrorism with others. Instead, the agent pretended to return from abroad only four weeks later, arranging to meet with Jones in person. At this meeting, Jones learned that the agent was now part of a recruitment network sending Westerners to fight with ISIS in Syria.[292] Again, rather than committing to assist the agent in recruiting others or asking to travel to join ISIS himself, Jones merely continued to spew his usual bombastic, extremist speech. If Jones had truly wanted to support ISIS through his actions, he surely would have done so by grasping one of the numerous opportunities provided by the two undercover agents.

Undeterred in their fixation with entrapping Jones and Schimenti, the FBI tried a different strategy. The fourth undercover agent, who had been conversing with Jones via Facebook since August 2016, told Jones that he wanted to travel to

285. Transcript of Trial, *supra* note 276, at 2783:5–:10 (closing argument of Joseph Jones's attorney).

286. *See id*. at 2783:13–84:17.

287. *Id*. at 2793:9–:20.

288. *See* Criminal Complaint: Affidavit, *supra* note 283, at 30.

289. *See Jones*, 2021 WL 633372, at *8.

290. *See* Criminal Complaint: Affidavit, *supra* note 283, at 29–30.

291. *See id*. at 31.

292. *See id*. at 31–32.

Syria to join ISIS but did not know how.[293] Jones then introduced this undercover agent to the second agent, who had purportedly traveled to Syria.[294] Beyond making this introduction, Jones was not further involved in the fake plot for one undercover agent to assist another to travel to fight for ISIS.

Around December 2016, the FBI also planted an informant at Schimenti's workplace. The informant pretended to be a Syrian refugee whose family was killed by Bashar Al-Assad.[295] The informant confided in Schimenti about his loneliness, depression, and desire to "go home"[296] to fight with ISIS against the Assad regime to vindicate his family's murder.[297] Rather than offer to join him, Schimenti warned the informant of the illegality of joining ISIS.[298] For more than two months during which the informant saw Schimenti almost every day at work, the FBI prepped him to psychologically manipulate Schimenti into believing that he was like an older brother to this lonely, heartbroken Syrian refugee.[299] Schimenti mentored him, brought him to the gym and to restaurants, and took the informant under his wing.

So in February 2017, when the informant decried his inability to go home, Schimenti was primed to sympathize with this younger, vulnerable refugee. Schimenti introduced the informant to Jones, and Jones then introduced the informant to the second undercover agent, who was tapped into the "ISIS facilitation network."[300] For weeks, the undercover agent and the informant were the only ones engaged in illegal activity. Jones and Schimenti still had not expressed any interest in traveling or giving the informant direct assistance in furtherance of his terrorist plans to join ISIS abroad.

On March 18, 2017, Jones made a fatal move. He declined to take payment for supplying three cheap cell phones to the informant, who had requested the phones in preparation for his trip to Syria.[301] On March 29, 2017, Schimenti made the same fatal move when he gave the informant six cell phones, two of which were used.[302] When the informant offered to pay, Schimenti declined, stating, "I know where they're going."[303] The informant expressed that he hoped each one would kill twenty people, to which Schimenti responded: "Many kuffar."[304] Shortly before his trip, the young informant lamented to his mentor Schimenti that he did not have a ride to the airport, which laid the trap for Schimenti to drive him there on April 7, 2017—the grounds for the prosecutors' material support to terrorism

293. *See id*. at 34.
294. *Id*.
295. *See Jones*, 2021 WL 633372, at *2.
296. *See* Transcript of Trial, *supra* note 276, at 2827:10–:12 (closing argument of Ed Schimenti's attorney).
297. *See id*. at 2822:7–:23.
298. *See id*. at 2738:7–:18 (closing argument of government attorney).
299. *See id*. at 2822:20–30:24 (closing argument of Ed Schimenti's attorney).
300. *See* Criminal Complaint: Affidavit, *supra* note 283, at 36–38, 45–47.
301. *See id*. at 51.
302. *Id*. at 56.
303. *Id*.
304. *Id*.

charge.[305] In exchange for his work, the informant received $50,000 from the FBI.[306]

After eighteen months of persistent badgering by four undercover agents and two informants, the FBI finally entrapped Jones and Schimenti into committing an illegal act: providing nine cheap plastic cell phones and a ride to the airport to an informant purportedly planning to travel to Syria to fight with ISIS against the Syrian Al-Assad regime. Knowing that the case against Schimenti was weak, the FBI then interviewed Schimenti with the intent to set him up to lie to federal agents. Schimenti fell for the trap, denying his interactions with the informant and his knowledge of the informant's plans to obtain cell phones to provide to ISIS abroad.[307] When the FBI played some of the recordings of his conversations with the informant, Schimenti denied that it was his voice on the recording.[308] At the time of the interview, the FBI already knew the answers to their questions given that they had been surveilling Schimenti and Jones for two years.

If all the prosecutors had as evidence was the low monetary value of seven new and two used plastic cell phones, and a last-minute ride to the airport, they would have had a weak case. The ultimate conclusion in the case underscores the idea that the most powerful evidence to sway an American jury in the government's favor was the extremist speech and beliefs of Jones and Schimenti.[309] The multiple undercover agents and informants had recorded hours of Jones expressing his admiration for ISIS and their brutal terrorism. The informant also recorded all of his conversations with Schimenti, during which Schimenti openly admitted his political support for ISIS. As Jones's and Schimenti's lawyers noted in their closing statements, the defendants' beliefs were perhaps repulsive but ultimately protected under the First Amendment.[310] For this reason, the FBI had to find a way to trick the two men into taking some action to assist the undercover agents and informants posing as ISIS supporters.

Rejecting a plea deal, both defendants chose to proceed to trial where they invoked an entrapment defense. Tried in the U.S. District Court for the Northern District of Illinois, the defendants were subject to the Seventh Circuit's relatively more robust entrapment doctrine. The court applied the five *Mayfield* factors to determine predisposition: (1) the defendant's character or reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant

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305. *See* Transcript of Trial, *supra* note 276, at 2752:9–:12 (closing argument of government's attorney); *id.* at 2823:14–:22 (closing argument of Ed Shimenti's attorney); *see also* Criminal Complaint: Affidavit, *supra* note 283, at 56–58.

306. *See* Edward Schimenti's and Joseph Jones' Motion to Continue Post-Trial Motions Based on Newly Discovery [sic] Evidence at 1, United States v. Jones, No. 17-cr-00236 (N.D. Ill. Oct. 24, 2019).

307. *See* United States v. Jones, 383 F. Supp. 3d 810, 814 (N.D. Ill. 2019).

308. *Id.*

309. *See generally* Motion to Dismiss Count I, *supra* note 274 (arguing that the charge of conspiring to provide material support to a terrorist organization cannot be proven because its statutory basis is unconstitutionally overbroad and vague).

310. *See* Transcript of Trial, *supra* note 276, at 2805:17–:25 (closing argument of Joseph Jones's attorney); *id.* at 2813:4–:7 (closing argument of Ed Schimenti's attorney).

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.[311] Finding that the defendants met their burden of proving the first element of entrapment—that the government induced them to commit an illegal act—the court granted the defendants' motion to argue entrapment before the jury, where predisposition would be the central factual issue.[312]

After all the evidence was presented, however, the jury found Schimenti and Jones guilty of material support to terrorism and Schimenti also guilty of making a false statement to the FBI. Despite clear evidence that the FBI agents approached the defendants (not the other way around), planned the fake plot for the undercover agents and informants to "travel" to fight for ISIS, gave one defendant an ISIS flag, failed to persuade either Jones or Schimenti to join them in their travels, and failed to obtain any assistance other than words of support for seventeen months, that was still not enough to convince the jury that these two Muslim defendants were not predisposed to provide material support to terrorism. The reason is obvious: hours of recorded conversations documenting Jones's and Schimenti's offensive and extremist political support for ISIS and opposition to Western policies, and tens of videos showing ISIS atrocities in Syria and Iraq that the defendants had praised.

Had the jury applied Posner's positionality test, it would have been required to determine whether Jones and Schimenti were "so situated by reason of previous training or experience or occupation or acquaintances" that they would have provided material support to terrorism absent the sting operation.[313] There is no evidence in the record that either defendant had acquaintances or associations with terrorist groups, other than the four undercover agents and two informants; nor did Jones or Schimenti accept the many offers for them to travel abroad to join ISIS. Whatever support they had for designated terrorist organizations was limited to lawful First Amendment-protected speech expressed orally and on social media. That the FBI so aggressively targeted the two men for more than eighteen months weakens "the inference that in yielding to [the government's inducement] the defendant[s] demonstrated that [they were] predisposed to commit the crime in question."[314]

There is no question that these two men held offensive views—as do tens of thousands of white right-wing extremists who want to start a race war, depose the U.S. government, and purchase large amounts of weapons in preparation for a white nativist civil war.[315] And herein lies the failure of entrapment law to protect

311. United States v. Mayfield, 771 F.3d 417, 435 (7th Cir. 2014).

312. United States v. Jones, No. 17-cr-00236, slip op. at 2 (N.D. Ill. May 25, 2019).

313. United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc).

314. *Id.*

315. *See* MARTIN A. LEE, THE BEAST REAWAKENS: FASCISM'S RESURGENCE FROM HITLER'S SPYMASTERS TO TODAY'S NEO-NAZI GROUPS AND RIGHT-WING EXTREMISTS 331–84 (2000); *see also* Michael Kimmel & Abby L. Ferber, *"White Men Are This Nation:" Right-Wing Militias and the Restoration of Rural American Masculinity*, 65 RURAL SOCIO. 582, 587–89 (2000); *Hearing on the*

defendants from the U.S. government's racialized, preventive counterterrorism strategy. All the FBI needs to do is send enough government agents and informants to badger, coerce, or manipulate their targets over a long period of time into a single act of assistance, no matter how minor and how long it takes. And if that does not work, the FBI conducts a voluntary interview with the target to set him up to lie to a federal agent in violation of 18 U.S.C. § 1001, which was the fate of thirty-four Muslim defendants charged only with making a false statement.[316] None of these details, of course, are included in the U.S. Attorney's press releases announcing the arrest of suspects in terrorism-related cases.[317] Nor were they

January 6th Investigation: Hearing Before the H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, 117th Cong. (2022).

316. *See, e.g.*, United States v. Maflahi, No. 03-cr-00412 (E.D.N.Y. filed Apr. 9, 2003); United States v. Qureshi, No. 04-cr-60057 (W.D. La. filed Feb. 11, 2005); United States v. Abdallah, No. 08-cr-00947 (D. Ariz. filed Aug. 19, 2008); United States v. Afzali, No. 09-cr-00716 (E.D.N.Y. filed Sept. 20, 2009); United States v. Abdow, No. 09-cr-00292 (D. Minn. filed Oct. 13, 2009); United States v. Simpson, No. 10-cr-00055 (D. Ariz. filed Jan. 13, 2010); United States v. Rockwood, No. 10-cr-00061 (D. Alaska filed July 21, 2010); United States v. Rockwood, No. 10-cr-00060 (D. Alaska filed July 21, 2010); United States v. Shehadeh, No. 10-cr-01020 (E.D.N.Y. filed Oct. 21, 2010); United States v. Mihalik, No. 11-cr-00833 (C.D. Cal. filed Aug. 29, 2011); United States v. Alkadhi, No. 14-cr-20030 (S.D. Fla. filed Jan. 17, 2014); United States v. Greene, No. 14-cr-00230 (D.D.C. filed Aug. 1, 2014); United States v. Furreh, No. 14-cr-00315 (D. Minn. filed Sept. 24, 2014); United States v. Coffman, No. 15-cr-00016 (E.D. Va. filed Nov. 14, 2014); United States v. Kodaimati, No. 15-cr-01298 (S.D. Cal. filed Apr. 23, 2015); United States v. Dempsey, No. 16-cr-00119 (E.D. Cal. filed June 23, 2016); United States v. Abood, No. 15-cr-00256 (N.D. Tex. filed May 13, 2015); United States v. Ali-Skelton, No. 16-cr-00077 (D. Minn. filed Mar. 22, 2016); United States v. Ali, No. 17-cr-00087 (E.D. Tex. filed May 17, 2017); United States v. Smith, No. 17-cr-00182 (W.D.N.C. filed June 21, 2017); United States v. Khan, No. 18-cr-00195 (D. Conn. filed Aug. 30, 2017); United States v. Wehelie, No. 17-cr-00295 (E.D. Va. filed Dec. 6, 2018); United States v. Ul-Hassan, No. 19-cr-00022 (W.D. Va. filed May 15, 2019); United States v. Malike, No. 03-cr-00638 (E.D.N.Y. filed May 21, 2003).

317. *See, e.g.*, Press Release, DOJ, Kansas Man Charged in Plot to Explode Car Bomb at Airport (Dec. 13, 2013) (available at https://www.justice.gov/opa/pr/kansas-man-charged-plot-explode-car-bomb-airport [https://perma.cc/J5KY-CWU2]); Press Release, DOJ, Virginia Man Arrested for Attempting to Support ISIL (Aug. 3, 2016) (available at https://www.justice.gov/opa/pr/virginia-man-arrested-attempting-support-isil [https://perma.cc/57TX-5VCQ]); Press Release, DOJ, Michigan Residents Arrested for Conspiracy to Provide Material Support to ISIS (Jan. 22, 2019) (available at https://www.justice.gov/opa/pr/michigan-residents-arrested-conspiracy-provide-material-support-isis [https://perma.cc/E3M7-ZXSU]); Press Release, DOJ, California Man Arrested in Terror Plot to Detonate Explosive Device Designed to Kill Innocents (Apr. 29, 2019) (available at https://www.justice.gov/opa/pr/california-man-arrested-terror-plot-detonate-explosive-device-designed-kill-innocents [https://perma.cc/M9GP-4KQL]); Press Release, U.S. Att'y's Off. for the E. Dist. of New York, Mohammed Mohsen Yahya Zayed - Convicted of Conspiring to Provide Support to Al Qaeda and Hamas Terrorist Groups - Sentenced to 45 Years in Prison (Sept. 1, 2005) (available at https://www.justice.gov/archive/usao/nye/pr/2005/2005sep1.html [https://perma.cc/2D4A-6QP2]); Press Release, U.S. Att'y's Off. for the E. Dist. of New York, Shahawar Matin Siraj Convicted of Conspiring to Place Explosives at the 34th Street Subway Station (May 24, 2006) (available at https://www.justice.gov/archive/usao/nye/pr/2006/2006may24.html [https://perma.cc/3PVP-UBWG]); Press Release, DOJ, Former Wilkes-Barre Man Convicted of Attempting to Provide Material Support to Al-Qaeda and Related Charges (July 13, 2007) (available at https://www.investigativeproject.org/case_docs/us-v-reynolds-pipeline-bomber/933/conviction-press-release.pdf [https://perma.cc/LD4W-W4K7]); Press Release, DOJ, Three Brothers Sentenced to Life Prison Terms for Conspiring to Kill U.S. Soldiers (Apr. 28, 2009) (available at https://www.justice.gov/opa/pr/three-brothers-sentenced-life-prison-terms-conspiring-kill-us-soldiers [https://perma.cc/T5MC-CSN9]); Press Release, DOJ, Two Men Who Provided Material Support to Terrorists and Plotted to Kill American Targets in

mentioned when prosecutors obtained convictions in the 152 trials against Muslims over the past twenty years.

3. Terry Lee Loewen

Terry Lee Loewen stands out as one of the oldest targets of an FBI sting operation.[318] The 58-year-old white convert to Islam came to the attention of the FBI when he befriended another individual on Facebook who was regularly posting content supporting violent jihad.[319] *Loewen* is among the line of cases brought during the Obama Administration where online undercover agents were looking for admirers and followers of Anwar al-Awlaki.[320] An undercover FBI agent whom Loewen believed was a member of Al Qaeda established online contact with Loewen.[321] Loewen took the bait. For the following six months, starting in May 2013, the undercover agent set the stage for a fake terrorist plot that entailed placing a fake bomb in the Wichita Airport, where Loewen worked as an avionics technician.[322]

The limited facts available are found in the government's criminal complaint, which selectively highlights the conversations most damning to the defendant. Although Loewen's lawyer pleaded entrapment as a matter of law in Loewen's motion to dismiss, the factual sections in all of the parties' briefings were redacted. Keeping these significant limitations in mind, the publicly available facts reveal the predatory nature of the sting operation.

The government alleged that Loewen expressed his interest in the propaganda of Anwar al-Awlaki and Al Qaeda's English online magazine *Inspire*.[323] Loewen allegedly stated that he had thoughts of committing violence against a civilian target but simultaneously claimed he had no plans of acting on those ideas.[324] Loewen had no knowledge or skills on how to make a bomb.[325] In August 2013, an undercover agent offered to put Loewen in touch with someone who could help him engage in violent jihad.[326] By September 2013, the undercover agent had worked on Loewen enough to convince him to send pictures of airplanes on

Afghanistan Receive 25-Year Prison Terms (Feb. 23, 2015) (available at https://www.justice.gov/opa/pr/two-men-who-provided-material-support-terrorists-and-plotted-kill-american-targets [https://perma.cc/TE3H-TS6E]); Press Release, DOJ, Jury Convicts Former Police Officer of Attempting to Support ISIS (Dec. 18, 2017) (available at https://www.justice.gov/opa/pr/jury-convicts-former-police-officer-attempting-support-isis [https://perma.cc/7BEB-K9H6]).

318. *See Trial and Terror: Terry Lee Loewen*, INTERCEPT, https://trial-and-terror.theintercept.com/people/2633cac0-ceb2-4933-a505-e4e2cd2e4001 [https://perma.cc/R7TU-3YS4] (last visited Jan. 15, 2023) (noting Loewen is currently sixty-seven years old).

319. *See* Criminal Complaint at 4, United States v. Loewen, No. 13-cr-10200 (D. Kan. Dec. 13, 2013); Plea Agreement Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) at 2, *Loewen*, No. 13-cr-10200 (D. Kan. June 8, 2015) [hereinafter Plea Agreement].

320. *Cf.* Scott Shane, *The Enduring Influence of Anwar al-Awlaki in the Age of the Islamic State*, 9 COMBATING TERRORISM CTR. SENTINEL 15, 15 (2016).

321. *See generally* Criminal Complaint, *supra* note 319.

322. *See Trial and Terror: Terry Loewen*, *supra* note 318.

323. Plea Agreement, *supra* note 319.

324. *Id.*

325. Criminal Complaint, *supra* note 319, at 10.

326. *Id.* at 7.

the tarmac.[327] The agent also recorded Loewen expressing a stronger interest in taking action.[328]

The positionality test requires that 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.[329]

In this case, when the undercover agent first made contact, Loewen had no knowledge about explosives, no plans to develop a bomb, and no contact with anyone associated with a terrorist organization.[330] While his work as a technician at the Wichita airport gave him unique access, there is no evidence that Loewen considered using it to commit a terrorist attack; that is, not until the agent developed this scheme. Prior to the sting operation, the only wrong Loewen committed was viewing Al Qaeda-produced texts and videos of terrorist actions—offensive, but still First Amendment-protected activity. That he had been consuming these materials for years yet had not planned violent action on his own weighs in favor of entrapment.[331]

Applying the five additional factors under *Mayfield* further demonstrates that without the government operatives' lead, Loewen would likely not have committed a terrorist act.[332] Loewen had no criminal record, the agent suggested the fake terrorist plot, and Loewen expressed hesitancy and reluctance throughout the sting operation. That continued reluctance was met with the agents' constant persuasion to stick to the plot. Defense counsel pointed out that "the Government's own affidavit to its Complaint argues against [the] very point" that Loewen had "the present ability to carry out the crime on his [] own."[333] For example, on August 8, 2013, when the FBI agent offered to put Loewen in contact with someone who could help him engage in violent jihad, Loewen responded by contemplating the type of commitment needed for jihad.

> You stated you might be able to put me in contact with someone that might be able to help - not sure what that means . . . perhaps you can better judge what it is I need . . . . I very much appreciate your advice and offer of help (I certainly need it), but my love for fellow Muslims is much greater than my love for myself.[334]

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327. *Id.* at 12.

328. *Id.* at 12–13.

329. United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc) (emphasis added).

330. *See* Criminal Complaint, *supra* note 319, at 10.

331. Plea Agreement, *supra* note 319, at 3 ("The examination revealed that the defendant had been researching violent jihad for many years prior to being investigated – and then contacted – by the FBI.").

332. *See* United States v. Mayfield, 771 F.3d 417, 435 (7th Cir. 2014).

333. Motion to Dismiss and Brief at 6, United States v. Loewen, No. 13-cr-10200 (D. Kan. Feb. 2, 2015) (citing *Mayfield*, 771 F.3d at 436).

334. Criminal Complaint, *supra* note 319, at 6.

On September 6, 2013, Loewen told the undercover agent:

> I believe the potential for me doing more is staggering. I have some rough ideas, but I know nothing about explosives . . . . I'm sure I am not as ready as I think I am, but by next year – who knows. Understand I have NO exxperience [sic] in things like this, but I'm willing to learn[.] Anyway, I'm just talking right now but I still feel I'm being led in this direction.[335]

Little did Loewen know at the time that he most certainly was being led by the FBI right into a sting operation that would end in his incarceration.

At many stages throughout their prolonged correspondence, even while Loewen expressed some support for jihad, he also repeatedly expressed reluctance to proceed with physical and violent action. For example, on August 21, 2013, Loewen stated:

> If by any chance you know of someone who is active in jihad and could use an occasional influx of "help", please let me know . . . . If the subject is too hot to handle, by all means let it go. I only want to help my brothers, not lead them to a destination they feel isn't for them. I just hate the kaffar government and those who are following it to the Hellfire, and the sooner it and its followers get there, the better.[336]

On September 9, Loewen stated his belief that "I'm moving way too fast for obvious reasons – trying to make up for lost time mostly. . .I'm going to stick with donating money to 'needy Muslims' for a while."[337] And when the undercover agent provided Loewen with instructions on how to send money to Al Qaeda via Western Union, Loewen never sent the money to the individual referred to him by the agent.[338] This failure to entrap him in material support to terrorism via financial donation likely made the FBI more desperate to push Loewen toward the fake bomb plot, even though he was clearly still reluctant.

On September 13, 2013, Loewen admitted that "[r]eading about the actions of the muhajideen [sic] and actually carrying them out is two different things. If not for my family, I would have already carried out some sort of operation – but thats [sic] my fault for putting others before Allah(swt) which I know better than to do."[339]

The government did not include in the criminal complaint any of the undercover agent's responses or statements to Loewen. Instead, all we know are Loewen's statements without any context about the conversations. What is left in between the lines is concerning. For example, on October 5, 2013, one FBI agent "asked if Loewen would be interested in a martyrdom operation . . . [stating that]

335. *Id*. at 10 (first alteration in original).
336. *Id*. at 7 (footnote omitted).
337. *Id*. at 11 (alterations in original).
338. *Id*. at 11 & n.15.
339. *Id*. at 11 (second alteration in original).

Loewen could back out at any time without the risk of losing face because no one knew his identity."[340] In response, Loewen expressed, among other reservations, that he wanted another few days to make his decision about going forward and thanked the agent for not getting anyone's hopes up in case he were to back out.[341] Loewen shared: "You are the only person I have any contact with on the jihad issue . . . ."[342] The complaint then jumps to October 7, 2013, noting that Loewen sent "numerous photographs of his airport access badge, entrance gates to the tarmac, and the devices used to access the gates."[343] But what is lacking here is any reference to the agent's response to Loewen's messages from two days prior, when he expressed wanting more time to make his decision; the government's portrayal of the facts sheds no light on what, if anything, the agent said to produce such a specific response of photographs and information specific to Loewen's airport job.

Under the Second Circuit's least robust predisposition test, which the Government argued applied in this case in the Tenth Circuit, the Government's curated facts demonstrated that the defendant was not "psychologically prepared[] to commit the crime for which he is being prosecuted" and that he would not have engaged in it unless assisted by the government.[344] That is, not until November 2013, after seven months of psychological manipulation. The two undercover agents had successfully created the so-called "bunch of guys" social network with Loewen that caused him to admit to one agent about the other agent, "I feel so close to this brother(as you said I would) that going to the end with him seems like the right thing to do."[345]

Because the record of the underlying facts of the case is filed under seal with the U.S. District Court in the District of Kansas, there is no way to confirm the extent to which the undercover agent persuaded Loewen to proceed with the (fake) terrorist plot on the multiple occasions Loewen expressed hesitancy and reluctance. That Loewen ultimately pleaded guilty just before trial further impedes a full explication of the facts. Nonetheless, the available details about the sting operation are further proof of the FBI's aggressive tactics aimed to transform an ideological extremist into a (fake) terrorist.

4. Damon Michael Joseph

Twenty-one-year-old Damon Michael Joseph, a convert to Islam whose alias was Abdullah Yusuf, came to the attention of authorities from his pro-ISIS postings on social media.[346] As a teenager, Joseph had resided in a group home

340. *Id.* at 13–14.

341. *Id.* at 14.

342. *Id.*

343. *Id.*

344. Response of the United States to Defendant's Motion to Dismiss at 5–6, United States v. Loewen, No. 13-cr-10200 (D. Kan. Mar. 2, 2015) (citing United States v. Ulloa, 882 F.2d 41, 44 (2d Cir. 1989), when arguing the district court should adopt the Second Circuit's test).

345. Criminal Complaint, *supra* note 319, at 17.

346. Affidavit in Support of Complaint & Arrest Warrant at 3, 27 n.35, United States v. Joseph, No. 19-cr-00048 (N.D. Ohio Dec. 10, 2018).

between April 20, 2015, and June 10, 2016, after he was convicted of gross sexual imposition of a minor under 13 when he was fifteen years old.[347] An employee of the group home who worked directly with Joseph stated he had become "a Nazi, an atheist, and a Satanist prior to abruptly converting to Islam."[348]

In late 2018, undercover agents noticed Joseph had reposted quotes and photographs from ISIS's media wing.[349] The first agent, claiming to be an ISIS supporter, contacted Joseph on September 18, 2018, gaining Joseph's trust by encouraging him to use his skills in graphic design to produce ISIS propaganda.[350] Toward that end, the agent introduced Joseph to a second agent, who praised Joseph's design skills. The second agent then urged Joseph to formally pledge allegiance to ISIS.[351] The first informant began to inquire whether Joseph saw a greater role for himself within the organization. Joseph began to speak vaguely about one day participating in an operation himself.[352] With time, this desire increased, reinforced by leading questions from the undercover agents who were eventually brought into the plot.[353] For example, the agents asked Joseph if he would be interested in doing graphic design for ISIS and later whether he would consider or be able to take up arms.[354]

Ultimately, the first undercover agent and Joseph formulated a plan for a shooting at a synagogue with extensive assistance from these agents, including a third undercover FBI agent who posed as a pious Muslim looking for guidance from Joseph.[355] The plot explicitly required the involvement of his newfound (fake) friends. Joseph and the undercover employees discussed where they could attack, what kind of weapons they would use, how they would have to watch for crossfire, and how they could obtain firearms.[356] Notably, Joseph was not legally permitted to own firearms because he was a juvenile sex offender repeatedly in and out of detention throughout his adolescence.[357] Thus, he had no way of legally obtaining the guns given to him by the undercover agent.

At the beginning of the sting operation, Joseph expressed reluctance toward committing violence himself, instead envisioning his role as more of a propagandist. For example, when asked about committing "physical jihad,"[358] Joseph replied that "I don't think I'm the one for that at least not at this point in my

347. Affidavit in Support of an Application for a Search Warrant at 6 & nn.7–8, *Joseph*, No. 19-cr-00048 (N.D. Ohio Nov. 30, 2018).

348. *Id*. at 6.

349. *Id*. at 7.

350. *Id*. at 9–10.

351. *Id*. at 17.

352. Affidavit in Support of Complaint & Arrest Warrant, *supra* note 346, at 17–18.

353. *Id*. at 19–23.

354. *See id*. at 6–7, 10.

355. *Id*. at 19–20.

356. *Id*. at 29–30.

357. *See* Affidavit in Support of an Application for a Search Warrant, *supra* note 347, at 6, ¶ 15 & n.7.

358. Essentially, a terrorist attack.

life."[359] Instead, Joseph preferred ISIS propaganda. Joseph referred to this as "virtual Jihad."[360] At one point, Joseph stated that although he did not feel sympathy for the victims of the Pittsburgh synagogue shooting (which was brought up by the first undercover agent and later touted as Joseph's inspiration), he also recognized that attacking places of worship was against the Quran.[361] Joseph did not even know how to "go about" committing physical jihad until after he spoke with undercover FBI agents who helped him formulate a plan.[362]

Joseph was charged with material support to terrorism in the U.S. District Court for the Northern District of Ohio.[363] The Sixth Circuit applies the five-factor predisposition test: (1) the defendant's character or reputation, including any prior criminal record; (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 repeated government persuasion; and (5) the nature of the inducement or persuasion by the government.[364] The Sixth Circuit emphasizes the question of whether the defendant evidenced a reluctance to commit the offense that was overcome by repeated government persuasion as "the most important factor in determining the lack of predisposition as a matter of law."[365]

Because Joseph expressed reluctance at the beginning of the sting operation but not throughout, in large part due to aggressive informant manipulation, Joseph was unlikely to obtain a ruling of entrapment as a matter of law. Before a jury, Joseph needed to overcome the bias arising from the disclosure that he was once a Nazi, an atheist, and now a Muslim posting pro-ISIS materials online. A jury could be easily distracted, focusing on the First Amendment-protected extremist social media postings rather than the persistent nature of two informants leading Joseph for over eight months into a lone-wolf-pack fake terrorist plot. All other members of the pack were government informants and agents. Joseph ultimately pleaded guilty rather than take his chances in court.[366]

The FBI's sting operation was successful insofar as it put another Muslim with "extremist" views in jail. But if that is the criterion for measuring success in criminal justice, then the First Amendment is merely symbolic—at least for Muslims and other minorities selectively targeted by powerful law enforcement agencies.

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359. Affidavit in Support of Complaint & Arrest Warrant, *supra* note 346, at 15.

360. *Id*. at 9, 18, 20, 21.

361. *Id*. at 19.

362. *See id*. at 18–20.

363. Indictment at 1, United States v. Joseph, No. 19-cr-00048 (N.D. Ohio Jan. 29, 2019).

364. United States v. Silva, 846 F.2d 352, 355 (6th Cir. 1988) (quoting United States v. McLernon, 746 F.2d 1098, 1112 (6th Cir. 1984)); *see also* United States v. Gamache, 156 F.3d 1, 9–10 (1st Cir. 1998) (citing United States v. Busby, 780 F.2d 804, 807 (9th Cir. 1986)); United States v. Marren, 890 F.2d 924, 930 (7th Cir. 1989).

365. *Silva*, 846 F.2d at 355 (alteration omitted) (quoting *McLernon*, 746 F.2d at 1113).

366. Judgment in a Criminal Case at 1, *Joseph*, No. 19-cr-00048 (N.D. Ohio Sept. 14, 2021).

B. THE PSYCHOLOGICALLY UNSTABLE

Compounding the concerns with counterterrorism sting operations is the psychological vulnerability of some Muslim targets. In at least 155 cases, there is evidence that the defendant suffered from mental illness.[367] Sometimes the defendant was diagnosed prior to trial, but more frequently, psychological problems were discovered through a pretrial or post-conviction state mental health assessment. Regardless of the timing of the diagnosis, the defendant's erratic, delusional, or aberrant behavior during the sting operation puts the FBI on notice that they are ensnaring a vulnerable Muslim target. Rather than backing off or redirecting the person to mental health services, the government exploits the defendant's psychological vulnerabilities, manipulating them into a lavish terrorist plot sure to result in a higher sentence. The facts of Mohamed Salat Haji's and Sami Osmakac's cases illustrate the egregious nature of the FBI's overreach.

1. Mohamed Salat Haji

A naturalized U.S. citizen born in Kenya, Mohamed Salat Haji was twenty-four years old and working a minimum wage job at a warehouse when he came to the attention of the FBI in 2016.[368] Haji's cousin, Muse Abdikadir Muse, was posting extremist pro-ISIS content on Facebook.[369] During their routine surveillance of social media, the FBI's covert online agents discovered Muse's postings in April 2016.[370] More than a year later in June 2017, an undercover agent posing as an ISIS recruiter contacted Muse over Facebook.[371] This time, Muse took the bait. According to the FBI, Muse expressed his desire to join ISIS abroad and was saving money to purchase the airfare.[372] Soon thereafter, Facebook shut down Muse's account because his pro-ISIS postings violated Facebook's policies.[373]

When Muse resurfaced on Facebook with a new account in August 2017, the same undercover agent in the online surveillance team tried again to recruit Muse in a sting operation.[374] Posing as an ISIS recruiter, the agent initiated a conversation with Muse via Facebook. The FBI then obtained a FISA warrant to search the contents of Muse's Facebook account. It was at this point in September 2017 that the FBI found Haji's communications with his cousin praising ISIS terrorist attacks.[375] Haji was now in the FBI's web. For the next eighteen months, multiple undercover agents posing as ISIS recruiters meticulously led Muse, Haji, and Muse's brother into a trap wherein their extremist rhetoric and social media

367. *See supra* note 22 and accompanying text.

368. *See* Transcript of Arraignments, Initial Pretrial Conferences, & Continuation of Detention Hearings at 197–98, United States v. Haji, No. 19-cr-00025 (W.D. Mich. Jan. 31, 2019); Continuation Sheet for Criminal Complaint at 2, *Haji*, No. 19-cr-00025 (W.D. Mich. Jan. 21, 2019).

369. *See* Continuation Sheet for Criminal Complaint, *supra* note 368.

370. *Id.*

371. *Id.* at 2–3.

372. *Id.* at 2.

373. *Id.* at 3.

374. *Id.*

375. *Id.*

postings would be transformed into Muse attempting to travel to Somalia to join ISIS on January 21, 2019.[376]

The three defendants certainly held extremist views and fantasized about fighting in defense of Islam in Syria and Somalia. They shared and watched reprehensible videos of ISIS beheadings and other forms of terrorist violence occurring abroad. They did not hide their offensive views as part of a secret, nefarious plot to commit terrorism. On the contrary, Muse posted and shared multiple extremist videos publicly on his Facebook accounts, not only allowing the FBI to easily identify him but also causing Facebook to shut down his accounts multiple times.

If posting pro-ISIS propaganda on social media was a crime, then the FBI could have immediately arrested Muse and Haji without ensnaring them in an eighteen-month sting operation. The FBI would not have had to pay Muse $1,200 to cover part of the round-trip ticket to Somalia that cost $1,800 because neither Muse nor Haji had enough money to pay for the full ticket.[377] If offensive and extremist speech and beliefs were unlawful, the FBI undercover agents would not have had to structure the $1,200 payment in four $300 payments to Western Union and instruct each of the defendants to pick up the $300 payments in order to meet the predicate act legal requirement for charging them with material support to terrorism.[378] For those reasons, Haji's counsel asserted an entrapment defense, which the court ordered to be filed under seal.[379]

Despite Haji's delusions of becoming a freedom fighter in Somalia, he was poor, inept, and mentally ill. Haji's minimum wage job at a retail store barely covered his basic expenses such that he, at twenty-four years old, still lived with his parents.[380] Similarly, his twenty-one-year-old cousin Muse was intermittently employed at minimum wage jobs, including at Walmart, and lived in his older brother's apartment.[381] As highlighted by his defense counsel, Haji and Muse "had no prior military training, no previous association with known terrorist operatives or even a real workable scheme to assist ISIS . . . . [Haji] had no contacts in Somalia and no knowledge of the country or the language or how he could possibly become a soldier for ISIS."[382]

Haji's sense of social isolation from American society and desire to return to Somalia, notwithstanding his arrival to the United States as a Somali refugee from Kenya, indicated mental health problems. Thus, it is no surprise that Haji's attorney requested a psychological evaluation of her client. Specifically, she informed the court in August 2020 that she had "become concerned with some statements made by Mr. Haji that relate to his ability to understand the charges

376. *Id*. at 10–11.

377. *Id*. at 8–9.

378. *Id*. at 9.

379. *See* Transcript of Status Conference at 16, *Haji*, No. 19-cr-00025 (W.D. Mich. Dec. 10, 2019).

380. *See* Transcript of Arraignments, Initial Pretrial Conferences, & Continuation of Detention Hearings, *supra* note 368, at 177:2–:13.

381. *See id*. at 151:11–:16, 175:22.

382. Sentencing Memorandum & Brief in Support of Departure from Advisory Guidelines at 2–3, *Haji*, No. 19-cr-00025 (W.D. Mich. Sept. 15, 2021).

against him and the legal process, as well as properly assist in his defense."[383] Nonetheless, in April 2021, the court found Haji competent to stand trial after evaluation by a forensic psychologist hired by the government.[384] The following month, Haji pleaded guilty to one count of conspiracy to provide material support to a designated foreign terrorist organization.[385] In the court's order sentencing Haji to 130 months in jail, it recommended that the Bureau of Prisons provide Haji with a mental health assessment and treatment.[386] Although the results of mental health assessments remain confidential, such assessments are often recommended due to unstable or depressive behavior by the inmate.

2. Sami Osmakac

Suffering from psychotic disorders, post-traumatic stress disorder, and depression, Sami Osmakac was an easy target for an FBI predatory sting operation.[387] Osmakac's family fled violence in Kosovo in 1992 to Germany. In 2000, they arrived in the United States when he was thirteen years old.[388] For the next seven years, he experienced the struggles that come with moving to a new country during adolescence. Osmakac had to learn English, make friends, and adapt to a completely new environment. His Muslim family, like many others immigrating from the Balkans at the time, was not religious.[389] However, in July 2009, Osmakac had a near-death experience. The flight home from his brother's wedding in Kosovo experienced severe turbulence and rapidly lost altitude. The passengers prepared for an emergency landing that could have been fatal.[390]

Since then, according to his family, Osmakac's mental health deteriorated dramatically. He suffered from nightmares of burning in hell and dreamt of killing himself. He heard the devil talking to him.[391] Osmakac became increasingly isolated, stopped socializing with his friends, and began attending the mosque frequently.[392] It was during this period that Osmakac met a Muslim convert, Russell Dennison, whose religious extremism appealed to Osmakac's delusions of becoming a martyr. Dennison's influence troubled Osmakac's family, who advised him to stop associating with Dennison. Not only did Osmakac refuse, but he berated his own family for not being what he believed were real Muslims.[393] Osmakac expressed his extremist views at mosques, resulting in his expulsion.[394]

383. *See* Brief in Support of Motion for Competency Evaluation at 3, *Haji*, No. 19-cr-00025 (W.D. Mich. Aug. 11, 2020).

384. *See Haji*, No. 19-cr-00025, slip op. at 1–2 (W.D. Mich. Apr. 28, 2021).

385. *See* Plea Agreement at 1, *Haji*, No. 19-cr-00025 (W.D. Mich. May 28, 2021).

386. *See* Judgment in a Criminal Case at 2, *Haji*, No. 19-cr-00025 (W.D. Mich. Sept. 23, 2021).

387. *See* Transcript of Competency Hearing at 8:8–:9, United States v. Osmakac, No. 12-cr-00045 (M.D. Fla. Nov. 13, 2013).

388. Trevor Aaronson, *The Sting: How the FBI Created a Terrorist*, INTERCEPT (Mar. 16, 2015, 8:28 AM), https://theintercept.com/2015/03/16/howthefbicreatedaterrorist/ [https://perma.cc/4U57-7VSA].

389. *See id.*

390. *See id.*

391. *See id.*; Transcript of Competency Hearing, *supra* note 387, at 16:6–:7.

392. *See* Aaronson, *supra* note 388.

393. *See id.*

394. *Id.*

Osmakac's worsening mental state caused his family to beg him to seek mental health treatment, which he rebuked.[395]

Osmakac traveled to Turkey in March 2011, a trip that would become a key piece of evidence in the subsequent sting operation.[396] Although the government later argued Osmakac was attempting to join Al Qaeda, Osmakac told the court-appointed psychologists that he was hoping to find a Muslim wife in a Muslim-majority country.[397] If Osmakac was indeed the dangerous terrorist the government made him out to be at trial, he could have easily joined a terrorist group in Syria or Iraq. Instead, he ran out of money while in Turkey, did not find a wife, and did not join a terrorist organization.[398] He called his family begging for money to purchase a ticket back home.[399]

Osmakac arrived home unemployed, disillusioned, socially isolated, and mentally ill. So when he met a government informant in September 2011, he was a prime target for a sting operation.[400] The informant allegedly tipped off the FBI that Osmakac was looking for an Al Qaeda flag, which Osmakac denies.[401] The FBI instructed the informant to hire Osmakac in his business, commencing the sting operation.[402] For the next two months, the informant gained the trust of Osmakac as part of the radicalization script of creating a small network of extremists (an undercover agent was soon brought into the sting) wherein government operatives manipulated, coerced, and cajoled the target into a fake terrorist plot. Mysteriously, none of the conversations between the informant and Osmakac appeared to be recorded for these first two months. It was not until late November 2011 that the recordings began and were later used in the trial against Osmakac.[403]

The absence of any evidence of Osmakac's mental state when the informant first made contact made it impossible for defense counsel to counter the government's claims that Osmakac was predisposed to commit a terrorist act. Therefore, the government relied solely on Osmakac's statements later in the sting operation, after the government operatives' manipulation had begun. That Osmakac was vulnerable due to his mental illness makes the absence of evidence of discussions at the beginning of the sting all the more important to determine predisposition. Yet, the court's jury instruction on entrapment made no mention of the relevance of the defendant's state of mind in early October 2011.[404] Nor did it even mention the importance of finding disposition beyond a generic statement that the jury

395. *See id.*
396. *See* United States v. Osmakac, 868 F.3d 937, 942–43 (11th Cir. 2017).
397. *See* Aaronson, *supra* note 388.
398. *Id.*
399. *See id.*; *Osmakac*, 868 F.3d at 943.
400. *See* Aaronson, *supra* note 388; *Osmakac*, 868 F.3d at 943.
401. *See* Aaronson, *supra* note 388.
402. *Id.*
403. *See id.*; *Osmakac*, 868 F.3d at 943.
404. *See generally* Court's Instructions to the Jury, United States v. Osmakac, No. 12-cr-00045 (M.D. Fla. June 10, 2014).

must find the defendant was "willing to break the law" and "the Government merely provide[d] what appear[ed] to be a favorable opportunity for the Defendant to commit a crime."[405] This instruction fails to inform the jury that the timing of the defendant's willingness—before, not during, the sting operation—is key to satisfying the legal requirement of predisposition.[406]

Doctrinally, this notable omission in the jury instructions is attributable to the Eleventh Circuit's case-by-case approach to predisposition. The Eleventh Circuit declines to look to any factor-based tests, reasoning that determining predisposition is a fact-intensive inquiry for which there is no way a factor test would be sufficient to establish predisposition (or a lack thereof).[407] Accordingly, "[a]ny list would necessarily be over and under inclusive by omitting factors which might prove crucial to a predisposition inquiry in one prosecution but are totally irrelevant in another."[408] Despite the fact-intensive test, the judge did not instruct the jury in Osmakac's trial to consider his mental illness (which was untreated during the sting operation) which made him especially vulnerable to manipulation. Nor did the judge note the jury's responsibility to focus on the point in time when the informant initiated the sting operation in September 2011 in determining whether all the government did was provide means and opportunity.[409] The absence of recordings at this time should have resulted in an adverse inference against the government.

Meanwhile, the recordings from late November 2011 to January 7, 2012, when Osmakac was arrested, evince his psychological instability and utter ineptitude.[410] He had delusional dreams of becoming a martyr even though he had no money.[411] He had no knowledge about making explosives. He had no connections to gun dealers. And he had no relationships with real terrorists, except for the undercover agent "Amir" to whom the informant introduced Osmakac.[412] In an unusual twist, FBI agents inadvertently recorded conversations among themselves during their orchestration of the sting operation. In these recordings, the FBI acknowledged what an easy target Osmakac made. They called him "a retarded fool," who they admitted had no capacity to plan, much less execute, a terrorist plan by himself.[413] Even in the intentional recordings, the agent posing as a terrorist laughed at Osmakac for thinking he could bomb five bridges at once in Tampa. In private conversations, government agents acknowledged that Osmakac lacked the money to pull off that kind of attack.[414] Rather than assisting

405. Court's Instructions to the Jury, *supra* note 404, at 15.
406. *See id.* at 15–16.
407. *See* United States v. Brown, 43 F.3d 618, 625 (11th Cir. 1995).
408. *Id.*
409. *See* Court's Instructions to the Jury, *supra* note 404.
410. *See* United States v. Osmakac, 868 F.3d 937, 942–43 (11th Cir. 2017).
411. *See* Aaronson, *supra* note 388.
412. *See id.*; *Osmakac*, 868 F.3d at 944.
413. *See* Aaronson, *supra* note 388.
414. *See id.*

him to seek treatment, the government exploited Osmakac's delusional state, advising him on a more realistic plan that would lead to his arrest.

If Posner's Seventh Circuit positionality test were applied to these facts, the prosecutor would have found it difficult to prove Osmakac was

> 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.[415]

And when instructed on the nature of the inducement by the government, the jury would consider the government's elaborate plans to give the informant $500 to then give to Osmakac, who then gave it to the undercover agent as a deposit on the gun and explosives for the terrorist organization.[416] The government had to pay itself to entrap Osmakac because he was penniless.

While the record is flush with evidence that Osmakac perversely interpreted Islam to desire martyrdom, the record is equally full of evidence of his severe psychological instability. Osmakac was sick, not dangerous. He needed mental healthcare, not to be entrapped in a counterterrorism sting operation. But the racialized political economy of counterterrorism prevents this humane approach to mental illness because each vulnerable, young Muslim man is an opportunity for the FBI and prosecutors to inflate their counterterrorism conviction rate, receive promotions, and maintain the fear of a "homegrown terrorism" threat necessary to sustain high levels of funding for counterterrorism.

C. WHEN THERE IS NO TERRORISM, SET THEM UP FOR FALSE STATEMENTS

In the cases where targets refuse to cooperate in the sting operation, the government reverts to pretextual charges.[417] That is, if they cannot convict them as terrorists, they will catch them in a lie that will lead them to the doors of the

415. United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc).

416. *See* Aaronson, *supra* note 388; *see also* Court's Instructions to the Jury, *supra* note 404, at 15–16.

417. At least thirty terrorism-related prosecutions are based exclusively on pretextual non-terrorism-related charges. *See* United States v. Khafagi, No. 03-cr-80087 (E.D. Mich. filed Feb. 13, 2003) (bank fraud); United States v. Al-Hussayen, No. 03-cr-00048 (D. Idaho filed Feb. 12, 2003) (visa fraud and false statement); United States v. Biheiri, No. 03-cr-00365 (E.D. Va. filed Aug. 8, 2003) (unlawful procurement of naturalization, materially false statements, and false oath in matter relating to naturalization); United States v. Wagner, No. 04-cr-00181 (S.D. Iowa filed July 15, 2004) (felon in possession of a firearm and body armor); United States v. Idais, No. 04-cr-00543 (E.D. Pa. filed Sept. 16, 2004) (false statement on visa application and use of visa obtained based on a false statement); United States v. Al-Uqaily, No. 04-cr-00191 (M.D. Tenn. filed Nov. 3, 2004) (possession of machine guns and unregistered firearms); United States v. Qureshi, No. 04-cr-60057 (W.D. La. filed Oct. 13, 2004) (false statements); United States v. Hayat, No. 05-cr-00160, (E.D. Cal. filed June 7, 2005) (false statement; with co-defendant Hamid Hayat); United States v. Benkahla, No. 06-cr-00009 (E.D. Va. filed Feb. 9, 2006) (false declarations and obstruction of justice); United States v. Mubayyid, No. 05-cr-40026 (D. Mass. filed May 11, 2005) (obstruction of the functions of the IRS, filing false tax returns, and making false statements; with co-defendants Muntasser and Al-Monla); United States v. Abdow, No. 09-cr-00292 (D. Minn. filed Oct. 27, 2009) (false statements); United States v. Abdullah, No. 09-cr-20549

jailhouse. In at least thirty-four cases, the defendant was ultimately charged only with making a false statement to a federal agent.[418]

Alexander Smith's case epitomizes the FBI's abuse of false statement criminal charges to prosecute targets they fail to ensnare in a fake terrorist plot. Smith was a high school dropout who witnessed his mother beaten by his stepfather when he was an adolescent.[419] He and his siblings were excommunicated from his white mother's family because she married his African-American father against her family's wishes. Moreover, Smith's father was not part of his life for long, leaving Smith with no extended family support from his mother or father's side. A biracial kid who suffered from an identity crisis and was raised by a single mom working overtime just to make ends meet, Smith had a hard life. When his best friend was killed in a gang shooting, Smith felt a deep sense of loss that led him to study religion. At the age of eighteen, Smith converted to Islam. He subsequently attended mosque regularly, as well as lectures and seminars, with his newfound faith community.[420]

(E.D. Mich. filed Nov. 10, 2009) (conspiracy; with co-defendants Bassir, Salaam, Saboor, Carswell, Beard, Philistine, Khan, Ibraheem, Porter, and Raqib); United States v. Ali, 799 F.3d 1008 (8th Cir. 2015) (conspiracy and false statements; with co-defendant Hassan); United States v. Rockwood, No. 10-cr-00061 (D. Alaska filed July 21, 2010) (false statements; with co-defendant Nadia Rockwood); United States v. Urbay, No. 10-cr-20685 (S.D. Fla. filed Sept. 7, 2010) (conspiracy to possess stolen firearms); United States v. Younis, No. 10-cr-00813 (S.D.N.Y. filed Sept. 15, 2010) (conducting and conspiracy to conduct an unlicensed money transmitting business); United States v. Morton, No. 12-cr-00035 (E.D. Va. filed May 13, 2011) (conspiracy, communicating threats, and using the Internet to place another in fear of death or serious injury); United States v. Fidse, No. 11-cr-00425 (W.D. Tex. filed May 25, 2011) (conspiracy to obstruct proceeding before department or agency and conspiracy to make false statements; with co-defendants Sheikh); United States v. Mihalik, No. 11-cr-00833 (C.D. Cal. filed Aug. 30, 2011) (false statements); United States v. Al-Akili, No. 12-cr-00091 (W.D. Pa. filed Mar. 15, 2012) (felon in possession of a firearm); United States v. Rios, No. 13-cr-00081 (E.D.N.C. filed Feb. 7, 2013) (possession of a stolen firearm); United States v. Abassi, No. 13-cr-00304 (S.D.N.Y. filed Apr. 22, 2013) (fraud and misuse of visas); United States v. Al-Khattab, No. 13-cr-00418 (E.D. Va. filed Oct. 30, 2013) (using the Internet to place another in fear of death or serious injury); United States v. Diaz, No. 15-cr-20264 (S.D. Fla. filed Apr. 6, 2015) (felon in possession of a firearm); United States v. Franey, No. 16-cr-05073 (W.D. Wash. filed Feb. 5, 2016) (unlawful possession of firearms and machine guns); United States v. Abu-Rayyan, No. 16-cr-20098 (E.D. Mich. filed Feb. 4, 2016) (false statement to acquire a firearm and felon in possession of a firearm); United States v. Wehelie, No. 17-cr-00295 (E.D. Va. filed Dec. 6, 2018) (false statements and obstruction of a federal investigation); United States v. Rahim, No. 17-cr-00169 (N.D. Tex. filed Feb. 14, 2018) (false statements); United States v. Wahid, No. 17-cr-00360 (D. Ariz. filed Mar. 14, 2017) (false statements and witness tampering); United States v. Ghoul, No. 17-cr-00312 (E.D.N.C. filed July 27, 2017) (attempted unlawful procurement of citizenship or naturalization and filing a false tax return); United States v. Khan, No. 18-cr-00195 (D. Conn. filed Aug. 30, 2017) (false statements); United States v. Spain, No. 17-cr-00123 (E.D. Va. filed Sept. 20, 2017) (felon in possession of a firearm); United States v. Duncan, No. 18-cr-00019 (E.D. Va. filed Feb. 6, 2018) (obstruction of justice); United States v. Ceasar, No. 19-cr-00117 (E.D.N.Y. filed Mar. 7, 2019) (obstruction of an official proceeding); United States v. Alameti, No. 19-cr-00013 (D. Mont. filed Apr. 4, 2019) (possession of a firearm by unlawful user of a controlled substance and false statements); United States v. Alam, No. 19-cr-00280 (E.D.N.Y. filed June 20, 2019) (possession of a firearm with an obliterated serial number).

418. *See supra* note 85, 316.

419. *See* Sentencing Memorandum Motion for Downward Departure/Variance at 2–3, United States v. Smith, No. 17-cr-00182 (W.D.N.C. July 24, 2020) [hereinafter Sentencing Memorandum].

420. *See id.*

Prior to his unknowing contact with the FBI's counterterrorism informant when he was twenty-four, Smith had no criminal record, no associations with foreign terrorist organizations, and no connections to violent extremists. What he did have, however, was a strong relationship with a Syrian-American family who had taken him in as part of their family.[421] When Smith was looking for a job after he dropped out of high school, Wael Kodaimati hired him to work for his company. Smith became like a brother to Saeed Kodaimati, who was three years younger than Smith.[422] The Kodaimatis took Smith with them on a family visit to Syria, before the country was ravaged by a tragic civil war. In addition to feeling a sense of belonging within the Kodaimati family, Smith was transformed by the trip because he felt that he was "finally in a place where I was just a person and didn't have to be white or black."[423] For this biracial American teenager who had always struggled to belong in the deep south of North Carolina, Smith was struck that "[i]n Syria, they don't see color. I was always judged for being biracial, but they saw me as a human."[424]

After the start of the Syrian Civil War in 2014, the Kodaimatis returned to Syria to defend their nation of origin.[425] Other than communicating with them to check on their safety, Smith continued with his life in the United States without any plans to travel to Syria, support ISIS, or engage in any terrorism-related activity. The FBI, however, had other plans. Their informant discovered Smith as part of their investigation of the Kodaimatis. Smith soon became the target of a sting operation wherein the informant would successfully manipulate and pressure Smith to attempt to travel to Syria to join ISIS.[426]

Following the radicalization literature blueprint, the informant first reached out to Smith pretending to be an ISIS recruiter.[427] But Smith was not interested in joining ISIS or traveling to Syria. At their first in-person meeting on August 7, 2014, Smith explained his intention to the informant that all he wanted to do was locate the Kodaimati family to find out if they were safe. Having failed to convince Smith to violate the law, the informant spent eight months befriending Smith and earning his trust to build a small social network, what Marc Sageman calls a "bunch of guys" in his radicalization research.[428]

Because Smith was unemployed at the time, he had no funds to cover his expenses, much less travel abroad. Therefore, "the FBI provided Mr. Smith with income by getting one of its sources, Bilal, to pose as [the informant's] friend who would find Mr. Smith work. That source had received over $253,081 for his time and another $23,000 in reimbursements, which even if divided by the

421. *See id.* at 3–4.
422. *See id.*
423. *Id.* at 4.
424. *Id.*
425. *Id.*
426. *See id.* at 6–9.
427. *See id.* at 7; Aziz, *supra* note 9, at 144.
428. *See* Sentencing Memorandum, *supra* note 419, at 7. *See generally* MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS (2004); SAGEMAN, *supra* note 42.

number of years he worked for [the] FBI would still amount to $23,000 a year."[429] "The FBI and/or its sources also supplied Mr. Smith with money to pay his phone bill and get gas, as well as gifting him a laptop."[430] These two informants were effectively attempting to create a (fake) terrorist cell, even though Smith had no desire to join or support ISIS. Their acts of purported generosity were calculated to earn Smith's trust, as well as impose a sense of obligation to pay back the favor to the two government informants.

In November 2014, the informant talked about his travels with Smith, at which point Smith stated, "[If] you need a buddy pass or something like that to be on a cheaper flight, let me know" because Smith's girlfriend could obtain cheap standby tickets for him.[431] Smith's offer was not for the informant or anyone else to travel abroad or in furtherance of a terrorist plot, but rather an offer to a friend whom Smith felt he owed a favor in exchange for his generosity.

Sure enough, four months later in March 2015, the informant asked Smith for the favor that would serve as the basis for the false statement charge.[432] Specifically, the informant "said that he had a brother 'we need[ed]' and was trying to get tickets from Tampa to Buffalo then from Buffalo to Canada and Canada to Europe, 'so I can send him you-know-where.'"[433] On March 20, 2015, Smith booked a standby ticket for the informant's friend.[434] Less than a month later, on April 11, 2015, Smith cut ties with the informant after rebuking his continuous pressure to fly to Syria.[435] Indeed, Smith's last communication with the informant was: "I can't have anything to do with this. All I wanted was to go visit my friends to make sure he and his family was okay. You then started asking me to do things I had no intention of doing."[436]

Rather than close the investigation on Smith based on his clear refusal to support terrorism, the FBI changed its strategy. First, they attempted to contact Smith for a voluntary interview, but he would not return their messages.[437] Knowing his girlfriend was, according to them, "the weakest link," the FBI targeted her and threatened her, saying, "you're going to tell us everything or you're going to jail and you're never getting out and your mother is going to die while you're in jail."[438] They went to her job at American Airlines and had airport security bring her to them for an interview. She was subsequently fired from her job.[439] After the FBI served her with a subpoena at her mother's house, Smith

429. Sentencing Memorandum, *supra* note 419, at 7–8 (emphasis omitted).
430. *Id.* at 8.
431. *Id.* (alteration in original).
432. *See id.*
433. *Id.* (alteration in original) (citation omitted).
434. *Id.*
435. *See id.* at 8–9.
436. *Id.* (emphasis and citation omitted).
437. *Id.* at 9.
438. *Id.* (citation omitted).
439. *Id.*

finally responded to the FBI and agreed to an interview.[440] This opportunity was the one the FBI had been waiting for. They planned to use the voluntary interview to ask Smith questions to which they knew the answers.

At this time, the FBI could not charge Smith with material support to terrorism, but soliciting a false statement from him to an FBI agent would allow them to prosecute Smith, a twenty-four-year-old Muslim convert who had refused when presented with the opportunity to join ISIS. Smith answered most of their questions honestly but for one statement: when asked if he had ever discussed his desire or plans to travel to Syria, he said no.[441] Ironically, the statement was false not because he wanted to join ISIS but because he had told the informant he was willing to go to Syria to check on the safety of the Kodaimatis. When the FBI asked Smith if he knew that the standby ticket he purchased for the informant's friend in March 2015 was for him to travel to support ISIS, Smith said no—likely out of fear that he would become ensnared in illegal activity which he believed had nothing to do with him. Smith had only done a small favor to a person he believed was a friend and had generously subsidized Smith's basic expenses when he was unemployed and in desperate financial straits.[442]

Smith's vulnerability—emotional and financial—made him the perfect target for the FBI's predatory sting operation.[443] Nevertheless, when Smith asked the judge to include an entrapment defense in the jury instructions, the judge denied the motion.[444] An American jury, primed by the media and politicians to believe Muslims are inherently suspect of terrorism, convicted Smith of two counts of making a false statement. Smith was sentenced to five years in prison.[445] Smith's clear rebuke of the informant's solicitations for him to travel to join ISIS was strikingly of little consequence.

Smith's case demonstrates the aggressiveness with which the FBI pursues young Muslim men to rack up terrorism-related prosecutions to serve the political economy of counterterrorism. Increased prosecutions—even if pretextual—translates into more funds, promotions, and accolades for the FBI and the DOJ.[446] Alexander Samuel Smith is one of thirty-four defendants only charged with a false statement in a terrorism-related case, in addition to seventy-four other defendants charged with false statements along with other criminal charges.

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440. *See id.*

441. *See id.*

442. *See id.* at 7–9.

443. When released on bail, Smith was permitted to attend regular mental health treatment, proving his psychological vulnerabilities. *See* Motion to Modify Conditions of Release Pursuant to 18 U.S.C. § 3145(a)(2) at 1, United States v. Smith, No. 17-cr-00182 (W.D.N.C. Jan. 25, 2018) ("[T]he U.S. District Court for the Western District of North Carolina confines Mr. Smith to his residence at all times except for employment, *mental health treatment*, court appearances, and meeting with counsel." (emphasis added)).

444. *See* Defendant's Proposed Jury Instruction at Exhibit A, *Smith*, No. 17-cr-00182 (W.D.N.C. Mar. 21, 2019) (entrapment instruction); Sentencing Memorandum, *supra* note 419, at 16 ("[T]he Court found there was no inducement in denying the request for an entrapment instruction . . . .").

445. *See* Judgment in a Criminal Case at 1–2, *Smith*, No. 17-cr-00182 (W.D.N.C. Aug. 11, 2020).

446. *See supra* note 10 and accompanying text.

D. THE POTENTIALLY LEGITIMATE CASES (RALPH KENNETH DELEON)

The seven case studies above offer a glimpse into the myriad abuses of investigative powers, unimpeded by an entrapment doctrine that is supposed to stop such government overreach. When used properly, however, sting operations can be effective law enforcement tools for preventing terrorism. One important lesson gleaned from the comparison of legitimate and illegitimate sting operations is the apparent irrelevance of the entrapment doctrine. Defendants consistently lose their entrapment defenses irrespective of the FBI's investigative techniques. Thus, the dispositive factor determining whether the Muslim target will lose his liberty once the government puts him in its crosshairs lies squarely within the FBI's control, not a legal check. Such unbridled executive power is all the more reason to codify a rights-protective entrapment defense through legislation, which is the topic of Part V.

Many attributes of the case against Ralph Kenneth DeLeon mirror those of the illegitimate cases of de facto entrapment. He was a new convert who knew little about Islam except for the extremist propaganda shared with him by Sohiel Kabir, the mastermind of the conspiracy to travel to join Al Qaeda in Afghanistan. When the twenty-one-year-old DeLeon met Kabir in 2010, he was a college dropout estranged from his devout Catholic Filipino-American family.[447] Socially isolated and working odd jobs, DeLeon could only afford an airplane ticket to travel to Afghanistan in pursuit of his purported jihadist aspirations by selling his car and requesting refunds from his withdrawn college courses.[448]

In contrast to the other cases, however, DeLeon had already begun discussing specific plans with three other young Muslim men to join Kabir in Afghanistan before the informant infiltrated the plot. For the next two years, DeLeon actively engaged in preparation for the group's plans to fight with Al Qaeda abroad. [449] Implanted in the group was the informant who on multiple occasions asked DeLeon if he would rather marry, start a family, and settle down than go abroad to fight in Afghanistan.[450] DeLeon rebuffed the informant, insisting his dream was to be on the front lines of the war against American soldiers.[451] DeLeon never expressed reluctance about the group's illicit plans.

The case record is replete with DeLeon's actions in furtherance of the conspiracy, including Skyping frequently with Sohiel Kabir to finalize an itinerary and secure a final travel date.[452] He searched for flights online, collected money from his co-conspirators, and sold his car to cover the cost of his ticket.[453] Moreover,

447. Defendant's Sentencing Memorandum at 6–7, United States v. DeLeon, No. 12-cr-00092 (C.D. Cal. Feb. 13, 2015).

448. *See DeLeon*, No. 12-cr-00092, slip op. at 8 (C.D. Cal. Sept. 15, 2014).

449. *See id*. at 6–8.

450. *See* Government's Consolidated Opposition to Defendants Sohiel Omar Kabir's and Ralph Kenneth DeLeon's Motions for Acquittal Pursuant to Rule 29 of the Federal Rules of Criminal Procedure at 40, *DeLeon*, No. 12-cr-00092 (C.D. Cal. Sept. 12, 2014).

451. *Id*.

452. *Id*. at 17–18.

453. *DeLeon*, slip op. at 7–8 (C.D. Cal. Sept. 15, 2014).

when DeLeon went to a shooting range and paintball field with his co-conspirators, his statements proved his intent to train to fight with Al Qaeda.[454] Meanwhile, the informant played a passive role as a member of the conspiracy rather than the lead and provocateur. Unlike the previously discussed cases, here, the government did not engage more informants or undercover agents in such a way that the so-called "bunch of guys" were primarily government agents, with agents outnumbering targets.

When DeLeon argued an entrapment defense in the U.S. District Court for the Central District of California, the judge rejected it as a matter of law.[455] The court found that DeLeon did not show either of the required elements of predisposition or government inducement.[456] But even if he had, the court found that the Government met the Ninth Circuit's five-factor predisposition test.[457] That DeLeon had begun his plans to travel abroad to join Al Qaeda a few months *before* he met the informant and rebuked the informant's attempts to persuade him out of the plot was sufficient evidence of predisposition. As a result, the jury did not receive instructions to consider whether DeLeon had been unlawfully entrapped. If all 290 of the government's counterterrorism sting operations mirrored this case, hundreds of Muslim men would not be incarcerated on account of their extremist speech and beliefs.

Entrapment law has proven ineffective in protecting defendants from predatory counterterrorism enforcement. Indeed, this may explain why only 36 defendants invoked the entrapment defense out of a total of 290 federal terrorism cases involving sting operations.[458] Resuscitating this dead-letter law is long overdue—either through binding Supreme Court jurisprudence or federal legislation.

V. RESUSCITATING THE ENTRAPMENT DEFENSE

The failings of entrapment jurisprudence highlighted in seven of the aforementioned terrorism-related cases are only the tip of the iceberg. Combined with the racialized political economy of counterterrorism, entrapment law's impotence makes young Muslim men especially vulnerable to predatory investigative practices. This Article proposes four alternative recommendations for doctrinal reform. First, the Supreme Court could revert to its original jurisprudence wherein only an objective test determining the government's inducement is

454. *See id*. at 7.

455. *Id*. at 11.

456. *Id*. at 5, 10.

457. The five factors are: (1) the character or reputation of the defendant, including any prior criminal record; (2) whether the suggestion of the criminal activity was initially made by the Government; (3) whether the defendant was engaged in the criminal activity for profit; (4) whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and (5) the nature of the inducement or persuasion supplied by the Government. United States v. Cortes, 757 F.3d 850, 858 (9th Cir. 2014); United States v. Busby, 780 F.2d 804, 807 (9th Cir. 1986) ("Although none of these factors is controlling, the defendant's reluctance to engage in criminal activity is the most important.").

458. *See supra* note 39 and accompanying text.

considered in assessing a defendant's entrapment claim. Second, the Supreme Court could keep the two-part test but explicitly adopt Judge Posner's positionality test for assessing a defendant's predisposition. Third, Congress could pass legislation that codifies the Supreme Court's original objective test. Finally, Congress could codify the current two-factor test and legislatively define predisposition according to the positionality test. The most rights-protective of these options would be to adopt a federal statute using the single-element objective test. Numerous state legislatures have followed this path, and their respective statutes can serve as templates for federal legislation codifying entrapment law.

A. UNIFYING FEDERAL ENTRAPMENT COMMON LAW DOCTRINE

Nearly one hundred years ago, when the U.S. Supreme Court created the judicial doctrine of entrapment in *Sorrells*, its stated intent was to prevent the government from the "making of criminals."[459] Justice Roberts wrote a separate opinion clarifying this objective in which he explained: "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."[460] Specifically, entrapment occurs when

> [the defendant] has committed the crime in question, but, by supposition, only because of instigation and inducement by a government officer. To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction.[461]

As a result, "courts must be closed to the trial of a crime instigated by the government's own agents."[462]

Had Justice Roberts's objective test been followed in subsequent cases, the courts would serve as a meaningful check on government abuse, as originally intended. Instead, the majority in *Sherman v. United States* supplanted the objective test focused on the government's actions with a subjective test that focused on the defendant's general predisposition.[463] In this 1958 case, the majority rejected Roberts's objective test on the grounds that the government would be handicapped if prohibited from showing the "defendant's criminal conduct was due to his own readiness."[464] As a result, *Sherman* opened the door for judges and juries to punish defendants with criminal records or, in the case of Muslims in counterterrorism enforcement, extremist beliefs.[465] Defendants who are politically

459. Sorrells v. United States, 287 U.S. 435, 441 (1932).
460. *Id.* at 454 (Roberts, J., concurring).
461. *Id.* at 458–59.
462. *Id.* at 459.
463. *See generally* Sherman v. United States, 356 U.S. 369 (1958).
464. *Id.* at 376–77.
465. *See* United States v. Russell, 411 U.S. 423, 428–29 (1973).

unsavory become easy prey to sting operations even when government agents or informants instigate, plan, and lead in executing the criminal act.

Nevertheless, Roberts's opinion served as the basis of Justice Frankfurter's concurring opinion in *Sherman* and Justice Douglas's dissenting opinion in *United States v. Russell*.[466] In *Sherman*, Justice Frankfurter noted, "No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society."[467] Likewise, Justice Douglas's dissent (joined by Justice Brennan) in *Russell* warns that "[f]ederal agents play a debased role when they become the instigators of the crime, or partners in its commission, or the creative brain behind the illegal scheme."[468] In his separate dissent, Justice Stewart stated that the central question in entrapment "is whether—regardless of the predisposition to crime of the particular defendant involved—the governmental agents have acted in such a way as is likely to instigate or create a criminal offense."[469] By 1973, the Court's jurisprudence had shifted markedly to emphasize the defendant's predisposition, rather than the government's abusive tactics to induce the defendant to commit a crime.

As a result, the federal circuit courts have adopted myriad tests that produce inconsistency and minimal protection for victims of government overreach, especially those belonging to vilified minority groups. This situation leaves two avenues for doctrinal reform. First, the Supreme Court could adhere to the original intent of the entrapment doctrine by adopting the objective test wherein juries focus exclusively on the government's actions that use "persuasion or other means likely to cause persons to commit the offense."[470] Or, in the alternative, the Supreme Court could explicitly incorporate Posner's positionality test into a single, consistent predisposition test binding on all federal courts.[471]

A third option is legislating entrapment to meaningfully protect individuals, especially those from minority communities vulnerable to government overreach. As a starting point, Congress could follow the lead of the twenty-five state legislatures that have codified entrapment law.[472] The most rights-protective statutes adopt the courts' original objective test.

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466. *See Sherman*, 356 U.S. at 378–85 (Frankfurter, J., concurring in the result); *Russell*, 411 U.S. at 436 (Douglas, J., dissenting).

467. *Sherman*, 356 U.S. at 382–83 (Frankfurter, J., concurring in the result).

468. *Russell*, 411 U.S. at 439 (Douglas, J., dissenting).

469. *Id.* at 441 (Stewart, J., dissenting).

470. The Texas entrapment statute is an example of an objective test. *See* TEX. PENAL CODE ANN. § 8.06(a).

471. *See generally* United States v. Hollingsworth, 27 F.3d 1196 (7th Cir. 1994) (en banc).

472. *See infra* notes 474–76.

B. STATE ENTRAPMENT STATUTES

Federal entrapment law is a judicial doctrine with no federal legislative counterpart.[473] However, half of the states have codified the entrapment defense. The twenty-five state entrapment statutes fall into three doctrinal categories: (1) inducement and predisposition (seven states);[474] (2) inducement and a higher bar for showing the defendant's disposition (thirteen states);[475] and (3) inducement as determined by an objective test (five states).[476] These three models offer a starting point for exploring federal legislation that would revert the entrapment doctrine to the Supreme Court's original intent of protecting unwary individuals from abuse by policing authorities, which disproportionately harms Muslims in the counterterrorism context. Moreover, a federal statute would standardize the doctrine to provide consistency across the federal courts—a key component of the rule of law.

1. Government Inducement and Defendant Predisposition

The first category of statutes mirrors the general test found in *Jacobson v. United States*, wherein the defendant must prove that the government induced the defendant *and* that the defendant was not predisposed to commit the crime.[477] For example, New York's entrapment statute reads:

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473. *See generally* Sorrells v. United States, 287 U.S. 435 (1932).

474. The subjective predisposition test is followed by Illinois, Indiana, Kentucky, Mississippi, New Hampshire, New York, and Tennessee. *See* 720 ILL. COMP. STAT. 5/7-12; IND. CODE § 35-41-3-9; KY. REV. STAT. ANN. § 505.010; MISS. CODE ANN. § 99-1-25; N.H. REV. STAT. ANN. § 626:5; N.Y. PENAL LAW § 40.05; TENN. CODE ANN. § 39-11-505.

475. The higher bar subjective predisposition test is followed by Alaska, Colorado, Connecticut, Delaware, Florida, Hawaii, Missouri, New Jersey, North Dakota, Oregon, Pennsylvania, Utah, and Washington. *See* ALASKA STAT. § 11.81.450; COLO. REV. STAT. § 18-1-709; CONN. GEN. STAT. § 53a-15; DEL. CODE ANN. tit. 11, § 432; FLA. STAT. § 777.201; HAW. REV. STAT. § 702-237; MO. REV. STAT. § 562.066; N.J. STAT. ANN. § 2C:2-12; N.D. CENT. CODE § 12.1-05-11; OR. REV. STAT. § 161.275; 18 PA. CONS. STAT. § 313; UTAH CODE ANN. § 76-2-303; WASH. REV. CODE § 9A.16.070.

Although some states claim to follow an objective standard, including that which is put forward by the American Law Institute in Model Penal Code § 2.13, *see infra* note 482, the statutory language leaves room for a subjective test of predisposition. *Compare* State v. Hernandez, 462 P.3d 1283, 1286–87 (Utah Ct. App. 2020) (claiming to follow an objective test), *with* State v. Dickerson, 511 P.3d 1191, 1201 (Utah Ct. App. 2022) (recognizing subjective aspects). *See also, e.g.*, State v. Agrabante, 830 P.2d 492, 499 (Haw. 1992) (claiming to follow an objective test); State v. Hoffman, 291 N.W.2d 430, 432 (N.D. 1980) (same); Castillo v. State, 821 P.2d 133, 137–38 (Alaska Ct. App. 1991) (same); State v. Davis, 916 A.2d 493, 504 (N.J. Super. Ct. App. Div. 2007) (same); Commonwealth v. Zingarelli, 839 A.2d 1064, 1073 (Pa. Super. Ct. 2003) (same); *but see, e.g.*, State v. McDaniel, 283 P.3d 414, 422 (Or. Ct. App. 2012) (claiming limited subjectivity).

Other states do not claim to follow an objective standard. *See, e.g.*, People v. Aponte, 867 P.2d 183, 186 (Colo. App. 1993); State v. Golodner, 46 A.3d 71, 87 (Conn. 2012); Harrison v. State, 442 A.2d 1377, 1385 (Del. 1982); Munoz v. State, 629 So.2d 90, 101 (Fla. 1993); State v. Foster, 838 S.W.2d 60, 65 (Mo. Ct. App. 1992); State v. Arbogast, 478 P.3d 115, 125 (Wash. Ct. App. 2020).

476. The objective test is followed by Arkansas, Georgia, Kansas, Montana, and Texas. *See* ARK. CODE ANN. § 5-2-209; GA. CODE ANN. § 16-3-25; KAN. STAT. ANN. § 21-5208; MONT. CODE ANN. § 45-2-213; TEX. PENAL CODE ANN. § 8.06.

477. 503 U.S. 540 (1992).

> In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant, or by a person acting in cooperation with a public servant, seeking to obtain evidence against him for purpose of criminal prosecution, and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person *not otherwise disposed* to commit it. Inducement or encouragement to commit an offense means active inducement or encouragement. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.[478]

The second category of entrapment laws also requires government inducement but adopts language that sets a higher bar for the government to show the defendant was disposed to commit the induced crime. For example, the Alaska entrapment statute states that "a public law enforcement official or a person working in cooperation with the official induced the defendant to commit the offense by persuasion or inducement as would be effective to persuade an average person, other than one who is *ready and willing, to commit the offense*."[479] Colorado's statute requires the government to show that "but for such inducement, [the defendant] *would not have conceived of or engaged in conduct* of the sort induced."[480] Entrapment statutes in Florida, Hawaii, New Jersey, North Dakota, and Utah require a showing that the government's inducement create a substantial risk that the offense would not be committed by *a person not otherwise disposed or ready* to commit it.[481]

Showing the defendant was "ready and willing," "would not have conceived of or engaged [in]," or "did not contemplate and would not otherwise have engaged" in the illegal conduct provides more clarity than a generic predisposition requirement subject to different interpretations. However, the state statutes still leave it to state judicial interpretation whether these requirements must exist at the beginning of a sting operation or can arise during the sting operation because of government inducement. The latter interpretation effectively grants the government significant leeway to manipulate, coerce, and cajole a defendant into crime. The objective test thus offers a solution that protects individual rights while still allowing legitimate sting operations based on a target's predicate act, not extreme political or religious beliefs.

2. Government Inducement and the Objective Test

The third category of statutes applies an objective test in looking strictly at government inducement to determine if entrapment occurred. The Model Penal Code (MPC) and five states have codified the objective test—Arkansas, Georgia,

478. N.Y. PENAL LAW § 40.05 (emphasis added).

479. ALASKA STAT. § 11.81.450 (emphasis added).

480. COLO. REV. STAT. § 18-1-709 (emphasis added).

481. *See* FLA. STAT. § 777.201; HAW. REV. STAT. § 702-237; N.J. STAT. ANN. § 2C:2-12; N.D. CENT. CODE § 12.1-05-11; UTAH CODE ANN. § 76-2-303.

Kansas, Montana, and Texas—wherein the emphasis is on the government's inducement, not the defendant's predisposition. In the five states' statutes, the factual analysis centers on whether the government's actions induced the defendant to commit the charged offense.

The Model Penal Code § 2.13 states:

> (1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:
> (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
> (b) employing methods of persuasion or inducement that *create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it*.
> (2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.
> (3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.[482]

The MPC commentary, in pertinent part, notes: "The formulation that was adopted represents an objective standard . . . . [T]he propensities of the particular defendant are irrelevant."[483] However, despite the MPC drafters' stated intent to impose an objective test, the phrase "create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it" could be interpreted by courts to include a subjective test, albeit higher than the first category.

Texas Penal Code § 8.06 and Arkansas Criminal Statute § 5-2-209 are narrowly drafted to focus on inducement by law enforcement. The Texas statute reads:

> (a) It is a defense to prosecution that the actor engaged in the conduct charged because he was *induced to do so by a law enforcement agent using persuasion or other means* likely to cause persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

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482. MODEL PENAL CODE § 2.13 (AM. L. INST. 1985) (emphasis added).

483. THE AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES: PART I 411 (1985); *see* Bailey v. People, 630 P.2d 1062, 1067 n.11 (Colo. 1981) (en banc) ("[T]he Model Penal Code . . . leaves no doubt that the probable reactions of hypothetical persons, not the individual defendant, furnish an objective yardstick against which police conduct is to be measured[.]").

> (b) In this section "law enforcement agent" includes personnel of the state and local law enforcement agencies as well as of the United States and any person acting in accordance with instructions from such agents.[484]

Similarly, Arkansas's entrapment law reads:

> (a) It is an affirmative defense that the defendant was entrapped into committing an offense.
>
> (b)(1) Entrapment occurs when a law enforcement officer or any person acting in cooperation with a law enforcement officer induces the commission of an offense by using persuasion or other means *likely to cause a normally law-abiding person to commit the offense*.
>
> (2) Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.[485]

Kansas Criminal Statute § 21-5208 and Montana Criminal Statute § 45-2-213 note that the government may afford the defendant an opportunity or facility to commit the crime but that the criminal purpose must originate with the defendant. The Kansas statute states:

> A person is not guilty of a crime if such person's criminal conduct was induced or solicited by a public officer or such officer's agent for the purposes of obtaining evidence to prosecute such person, unless:
>
> (a) The public officer or such officer's agent merely afforded an opportunity or facility for committing the crime in furtherance of *a criminal purpose originated by such person* or a co-conspirator; or
>
> (b) The crime was of a type which is likely to occur and recur in the course of such person's business, and the public officer or such officer's agent in doing the inducing or soliciting did not mislead such person into believing such person's conduct to be lawful.[486]

Likewise, Montana's statute states:

> A person is not guilty of an offense if the person's conduct is incited or induced by a public servant or a public servant's agent for the purpose of obtaining evidence for the prosecution of the person. However, this section is inapplicable if a public servant or a public servant's agent merely affords to the person the opportunity or facility for committing an offense in furtherance of *criminal purpose that the person has originated*.[487]

Georgia's entrapment statute is arguably the most rights-protective for defendants because it explicitly references "undue persuasion, incitement, or deceitful

484. TEX. PENAL CODE ANN. § 8.06 (emphasis added).
485. ARK. CODE ANN. § 5-2-209 (emphasis added).
486. KAN. STAT. ANN. § 21-5208 (emphasis added).
487. MONT. CODE ANN. § 45-2-213 (emphasis added).

means" by government agents or informants as a basis for finding the defendant was unlawfully entrapped.[488] It also requires the trier of fact to ask if "the accused would not have committed [the crime] except for the conduct of such officer."[489] The law reads as follows:

> A person is not guilty of a crime if, by entrapment, his conduct is induced or solicited by a government officer or employee, or agent of either, for the purpose of obtaining evidence to be used in prosecuting the person for commission of the crime. Entrapment exists where the idea and intention of the commission of the crime originated with a government officer or employee, or with an agent of either, and he, *by undue persuasion, incitement, or deceitful means, induced the accused to commit the act* which the accused would not have committed except for the conduct of such officer.[490]

An entrapment defense raised in these five states prompts juries to determine whether the defendant would have committed the act but for the government's manipulation, trickery, coercion, and cajoling. However, in interpreting appeals raising errors related to entrapment defenses, the state supreme courts, inquiring into whether the government's conduct "merely afford[ed] a person an opportunity to commit an offense,"[491] often refer to case law from before the passage of these entrapment laws. As a result, even though the statutes do not explicitly reference the defendant's predisposition or state of mind, predisposition continues to be referenced by courts that by design rely on stare decisis in interpreting common law, notwithstanding its codification into statute.[492]

Prosecutors often argue that these entrapment statutes should be interpreted as implying the defendant is predisposed if the defendant accepts the government's means and opportunity, citing case law issued prior to the statute's promulgation. A defense lawyer is then put in the position of having to prove that the government went further to manipulate or coerce her client into the illegal act, which inevitably brings in the defendant's predisposition.[493]

The government's backdoor inclusion of predisposition should be considered in prospective federal legislative initiatives. Should the objective test be properly applied in counterterrorism sting operations against Muslims, the defendants would be more likely to succeed in proving they were unlawfully entrapped—not

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488. GA. CODE ANN. § 16-3-25.

489. *Id.*

490. *Id.* (emphasis added).

491. *See, e.g.*, ARK. CODE ANN. § 5-2-209.

492. *See, e.g.*, Reese v. State, 877 S.W.2d 328, 333 (Tex. Crim. App. 1994) (en banc); State v. Karathanos, 493 P.2d 326, 331 (Mont. 1972); State v. Reichenberger, 495 P.2d 919, 925–26 (Kan. 1972).

493. The kinds of cases that come before the state supreme courts, asking for interpretation of the entrapment statute, commonly involve criminal drug sale or purchase charges. The circumstances nearly always involve an undercover agent or informant purchasing illegal drugs from or selling illegal drugs to the defendants. This is a substantively different fact pattern than a months-long sting operation to manipulate, cajole, or coerce an incompetent young man to conduct a terrorism-related offense.

because the defendants did not hold extremist political views but because they were mostly inept bombasts who lacked the money, skills, training, and personal connections to commit a terrorist act. Most of them only had social media accounts that were repeatedly shut down due to their offensive political posts.

C. CODIFYING THE OBJECTIVE TEST IN A FEDERAL ENTRAPMENT STATUTE

To date, no Muslim defendant in a terrorism-related case has been successful in raising an entrapment defense,[494] even where the FBI uses the most aggressive tactics in manufacturing a terrorist plot. Targeting individuals who are mentally ill, recently released from jail, repeatedly hesitant to continue, or live in rehabilitation centers is exploitative and predatory.[495] The political, as opposed to public safety, objectives become more evident when the government's case relies largely on Islamophobic narratives about "radical Islam."[496] At trial, prosecutors scare juries with the defendant's offensive statements and social media postings, while dismissing his complete lack of skills, resources, and associations necessary to commit the (fake) terrorist attack.[497] Nor is there consideration of the fact that it takes FBI agents and informants an average of twelve months to manipulate and coerce a defendant to finally go along with a manufactured plot that is planned, led, and implemented by the government. All of these factors are supposed to weigh in favor of a defendant's claim of unlawful entrapment. The courts' failure to serve as a check on government abuse makes codification of an objective test in entrapment legislation all the more necessary.

Accordingly, this Article recommends the following statutory language:

> (1) A person is not guilty of a crime if the person can prove by a preponderance of the evidence that such person's criminal conduct was induced or solicited using persuasion, coercion, deception, or other means, by a public officer or such officer's agent, for the purposes of obtaining evidence to prosecute such person, and which the accused would not have committed except for the conduct of such officer, unless:
>
> (a) The government can prove beyond a reasonable doubt that the public officer or such officer's agent merely afforded an opportunity or facility for committing the crime in furtherance of a criminal purpose *originated* by

494. *See* Norris & Grol-Prokopczyk, *supra* note 18, at 612–13; Laguardia, *supra* note 90, at 171, 173; Richard Bernstein, *A Defense That Could Be Obsolete*, N.Y. TIMES (Dec. 1, 2010), https://www.nytimes.com/2010/12/02/us/02iht-letter.html.

495. *See generally supra* Part IV (featuring case studies of Muslim men who have raised the entrapment defense).

496. *See* Szpunar, *supra* note 77, at 375–76. *See generally* Aziz, *supra* note 81 (discussing the U.S. government's use of religiosity as a proxy for terrorism and reliance on "material support" laws to prosecute those who cannot otherwise be shown to have participated in terrorism).

497. *See* Associated Press, *FBI Actions Questioned in Terror Plot Probe*, L.A. DAILY NEWS (Aug. 29, 2017, 2:34 AM), https://www.dailynews.com/2007/05/11/fbi-actions-questioned-in-terror-plot-probe/ [https://perma.cc/2NGA-GK8H].

> such person; and the person's criminal purpose is *independent* and *not the product of the government's inducement* directed at the person;[498] or
>
> (b) The government can prove beyond a reasonable doubt that the crime was of a type which is likely to occur and recur in the course of such person's business, and the public officer or such officer's agent in doing the inducing or soliciting did not mislead such person into believing such person's conduct to be lawful.
>
> (2) If the defendant meets the requirements in Section (1), the defendant is entitled to a jury instruction that incorporates all of the language in Section (1), (1)(a), and (1)(b).
>
> (3) Speech, viewpoints, or activities protected by the First Amendment of the United States Constitution cannot be used as evidence to meet the requirements in Sections (1)(a) or (1)(b).

Passage of such a statute not only unifies the law across the country in furtherance of the rule of law principles of consistency and predictability but also deters government agents and informants from abusing their power to manufacture crime. In the case of counterterrorism, codifying the objective test deters federal agents from exploiting the individual vulnerabilities of their Muslim targets and the societal prejudices held against targets' religious identity to inflate conviction rates. This frees up the government's time to focus on predicate acts in furtherance of illegal activity, rather than extremist speech.

CONCLUSION

With America in the throes of a racial awakening, the public is realizing law's potency in furthering systems of oppression rooted in nefarious stereotypes of racial minorities as illiberal, foreign, and dangerous.[499] A national anti-racism movement is challenging the blind acceptance of legal doctrines that fail to consider the racial disparities in enforcement of facially neutral criminal laws.[500] Counterterrorism enforcement is one of the many contexts in which the racial disparities are glaring.

For nearly two decades, anti-terrorism resources have been deployed in a way that securitizes, stigmatizes, and incarcerates Muslims who hold purportedly extremist political views. While racialized law enforcement erodes the rule of law for all, the consequences are grave for the four to five million Muslims in the United States who experience myriad derivative harms from the collective

498. *See* Jacobson v. United States, 503 U.S. 540, 550 (1992) (noting that the government must prove that defendant's predisposition is independent and not the product of government attention).

499. *See* JULIANA MENASCE HOROWITZ, ANNA BROWN & KIANA COX, PEW RSCH. CTR., RACE IN AMERICA 2019 (2019), https://www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019/ [https://perma.cc/3CD2-G8GU].

500. *See* Emily Cochrane & Luke Broadwater, *Here Are the Differences Between the Senate and House Bills to Overhaul Policing*, N.Y. TIMES (June 23, 2020), https://www.nytimes.com/2020/06/17/us/politics/police-reform-bill.html.

stigma.[501] Even if a Muslim is not directly targeted in a sting operation, the continuous confirmation of stereotypes that Muslims are terrorists subjects Muslim communities to hate crimes, hateful speech, and discrimination in their lived experiences.[502]

Although directly intended to protect defendants from the government overreach occurring in counterterrorism sting operations, entrapment law has proven impotent. The resolution of the twenty-six trials against Muslims who raised an entrapment defense have all been the same: conviction.[503] This outcome is due in large part to the racial politics of national security in the United States, wherein Americans are besieged with images of Muslims as the quintessential terrorists. This environment makes it nearly impossible to find jurors immune to prosecutors' scare tactics that emphasize the defendant's extremist speech as the basis for finding predisposition to criminal activity. Meanwhile, defense counsels' reminders that such speech is protected by the First Amendment go ignored.

The activity attracting government intervention is lawfully protected political and religious speech—albeit on the fringes of societal norms. Moreover, the individual may never go beyond posting unsavory, extremist content on social media. The racial double standards are glaring in how the government responds differently to Muslims and white supremacist individuals who promote ideologically deviant views deemed "extremist" by mainstream norms. Put simply, Muslims are targets of sting operations, while white supremacists who frequently spew racist, anti-government, and authoritarian rhetoric online are granted leniency to exercise their constitutional rights until they reach the point of planning anti-government attacks or an attempted insurgency.[504] White Christian political

501. *See* LAURA SILVER, MOIRA FAGAN, AIDAN CONNAUGHTON & MARA MORDECAI, PEW RSCH. CTR., VIEWS ABOUT NATIONAL IDENTITY BECOMING MORE INCLUSIVE IN U.S., WESTERN EUROPE (2021), https://www.pewresearch.org/global/2021/05/05/3-discrimination-in-society/ [https://perma.cc/MJ3X-9BZC].

502. *See* Aziz, *Policing Terrorists*, supra note 46; *see also* Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment?*, 2017 BYU L. REV. 779, 783; Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women's Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1, 4, 10 (2014).

503. *See supra* note 230 for a list of the twenty-six terrorism-related trial cases against Muslim defendants who raised an entrapment defense, to no avail.

504. *See The Year in Hate and Extremism 2019*, S. POVERTY L. CTR. (Mar. 18, 2020), https://www.splcenter.org/news/2020/03/18/year-hate-and-extremism-2019 [https://perma.cc/DGH4-3DP3]; ANTI-DEFAMATION LEAGUE, WITH HATE IN THEIR HEARTS: THE STATE OF WHITE SUPREMACY IN THE UNITED STATES (2015), https://www.adl.org/education/resources/reports/state-of-white-supremacy [https://perma.cc/2QN4-KNK3]; *see also* Katie Benner, *Parler Says It Sent the F.B.I. Posts About Threats to the Capitol Ahead of Jan. 6*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/us/parler-fbi-capitol-attack.html; Betsy Woodruff Swan, *'The Intelligence Was There': Law Enforcement Warnings Abounded in the Runup to Jan. 6*, POLITICO (Oct. 7, 2021, 7:17 AM), https://www.politico.com/news/2021/10/07/law-enforcement-warnings-january-6-515531 [https://perma.cc/D5UG-S99G]; Malachi Barrett, *Extreme Rhetoric Thrives on Alternative Social Media Sites Growing After Facebook, Twitter Crackdown*, MLIVE (Jan. 14, 2021, 9:26 AM), https://www.mlive.com/politics/2021/01/extreme-rhetoric-thrives-on-alternative-social-media-sites-growing-after-facebook-twitter-crackdown.html [https://perma.cc/4JPN-C2A3].

extremists are presumed to be unwary innocents, while Muslim political extremists are presumed to be unwary criminals.

To redress these racial inequities, this Article proposes a federal legislative response. Not only would such a law unify entrapment jurisprudence across the circuits, but it would also shield defendants against government abuse of power. An objective test that deters informants and undercover agents from manufacturing crime ensures that targets of sting operations are not merely vilified minorities who hold unpopular political views, but rather true threats to the nation's security. Absent a revamping of entrapment law, the racial politics of counterterrorism will continue to infringe on innocent Muslims' civil rights while giving free reign to far-right groups to plan politically motivated violence. The result is less free minority communities and a more dangerous society—precisely what the current racial reckoning seeks to upend.