



TARGETED AND ENTRAPPED

MANUFACTURING THE “HOMEGROWN THREAT”

IN THE UNITED STATES





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The Center for Human Rights and Global Justice (CHRGJ) at New York University School of Law was established in 2002 to bring together the law school's teaching, research, clinical, internship, and publishing activities around issues of international human rights law. Through its litigation, advocacy, and research work, CHRGJ plays a critical role in identifying, denouncing, and fighting human rights abuses in several key areas of focus, including: Business and Human Rights; Economic, Social and Cultural Rights; Caste Discrimination; Human Rights and Counter-Terrorism; Extrajudicial Executions; and Transitional Justice. Philip Alston and Ryan Goodman are the Center's Faculty Chairs; Smita Narula and Margaret Satterthwaite are Faculty Directors; Jayne Huckerby is Research Director; and Veerle Opgenhaffen is Senior Program Director.

The International Human Rights Clinic (IHRC) at New York University School of Law provides high quality, professional human rights lawyering services to community-based organizations, nongovernmental human rights organizations, and intergovernmental human rights experts and bodies. The Clinic partners with groups based in the United States and abroad. Working as researchers, legal advisers, and advocacy partners, Clinic students work side-by-side with human rights advocates from around the world. The Clinic is directed by Professor Smita Narula of the NYU faculty; Amna Akbar is Senior Research Scholar and Advocacy Fellow; and Susan Hodges is Clinic Administrator.

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GLOSSARY

CHRGJ	Center for Human Rights and Global Justice
DIOG	Domestic Investigative Operational Guidelines
DOJ	Department of Justice
DOJ OIG	Department of Justice, Office of the Inspector General
DRUM	Desis Rising Up and Moving
ECtHR	European Court of Human Rights
FBI	Federal Bureau of Investigation
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
JTTF	Joint Terrorism Task Force
Ashcroft Guidelines	Attorney General's Guidelines on FBI Undercover Operations (2002)
Gonzales Guidelines	Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources (2006)
Mukasey Guidelines	Attorney General's Guidelines for Domestic FBI Operations (2008)
NYPD	New York City Police Department



© Lyric Cabal. Elizabeth McWilliams, mother of David Williams, prepares macaroni salad at her home in Newburgh, NY.

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Wake up, open your eyes, look around you, see how this world has changed... At least take 5 minutes to look into these cases, and research, and look for real proof.

Lejla Duka, age 13, daughter of Dritan Duka, defendant in the “Fort Dix Five” case

Newburgh is an extremely impoverished town. How much money did they spend on this whole production? They need to be investing in our communities for the future, not spending millions of dollars on a fake case that makes nobody safer.

Alicia McWilliams, aunt of David Williams, defendant in the “Newburgh Four” case

There are many stories that overlap. Many men in our communities have been targeted, and the women and children are left out in the cold.

Shahina Parveen, mother of defendant Shahawar Matin Siraj

Executive Summary

Since September 11, 2001, the U.S. government has targeted¹ Muslims in the United States by sending paid, untrained informants² into mosques and Muslim communities. This practice has led to the prosecution of more than 200 individuals in terrorism-related cases.³ The government has touted these cases as successes in the so-called war against terrorism.⁴ However, in recent years, former Federal Bureau of Investigation (FBI) agents,⁵ local lawmakers,⁶ the media, the public, and community-based groups⁷ have begun questioning the legitimacy and efficacy of this practice, alleging that—in many instances—this type of policing, and the resulting prosecutions, constitute entrapment.⁸

This Report examines three high-profile terrorism prosecutions in which government informants played a critical role in instigating and constructing the plots that were then prosecuted. In all three cases, the FBI or New York City Police Department (NYPD) sent paid informants into Muslim communities or families without any particularized suspicion of criminal activity. Informants pose a particular set of problems given they work on behalf of law enforcement but are not trained as law enforcement.⁹ Moreover, they often work for a government-conferred benefit—say, a reduction in a preexisting criminal sentence or a change in immigration status—in addition to fees for providing useful

information to law enforcement, creating a dangerous incentive structure.¹⁰

In the cases this Report examines, the government's informants held themselves out as Muslims and looked in particular to incite other Muslims to commit acts of violence. The government's informants introduced and aggressively pushed ideas about violent jihad and, moreover, actually *encouraged* the defendants to believe it was their duty to take action against the United States. In two of the three cases, the government relied on the defendants' vulnerabilities—poverty and youth, for example—in its inducement methods. In all three cases, the government selected or encouraged the proposed locations that the defendants would later be accused of targeting. In all three cases, the government also provided the defendants with, or encouraged the defendants to acquire, material evidence, such as weaponry or violent videos, which would later be used to convict them.

The government played a significant role in instigating and devising the three plots featured in this Report—plots the government then “foiled” and charged the defendants with. The defendants in these cases were all convicted and are facing prison sentences of 25 years to life. These prosecutions—and others that similarly rely on the abusive use of informants—are central to the government's

claim that the country faces a “homegrown threat” of terrorism. Serious questions have been raised about the government’s role in each of these cases, as well as around the set of laws that have facilitated these practices. They also raise fundamental human rights concerns.

Part I.A. of this Report considers four trends that have enabled the aggressive and widespread use of informants in Muslim communities: (1) the conflation of Muslims with terrorism and terrorists; (2) the U.S. government’s adoption of unsupported theories about “radicalization” and “homegrown terrorism” in American Muslim¹¹ communities; (3) a shift toward a preventative model of policing and prosecuting terrorism, which seeks to intervene prior to any plan to commit a particular crime; and (4) the lack of accountability and transparency of law enforcement activities. **Part I.B.** assesses the domestic legal framework governing the use of informants in undercover investigations, including the entrapment defense. Drawing on media accounts, court documents, and interviews, **Part II** then examines three high-profile terrorism prosecutions, looking closely at the government’s practices in instigating and constructing the plot through informants, and the impacts the prosecutions have had on the families of the defendants. **Part III** evaluates the human rights impacts of the practices and policies detailed herein



© Lyric Cabal. Alicia McWilliams, reads a letter from her nephew David Williams. The letter reads, “Dear Aunt Alicia. I love you and I miss you. It warms me to know that every time I step into that court room our eyes meet.”

and the corresponding obligations of the U.S. government to respect, protect, and fulfill these human rights. **Part IV** concludes with policy recommendations.

This Report is grounded in consideration of the government’s prosecutions against the “Newburgh Four”¹² with a focus on defendant David Williams; the “Fort Dix Five”¹³ with a focus on defendants Eljvir, Dritan, and Shain Duka; and the case of Shahawar Matin Siraj.¹⁴ Family members of David, Eljvir, Dritan, Shain, and Shahawar were interviewed for this Report, which builds on the Center for Human Rights and Global Justice’s (CHRGJ) longstanding work documenting the impact of U.S. counterterrorism policies on Muslim, Arab, Middle Eastern, and South Asian communities.¹⁵ We also interviewed and consulted with experts, journalists, and

community leaders studying these issues, and drew on court documents and media accounts.

The experiences of the families who were interviewed for this Report demonstrate the profound toll government policies are taking on Muslim communities and families. Counterterrorism law-enforcement policies and practices are undermining U.S. human rights obligations to guarantee the rights to nondiscrimination; a fair trial; freedom of religion expression and opinion; as well as the right to an effective remedy when rights violations take place.

The families have been outspoken about the injustice of these tactics and the prosecutions that they have spawned. A growing chorus of commentators, community members, scholars, and policy experts, is beginning to challenge the legitimacy of the government's practices, and the notions that these prosecutions substantiate a "homegrown threat" or provide any security-enhancing benefits.¹⁶

The cases highlighted in this Report do not stand alone. A number of cases around the country have been met with similar concerns, which further suggests that the practices highlighted here are illustrative of similar law enforcement activities targeting Muslim communities around the country.¹⁷ As this Report argues, the U.S. government must put

an end to criminalizing Muslim communities. Not only do these practices fail to enhance public safety goals, but they pose intolerable threats to basic human rights across the country.

To abide by these international human rights obligations, CHR&GJ urges the U.S. government to act immediately to implement the following recommendations with respect to law enforcement and counterterrorism investigations, particularly those that involve the use of extensive surveillance and paid informants without particularized suspicion of criminal activity:

- The U.S. government should reject "radicalization" theories that threaten the rights to freedom of religion, opinion, and expression, and should put an end to the preventative policing and prosecution methods that rely on such theories.¹⁸
- Congress should hold hearings on the impact of counterterrorism policies on Muslim, Arab, South Asian, and Middle Eastern communities in the United States. These hearings should include consideration of current intelligence-gathering tactics and the use of informants in counterterrorism investigations.
- Congress should pass the End Racial Profiling Act, proposed federal legislation to ban racial profiling by law enforcement.



© Lyric Cabal. Zurata Duka holds a photo of her son Dritan Duka.

- The Department of Justice (DOJ) should revise its own June 2003 Federal Guidance on Racial Profiling to eliminate the border and national security loophole, to include a ban on profiling based on religion and ethnic origin, and to ensure that the guidance is enforceable.
- The DOJ should open an investigation into all terrorism-related cases involving the use of an informant since September 11, 2001, with a view towards examining oversight and actions of informants, the circumstances under which they are deployed, the types of information they gather, and their role in instigating terrorist plots.
- Attorney General Holder should issue new guidelines to replace the Mukasey Guidelines for Domestic FBI Operations (2008), the 2006 Gonzales Guidelines on Confidential Human Sources, and the 2002 Ashcroft Guidelines on FBI Undercover Operations. These new guidelines should eliminate authorization for the pre-investigation “assessment” stage. Further, the new guidelines should ensure that:
 - The FBI and other law enforcement agencies do not open investigations, including by using informants, against individuals absent particularized suspicion of wrongdoing.
 - The FBI and other law enforcement agencies are not allowed to target individuals and communities through surveillance, informants, or other information-gathering techniques based on race, religion, or national origin, or political and religious statements or beliefs.
 - The FBI is explicitly and consistently prohibited from using informants to engage in entrapment or inducement to commit crimes.
- The NYPD should revise its guidelines to only allow for investigations when there is an articulable and reasonable suspicion of criminal activity.

I. The Context

The practices and policies that are the focus of this Report are, at their core, about the targeting of Muslims as “potential threats” to the United States. This section talks first about law enforcement and cultural trends facilitating the prosecutions featured in this Report; and secondly about the legal frameworks governing the FBI and NYPD in their law enforcement practices, including the use of informants and the low thresholds required to commence investigations.

A. Law Enforcement Trends

The U.S. government’s focus on Muslims in counterterrorism operations appears to stem from a series of assumptions about Muslims and terrorism, including the following: that Muslims are more likely to become terrorists; that American Muslims are increasingly being “radicalized” and compelled into committing violence in the name of Islam; and that counterterrorism policies should focus on identifying individuals who hold certain ideologies and exhibit certain behaviors as indicative of “radicalization” in order to stop them before they can act.¹⁹ These assumptions, however, find no support in empirical research. To the contrary, research conducted by a variety of institutions suggests the assumptions in the radicalization theory are wrong.²⁰ Worse still, government policies relying on these assumptions greatly undermine fundamental human rights.²¹

1. Conflating Muslims with Terrorists and Terrorism

The first problematic contributing factor to the current situation is the conflation of Muslims with terrorists and terrorism. The popular notion of terrorism has become inextricably linked to Muslims and Islam, due in no small part to a host of government policies targeting Muslims as potential terrorists.²² There is also evidence to suggest that many law enforcement agencies are trained with materials that construct Muslims as potential terrorists.²³

Moreover, commentators have noted that the government tends to use criminal terrorism charges in cases involving Muslim defendants charged with violent crimes, but not against non-Muslims charged with similar conduct.²⁴ Yet, since September 11, 2001, there have been more instances of politically-motivated violence in the U.S. committed by non-Muslims than there have been by individuals claiming to be motivated by Islam.²⁵

In addition, the construction of a terrorist “Other” has conflated notions of race, ethnicity, religion, national origin, gender, and political views, effectively racializing Islam, Muslims, and Muslim religious practice as radically threatening to U.S. national security interests.²⁶ Muslim men have been constructed as particularly



Dritan and Shain Duka, with Dritan's children Idris, Yasmine, and Xhebrail.

dangerous.²⁷ “Muslim” and “Arab” are no longer discrete signifiers of religion or race but have been combined—by the media, popular conceptions, and the government’s own practices and policies—into a broader category of “Muslim looking people.”²⁸ Muslim cultural and religious practices have also been marked in various ways as indicators of potential terrorist criminality.²⁹ In turn, law enforcement officers target those who they perceive to look or act like Muslims in terrorism investigations, surveillance, and prosecutions.³⁰

2. The Myth of “Radicalization”

A second explanatory factor is the view that American Muslims are increasingly being “radicalized” into committing violence in the name of Islam. The 2007 NYPD report entitled “Radicalization in the West: The Homegrown Threat” has been pivotal in popularizing radicalization theories.³¹ Though the theories underlying the report have been criticized as “thinly sourced” and “reductionist,”³² they continue to enjoy support at the highest levels of government.³³ These theories are premised roughly on the

notion that “the path to terrorism has a fixed trajectory and that each step of the process has specific, identifiable markers.”³⁴ Yet no empirical, social scientific research supports the notion of a “religious conveyor belt” that predictably leads to terrorism. In fact, research suggests that there is no such process that can be identified with any confidence.³⁵ Equally troubling, the so-called markers of radicalization are over-determinate³⁶ and focused on Muslim religious practice in fundamentally discriminatory ways.³⁷

Nonetheless, the U.S. government has played a role in nurturing the idea that “radicalization” is an identifiable process. In February 2011, under the leadership of Senator Joe Lieberman, the Homeland Security and Governmental Affairs Committee issued a report on the Fort Hood shooting, calling on the National Security Council and Homeland Security Council to develop “a comprehensive national approach to countering homegrown radicalization to violent Islamist extremism.”³⁸ In March 2011, Representative Peter King held a widely criticized Congressional hearing, premised on the assertions that American Muslims are “radicalizing” at an increasing rate; that American Muslims are not doing enough to counter this trend; and that American Muslim communities are not cooperating with law enforcement.³⁹ The only law enforcement witness called by Representative King rejected the premise of the hearing.⁴⁰

The King hearing is only the most recent manifestation of the government's adoption of the radicalization theory. Elsewhere, President Barack Obama, the FBI, the Department of Homeland Security, and the National Counterterrorism Center, have all embraced the theory of radicalization.⁴¹

3. “Preventative” Policing

A third interrelated factor is law enforcement's shift to a preventative approach to counterterrorism, whereby the government investigates individuals without any evidence of individual wrongdoing.⁴² The preventative model assumes that radicalization is as an identifiable process, and suggests that it is desirable to investigate and prosecute individuals while they are still in the early stages of “radicalizing” so that they will not develop into full-fledged terrorists.⁴³ Rather than focusing on the policing of criminal activity, this approach facilitates the criminalization of those who “act Muslim,” either through their religious practice, attendance at a mosque, or their expression of political opinions critical of U.S. foreign policy.⁴⁴ The use of informants appears to be a core feature of this model of policing terrorism.⁴⁵

4. Permissive Legal Frameworks

A fourth factor—examined in greater detail in the next section—is the use of particular laws and policies that facilitate the preventative model of aggressive policing and prosecution, combined with a concomitant absence of legal or regulatory safeguards.⁴⁶ The U.S. government has aggressively used material support statutes, conspiracy or attempt charges, or combinations thereof in terrorism prosecutions, resulting in the criminalization of a range of behaviors that do not seem to be indicative of any intent to commit a violent crime.⁴⁷ At the same time, the DOJ has expanded its powers and relaxed longstanding safeguards against rights abuses, including, but not limited to, the relaxation of the Attorney General's regulations of the FBI.⁴⁸ Moreover, the DOJ's guidance on racial profiling⁴⁹ bans profiling on the basis of race and ethnicity, but does not explicitly ban profiling on the basis of religion or national origin, and creates loopholes for racial profiling in national security and border security contexts.

These four factors and trends are mutually reinforcing. Together, they help explain the phenomenon that will be analyzed more closely in this Report—namely, the targeted and abusive use of paid informants in Muslim communities.

B. The Domestic Legal Framework

Since September 11, 2001, as the FBI has settled into a dual role of an intelligence gathering and law enforcement agency, its authority to collect information has expanded, and its focus, in the counterterrorism context, has shifted to a preventative model.⁵⁰ As a result, the FBI seems to increasingly rely on informants, undercover agents, and other forms of surveillance to gather information and, allegedly, to prevent terrorism. Serious questions have been raised about the efficacy and discriminatory nature of these practices, which seem to target Muslim, Arab, South Asian, and Middle Eastern communities as well as activists critical of U.S. foreign policy.⁵¹ In the last few years, the FBI's use of informants, cooperating witnesses, and undercover agents in political and religious spaces has come under increased scrutiny and criticism.⁵²

Informants pose a particular set of problems given they work on behalf of law enforcement but are not trained as law enforcement.⁵³ Moreover, they often work for a government-conferred benefit—say, a reduction in a preexisting criminal sentence or change in immigration status—in addition to fees for providing useful information to law enforcement, creating a dangerous incentive structure.⁵⁴

The following section closely examines the issue of informants by looking at the domestic legal framework governing the use of informants, to wit, the relevant FBI and NYPD guidelines for such activities; and the entrapment defense. As it will reveal, there are almost no limits placed on when or how law enforcement agencies use informants.

1. The Mukasey Guidelines

From World War II through to the 1970s, the FBI conducted a series of covert domestic operations aimed at various groups considered to be antagonistic to the U.S. government, including through the oft-criticized COINTELPRO program.⁵⁵ As part of these operations, the FBI systematically surveilled and worked to undermine the “New Left,” including individuals thought to be members of the Communist Party, Black and women's liberation struggles, and other groups critical of the U.S. government.⁵⁶ The United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities—also known as the Church Committee—found that the FBI relied on “secret informants . . . wiretaps, microphone ‘bugs,’ surreptitious mail opening, and break ins, [sweeping] in vast amounts of information about the personal lives, views and associations of American citizens” and “conducted a sophisticated vigilante

operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence.”⁵⁷

Against this background, in 1976, Attorney General Edward Levi promulgated the first Attorney General Guidelines.⁵⁸ In the words of Attorney General Levi, these Guidelines “proceed from the proposition that Government monitoring of individuals or groups because they hold unpopular or controversial political views is intolerable in our society.”⁵⁹ For the first time, the Attorney General placed express limits on the FBI’s investigative techniques in order to protect against the types of abuses that marked COINTELPRO.

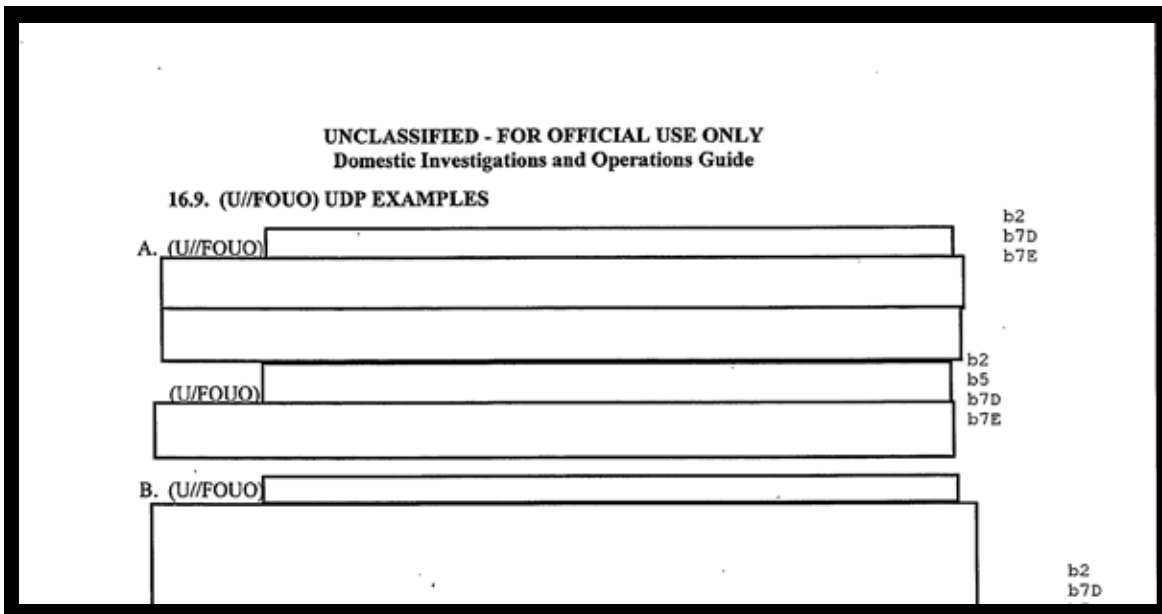
As documented in a recent study by the Brennan Center for Justice at NYU School of Law, over the years, particularly after September 11, 2001, Attorneys General have steadily eroded the Guidelines.⁶⁰ Attorney General Michael Mukasey’s 2008 Guidelines—currently in effect—reinforced that trend, eviscerating the Guidelines sufficiently as to bring us almost full circle to a pre-Guidelines era.

The Mukasey Guidelines are profoundly

troubling in that they allow the FBI to authorize informants and other surveillance techniques without any factual predicate or nexus to suspected criminal conduct.⁶¹ Under these Guidelines, for instance, it is permissible for the FBI to broadly instruct informants to gather names, emails, and phone numbers of particularly devout mosque attendees, without any particular nexus to suspected criminal activity.⁶²

More specifically, (1) the Guidelines authorize the FBI to undertake “assessments”⁶³ prior to preliminary investigations, in situations where there is no “information or . . . allegation indicating” wrongdoing or a threat to national security; (2) in this assessment stage, the Guidelines permit the FBI to use intrusive investigative techniques such as “recruiting and tasking informants to attend meetings or events surreptitiously”; “questioning people or engaging them in conversation while misrepresenting the agent’s true identity”; and, “engaging in definite physical surveillance of homes, offices and individuals”; and (3) the Guidelines “eliminat[e] or reduc[e] many of the requirements for supervisory approval of particular investigative techniques and temporal limits on investigative activity.”⁶⁴

The Guidelines are implemented by the FBI’s Domestic Investigative Operational Guidelines (DIOGs), which are available to



FBI Domestic Investigations and Operations Guide, heavily redacted section on “Undisclosed Participants”

the public only in highly redacted form.⁶⁵ Although heavy redactions prevent a holistic assessment of the DIOGs, it is clear that the DIOGs allow for the FBI to engage in investigative activity “based in part—or even primarily” on “‘the exercise of First Amendment rights or on the race, ethnicity, national origin or religion.’ of their subject.”⁶⁶ The DIOGs also allow the FBI to collect “information regarding ethnic and racial behaviors ‘reasonably believed to be associated with a particular criminal or terrorist element of an ethnic community’” and “to collect ‘the locations of ethnic-oriented businesses and other facilities’ (likely including religious facilities such as mosques) because ‘members of certain terrorist organizations live and operate primarily within a certain concentrated community of the same ethnicity.’”⁶⁷

The Guidelines and DIOGs work together to authorize extensive surveillance, information-gathering, and “geo-mapping” of Muslim communities, creating a troubling law

enforcement approach of targeting entire communities, rather than policing individuals on the basis of particularized suspicion of criminal activity.⁶⁸

In tandem with the Guidelines and DIOGs, the 2003 DOJ Guidance Regarding the Use of Race by Federal Law Enforcement Agencies⁶⁹ bans profiling on the basis of race and ethnicity, but does not explicitly ban profiling on the basis of religion or national origin. It also creates loopholes for racial profiling in the national security and border security contexts.

2. Informants Under the FBI Guidelines

While the Mukasey Guidelines and DIOGs allow the FBI to recruit informants and place them within communities without any suspicion of specific criminal activity, they also authorize informants to engage in activities that would otherwise be illegal, and do not contain an unequivocal ban on entrapment.⁷⁰

The NYPD and the Handschu Guidelines

Since September 11, 2001, the FBI, NYPD, and other law enforcement agencies have increasingly directed their surveillance and investigation activities—including the use of informants—at Muslim communities in an effort to identify would-be terrorists. Although the targets may be different, these aggressive tactics are not new. In the midst of COINTELPRO, the NYPD, like the FBI, infiltrated and kept dossiers on individuals thought to be affiliated with the “New Left”—those considered to be radical at that time.⁸³

In 1971, a group of activists brought a class action in federal court against the Mayor of the City of New York, its Police Commissioner, and the New York City Police Department's Public Security Section, formerly known as the Special Services Division. The plaintiffs in *Handschu v. Special Services Division* alleged that their constitutional rights had been violated by the Special Services Division's surveillance and other investigatory activities against them and their organizations.⁸⁴ In 1985, the court approved a settlement prohibiting the NYPD from investigating political and religious organizations and groups unless there was “specific information” that the group was linked to a crime that had been committed or was about to be committed.⁸⁵ The settlement also established a system of record-keeping and procedures for approval of investigations by a three-member body, called the Handschu Authority.⁸⁶ The system set up a “paper trail” enabling individuals to access information about whether they were under investigation, what information had been gathered, and how it was gathered.⁸⁷ The terms of the settlement came to be known as the “Handschu Guidelines.”

In September 2002, New York City Police Commissioner Ray Kelly moved to modify the 1985 *Handschu* consent decree on the grounds that the guidelines did not reflect our “more dangerous, constantly changing world, one with challenges and threats that were never envisioned when the Handschu guidelines were written.”⁸⁸ In February 2003, the court determined that the NYPD should be permitted to modify the 1985 decree in a way that was consistent with the FBI Guidelines.⁸⁹ In

August 2003, the court approved the modified guidelines submitted by the NYPD, opening the door to same kind of abuses the original Handschu Guidelines were designed to safeguard against.⁹⁰ The revised guidelines provide substantially fewer protections than the original Handschu Guidelines, and lower the substantive threshold required for investigation.⁹¹ In fact, the revised guidelines explicitly state in the preamble, “In the view of federal, state and local law enforcement agencies, the prevention of future attacks requires the development of intelligence and the investigation of potential terrorist activity before an unlawful act occurs.”⁹² The revised guidelines allow the NYPD to initiate investigations based on speech or expression protected by the First Amendment.⁹³ There are no restrictions placed on the use of informants except that their deployment must be authorized by the Deputy Commissioner of the Intelligence Division.⁹⁴ In fact, the revised guidelines give enormous discretion to the Deputy Commissioner. The Deputy Commissioner now has the authority to internally approve investigations and investigatory techniques, rather than having to subject the decision to approval from the quasi-independent Handschu Authority.⁹⁵

In addition to the relaxation of Handschu Guidelines, the NYPD has grown in size, scope, and resources since 2001. In 2002, Commissioner Kelly created the Counterterrorism Bureau of the NYPD,⁹⁶ which, in turn, participates in the NYPD-FBI Joint Terrorism Task Force (JTTF),⁹⁷ one of many JTTFs across the country.⁹⁸ Although the NYPD collaborates with the FBI through the JTTF, it appears to have developed its own independent machinery for operating counterterrorism investigations within New York and around the world, largely without federal oversight.⁹⁹ The NYPD has become a leading advocate for law enforcement based on the flawed radicalization model.¹⁰⁰

The Mukasey Guidelines point to the Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources—promulgated in 2006 by then-Attorney General Alberto Gonzales—for additional guidance on the use of informants.⁷¹ Both the Mukasey and Gonzales Guidelines explicitly contemplate that informants will be authorized to engage in illegal activity, with limitations only on acts of violence and acts that would be unlawful if performed by an actual FBI agent.⁷²

Departing from prior sets of guidelines promulgated by John Ashcroft and Janet Reno,⁷³ the Gonzales Guidelines do not require FBI agents to prohibit informants from engaging in entrapment. Whereas prior guidelines prohibited the FBI from permitting an informant to “participate in an act that constitutes an obstruction of justice (e.g. perjury, witness tampering, witness intimidation, entrapment, or the fabrication, alteration, or destruction of evidence),” or to “initiate a plan or strategy to commit a federal, state, or local offense,”⁷⁴ the Gonzales Guidelines’ General Provisions section removed these prohibitions.

The Gonzalez Guidelines address entrapment obliquely.⁷⁵ While they require the FBI agent to provide a prospective informant unconditional prohibitions on violence and unlawful gathering of evidence, FBI agents

are only required to provide instructions on entrapment “if applicable.”⁷⁶ The Guidelines do not, however, explain under what conditions these instructions must be given.

In 2005, the DOJ Office of the Inspector General (DOJ OIG) released a report⁷⁷ on the FBI’s compliance with, among other things, the 2002 Ashcroft Guidelines on FBI Undercover Operations.⁷⁸ The Undercover Operations Guidelines include a section regarding entrapment. The language reflects the contours of the entrapment defense—which will be explained in the next section—and a concern about running afoul of the doctrine in court. Though the Undercover Operations Guidelines counsel that entrapment should be “avoided,” they provide a number of conditions under which “an inducement to an individual to engage in crime is authorized.”⁷⁹ In the 2005 DOJ OIG report, the DOJ OIG declined to review the FBI’s compliance with the section on entrapment on the grounds that the section “largely addresses authorization issues that we analyzed through examination of the Guidelines’ general authorization provisions.”⁸⁰ Thus, nowhere in this 301-page report is there any review of the issue of entrapment.

A more recent 2010 report by the DOJ OIG on the FBI’s investigations of domestic advocacy groups raised similar

concerns about the FBI's compliance with its own guidelines. For example, the DOJ OIG reviewed documents that "gave the impression" that the FBI focused on a particular group "as a result of its anti-war views." The DOJ OIG also found "the FBI extended the duration of investigations involving advocacy groups or their members without sufficient basis"; as well as "instances in which the FBI used questionable techniques and improperly collected and retained First Amendment information in FBI files."⁸¹

The 2005 and 2010 DOJ reports raise concerns about the FBI's compliance with its own permissive guidelines.

Amongst those who have been critical of the FBI's lack of compliance is Mike German, a former FBI domestic counterterrorism agent, currently serving as Senior Policy Counsel at the ACLU. In an interview with CHR&GJ, German noted that the 2005 Report "showed that the FBI was out of compliance with its guidelines to an extraordinary extent." German also said that "the Attorney General guidelines are FBI policy. If they're not being followed, that's a signal that something's wrong. The policies were derived from cases where the FBI overreached."⁸²

3. The Entrapment Defense

As the previous section demonstrated, the relevant FBI guidelines provide few checks on an expansive set of available surveillance tools, including informants. However, those indicted after an investigation involving the aggressive use of an informant have recourse to the judicially created entrapment defense. To mount a successful entrapment defense, the defendant must show by a preponderance of the evidence that the government induced him or her to commit the crime charged.¹⁰¹ If the defendant is successful in proving inducement, the government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime charged. Although the standards for establishing inducement and predisposition vary across the federal circuits and between states,¹⁰² "the principal element in the defense of entrapment [is] the defendant's predisposition to commit the crime."¹⁰³ Focused on predisposition, the "subjective test" prevails as the general standard in federal courts. The alternative "objective" test focuses on the conduct of the government actors, rather than the mental state of the defendant.¹⁰⁴

Though it has yet to succeed, the entrapment defense has been raised in a number of federal criminal terrorism cases relying on a paid, undercover informant.¹⁰⁵ The

Convictions Rely on Prejudicial¹⁰⁸ Evidence

The types of evidence relied upon by the government in terrorism-related prosecutions are highly prejudicial, and build on the conflation of Muslim religious practice, political opinions critical of U.S. foreign policy, and terrorism. The prejudicial nature of relying on such evidence is magnified in the context of an entrapment defense, when the defendant's predisposition to commit the charged crimes is at issue. The evidence shown in court used to establish predisposition to commit the charged crime—violent videos, unpopular political and religious speech, and, in some cases, weaponry¹⁰⁹—is in fundamental tension with rights to a fair trial, nondiscrimination, and freedom of religion, expression, and opinion.¹¹⁰ The evidence tends to correlate what should be protected speech and expression with predisposition for criminality.¹¹¹ Moreover, from videos to weaponry the material is often either provided by or obtained at the encouragement of the informant.¹¹² In the case of unpopular political and religious speech, the speech is often reflective of—or encouraged by—the informant's own speech and attempts to incite the defendants over several months. Thus, whether the defendants would have committed the charged crimes on their own is highly questionable.¹¹³ But given the sensational evidence, government rhetoric about the threat of “homegrown terrorism,” and rising Islamophobia, it is not surprising that juries have opted to conclude that the defendants in question were predisposed to committing terrorism-related crimes.

The seeming conflation of unpopular political and religious views with the notion of predisposition to criminal activity¹¹⁴ raises particular human rights concerns in regards to U.S. obligations to protect rights to a fair trial, nondiscrimination, and freedom of religion, expression, and opinion.¹¹⁵ In investigating or trying Muslim defendants, law enforcement agents and the courts have equated the expression of religious ideas—or even the possession of particular print and video materials—as evidence of a desire to commit terrorism.¹¹⁶ There is no empirical research that establishes a causal link between any political or religious viewpoint with a propensity to commit violent acts.¹¹⁷ However, much of the evidence presented at trials to convict the individuals highlighted in this Report (as well as other defendants in terrorism prosecutions) is based on the problematic assumption that religious and political views or speech constitute proof of intent or predisposition.



Dritan Duka with his wife, Jennifer Marino, and their children Lejla, Xhebrail, Yasmine, Idris, and Annesa, at the Federal Detention Center in Philadelphia, during Dritan's first visit with his children in prison.

defendants are usually able to demonstrate government inducement by a preponderance of the evidence, shifting the burden to the government to prove beyond a reasonable doubt that the individual defendant was predisposed to commit the crime prior to meeting the informant.¹⁰⁶ But the entrapment defense has consistently failed, because juries have either found that there was no inducement or that the government had proved predisposition beyond a reasonable doubt.¹⁰⁷

To the extent that the policing and prosecutorial policies relied upon in these cases go unquestioned, these cases will further legitimate the practice of investigating individuals based solely on their religious and political views. As former FBI Agent Mike German notes,

"If the government targets somebody based on political advocacy, and can lure a few people into committing bad acts, then a successful prosecution in those cases justifies future targeting of people who are in the same position. . . . Whether these cases could survive an entrapment defense is not the relevant question. It's whether it's appropriate for the government to act in a way where they're aggrandizing the nature of the threat. It's just difficult to understand what the legitimate government interest is in these cases."¹¹⁸

Between the FBI Guidelines and the entrapment defense, there are effectively no legal protections placed on the government's use of informants.¹²⁴ Substantive defenses like entrapment or outrageous government conduct exist, but in particular in the terrorism context, the virtual equation of political and religious viewpoints with

predisposition renders the entrapment defense ineffectual.¹²⁵ Civil rights lawsuits are also theoretically possible, but seem unlikely to succeed.¹²⁶ As the three case studies that follow will illustrate, this lack of protection essentially leaves the individuals caught up in these FBI-incited plots—and their families—with little recourse to justice.

Entrapment in other Jurisdictions: The U.K. and Canada

Peer jurisdictions, including the U.K. and Canada, have dealt with entrapment cases by adopting an objective test, based on a view that the violation is best understood as government abuse of process, and that the courts should not permit prosecutions predicated on that abuse. In both jurisdictions, the analysis focuses on the propriety of police conduct in light of the circumstances.¹¹⁹

Common factors in both jurisdictions in assessing government conduct include the nature and extent of police inducement, the particular vulnerability of the defendant, the extent of police intrusiveness, and the nature of the offense.¹²⁰

In the U.K., the overriding consideration is whether the conduct of the police was so seriously improper as to bring the administration of justice into disrepute.¹²¹

In Canada, additional factors include whether the police exploited the compassion, sympathy, or friendship of the target, and whether the police conduct is aimed at undermining other constitutional values.¹²²

Notably, both jurisdictions have rejected focusing on predisposition, and have counseled instead for a focus on the propriety of government conduct.¹²³ If applied to the cases considered in this Report, such standards would likely lead to different result on the question of entrapment.

II. The Cases

This section describes three New York-area cases involving the government's targeted use of informants in Muslim communities. However, it is important to note that the use of these tactics in is not limited to New York or New Jersey. There have been a number of cases around the country that have raised similar concerns, suggesting the practices highlighted in these cases are illustrative of larger patterns of law enforcement activities that target Muslim communities around the country.¹²⁷

The accounts that follow are drawn from a combination of interviews with the defendants' family members, court documents, and media coverage. The accounts seek to move beyond the government's one-dimensional portrayals of the defendants in these cases as terrorists, providing a fuller picture of the government's role in constructing the plots at issue and highlighting the human toll of these abusive government policies and practices. The specter of terrorism allegations has cast a shadow on the defendants, as well as on family members who have lost their sons, husbands, brothers, or fathers, and have suffered stigmatization and harassment as a result of these government-incited plots.



© Lyric Cabal. Elizabeth McWilliams, mother of David Williams holds her son's school photograph.

A. David Williams – “The Newburgh Four” (Newburgh, NY)

1. The Family

When David Williams was 10 years old, his mother Elizabeth moved the family from Brooklyn to Newburgh.¹²⁸ David's father had gone to prison on drug charges and she wanted to get away from crime in the city.¹²⁹ But Newburgh was a city on the decline. As David got older, he began selling drugs, and eventually wound up serving a five-year prison sentence.¹³⁰

After his release in 2007 at the age of 24, David set about getting his life in order. With no high school degree and a conviction on his record, he faced significant challenges. Nonetheless, Elizabeth recalls, “He was doing good. I told him, even though you have a felony, you can still go to college.” Despite his learning disabilities, he pursued his education at ASA College in Brooklyn.¹³¹

To his younger brother, Lord McWilliams, David was the only father figure he had. Together with their other brother, Hassan, David steered Lord away from making the same mistakes he had made. “He always tried to show me the do's and don'ts of life, told me to stay in school, stay off the streets,” says Lord.¹³² In early 2009, Lord was planning on joining the military, with his sights set on the elite Navy SEALs. In March, however, his stomach swelled to a frightening size and doctors diagnosed him

with liver cancer. Lord was immediately hospitalized and David was devastated.

“It was the first time I saw David cry,” Lord has said. “For him not to be able to protect me, I can only imagine how he felt.”¹³³

Elizabeth anticipated how David would react. “I didn't want to tell him how serious it was, because I didn't want him to go back to selling drugs. I told him Lord was going to be OK.”¹³⁴

David's aunt, Alicia McWilliams, recalls the time well. “David watched his brother almost die and be revived five times. He knew Lord needed a liver. The whole experience took him for a loop.”¹³⁵

2. The Case

In April 2009, David was presented with an opportunity to make the kind of money he needed to help Lord and more.¹³⁶ An acquaintance by the name of James Cromitie told him about a wealthy Pakistani businessman he knew as Maqsood.¹³⁷ He had offered Cromitie \$250,000, several luxury cars, and financing for a barbershop, to help him carry out a terrorist attack in the United States; Hussain also encouraged Cromitie's anti-Semitism.¹³⁸ Maqsood had asked Cromitie to find lookouts, who would also be paid. But the lookouts, Maqsood

repeatedly insisted, had to be Muslim.¹³⁹ As David would later tell it, Cromitie had a plan to get the money before they would actually carry out the plot. Either way, Cromitie told David nobody would get hurt.¹⁴⁰

Maqsood's real name was Shahed Hussain. He was a paid FBI informant who—for the previous eight months—had been encouraging Cromitie to agree to a plot to plant bombs at a local synagogue.¹⁴¹ Originally sent into Newburgh to report on the local mosque, Masjid Al-Iklas, he focused on Cromitie after the mosque regulars grew suspicious of his attempts to engage them in discussions about violent jihad.¹⁴²

Hussain had prior experience investigating on behalf of the FBI. He had helped the FBI obtain convictions in a controversial case against a pizza-parlor owner and a local imam in Albany.¹⁴³ Hussain's apparent generosity wasn't limited to Cromitie. He told Elizabeth that when Lord got better, he would take the whole family to Disney World. Lord recalls, "When my mom first told me that, I thought, that's nice of him."¹⁴⁴

On May 13, 2009, at the FBI's direction, Hussain drove Cromitie, David, and two others—Laguerre Payen and Onta Williams

(no relation to David)—to the Bronx to conduct surveillance on various synagogues.¹⁴⁵ Next he drove them to Connecticut to look at the Stinger missile they were to use.¹⁴⁶ Unbeknownst to David and the others, the weapons were fake and supplied by the FBI.¹⁴⁷

The night of May 20th, Hussain drove Cromitie, Payen, and the two Williams' to the Bronx. The FBI had placed two cars in front of the proposed targets and instructed Hussain to have Cromitie place the explosives in their trunks.¹⁴⁸ Hussain dropped David off first

"We got pulled into a political game. The case was directed, produced, and scripted by the FBI, and all they needed were puppets."

and then drove the remaining men to the first car.¹⁴⁹ Before reaching the second car, Hussain turned off his recording device.¹⁵⁰ The four were arrested shortly after.¹⁵¹

At the time, Lord was at home in Newburgh. He had just come home from chemotherapy and was playing cards with a friend. "I heard a boom at the door. I thought something must be wrong, because it wasn't a knock, it was like someone kicking at the door. Then the SWAT team stormed in, I put my hands up,

and sat down.” Lord and his family members were taken outside and watched as the FBI removed evidence from their home. “At first, I thought my brother had stored drugs in our house. But then I started hearing the words terrorism, mass destruction, and I was very confused.”¹⁵²

“Being called a terrorist hurts more than if people say other things. Sometimes, I want to throw in the towel....”

At first, Alicia’s anger was directed at her nephew. “I thought, what the f*** did you do?” But the more she learned about the case, the more her anger shifted toward the government.

“We got pulled into a political game. The case was directed, produced, and scripted by the FBI, and all they needed were puppets.” At the initial jury selection in White Plains, she recalls, “They had snipers on the roof. That was just for show.”

Alicia also recalls that when David was locked up in White Plains, people kept slipping notes under his door calling him a terrorist.¹⁵³ “He was judged, tried, and convicted while inside. The guards were told to go hard on him. In these cases, you’re guilty until proven guilty.”

In October 2010, after eight days of deliberation, the jury returned a guilty verdict.¹⁵⁴ On May 3, 2011, the judge denied the defendants’ motions for dismissal on the bases of outrageous government conduct and entrapment.¹⁵⁵ Sentencing is scheduled for June 2011. The charges carry a minimum sentence of 25 years, and the men could face life in prison.¹⁵⁶

3. The Impacts

The damage to the family has been profound. Since David’s arrest, Elizabeth has struggled. “The friends I thought I had, I didn’t have,” she says. She was evicted from the apartment where the original raid was conducted. And she’s had a hard time finding work or a regular place to stay.¹⁵⁷

Lord, now 22, feels responsible. In his mind, “David was put in this position because I got sick.” Since the arrest, he has been harassed for being Muslim and for being the brother of an accused terrorist. “Being called a terrorist hurts more than if people say other things. Sometimes, I want to throw in the towel. I think, if life is this hard, maybe death is easier.” For a while, he even stopped taking his cancer medication. “My brother said, you’re not taking your medication, if you die, who is going to take care of mom? Now, I see that was selfish. I’m taking my medication now. I’m trying to hold my mother together.”¹⁵⁸



Alicia McWilliams, aunt of David Williams, in her living room.

For her part, Alicia McWilliams has gone from feeling abandoned by her community, to becoming a leading organizer around the issues raised by her nephew's case. Alicia particularly laments the resources wasted on the case. "Newburgh is an extremely impoverished town. How much money did they spend on this whole production? They need to be investing in our communities for the future, not spending millions of dollars on a fake case that makes nobody safer."¹⁵⁹

"We have to ask ourselves, who is going to protect us from this government overreach?" she adds. When asked if she feels daunted or scared, she says, "No. I'm going to keep fighting for David until the end of time."¹⁶⁰

Alicia quickly realized that David's case was just one of dozens of cases where informants were inserted into Muslim communities to lure young Muslim men into participating in concocted plots.¹⁶¹ She became close with several other families and urged them to speak out. "They're going to have to learn to deal with the fear that's going to come with speaking out on behalf of their loved ones." Despite these difficulties, Alicia notes that organizing around David's case has also been a fulfilling and positive process. "I'm learning about new cultures and religions." But she insisted the issue is not exclusively a Muslim one. "This affects all of us, as Americans."

As Lord puts it, "At first, I asked myself, why my family? But then I learned that it's bigger than us."

"Newburgh is an extremely impoverished town. How much money did they spend on this whole production? They need to be investing in our communities for the future, not spending millions of dollars on a fake case that makes nobody safer."



Ferik Duka, father of the Duka brothers, with his grandchildren Idris, Yasmine, Lejla, and Xhebrail.

It was a family full of love, respect, trust, harmony, and dignity. The tables outside, in the backyard, use to be filled with people, People would come over from Staten Island, Brooklyn, and have barbeques. I still have the tables outside, 24 chairs... but now it's gone with the wind. My sons are political prisoners, not terrorists.

Ferik Duka, age 64 (father of Eljvir, Dritan and Shain Duka)

B. Eljvir, Dritan and Shain Duka – “The Fort Dix Five” (Cherry Hill, NJ)

1. The Family

Family was everything to brothers Eljvir, Dritan, and Shain Duka. They worked seven days a week for their father’s roofing business and urged their father, Ferik Duka, to retire. Ferik remembers, “They stopped me from working. They told me, ‘You aren’t going to work anymore; you’ve worked enough. You came to this country with nothing, you worked for us. No more work for you and Mommy.’”¹⁶²

When the brothers weren’t working to support the family, they spent their free time with Dritan’s five children. “We were always going to the park, picnics, we went to Six Flags every year, and every Friday we’d all go to the mosque. We had a really fun time together as a family. Our family was tight,” reminisces Dritan’s eldest daughter, Lejla Duka.¹⁶³ Except for one year when Dritan moved his family to a nearby apartment, all three brothers and their families lived in the same house with their parents and younger brother Burim in Cherry Hill, New Jersey.

“We were always going to the park, picnics, we went to Six Flags every year, and every Friday we’d all go to the mosque. We had a really fun time together as a family. Our family was tight.”

The Dukas are ethnic Albanians who emigrated to the United States when Eljvir, Dritan, and Shain were six, four, and one and a half years old, respectively. Zurata and Ferik Duka came to America to escape discrimination in the former Yugoslavia and make a better life for their sons. They had no idea that two decades later their sons would themselves end up the victims of discrimination—at the hands of the country they had believed in—with all three sent to prison for the rest of their lives¹⁶⁴ on terrorism charges for a plot that was, in fact, created by the FBI.¹⁶⁵

2. The Case

The chain of events that turned the Dukas’ world upside down began in January 2006 when Eljvir, Dritan, and Shain asked their father if they could take a vacation for the first time in years.

The four brothers spent their week off in the Pocono Mountains with eight friends. To remember the trip, they made a DVD of the vacation from video footage they had recorded over the course of the week. Their youngest brother, Burim Duka, who was on the trip, explains, “there were 11 of us [guys], and we wanted to make copies for everyone, so we went to Circuit City. The clerk watching the video heard us saying Allahu Akbar [God is Great], and turned it into the police station.

They turned it over to the FBI. And then the FBI started following us.”¹⁶⁶

The vacation video footage showed the Duka brothers and their friends engaging in recreational activities—riding horses, skiing, playing paintball, shooting at a firing range, and pulling pranks. But after seeing the DVD, the FBI targeted the Duka brothers and two of their friends, Mohammed Shnewer¹⁶⁷ and Serdar Tatar, as the subjects of a costly and intensive investigation that would last more than a year.¹⁶⁸

The government sent paid informants, Mahmoud Omar and Besnik Bakalli, to Cherry Hill. The Duka brothers became especially close to Bakalli, an Albanian national.¹⁶⁹ The brothers brought Bakalli to their house where Zurata cooked him Albanian meals. “We respected him. We loved him as a son,” explains Ferik.¹⁷⁰ The brothers thought Bakalli was their friend when, in fact, he was being paid by the government and given legal status to spy on the Duka family.¹⁷¹

Over the course of more than a year, Omar and Bakalli secretly recorded hundreds of hours of conversations¹⁷² with the Duka brothers, Shnewer, and Tatar. Both informants bombarded the men with talk of violence, trying to goad them into action by questioning their manhood and encouraging them to download videos depicting individuals

committing violent acts in the name of Islam.

In August 2006, the informant Omar drove Mohammed Shnewer to Fort Dix and other sites, which the government later characterized as “reconnaissance.”¹⁷³ A few months later, Omar approached the brothers with a list of weapons, offering to help them procure more guns. Burim explains, “My brothers wanted the guns because they were going to the Poconos again with their friends and didn’t want to wait in line for target shooting with such a big group.”¹⁷⁴

The brothers never made it to their next vacation. On May 7, 2007, Dritan and Shain were arrested when they went to pick up the guns. Eljvir was arrested at Dritan’s apartment in front of Burim and Dritan’s entire family.

The trial took place in Camden, New Jersey. “Eight weeks. We never missed a day. 9/9:30 to 4:30pm in the courtroom,” says Ferik of his and Zurata’s attendance during the trial.¹⁷⁵

The three Duka brothers, Mohammed Shnewer, and Serdar Tatar were charged with conspiracy to attack Fort Dix and weapons possession.¹⁷⁶ In a conspiracy case, any act of any member is attributed to the group as a whole and the informants intentionally tried to create enough ties between the brothers,



© Lyric Cabal. Zurata Duka, mother of the Duka brothers, in her home praying.

request, the jury that heard the case was anonymous, meaning that none of the parties, their counsel, the public, or the media was

Shnewer, and Tatar to make this argument.¹⁷⁷

Though there were grounds for the entrapment defense,¹⁷⁸ the Duka brothers' attorneys focused instead on the brothers' lack of awareness of any plot whatsoever. They argued that the brothers had no knowledge of the alleged agreement to commit a crime and as a result there was insufficient evidence to prove conspiracy.¹⁷⁹ The informant Omar even testified on the stand that the Duka brothers had no idea about the plan, nor any knowledge of the trip that he and Shnewer had taken to Fort Dix.¹⁸⁰ The Duka brothers can also be heard on the tapes rejecting the informants' attempts to provoke them into expressing support for violent jihad. For example, Eljvir's lawyer noted in his opening statement that Eljvir can be heard on tape saying that staging an attack is "haram" (forbidden) and that soldiers on U.S. soil have not done anything to warrant such measures.¹⁸¹

Nevertheless, the jury convicted the Duka brothers and their co-defendants. By virtue of an extraordinary government

aware of the identities of the jury members at trial. The use of anonymous juries has been criticized for biasing the jury itself to perceive of the defendants as so dangerous as to require anonymity.¹⁸² After the trial, juror number three publicly stated that the jury was sure "they were going to do it"—that the men would eventually have carried out an attack on the Fort Dix army base.¹⁸³ The Duka family questions the impartiality of the jury, particularly juror number three, whose son—a marine—had been wounded in Iraq. She publicly admitted that watching some of the videos shown at trial—videos the informants downloaded or encouraged the men to download—had reminded her of the attack on her son.¹⁸⁴

3. The Impacts

Ferik and Zurata Duka came to this country as hopeful immigrants, learned the language, started a successful business, were well-respected in the community, and, most importantly, had created a close-knit and loving family.

All of this changed when the government decided to target their sons. Eljvir, Dritan, and Shain have now been in prison for almost four years and will remain there for the rest of their lives unless their appeal is successful.¹⁸⁵ Zurata struggles to articulate the devastating effects that the case has had on their lives: "I can't explain it. We are not the people that we used to be, happy. We are not the same people...we're not here anymore."¹⁸⁶

The same night that the FBI arrested his sons, Ferik Duka was arrested and held in immigration detention for a month.¹⁸⁷

Amidst everything else, Dritan's family was summarily evicted from the apartment they had rented. Zurata recalls,

"They [the landlord] said 'get out of the apartment these are terrorists.' They gave us three days' time to get our clothes. We had to get clothes from the apartment and bring them to our house, which was surrounded by news people. I had the truck, but nobody to drive, nobody to help."¹⁸⁸

After the eviction, Dritan's five children moved in with their grandparents and uncle Burim, where they've lived ever since.

Without his brothers to run the roofing business, Burim dropped out of high school

to support his remaining family members. Noting that his nieces and nephews are "like orphans now," Burim said, "it's me who supports them now... I basically support four families."¹⁸⁹ Shouldering a heavy burden for a 20-year old, Burim now runs one of the Dukas' roofing companies; Ferik came out of retirement to run the other.

"Obama, the Justice Department – they have to hear. They are not doing the right thing; they have to stop pointing the finger at innocent Muslim people."

Zurata Duka, mother of the Duka brothers

At the time of the arrests, the Dukas' roofing companies had over \$400,000 in contracts. These dried up almost immediately after the brothers were arrested. People who had worked with Ferik for more than a decade took their business elsewhere. Their biggest customer, the local fire department, called to say they had been warned by the government not to do business with the Dukas. Internet sites labeled their businesses as being "run by terrorists,"¹⁹⁰ and they received harassing phone calls at their businesses. While they once dreamt of building four neighboring houses, one for each brother, today they are barely able to make ends meet.

The neighborhood that the Dukas have called home for more than a decade has become inhospitable to them. Though some have stuck by the family, many neighbors have stopped talking to them. When the brothers were first arrested, strangers would drive by the house yelling “terrorist.” The Muslim community in Cherry Hill has also distanced itself from the family. “They said ‘we are scared,’” explains Ferik.¹⁹¹

Ferik and Burim are convinced that they are often followed while driving. The whole family suspects that they remain under 24-hour government surveillance. Zurata expressed fear of retaliation against herself, or even against 13-year-old Lejla, for speaking out about the case. “Disappearances are not unheard of in this country,” she said, her former confidence in freedom and justice in America shattered.¹⁹²

The family does not fly, unwilling to face hours of questioning at the airport, if not worse. Zurata and Ferik’s worst nightmare is that Burim might become the next victim of a government set-up. “The government already took three of my sons... what’s to stop them from taking Burim too?” asks Zurata.¹⁹³

Instead, when they have to travel, the Dukas drive. They drove two days straight in July 2010 to Colorado to visit Eljvir, Dritan, and Shain, where they are housed in the nation’s only supermax prison. It was the first time

they had seen them in months and they had to interact with them from behind a glass wall. It was the first time that Eljvir met his daughter Fatima, who was born after his arrest.

While the rest of his family was in Colorado, Burim remained at home. He was denied permission to visit his brothers without any further explanation. “Everyone called us ‘four peas in a pod,’ we were that close. I went with my brothers everywhere. And now I haven’t seen my brothers in four years,” recalls Burim.¹⁹⁴

In the four years since the arrests, the members of the Duka family have worked hard to raise awareness about the case and what they see as the systemic injustice of counterterrorism operations in the United States today. “If we don’t speak up, who else is going to? The more people we get [to listen], the more the FBI will realize they have to stop what they’re doing. We have to start a trial against the FBI, to hold them accountable for what’s going on,” explains Burim, who runs the FreeFortDixFive.com website on his brothers’ behalf.¹⁹⁵

Lejla, who began speaking publicly about the case when she was only 11 years old, adds “it’s not just my father’s case, there are thousands of cases just like this, and we need to step forward, so we can actually be a free country.”¹⁹⁶

"We saw around 50 federal agents. They were all dressed in black. They were in the dumpsters even. I came out of the car to see what was going on. They pointed guns at us. They put Dritan in handcuffs. They had me in handcuffs. They had dogs trained on us, foaming at their mouths, which was scary because we couldn't protect ourselves. The nieces and nephews were just in the truck crying. I was 15. I thought I was in a dream when that was going on, during the arrest."

Burim Duka, age 20 (brother of Eljvir, Dritan and Shain Duka), describing Dritan's arrest



© S. Nadia Hussain. Shahina Parveen, mother of Shahawar Matin Siraj, attending the 2011 South Asian Summit in Washington, D.C., hosted by South Asian Americans Leading Together (SAALT).

C. Shahawar Siraj Matin (Bay Ridge, NY)

1. The Family

When Shahawar Matin Siraj was 16 years old, his mother, Shahina Parveen, moved his family from Pakistan to the United States. They applied for asylum for fear of facing persecution as Ismaili Muslims, a religious minority in Pakistan. Like many immigrants before them, they settled in Jackson Heights, Queens, and have lived there ever since.¹⁹⁷

With his father, Siraj Abdul Rehman, unable to work due to health problems, Shahawar began supporting the family financially shortly after arriving in the country. With a tenth-grade education, he held a variety of jobs before becoming a clerk at his uncle's bookstore, Islamic Books and Tapes, in Bay Ridge, Brooklyn.¹⁹⁸

Although he took on the responsibilities of an adult, his mother and sister remember his childlike qualities. "He was an honest, hard-working, and immature kid," his mother Shahina recalls. Even while he was working, Shahina says, "I always knew where my son was. I was always aware of his whereabouts." Shahawar's sister, Saniya, now 24 years old, also recalls his innocent and trusting nature. "If you said something nice to him, he was all yours. He was a little immature. He believed in people."¹⁹⁹

Mother and sister also note Shahawar's generosity. "After September 11, he

volunteered to donate blood for the victims. He was sad that all these people were hurting, and he wanted to help." Saniya recalls, "Shahawar shared everything with me. He taught me how to play Pokémon and car-racing video games."²⁰⁰

2. The Case

Starting in November 2002, an undercover police officer, known only by his alias, Kamil Pasha, started hanging around the bookstore and getting to know Shahawar.²⁰¹ He engaged Shahawar in discussions about—among other things—9/11, Osama bin Laden, and suicide bombings in Palestine.²⁰² Shahawar made statements during these conversations that would later be used against him at trial.

Around the same time, a 50-year old Egyptian-American named Osama Eldawoodly was looking to work for the NYPD. He had offered to help investigate ID fraud among immigrants but, instead, the NYPD told him that they wanted him to be their "eyes and ears" within the Muslim community.²⁰³ Eldawoodly agreed and was soon sent to a mosque in Staten Island.²⁰⁴ He proved to be an eager recruit: his first day on the job he took down the license plate numbers of every car in the mosque's parking lot.²⁰⁵

Over the next several months, Eldawoodly

made 575 visits to various mosques and filed some 350 reports.²⁰⁶ Eventually, he was sent to the Islamic Society of Bay Ridge, where he developed a reputation for being theatrically devout and outspoken.²⁰⁷

According to Shahina, Eldawoody's original target was the mosque's imam, Sheikh Reda Shata: "The informant first went after the imam but when that didn't work, he started hanging out at the mosque looking for an easier target. When he couldn't get the imam, he came for my son."²⁰⁸

"Our entire family is scared, they're scared to talk in our house. One of our aunts hasn't called us in three years. We don't even visit with her because she's too scared."

In September 2003, the NYPD told Eldawoody to befriend Shahawar.²⁰⁹ Eldawoody did and reported that he found Shahawar "impressionable."²¹⁰ He also became close with Shahawar's friend, James Elshafay, a 19-year-old schizophrenic, who would later testify against Shahawar at trial.

With time, Shahawar came to regard Eldawoody as an elder. "I am like your son," he said. Eldawoody reciprocated, calling

Shahawar his "son."²¹¹ Eldawoody began driving Shahawar home nearly every day, and expounded on his views regarding Islamic duties and politics. Eldawoody cursed America, and insisted that "it was lawful to spill a non-Muslim's blood."²¹² Eldawoody also said that his imam had issued a fatwa to kill American soldiers.²¹³ He also said that he didn't want to die of cirrhosis while Muslims were still suffering—that he wanted to "do something."²¹⁴

Shahina recalls that she and her husband were troubled by the burgeoning relationship between Shahawar and Eldawoody. "I warned Shahawar about Eldawoody, because he was a bad driver. For a while, he stopped getting a ride, but then started up again. I told him not to, but he said, 'He's a sick man, he's dying.'"²¹⁵

In April 2004, when the abuse of detainees by U.S. soldiers at Abu Ghraib²¹⁶ first became public, Eldawoody seized on the opportunity to take things to the next level. Shahina explains that Eldawoody started showing Shahawar "awful, awful scary photos of Abu Ghraib and Guantanamo. If you show these pictures even to a non-Muslim, it'll make them crazy. No one can bear these photos, Eldawoody showed Shahawar these photos and said, 'it's your duty as a Muslim to do jihad in response.'"²¹⁷



© DRUM. Shahina Parveen (second from left), mother of Shahawar Matin Siraj, in Washington D.C.

After months of Eldawoody's campaign, Shahawar finally crumbled when he was shown pictures of young Iraqi girls being threatened and raped; he told Eldawoody that they had to do something.²¹⁸ Eldawoody then told him about a group called "The Brotherhood," with operatives in upstate New York who could help them.²¹⁹ Then, in May 2004, Eldawoody told his handlers, "I believe it's time to record."²²⁰

At some point around that same time, his friend James Elshafay shared a crude map of Staten Island—marked with the jail, police stations, and surrounding bridges—with Shahawar.²²¹ Shahawar turned the map over to Eldawoody, who said he would show it to the Brotherhood.²²² Despite Elshafay's mental problems, Eldawoody flattered him and queried him about how best to blow up the Verrazano Bridge.²²³

In early August of that year—possibly to

impress Eldawoody—Shahawar suggested that a bomb at the 34th Street subway station late at night would cause great economic damage without killing anyone.²²⁴ Once again, Eldawoody proved eager. He suggested using uranium-235 and remote-controlled detonation, and even offered to obtain the nuclear material from the Russian mafia.²²⁵ Though Shahawar grew uneasy,²²⁶ Eldawoody pressed on, asking if the station had surveillance cameras.²²⁷ On August 21st, he drove Shahawar and Elshafay to survey the station.²²⁸ They returned to Eldawoody's car and drew up maps, which would be used against Shahawar at trial.²²⁹

Just two days later, while driving Shahawar and Elshafay home, Eldawoody had surprising news for the pair: "Brother Nazeem is . . . very happy. Very, very impressed."²³⁰ When Shahawar asked, "Who is Brother Nazeem?" Eldawoody replied that he was a higher up in the Brotherhood and that he was, "very, very, very happy with 34th. He's very happy with 34th."²³¹

Shahawar has said he was taken aback by how quickly things were developing. Shahawar asked if this "Brother Nazeem" understood that there was to be no killing, and changed the subject several times,²³² but Eldawoody was intent on getting a commitment and repeatedly asked how Shahawar planned to contribute.²³³ Shahawar refused to plant

**“They’ve ruined my children’s future . . .
Years have been wasted. [My daughter’s]
now the sister of a ‘terrorist.’”**

any bombs, but tentatively agreed to serve as a lookout.²³⁴ However, he insisted that he would first need his mother’s permission.²³⁵ Unsatisfied with this stipulation, Eldawoody threatened to tell “the Brotherhood” and said, “If you tell me you don’t feel comfortable, if you don’t want to do it, let me tell him straight. . . . You don’t want to do it?”²³⁶ Shahawar’s response was, “No, I don’t want to do it.”²³⁷ Eldawoody then ratcheted up the pressure: “Okay. Okay. That’s what I’m going to call him to let him know, okay? Why didn’t you tell me before?”²³⁸ Shahawar: replied “I don’t know I have to do it. I know that I am making a plan. But, you know, I don’t know that I’m going to go and do it. And so that fast? No, impossible.”²³⁹ Nonetheless Eldawoody persisted and Shahawar finally agreed to be a lookout.²⁴⁰ This seemed to appease Eldawoody. Before getting out of the car, Shahawar apologized.²⁴¹

There was no further contact between the three.²⁴² Elshafay would later testify that Shahawar had tried to back out of the plan.²⁴³

The following week, the police asked Shahawar to come to the station about an unresolved misdemeanor charge and, when Shahawar went to the station, he was arrested on conspiracy charges.²⁴⁴

At his trial in Brooklyn, the defense argued that Shahawar had been entrapped.²⁴⁵ In its

rebuttal, which focused on predisposition, the government relied heavily on statements Shahawar had made in the presence of Kamil Pasha.²⁴⁶ A jury found Shahawar guilty and he was sentenced to 30 years in prison.²⁴⁷

3. The Impacts

The day after Shahawar was sentenced, Immigrations and Customs Enforcement (ICE) agents took Shahina, Saniya, and Siraj into custody.²⁴⁸ Shahina and Saniya spent the next 11 days in a detention center in Elizabeth, New Jersey.²⁴⁹ “The conditions were really bad,” says Saniya, “We didn’t have any privacy and had to take showers in front of everyone else. They separated us for two days. My mom was crying and crying, yelling ‘Don’t go, don’t take her.’ She didn’t sleep the entire night.”²⁵⁰

Supporters protested outside the facility and scrambled to raise money for the family’s bail. When Shahina and Saniya were released, they found that the government had seized their bank account and confiscated their passports and IDs, leaving their lives in tatters. Siraj would spend the next six months in immigration detention.

“They made us beggars,” Shahina says. Saniya took time off from school, as money was diverted to lawyers. With both breadwinners behind bars, Shahina went to work at the

very bookstore where Eldawoody had first befriended her son. When her husband was eventually released six months after their son's arrest, he took over her position at the bookstore. Since then, he has worked seven days a week, all while under house arrest.

"Our entire family is scared," laments Saniya. "They're scared to talk in our house. One of our aunts hasn't called us in three years. We don't even visit with her because she's too scared." The cousins whom Shahawar used to play with no longer visit the Siraj household. Formerly friendly neighbors have also kept their distance.²⁵¹

At first Shahina and Saniya were fearful and withdrawn as well. Mother and daughter were stigmatized by Shahawar's arrest, and traumatized by their own immigration arrest and detention. After being released from detention, Saniya was afraid they would come back and says she "began having nightmares."

Shahina said the ramifications of her son's case have extended to all aspects of her life. "I'm worried about my daughter's prospects for marriage and employment. They've ruined my children's future, my daughter's college. Years have been wasted. She's now the sister of a 'terrorist.'"

Over time, however—and faced with the growing awareness that Shahawar's case

is actually part of a larger pattern—Shahina and Saniya began to combat their sense of isolation. Through a community organization called Desis Rising Up and Moving (DRUM), both Shahina and Saniya have become vocal advocates, both for Shahawar and against the government's use of informants to target Muslims and concoct fake terrorist plots. "I'm not scared anymore," says Saniya, "I got that strong feeling from DRUM, because a lot of people supported us. I learned a lot, and my mom became more active. She spoke out. I spoke out."

Shahina echoes the sense that they are part of a larger justice movement. "I went to DRUM in 2006, and since then, I realized that we were not the only ones being targeted, but that there are many families who have been targeted, and many families with many sons in jail."

"There are many stories that overlap. Many men in our communities have been targeted, and the women and children are left out in the cold."

D. Patterns

As with other cases around the country,²⁵² the three cases outlined in this Report all involved the use of informants where there was no previous evidence to suggest that the defendants were planning to commit violent acts before the FBI or NYPD intervened. The government's informants not only held themselves out as Muslims, but also focused their attempts at incitement on Muslims. The government's informants introduced and aggressively pushed ideas about violent jihad and even encouraged the defendants to believe that it was their duty to take action against the United States. In two of the three cases, the government relied on the defendants' vulnerabilities—poverty and youth, for example—in its inducement methods. In all three cases the government selected or encouraged the proposed locations that the defendants would later be accused of targeting. Likewise, in all three cases, the government provided the defendants with—or encouraged the defendants to acquire—material evidence, such as weaponry or violent videos, which would later be used to convict them.

“There are many stories that overlap. Many men in our communities have been targeted, and the women and children are left out in the cold.”

Shahina Parveen, mother of
Shahawar Matin Siraj

The government played a significant role in instigating and devising the three plots featured in this Report—plots the government then “foiled” and charged the defendants with. Despite this fact, the defendants in these cases were all convicted and are facing prison sentences of 25 years to life. These and similar prosecutions that rely on the abusive use of informants have been central to substantiating the government's claim that, as a country, we face a “homegrown threat” of terrorism. Each case also raises serious questions about both the government's role and the set of laws being used to facilitate these practices.

These cases and other documented practices are suggestive of larger patterns of law enforcement activities that are targeting Muslim communities around the country.²⁵³ As elaborated below, these practices, and their impacts, raise a number of serious human rights concerns.

III. Human Rights Implications and Obligations

The practices described in this Report raise serious concerns about the U.S. government's compliance with its international human rights obligations. As described below, international treaties ratified by the United States guarantee, among other rights, the rights to: a fair trial, non-discrimination, and freedom of expression and religion. As a State Party to the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),²⁵⁴ the United States is obligated to respect, protect, and fulfill the rights contained in these treaties for all individuals within its territory or under its jurisdiction, and must do so in a non-discriminatory manner.²⁵⁵ Under international law, a number of these rights apply equally to citizens and non-citizens.²⁵⁶

International human rights law also recognizes that the State has a duty to protect its nationals and others against violence, including terrorism. Specifically, States must protect the right to life through policing and other security measures.²⁵⁷ States must, however, simultaneously comply with international human rights law while taking steps to protect national security.²⁵⁸ As described below, the U.S. government's practices and policies that are the subject of this Report implicate the rights to a fair trial, non-discrimination, and freedom of

expression and religion, all of which are protected under international law.

Although we focus our analysis on the rights obligations that the United States has as to the defendants and Muslim communities more broadly, the experiences of the families of the defendants also raise significant human rights issues.²⁵⁹

A. Right to a Fair Trial

Pursuant to its obligations under the ICCPR and ICERD, the United States must guarantee the right to a fair trial, and must do so in a non-discriminatory manner.²⁶⁰ The U.N. Human Rights Committee, (the body responsible for monitoring implementation of the ICCPR) has not yet had the opportunity to consider the issue of entrapment or the use of informants in a manner that is directly on point to the cases that are the subject of this Report. However, the European Court of Human Rights (ECtHR), a leading authority on human rights law, has applied analogous fair trial provisions to undercover police investigations.²⁶¹ In particular, the ECtHR recognizes that a fair trial requires that all aspects of a criminal proceeding be fair, including "the way in which evidence was taken."²⁶² With regard to undercover investigations, the ECtHR has held that proceedings resulting from investigations where police incite the commission of a

crime are fundamentally deprived of their fairness. Thus, to ensure that due process and the right to a fair trial are not violated, undercover agents must investigate in “an essentially passive manner,” and cannot “exert such an influence on the subject as to incite the commission of an offense that would otherwise not have been committed.”²⁶³ Otherwise, using the evidence obtained by incitement would result in the defendant “being definitively deprived of a fair trial from the outset.”²⁶⁴

In assessing whether the government incited the crime, the ECtHR considers whether the agents pressured or threatened the defendant, or whether objective circumstances were such that the government had good reason to believe that the defendant would have committed the crime on their own—for example, given prior related convictions—which would indicate predisposition.²⁶⁵

Incitements by government agents to commit the crime during the investigation phase have serious implications for assessing the overall fairness of criminal proceedings as a whole.²⁶⁶ In the three cases detailed in this Report, the informants, working on behalf of the government, went far beyond investigating in a passive manner. On the contrary, the government's informants played a significant role in instigating and devising the plots for which the defendants were later

convicted. The government did not have any particularized suspicion of criminal activity at the time the informants met the defendants. Nor did any of the defendants have prior related convictions. In other words, the government had no good reason to believe the defendants would have committed the crime on their own. These actions have serious implications for the defendants' rights to a fair trial, and as described further below, to their rights to non-discrimination, and freedom of religion, expression, and opinion.

B. Right to Non-Discrimination

The prohibition on discrimination is one of the pillars of the protections guaranteed by both ICERD and ICCPR, constituting a peremptory norm of international law from which no derogation is permitted,²⁶⁷ even in times of public emergency.²⁶⁸ The ICCPR prohibits discrimination on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁶⁹ Under ICERD, State Parties “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.”²⁷⁰ ICERD defines prohibited “racial discrimination” broadly to include

“any distinction, exclusion, restriction or preference based on race, colour, descent,

or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”²⁷¹

Although ICERD, on its face, does not cover discrimination based on religion, the Convention has been interpreted to prohibit religious discrimination, especially when consistently tied to racial discrimination.²⁷²

The construction of a terrorist “Other” in the post-September 11, 2001, context has conflated notions of race, ethnicity, religion, national origin, gender, and political views, effectively racializing Islam, Muslims, and Muslim religious practice as radical and dangerous to U.S. national security interests.²⁷³

In all three of the cases highlighted in this Report, the government used paid informants to incite the defendants to act. While the facts of each case are distinct, David Williams; Eljvir, Dritan, and Shain Duka; and Shahawar Matin Siraj were all targeted by the government for investigation, surveillance, and the use of informants because they are Muslim, a fact that implicates the fundamental right to non-discrimination.²⁷⁴

Under international law, policies that impose a disproportionate burden on particular groups—whether purposely or in effect—must be justified in order not to constitute prohibited discrimination.²⁷⁵ In determining whether the government’s targeting of Muslims for surveillance and coercive counterterrorism investigations is illegal under international law, two key questions must be addressed.

First: *Do the government’s investigation policies and practices have the purpose or effect of disproportionately burdening a particular racial, ethnic, religious, or national group?*²⁷⁶

Though the burden to prove intent under international human rights law is high, the policies and practices highlighted in this Report suggest the government is targeting Muslim communities with law enforcement and intelligence-gathering activities like surveillance and informants, absent any particularized reason to suspect criminal activity.²⁷⁷

The government has argued that counterterrorism investigations targeting Muslims do not constitute discrimination because law enforcement officials only launch investigations when they have good reason to believe that the subjects are planning to commit a crime. However, the FBI Guidelines and DIOGs allow

for investigations and the collection of information focusing on certain ethnic communities, without any factual predicate or evidence of criminality.²⁷⁸

As the cases mentioned in this Report clearly demonstrate—encouraged by the preventative model's focus on “radicalization”—the government is taking action before any real indication of criminality arises. Instead, the government appears to be targeting Muslim communities on the basis of their religious and cultural identities and practices, as well as expression of religious and political beliefs, absent any nexus to criminal behavior.²⁷⁹ The NYPD Radicalization Report, for example, identifies “[w]earing traditional Islamic clothing [and] growing a beard,” as signs of the, “self-identification” phase of radicalization.²⁸⁰

The laws, policies, and practices of counterterrorism policing—including those documented in this Report—have resulted in greater law enforcement scrutiny of Muslim communities around the United States in a manner that targets Muslim religious practice, such as attendance at the mosque, or expression of political opinions critical of U.S. foreign policy, raising troubling human rights impacts and concerns. Whatever the intent, the government's investigation and surveillance policies have a discriminatory effect, with the burdensome impact of surveillance, informant, and government-

manufactured plots—as well as terrorism prosecutions—falling disproportionately on Muslim communities.²⁸¹

*Second: Is this disproportionate burden justified? International law allows discrimination to be justified in certain circumstances, where the aim of the measure is legitimate and the differentiation is objective, reasonable, and proportional to that aim.*²⁸²

Policies and practices that have the purpose or effect of disproportionately burdening a particular racial, ethnic, religious, or national group must be justified in order not to constitute prohibited discrimination.²⁸³ Factors that may be considered in determining whether a burden is justified include:

1. The importance of the right infringed by the measure;²⁸⁴
2. The aim and legitimacy of the measure;²⁸⁵
3. Whether the measure uses criteria that are “objective and reasonable”;²⁸⁶ and,
4. Whether the means used are proportional to, and effectively advance, the aim.²⁸⁷

With regard to the first point, the rights to non-discrimination, a fair trial, and to freedom of religion, expression, and opinion (discussed further below) are fundamental human rights.²⁸⁸ In considering the second

factor—the legitimacy of the aim or objective pursued—while the government's overarching aim is arguably to identify potential threats and, thereby, defend national security, as noted above, these aims must be pursued in compliance with human rights norms.²⁸⁹

On the final two criteria, the targeting and surveillance of Muslim communities writ large—as well as the use of informants to incite Muslims to engage in speech or conduct that will later be used to support a government-concocted terrorism plot—are simply not justified when one considers the following points:

- Law enforcement activities appear to be triggered simply by virtue of the subjects being Muslim, without any actual indication of criminal behavior, suggesting that the criteria used is neither “objective” nor “reasonable.”
- The government expends significant resources paying informants and manufacturing terrorist plots. These actions do not make the country safer and, in fact, divert limited resources away from monitoring actual threats.²⁹⁰
- The government's use of informants and surveillance in Muslim communities institutionalizes and legitimizes Islamophobia and xenophobia in the general public.²⁹¹

C. Rights to Freedom of Religion and Expression

The ICCPR guarantees the rights to freedom of thought, conscience, and religion,²⁹² and to freedom of opinion and expression.²⁹³ The Human Rights Committee has made clear that the Article 18 right to freedom of thought, conscience and religion... “is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.”²⁹⁴ The Article 19 right to freedom of opinion, expression and information is similarly broad, encompassing “the freedom to seek, receive and impart information and ideas of all kinds.”²⁹⁵

The right to freedom of thought, conscience, and religion is directly affected when the government's surveillance and counterterrorism investigations target individuals because of their faith.²⁹⁶ The government's targeting of the Muslim community in law enforcement operations also implicates the right to freedom of opinion and expression when individuals are subjected to greater scrutiny because of the particular political opinions they express.²⁹⁷ Anti-radicalization policies and resultant law enforcement practices—coupled with the general climate of Islamophobia they foment—also have an indirect chilling effect

on freedom of expression and religion in the Muslim community more broadly.²⁹⁸

Many Muslims—or those perceived to be Muslim—have intentionally altered how they practice or manifest their religion.²⁹⁹ For example, many have altered their physical appearance or dress, curtailed public prayer or worship, changed their names, or now avoid the discussion of politically-charged topics.³⁰⁰ As such, the effects of targeted surveillance and discrimination against the Muslim community have had serious implications for both the freedom of religion (Article 18) and the freedom of opinion and expression (Article 19). Many American Muslims are unable to practice their religion freely and are constrained in their ability to express their religious and political views without fear. Studies have shown that a majority of Muslims believe it has become “more difficult to be a Muslim in America,” while almost three-quarters have expressed the concern that “U.S. anti-terrorism policies single out Muslims for extra surveillance.”³⁰¹

Arun Kundnani, Open Society Institute Fellow and author of *Spooked: How Not to Prevent Violent Extremism*, has done extensive research on the effects of anti-radicalization policies in the U.K. and, more recently, in the United States. In an interview with CHR&GJ, he explained,

“When you unpack the concept of radicalization, it tends to involve some

notion of ideology or ideas as the driver of violence, even though that is inconsistent with empirical research. This points in the direction of criminalizing the ideas that are thought to motivate violence. There is a drive to say that this set of ideas, this ideology is not entitled to freedom of expression.”³⁰²

Kundnani has observed the real-life effects of these concerns amongst Muslim communities.

“The radicalization model implies that those expressing radical views should expect the FBI to infiltrate their mosques or community organizations. As a result, there has been a real chilling effect on expression. I have seen a reluctance to express views on issues such as Palestine or American foreign policy, in order to avoid attracting the attention of law enforcement.”³⁰³

The U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, has reinforced this general critique of the government’s conflation of religion and terrorism, noting that the United States should “not act in a manner which might be seen as advocating the use of race and religion for the identification of persons as terrorists.”³⁰⁴

IV. Recommendations and Concluding Observations

The United States must abide by its international human rights obligations and must ensure the rights detailed above to all within its territory or under its jurisdiction in a non-discriminatory manner. The U.S. must also provide an effective remedy for human rights violations.³⁰⁵ It has thus far proved impossible for persons who have suffered rights violations as a result of the practices described in this Report to gain redress.³⁰⁶ To abide by these international human rights obligations, CHR&GJ urges the U.S. government to act immediately to implement the following recommendations with respect to law enforcement and counterterrorism investigations, particularly those that involve the use of extensive surveillance and paid informants without particularized suspicion of criminal activity:

- The U.S. government should reject “radicalization” theories that threaten the rights to freedom of religion, opinion, and expression, and should put an end to the preventative policing and prosecution methods that rely on such theories.¹⁸
- Congress should hold hearings on the impact of counterterrorism policies on Muslim, Arab, South Asian, and Middle Eastern communities in the United States. These hearings should include consideration of current intelligence-gathering tactics and the

use of informants in counterterrorism investigations.

- Congress should pass the End Racial Profiling Act, proposed federal legislation to ban racial profiling by law enforcement.
- The DOJ should revise its own June 2003 Federal Guidance on Racial Profiling to eliminate the border and national security loophole, to include a ban on profiling based on religion and ethnic origin, and to ensure that the guidance is enforceable.
- The DOJ should open an investigation into all terrorism-related cases involving the use of an informant since September 11, 2001, with a view towards examining oversight and actions of informants, the circumstances under which they are deployed, the types of information they gather, and their role in instigating terrorist plots.
- Attorney General Holder should issue new guidelines to replace the Mukasey Guidelines for Domestic FBI Operations (2008), the 2006 Gonzales Guidelines on Confidential Human Sources, and the 2002 Ashcroft Guidelines on FBI Undercover Operations. These new guidelines should eliminate authorization for the pre-investigation “assessment”

stage. Further, the new guidelines should ensure that:

- The FBI and other law enforcement agencies do not open investigations, including by using informants, against individuals absent particularized suspicion of wrongdoing.
- The FBI and other law enforcement agencies are not allowed to target individuals and communities through surveillance, informants, or other information-gathering techniques based on race, religion, or national origin, or political and religious statements or beliefs.
- The FBI is explicitly and consistently prohibited from using informants to engage in entrapment or inducement to commit crimes.
- The NYPD should revise its guidelines to only allow for investigations when there is an articulable and reasonable suspicion of criminal activity.

CHRGJ additionally urges the U.S. government to implement the January 2011 recommendations of the U.N. Working Group on the U.S. Universal Periodic Review (UPR).³⁰⁸ Among other things, the UPR Working Group recommended that the United States amend its definition

of racial profiling to conform with the requirements of ICERD; that it make all domestic anti-terrorism legislation and action fully consistent with human rights standards; that it devise specific programs aimed at countering growing Islamophobic and xenophobic trends in society; and that it pass the End Racial Profiling Act and comprehensive state legislation prohibiting racial profiling.

Since September 11, 2011, the government has targeted Muslims in America in a variety of particularly intense and broad ways, including by sending paid untrained informants into mosques and Muslim communities. This practice has led to a number of high-profile terrorism prosecutions that support the government's claim that we face a "homegrown threat." A closer look at the government practices underlining a number of these cases raises serious questions about the U.S. government's role and purpose in inciting and devising these plots in Muslim communities. To abide by its obligations to ensure fundamental human rights, the U.S. government must put an end to this discriminatory targeting of Muslim communities.



© Lyric Cabal. Zurata Duka (center) and Faten Shnewer (right) speak at a rally in Foley Square, near New York City's federal courthouses, about their sons' involvement in the Fort Dix Five case. Alicia McWilliams (back left) watches on stage, awaiting her opportunity to speak on behalf of her nephew, David Williams, and the Newburgh Four case.

ENDNOTES

¹ The term “targeting” as used in this Report encompasses differential treatment of individuals or groups either intentionally or in effect, both of which raise concerns under international human rights law prohibitions on discrimination, which will be more fully explored later in the Report.

² This Report is concerned primarily with informants, and not cooperators or paid undercover officers. See David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. REV. L. & SOC. CHANGE 123, 128 (2010) (distinguishing informants who are under the control of law enforcement from informants who approach law enforcement with information of their own volition, and noting that when law enforcement uses the former in mosques, it “deliberately targets these institutions and the individuals within them for investigation.”); CENTER ON LAW AND SECURITY, NYU SCHOOL OF LAW, TERRORIST TRIAL REPORT CARD, SEPTEMBER 11, 2001-SEPTEMBER 11, 2009 42 (2009), available at http://www.lawandsecurity.org/Portals/0/documents/02_TTRCFinalJan142.pdf [hereinafter 2009 CLS TERRORIST TRIAL REPORT CARD] (explaining that though technically “the difference between an informant and a cooperator largely depends on whether or not a formal agreement of cooperation has been signed,” the more colloquial framework distinguishes between the two based on whether the individual ever intended to aid any alleged terrorist activity, with “informants” referring to those without any such intent); Interview with Mike German (Apr. 5, 2011) (on file with CHRGJ) [hereinafter CHRGJ Interview with Mike German].

³ According to the Center on Law and Security (CLS), since September 2001, informants have been used in 210 terrorism prosecutions overall, and in 97 (62 percent) of the most high-profile terrorism prosecutions. CLS reports 998 terrorism prosecutions since September 2001. 2009 CLS TERRORIST TRIAL REPORT CARD, *supra* note 2 at 46; CENTER ON LAW AND SECURITY, NYU SCHOOL OF LAW, TERRORIST TRIAL REPORT CARD, SEPTEMBER 11, 2001-SEPTEMBER 11, 2010 4, 20 (2010), available at http://www.lawandsecurity.org/Portals/0/documents/01_TTRC20101.pdf. CLS’s Karen Greenberg has commented: “The conviction rate for those cases that involved informants is almost a hundred percent; it’s 97 percent. So that gives you a kind of sense of how important [informants] are and how useful they’ve been.” Anjali Kamat and Jackie Soohen, *Entrapment or Foiling Terror? FBI’s Reliance on Paid Informants Raises Questions about Validity of Terrorism Cases*, DEMOCRACY NOW!, Oct. 6, 2010, available at http://www.democracynow.org/2010/10/6/entrapment_or_foiling_terror_fbis_reliance [hereinafter *Entrapment or Foiling Terror*]. A March 2011 CLS press release noted that 128 national security / terrorism cases (some multi-defendant) have involved informants, though it seems their method of counting cases has changed since the 2009 TTRC, making it difficult to use the data for any analysis about the rates of reliance on informants. Center for Law and Security, TTRC Update: Informant Cases & the Entrapment Defense (Mar. 24, 2011) [hereinafter March 2011 CLS TTRC Update].

⁴ Celeste Katz & Corky Siemaszko, *Heroes Honored after Foiling Terror Plot to Bomb Riverdale Synagogues*, N.Y. DAILY NEWS, MAY 22, 2009, available at http://articles.nydailynews.com/2009-05-22/news/17922274_1_james-cromitie-synagogues-plot; Sean Alfano, *FBI: Army Base ‘Dodged A Bullet’: Authorities Arrest Six ‘Islamic Militants’ Who Aimed To Kill Soldiers At New Jersey’s Fort Dix*, CBS NEWS, May 8, 2008, available at <http://www.cbsnews.com/stories/2007/05/08/terror/main2773084.shtml>; Craig Horowitz, *Anatomy of a Foiled Plot: Two would-be Bombers of the Herald Square Subway Station Find that Three is a Crowd*, N.Y. MAG., May 21, 2005, available at <http://nymag.com/nymetro/news/features/10559/> [hereinafter Horowitz, *Anatomy of a Foiled Plot*].

⁵ Former FBI Agents James Wedick and Mike German have vocally criticized the FBI’s use of surveillance and informants. See *Entrapment or Foiling Terror*, *supra* note 3 (quoting Wedick as saying, “You just can’t continue to, you know, to get a select group of people who are responsible for petty crimes, give them huge amounts of money, and send them into a small minority community, desperate because of the recession and work not being there, and suggesting people commit crimes, and not expect an explosion to happen, because they’re desperate for money and the informant is offering huge rewards.”); CHRGJ Interview with Mike German, *supra* note 1 (“Whether these cases could survive an entrapment defense is not the relevant question. It’s whether it’s appropriate for the government acting in a way where they’re aggrandizing the nature of the threat. It’s just difficult to understand what the legitimate government interest is in these cases.”). See also *FBI Expands Probe*

into *Antiwar Activists*, DEMOCRACY NOW!, Dec. 23, 2010, available at http://www.democracynow.org/2010/12/23/fbi_expands_probe_into_antiwar_activists (quoting German as saying, “We’re interested in a lot of different new FBI programs. There’s a Domain Management program, which purports to allow the FBI to collect racial and ethnic demographic information and map our communities across the nation by race and ethnicity”).

⁶ The Albany Common Council has passed a resolution calling on the Department of Justice to review two convictions of Muslim men, Yassin Aref and Mohammed Hossain, where entrapment was at issue. Jordan Carleo-Evangelist, *Albany council calls on feds to re-open Muslims’ case*, TIMES UNION, Apr. 6, 2010, available at <http://blog.timesunion.com/localpolitics/6578/albany-council-calls-on-feds-to-re-open-muslims-case/>; *Entrapment or Foiling Terror*, *supra* note 3 (quoting Albany Common Council Member Dominick Calsolaro as saying, “It seems like, you know, they did this, these actions, because they had to show that they were being—you know, the federal government is trying to be tough on terrorism. But the fact that if you have to send in, you know, an agent provocateur, whatever you want to call them, in order to entrap someone, who’s not doing anything illegal to begin with, I mean, where is this going? And then, where does this stop?”).

⁷ See Alisa Chang, *Four Men Convicted In Plot to Bomb New York Synagogues*, WNYC, Oct. 18, 2010, available at <http://www.wnyc.org/articles/wnyc-news/2010/oct/18/four-men-convicted-plot-bomb-new-york-synagogues/> (quoting Karen Greenberg with CLS about the Newburgh Four case, “There were questions even at the end of the trial about who exactly had been the initiator [sic] . . . whether it had been the informant or whether it had been one of the four accused.”); Guy Lawson, *The Fear Factory*, ROLLING STONE, Feb. 7, 2008, at 62, available at <http://guylawson.com/pdf/rollingstone/fearfactory.pdf> (quoting David Cole as saying, “when you’re pressing people to undertake conduct they would have never undertaken without an informant pushing the along, there is a real question if you’re creating crime, not preventing crime.”); Ira Glass & Petra Bartosciewicz, *Arms Trader 2009*, THIS AMERICAN LIFE, Aug. 7, 2009, available at <http://www.thisamericanlife.org/radio-archives/episode/387/arms-trader-2009> [hereinafter Glass & Bartosciewicz, *Arms Trader 2009*] (quoting Aziz Huq discussing the Newburgh Four case, “basically what you have here is the most recent case in a series of cases in which an alleged terrorism conspiracy is initiated and pushed along by a government informant”); COUNCIL ON AMERICAN ISLAMIC RELATIONS (CAIR), THE FBI’S USE OF INFORMANTS, RECRUITMENT AND INTIMIDATION WITHIN MUSLIM COMMUNITIES, available at http://ca.cair.com/download.php?f=/downloads/CAIR_FBI_Abuses_Annotated_Source_List--Articles_and_Cases.pdf [hereinafter CAIR, THE FBI’S USE OF INFORMANTS, RECRUITMENT AND INTIMIDATION WITHIN MUSLIM COMMUNITIES] (“The FBI has used informants and agents provocateurs to infiltrate mosques, befriend and provoke worshippers into making incriminating statements, or induce vulnerable Muslims into discussing illicit activity.”); Stephen Downs, VICTIMS OF AMERICA’S DIRTY WARS: TACTICS AND REASONS FROM COINTELPRO TO THE WAR ON TERROR (2011), available at http://www.projectsalam.org/downloads/Victims_of_Americas_Dirty_Wars.pdf (noting that, in the context of the “War on Terror,” “[p]reemptive prosecution involves not only convicting innocent defendants of contrived or fake crimes, but also twisting and breaking procedural rules in order to convince a jury, the media, and the American public that the innocent defendants are really guilty and dangerous.”); National Radio Project, *Presumed Guilty: American Muslims and Arabs*, Mar. 22, 2011, available at <http://www.radioproject.org/2011/03/presumed-guilty-american-muslims-and-arabs/> (interviewing Veena Dubal, Asian Law Caucus National Security and Civil Rights Program Staff Attorney, Dominick Calsolaro, Albany Common Council Member, family members of defendants charged with terrorism-related offenses, Fred Korematsu, and others); Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687 (2010); Thomas Cincotta, *From Movements to Mosques, Informants Endanger Democracy*, PUBLIC EYE MAG. (Summer 2009), available at <http://www.publiceye.org/magazine/v24n2/movements-to-mosques.html>. See also Jon Sherman, *A Person Otherwise Innocent: Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475 (2009); Harris, *supra* note 2.

⁸ Graham Rayman, *Were the Newburgh 4 Really Out to Blow Up Synagogues? A Defendant Finally Speaks Out*, THE VILLAGE VOICE, Mar. 2, 2011, available at <http://www.villagevoice.com/2011-03-02/news/were-the-newburgh-4-really-out-to-blow-up-synagogues/> [hereinafter Rayman, *Were the Newburgh 4 Really Out to Blow Up Synagogues?*]; *Entrapment or Foiling Terror*, *supra* note 3; PBS, *Before the Fact: The Fort Dix Five*, PBS Need to Know, Sep. 10, 2010, available at <http://video.pbs.org/video/1588640291/#>; Lawson, *supra* note 7; Rone Tempest, *In Lodi Terrorism Case, Intent Was the Clincher*, L.A. TIMES, May 1, 2006, available at <http://articles.latimes.com/2006/may/01/local/me-lodi1>; Amanda Ripley, *The Fort Dix Verdict: A Victory for Pre-emptive Prosecutions*, TIME.COM, Dec. 23, 2008, available at <http://www.time.com/time/nation/article/0,8599,1868370,00.html#ixzz1KNGCkXK5> (“Since 9/11, the FBI has begun using legions of Muslim or Arabic informants, many of

them illegal immigrants with criminal records, to try to root out radicals before they strike. But the strategy has led to accusations that the informants are themselves hatching the crime, a charge that hung over the entire Fort Dix proceedings.”). The American Civil Liberties Union of Southern California and the Council on American Islamic Relations recently brought suit on behalf of three Muslim plaintiffs against the FBI, alleging the FBI of paying Craig Monteilh to survey, infiltrate, and record conversations in mosques. Complaint, *Yassir Fazaga v. Federal Bureau of Investigation*, No. SA CV 11-00301 (C.D.Ca. Feb. 22, 2011). See also Shan Li, *FBI violated 1st Amendment rights of Muslims, suit alleges*, L.A. TIMES, Feb. 24, 2011, available at <http://articles.latimes.com/2011/feb/24/local/la-me-fbi-muslims-20110224>; Jennifer Medina, *Suit Accuses F.B.I. of Spying at Mosques in California*, N.Y. TIMES, Feb. 24, 2011, available at <http://www.nytimes.com/2011/02/25/us/25mosque.html>. Monteilh has himself sued the FBI. Scott Glover, *Suit by Alleged Informant Says FBI Endangered His Life*, L.A. TIMES, Jan. 23, 2010, available at <http://articles.latimes.com/2010/jan/23/local/la-me-informant23-2010jan23>. The use of informants has been criticized outside of the context of counterterrorism as well. See, e.g., Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CINN. L. REV. 645, 645 (2004) (“The use of criminal informants in the U.S. justice system has become a flourishing socio-legal institution unto itself. Characterized by secrecy, unfettered law enforcement discretion, and informal negotiations with criminal suspects, the informant institution both embodies and exacerbates some of the most problematic features of the criminal justice process”).

⁹ Former FBI Agent Mike German—currently the Policy Counsel on National Security with the American Civil Liberties Union—points out that unlike officers, informants are untrained, and pose a substantially greater risk of violating the rights of those they investigate. CHRGJ Interview with Mike German, *supra* note 2.

¹⁰ Natapoff, *supra* note 8, at 651-52 (“[A]n informant provides information about someone else’s criminal conduct in exchange for some government-conferred benefit, usually lenience for his own crimes, but also for a flat fee, a percentage of the take in a drug deal, government services, preferential treatment, or lenience for someone else”). See also *Entrapment or Foiling Terror*, *supra* note 3; CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, UNDER THE RADAR: MUSLIMS DEPORTED, DETAINED, AND DENIED ON UNSUBSTANTIATED TERRORISM ALLEGATIONS 13-14 (2011) [hereinafter UNDER THE RADAR].

¹¹ This Report uses the terms “American Muslims” and “Muslim Americans” interchangeably. These terms are intended to cover both citizens and non-citizens.

¹² *United States v. Cromitie*, No. 09 Cr. 558 (S.D.N.Y.).

¹³ *United States v. Shnewer*, No 07 Cr. 459 (D.N.J.).

¹⁴ *United States v. Siraj*, No. 05 Cr. 104 (E.D.N.Y.).

¹⁵ See UNDER THE RADAR, *supra* note 10; CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, AMERICANS ON HOLD: PROFILING, CITIZENSHIP, AND THE “WAR ON TERROR” (2007) [hereinafter AMERICANS ON HOLD]; Documentary: Americans on Hold – Profiling, Prejudice, and National Security (Center for Human Rights and Global Justice 2010); CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, IRREVERSIBLE CONSEQUENCES: RACIAL PROFILING AND LETHAL FORCE IN THE “WAR ON TERROR” 19 (2006), available at <http://www.chrgj.org/docs/CHRGJ%20Irreversible%20Consequences%20June%202006.pdf> [hereinafter IRREVERSIBLE CONSEQUENCES].

¹⁶ See *supra* notes 5-8.

¹⁷ Although this Report highlights the government’s cases against the Newburgh Four, Fort Dix Five, and Shehavar Siraj Matin, these cases are in many ways not exceptional. Our research came across at least 20 other terrorism prosecutions in recent years against Muslim defendants that involved some combination of paid informants, selection for investigation based on perceived religious identity, or a plot that was created by the government (target selected by the FBI, fake munitions provided by government agents, informant or other government agents pressured defendants into committing acts for which they were eventually prosecuted, etc.). These prosecutions include Sami Samir Hassoun (Chicago, IL), Antonio Martinez (Baltimore, MD), Yassin Aref and Mohammed Hossain (Albany, NY), the Liberty City Seven (Miami, FL), Hamid Hayat and Umer Hayat (Lodi, CA), Mohamed Osman Mohamud (Portland, OR), Hosam Smadi (Dallas, TX), Tarik Shah (New York, NY), the Detroit Ummah

case (Detroit, MI), Russell Defreitas, Abdul Kadir, Abdul Nur, Donald Nero, and Kareem Ibrahim (New York, NY), Sayed Haris Ahmed and Ehsanul “Shifa” Sadequee (Atlanta, GA), and Derrick Shareef (Rockwood, IL). Similar tactics were used in the case against Hemant Lakhani (Newark, NJ), who is not Muslim. Project SALAM has an online database of post-September 11, 2001 terrorism-related prosecutions and convictions of Muslims, which is quite a bit more expansive than the topic of this Report. It is available at <http://www.projectsalam.org/database.html>. See generally Downs, *supra* note 7. See also Said, *supra* note 7, at 689 (noting in discussion of Batiste, Hayat, Lakhani, and Siraj that, “regardless of whether an informant’s conduct legally constitutes entrapment, several of the post-9/11 cases highlight situations in which the existence of a real threat to national security was questionable”); Sherman, *supra* note 7, at 1500 (noting in discussion of Batiste, Hayat, Lakhani, and Siraj that in each case the FBI initiated the contact, provided equipment or money, incited the defendants to participate in the plot, contributed to or completely designed the plot, cultivated close relationships with the defendant, and encouraged defendants when they resisted); Lawson, *supra* note 7 (stating that “a closer inspection of the cases brought by [Joint Terrorism Task Forces] reveals that most of the prosecutions had one thing in common: The defendants posed little if any demonstrable threat to anyone or anything”); *Entrapment or Foiling Terror*, *supra* note 3.

Additional information on these cases can be found at the following sources.

Sami Samir Hassoun (Chicago, IL): Andy Grimm, Annie Sweeney and Jeremy Gorner, *Lebanese immigrant charged in Wrigleyville bomb plot*, CHI. TRIB., Sep. 20, 2010, available at http://articles.chicagotribune.com/2010-09-20/news/ct-met-wrigleyville-bomb-plot-20100920_1_car-bombs-phony-bomb-terrorism-plot; Sophia Tareen, *Sami Samir Hassoun Arrested In Alleged Chicago Bomb Plot*, HUFFINGTON POST, Sep. 20, 2010, http://www.huffingtonpost.com/2010/09/20/sami-samir-hassoun-arrest_n_732120.html.

Antonio Martinez (Baltimore, MD): Ben Nuckols, *Lawyer: FBI entrapped Baltimore bomb plot suspect*, SALON, Dec. 13, 2010, http://www.salon.com/news/feature/2010/12/13/us_recruiting_center_bomb_plot_1; Maria Glod, *Bomb Plot Case May Be Harbinger*, WASH. POST, Dec. 14, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/13/AR2010121305708.html>.

Yassin Aref and Mohammed Hossain (Albany, NY): Paul Gundahl, *Suspicion, Acceptance in Wake of Terror Trial*, TIMES UNION (Albany), Oct. 12, 2006, at B1, available at <http://albarchive.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=6362940>; *America at a Crossroads – Security Versus Liberty: The Other War* (PBS television broadcast Apr. 20, 2007), information available at http://www.pbs.org/weta/crossroads/about/show_security_vs_liberty.html.

The Liberty City Seven (Miami, FL): “*Aspirational Rather than Operational*”–7 Arrested in Miami Terror Plot (DEMOCRACY NOW television broadcast, Jun. 26, 2006) available at http://www.democracynow.org/2006/6/26/aspirational_rather_than_operational_7_arrested; Amanda Ripley, *Preemptive Terror Trials: Strike Two*, TIME, Dec. 13, 2007, available at <http://www.time.com/time/nation/article/0,8599,1694430,00.html>;

Hamid Hayat and Umer Hayat (Lodi, CA): Amy Waldman, *Prophetic Justice*, THE ATLANTIC, Oct. 2006, available at <http://www.theatlantic.com/magazine/archive/2006/10/prophetic-justice/5234/>; PBS, Frontline, *The Enemy Within: The Terror Case in Lodi, California*, <http://www.pbs.org/wgbh/pages/frontline/enemywithin/loidi/> (last visited May 12, 2011).

Mohamed Osman Mohamud (Portland, OR): Dina Temple-Raston, *Alleged Portland Bomber to Claim Entrapment*, NPR, Nov. 30, 2010, <http://www.npr.org/2010/11/30/131704930/alleged-portland-bomber-to-claim-entrapment>; Joel Millman and Evan Perez, *Teen in Oregon Bomb Sting to be Arraigned*, WALL ST. J., Nov. 29, 2010, available at <http://online.wsj.com/article/SB10001424052748704700204575642900598623706.html>.

Hosam Smadi (Dallas, TX): Jason Trahan, *Dallas bombing plotter Hosam Smadi sentenced to 24 years in prison*, DALLAS MORNING NEWS, Oct. 19, 2010, available at <http://www.dallasnews.com/news/community-news/dallas/headlines/20101019-Dallas-bombing-plotter-Hosam-Smadi-sentenced-2540.ece>; Robert Wilonsky, *For Trying to Blow Up Fountain Place, Hosam Smadi’s Sentenced to 24 Years in Prison*, DALLAS OBSERVER BLOGS, Oct. 19, 2010, http://blogs.dallasobserver.com/unfairpark/2010/10/for_trying_to_blow_up_fountain.php#.

Tarik Shah (New York, NY): Alan Feuer, *Bronx Man Pleads Guilty In Terror Case*, N.Y. TIMES, Apr. 5, 2007, available at <http://select.nytimes.com/gst/abstract.html?res=F30C12F83D5B0C768CDDAD0894DF404482&partner=rssnyt&emc=rss>; Alan Feuer, *Tapes Capture Bold Claims Of Bronx Man In Terror Plot*, N.Y. TIMES, May 8, 2007, available at <http://www.nytimes.com/2007/05/08/nyregion/08terror.html>.

The Detroit Ummah case (Detroit, MI): Margaret Lucas Agius, *Eleven members/associates of Ummah charged with federal violations*, DETROIT EXAMINER, Oct. 28, 2009, available at <http://www.examiner.com/legal-news-in-detroit/eleven-members-associates-of-ummah-charged-with-federal-violations>; Steven Gray, *Why Was*

A Controversial Imam Shot 20 Times?, TIME, Feb. 1, 2010, available at <http://www.time.com/time/nation/article/0,8599,1958229,00.html>.

Russell Defreitas, Abdul Kadir, Abdul Nur, Donald Nero, and Kareem Ibrahim (New York, NY): A.G. Sulzberger, *Lawyers Dispute Suspects' Intent in J.F.K. Bomb Plot Trial*, N.Y. TIMES, Jun. 30, 2010, available at <http://www.nytimes.com/2010/07/01/nyregion/01terror.html?ref=russellmdefreitas>; Tom Hays, *Russell Defreitas, JFK Cargo Handler, Sentenced To Life For Bomb Plot*, HUFFINGTON POST, Feb. 17, 2011, http://www.huffingtonpost.com/2011/02/17/russell-defreitas-jfk-car_n_824793.html;

Sayed Haris Ahmed and Ehsanul "Shifa" Sadequee (Atlanta, GA): PBS, Frontline World, Canada: The Cell Next Door, (Television broadcast, Jan. 30, 2007), transcript available at http://www.pbs.org/frontlineworld/about/episodes/602_transcript.html; Ashley Hays, *Georgia men get lengthy prison time for supporting terrorists*, CNN, Dec. 14, 2009, http://articles.cnn.com/2009-12-14/justice/terror.sentence_1_terrorist-sadequee-and-ahmed-syed-haris-ahmed?_s=PM:CRIME.

Derrick Shareef (Rockwood, IL): Lawson, *supra* note 7; Pierre Thomas, *Lone Wolf Charged with Plotting Attack During Christmas Rush*, ABCNEWS, Dec. 8, 2006, <http://abcnews.go.com/TheLaw/story?id=2710776&page=1> (last visited May 11, 2011); *Illinois Terror Suspect Pleads Guilty*, USA TODAY, Nov. 28, 2007, available at http://www.usatoday.com/news/nation/2007-11-28-illinois-terror-plea_N.htm.

Hemant Lakhani (Newark, NJ): Glass & Bartosciewicz, *Arms Trader 2009*, *supra* note 7; Robert Hanley, *Man Accused of a Scheme to Sell Missiles Praised bin Laden on Tapes*, N.Y. TIMES, Jan. 9, 2005, available at <http://www.nytimes.com/2005/01/09/nyregion/09missile.html?pagewanted=print&position=>.

¹⁸ Although states have an obligation under the right to life to protect national security, they must not do so at the expense of their other human rights obligations, for example complying with the rights to freedom of expression, opinion, and religion under Articles 18 and 19 of the ICCPR. See *supra* notes 292 and 293.

¹⁹ MITCHELL SILBER AND ARVIN BHATT, N.Y.C. POLICE DEP'T, RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT (2007) [hereinafter SILBER & BHATT, NYPD RADICALIZATION REPORT] a 2007 report by the NYPD, exemplifies these assumptions.

²⁰ FAIZA PATEL, BRENNAN CENTER FOR JUSTICE, RETHINKING RADICALIZATION (2011), available at http://www.brennancenter.org/content/resource/rethinking_radicalization [hereinafter PATEL, RETHINKING RADICALIZATION] (citing MI5 study concluding that "there is no singly pathway to extremism" all those studied "had taken strikingly different journeys to violent extremist activity;" citing former CIA case officer Marc Sageman who analyzed 500 cases and concluded that "[o]ne cannot simply draw a line, put markers on it and gauge where people are along this path to see whether they are close to committing atrocities;" citing Rand Corporation study based on 14 years of research which was unable to identify the subset of individuals who would commit violence, which was "often a matter of happenstance.").

²¹ See *infra* Part III.

²² This Report focuses on discriminatory law enforcement practices against Muslims in the U.S., recognizing that the conflation of race, religion, and national origin has resulted in a much larger category of persons considered "Muslim" than only those who adhere to Islam, including non-Muslim members of Middle Eastern, South Asian, and Arab communities. See, e.g., IRREVERSIBLE CONSEQUENCES, *supra* note 15, at 20 (analyzing shoot to kill policies for alleged suicide bombers and the impacts on Muslims and those perceived to be Muslim); AMERICANS ON HOLD, *supra* note 15, at 35 (documenting the FBI name check process in the context of the confluence of national security and immigration policy, and the impacts on Muslim, Middle Eastern, South Asian, and Arab communities); UNDER THE RADAR, *supra* note 10, at 1 (documenting the U.S. government's "deployment of lower evidentiary standards and lack of due process guarantees in the immigration system against Muslims to further marginalize this targeted group in the name of national security"); MUSLIM ADVOCATES, UNREASONABLE INTRUSIONS: INVESTIGATING THE POLITICS, FAITH & FINANCES OF AMERICANS RETURNING HOME (2009), available at http://www.muslimadvocates.org/img/Interrogation_Map2.jpg [hereinafter UNREASONABLE INTRUSIONS: INVESTIGATING THE POLITICS, FAITH & FINANCES OF AMERICANS RETURNING HOME]; ASIAN LAW CAUCUS, RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION'S DOORSTEPS (2009) (hereinafter RETURNING HOME), available at <http://www.asianlawcaucus.org/wp-content/uploads/2009/04/Returning%20Home.pdf>; RIGHTS WORKING GROUP, FACES OF RACIAL PROFILING: A REPORT FROM COMMUNITIES ACROSS AMERICA 24-34 (2010) [hereinafter RWG RACIAL PROFILING REPORT], available

at <http://www.rightsworkinggroup.org/sites/default/files/rwg-report-web.pdf> ("Following the tragic events of Sept. 11, 2001, members of Arab, Middle Eastern, Muslim and South Asian communities became automatically suspect as the government, in the name of national security, implemented programs and policies that profiled individuals of these communities based on their perceived race, ethnicity, religion or national origin. Members of these communities were increasingly and disproportionately placed under surveillance, stopped, searched, interrogated, detained and labeled 'terrorism suspects.' The government also began aggressively using civil immigration laws, criminal laws and criminal procedure in a sweeping and discriminatory manner to target members of these communities."); Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. (forthcoming 2011) (discussing FBI and Customs and Border Protection interviews of Muslims based on and inquiring about political, religious, and cultural expressions and associations); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004) ("The physical violence exercised upon the bodies of Arabs, Muslims, and South Asians has been accompanied by a legal and political violence toward these communities. . . . Taken together, the multiple assaults on the bodies and rights of Arabs, Muslims, and South Asians produce a psychological violence as well and reracialize the communities they target as "Muslim-looking" foreigners unworthy of membership in the national polity."); Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1204-1206 (2004) (noting that "mosques have occupied most of the F.B.I.'s attention" since 2002 and that "the F.B.I. has used a variety of investigative techniques to monitor worshippers at mosques . . . [including] confidential informants, undercover agents, surveillance cameras, flyovers, and subpoenas for phone records" (footnotes omitted)). See also Murad Hussain, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920, 926 (2008) [hereinafter Hussain, *Defending the Faithful*]; PATEL, RETHINKING RADICALIZATION, *supra* note 20.

²³ See THOMAS CINCOTTA, POLITICAL RESEARCH ASSOCIATES, *MANUFACTURING THE MUSLIM MENACE: PRIVATE FIRMS, PUBLIC SERVANTS, AND THE THREAT TO RIGHTS AND SECURITY 1* (2011): "A nine-month investigation ... finds that government agencies responsible for domestic security have inadequate mechanisms to ensure quality and consistency in terrorism preparedness training provided by private vendors; public servants are regularly presented with misleading, inflammatory, and dangerous information about the nature of the terror threat through highly politicized seminars, industry conferences, trade publications, and electronic media. In place of sound skills training and intelligence briefings, a vocal and influential sub-group of the private counterterrorism training industry markets conspiracy theories about secret jihadi campaigns to replace the U.S. Constitution with Sharia law, and effectively impugns all of Islam—a world religion with 1.3 billion—adherents as inherently violent and even terroristic." Earlier this year, it became public that the NYPD was using a film called *The Third Jihad* in training in its officers. *The Village Voice* described it as "a spectacularly offensive smear of American Muslims. . . . It is 72 minutes of gruesome footage of bombing carnage, frenzied crowds, burning American flags, flaming churches, and seething mullahs." Tom Robbins, *NYPD Cops' Training Included in Anti-Muslim Horror Flick: Experiments in Terror*, THE VILLAGE VOICE, Jan. 19, 2011, available at <http://www.villagevoice.com/2011-01-19/columns/nypd-cops-training-included-an-anti-muslim-horror-flick/>. See also Arun Venugopal, *NYPD Asked to Explain Alleged Screening of Anti-Muslim Film*, WNYC, Mar. 22, 2011, available at <http://www.wnyc.org/blogs/wnyc-news-blog/2011/mar/22/nypd-asked-explain-screening-anti-muslim-film/> ("Muslim groups and elected officials are calling on the NYPD to explain why it allegedly screened a controversial documentary known as 'The Third Jihad' for trainees.").

²⁴ See, e.g., Scott Horton, *What Makes a Domestic Terrorist*, THE CENTERLINE: THE BLOG OF THE CENTER ON LAW AND SECURITY, Jan. 12, 2011, available at <http://centerlineblog.org/2011/01/12/online-open-forum-after-tucson/> (quoting several terrorism experts describing cases where terroristic acts by non-Muslims were not treated as domestic terrorism); Sahar Aziz, *Why Isn't Jared Lee Loughner a Homegrown Terrorist?*, TRUTHOUT, Jan. 12, 2011, available at <http://archive.truthout.org/why-isnt-jared-lee-loughner-a-homegrown-terrorist66783> (questioning why Jared Loughner's politically motivated shooting of U.S. Rep. Gabrielle Giffords has not been framed as domestic terrorism).

²⁵ ALEJANDRO J. BEUTEL, MUSLIM PUBLIC AFFAIRS COUNCIL, *DATA ON POST-9/11 TERRORISM IN THE UNITED STATES 2* (last updated April 18, 2011), available at <http://www.mpac.org/assets/docs/publications/MPAC-Post-911-Terrorism-Data.pdf>; CHR&GJ Interview with Mike German, *supra* note 2 (citing several cases). Research has shown that Muslims as a group are not more likely than others to commit terrorist acts. According to the Southern Poverty Law Center, in January 2011 alone "a neo-Nazi was arrested headed for the Arizona border with a dozen

homemade grenades; a terrorist bomb attack on a Martin Luther King Jr. Day parade in Spokane, Wash., was averted after police dismantled a sophisticated anti-personnel weapon; and a man who officials said had a long history of antigovernment activities was arrested outside a packed mosque in Dearborn, Mich., and charged with possessing explosives with unlawful intent. That's in addition, the same month, to the shooting of U.S. Rep. Gabrielle Giffords in Arizona, an attack that left six dead and may have had a political dimension." None of the suspects arrested in any of these incidents was Muslim. Mark Potok, Southern Poverty Law Center, *The Year in Hate and Extremism*, Intelligence Report No. 141 (Spring 2011), *available at* <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/spring/the-year-in-hate-extremism-2010>. *See also* David Dayen, *Sheriff Lee Baca, Only Law Enforcement Witness at King's Muslim Radicalization Hearings, Speaks Out*, FIREDOGLAKE, Mar. 9., 2011, <http://news.firedoglake.com/2011/03/09/sheriff-lee-baca-only-law-enforcement-witness-at-kings-muslim-radicalization-hearings-speaks-out/> ("Since 9/11, 77 extremist efforts or attacks have been carried out by non-Muslim extremists in the United States," said [Los Angeles County Sheriff Lee] Baca. In addition, of the last 10 terror plots attempted by Muslims, seven of them have been thwarted by Muslims coming forward. 'This is not a Muslim problem, it's a people problem.'").

²⁶ *See supra* note 22.

²⁷ *See, e.g.,* Rupal Oza, *Contrapuntal geographies of threat and security: the United States, India, and Israel*, 25(1) ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE 9 (2007).

²⁸ *See supra* note 22.

²⁹ *See, e.g.,* Shinnar, *supra* note 22. *See generally supra* note 22.

³⁰ *See supra* note 22. *See also* AMERICANS ON HOLD, *supra* note 15, at 35. (describing how members of the Sikh community have been targeted in part because they wear turbans, easily identifiable manifestations of their faith. Amardeep Singh, Executive Director of the Sikh Coalition explained, "Our articles of faith and our national origin have made us suspect—both for private and public actors. Our primary article of faith, the turban, is identified in this country with terrorism.").

³¹ SILBER & BHATT, NYPD RADICALIZATION REPORT, *supra* note 19.

³² PATEL, RETHINKING RADICALIZATION, *supra* note 20, at 1.

³³ S. COMM. ON HOMELAND SECURITY AND GOV'T AFFAIRS, A TICKING TIME BOMB: COUNTERTERRORISM LESSONS FROM THE U.S. GOVERNMENT'S FAILURE TO PREVENT THE FORT HOOD ATTACK (2011) [hereinafter FORT HOOD REPORT], *available at* http://hsgac.senate.gov/public/_files/Fort_Hood/FortHoodReport.pdf.

³⁴ SILBER & BHATT, NYPD RADICALIZATION REPORT, *supra* note 19; Patel, *Rethinking Radicalization*, *supra* note 20; Interview with Arun Kundnani, Open Society Institute Fellow (Apr. 6, 2011) (on file with CHRGJ) [hereinafter CHRGJ Interview with Arun Kundnani] ("When you unpack the concept of radicalization, it tends to involve some notion of ideology or ideas as the driver of violence, even though that is inconsistent with empirical research. This points in the direction of criminalizing the ideas that are thought to motivate violence. There is a drive to say that this set of ideas, this ideology is not entitled to freedom of expression.").

³⁵ *See* PATEL, RETHINKING RADICALIZATION, *supra* note 20, at 2-3, 8-9.

³⁶ The NYPD report, for example, notes at the same time that "A range of socioeconomic and psychological factors have been associated with those who have chosen to radicalize include the bored and/or frustrated, successful college students, the unemployed, the second and third generation, new immigrants, petty criminals, and prison parolees" and that markers of the "pre-radicalization phase" include "middle-class backgrounds; not economically destitute" and "[l]ittle, if any, criminal history." SILBER & BHATT, NYPD RADICALIZATION REPORT, *supra* note 19, at 24, 25.

³⁷ *See, e.g., id.* at 33 (identifying "Wearing traditional Islamic clothing, growing a beard" as signs of the "self-

identification" phase of radicalization). See also IRREVERSIBLE CONSEQUENCES, *supra* note 15, at 7-8.

³⁸ The Fort Hood report also requested that the FBI produce an in-depth analysis of the ideology of "violent Islamist extremism." FORT HOOD REPORT, *supra* note 33, at 43.

³⁹ *The Extent of Radicalization in the American Muslim Community and that Community's Response: Hearing Before H. Homeland Security Comm.*, 112th Cong. (Mar. 10, 2011) [hereinafter *King Hearing*], available at <http://homeland.house.gov/hearing/hearing-%E2%80%9Cextent-radicalization-american-muslim-community-and-communitys-response%E2%80%9D>. For the range of criticism, see, e.g., *Mother of 9/11 Victim Condemns King Hearing on Muslim 'Radicalization,'* DEMOCRACY NOW!, Mar. 11, 2011, available at http://www.democracynow.org/2011/3/11/mother_of_9_11_victim_condemns; Letter from civil rights organizations to Rep. Peter King, Mar. 7, 2011, available at <http://talkingpointsmemo.com/documents/2011/03/progressive-groups-criticize-king-for-targeting-muslims.php?page=1>; Jeff Stein, *Rep. Peter King's plan for hearings on Muslim 'radicalization' draws criticism from all sides*, WASH. POST, Jan. 21, 2011, available at http://voices.washingtonpost.com/spy-talk/2011/01/rep_kings_radical_muslims_hear.html.

⁴⁰ See, e.g., Jordy Yager, *King hearing 'counterproductive,' L.A. County sheriff testifies*, THE HILL, Mar. 10, 2011, available at <http://thehill.com/blogs/blog-briefing-room/news/148651-king-hearing-counterproductive-la-county-sheriff-testifies>; David Dayen, *Sheriff Lee Baca, Only Law Enforcement Witness at King's Muslim Radicalization Hearings, Speaks Out*, FIREDOGLAKE, Mar. 9, 2011, <http://news.firedoglake.com/2011/03/09/sheriff-lee-baca-only-law-enforcement-witness-at-kings-muslim-radicalization-hearings-speaks-out/>.

⁴¹ EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 19 (2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf; Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266, § 2402(b) (2007) (codified at 6 U.S.C. § 347) (designating DHS as lead agency in combating radicalization). The Radicalization and Extremist Messaging Group of the National Counterterrorism Center (NCTC) (which is part of the office of the Director of National Intelligence (DNI)), leads the Intelligence Community's efforts on radicalization issues. See Nat'l Counterterrorism Ctr., About Us, http://www.nctc.gov/about_us/about_nctc.html (last visited April 21, 2011); Nine Years after 9/11: Confronting the Terrorist Threat to the Homeland: Hearing Before the S. Comm. on Homeland Security and Gov't Affairs, 111th Cong. 1, 4 (2010) (statement for the record by Robert S. Mueller, III, Dir., Fed. Bureau of Investigation) available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9cda2966-30ed-48e2-b3a9-7d40f0b617e5.

⁴² See DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 1-19 (2007) [hereinafter COLE & LOBEL, LESS SAFE, LESS FREE]; EMILY BERMAN, BRENNAN CENTER FOR JUSTICE, DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS 5-6, 13-15 (2011), available at http://brennan.3cdn.net/b80aa0bab0b425857d_jdm6b8776.pdf [hereinafter NEW POWERS, NEW RISKS]. See also Glass & Bartosciewicz, *Arms Trader 2009*, *supra* note 7.

⁴³ PATEL, RETHINKING RADICALIZATION, *supra* note 20, at 19-25.

⁴⁴ See, e.g., Shinnar, *supra* note 22. See generally *supra* note 22.

⁴⁵ See, e.g., PATEL, RETHINKING RADICALIZATION, *supra* note 20, at 21-23, 30; CAIR, THE FBI'S USE OF INFORMANTS, RECRUITMENT AND INTIMIDATION WITHIN MUSLIM COMMUNITIES, *supra* note 7.

⁴⁶ See generally COLE & LOBEL, LESS SAFE, LESS FREE, *supra* note 42; Sherman, *supra* note 7.

⁴⁷ See generally Sherman, *supra* note 7; COLE & LOBEL, LESS SAFE, LESS FREE, *supra* note 42.

⁴⁸ BERMAN, *supra* note 42, at 1-3.

⁴⁹ US DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT

AGENCIES (2003), available at <http://www.fletc.gov/training/programs/legal-division/downloads-articles-and-faqs/downloads/doj-guidance/racialprofiling.pdf/download> [hereinafter 2003 DOJ RACIAL PROFILING GUIDANCE].

⁵⁰ US DEP'T OF JUSTICE, ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 9 (2008) [hereinafter MUKASEY GUIDELINES] (discussing the FBI as "an intelligence as well as a law enforcement agency"). See also COLE & LOBEL, LESS SAFE, LESS FREE, *supra* note 42, at 1-19. The FBI's legal authority, and the Attorney General's authority stems from a broadly worded federal statute. See 28 U.S.C. § 533 (2000) ("The Attorney General may appoint officials - (1) to detect and prosecute crimes against the United States; (2) to assist in the protection of the person of the President; (3) to assist in the protection of the person of the Attorney General; (4) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.").

⁵¹ See *supra* note 22. See also US DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS (2010) [hereinafter 2010 DOJ OIG REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS].

⁵² See *supra* notes 5-8. The government's use of informants has also been criticized outside of the context of counterterrorism policies. See, e.g., Natapoff, *supra* note 8.

⁵³ Former FBI Agent Mike German—currently the Policy Counsel on National Security with the American Civil Liberties Union—points out that unlike officers, informants are untrained, and pose a substantially greater risk of violating the rights of those they investigate. CHR&GJ Interview with Mike German, *supra* note 2.

⁵⁴ Natapoff, *supra* note 8, at 651-52 ("[A]n informant provides information about someone else's criminal conduct in exchange for some government-conferred benefit, usually lenience for his own crimes, but also for a flat fee, a percentage of the take in a drug deal, government services, preferential treatment, or lenience for someone else"). See also ENTRAPMENT OR FOILING TERROR, *supra* note 3; UNDER THE RADAR, *supra* note 10, at 13-14.

⁵⁵ US DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, SPECIAL REPORT: THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES 29-36 (2005) [hereinafter 2005 DOJ REPORT], available at <http://www.justice.gov/oig/special/0509/final.pdf>; BERMAN, *supra* note 42, at 8-9.

⁵⁶ BERMAN, *supra* note 42, at 8-9.

⁵⁷ Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Book II: Intelligence Activities and the Rights of Americans*, S. Rep. No. 94-755, at 23-37.

⁵⁸ 2005 DOJ REPORT, *supra* note 53, at 29-36. At this time, Congress was considering enacting a legislative charter reconstituting the FBI under a general statutory framework. After the Levi Guidelines were issued, however, Congress left things where they stood.

⁵⁹ *Id.* at 36 (citing *FBI Oversight*, Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 95th Cong. pt. 1, 20-26 (1978) (internal quotation marks omitted)).

⁶⁰ BERMAN, *supra* note 42.

⁶¹ See 2010 DOJ OIG REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS, *supra* note 51, at 5-27.

⁶² See, e.g., Shan Li, *Lawsuit contends FBI violated rights of hundreds of Muslim Americans*, L.A. TIMES BLOG, Feb. 22, 2011, available at <http://latimesblogs.latimes.com/lanow/2011/02/fbi-muslim-communities-lawsuit-aclu.html?lanow>; Li, *supra* note 8; Medina, *supra* note 8; Glover, *supra* note 8. See also Complaint, Yassir Fazaga v. Federal Bureau of Investigation, No. SA CV 11-00301 (C.D.Ca. Feb. 22, 2011).

⁶³ "Assessments may be carried out to detect, obtain information about, or prevent or protect against federal

crimes or threats to the national security or to collect foreign intelligence.” MUKASEY GUIDELINES, *supra* note 50, at V.A.1.

⁶⁴ “Assessments...require an authorized purpose but not any particular factual predication.” BERMAN, *supra* note 42, at 2, 17, 22. See Jerome P. Bjelopera & Mark A. Randol, Congressional Research Service, THE FEDERAL BUREAU OF INVESTIGATION AND TERRORISM INVESTIGATIONS, 1 (Apr. 27 2011) (noting the Guidelines and DIOGs provide “the FBI more leeway to engage in proactive investigative work that does not depend on criminal predication (i.e., a nexus to past or future criminal activity)”).

⁶⁵ Muslim Advocates, a California-based advocacy organization, filed a Freedom of Information Act request for the DIOGs. See Muslim Advocates, Muslim Advocates seeks FBI Guidelines on Racial Profiling of Muslim Americans, June 17, 2009, http://www.muslimadvocates.org/end_profiling/muslim_advocates_seeks_fbi_gui_1.html (last visited Apr. 29, 2011). The DOJ released redacted excerpts of the DIOGs, available here: Muslim Advocates, Department of Justice Continues to Cloak FBI Guidelines in Secrecy, Jan. 19, 2010, http://www.muslimadvocates.org/latest/profiling_update/community_alert_seek_legal_adv.html (last visited Apr. 29, 2011).

⁶⁶ BERMAN, *supra* note 42, at 24.

⁶⁷ *Id.*

⁶⁸ The Los Angeles Police Department’s experiment with geo-mapping of Muslim communities is most well-known. Richard Winton, Jean-Paul Renaud, and Paul Pringle, *LAPD To Build Data on Muslim Areas*, L.A. TIMES, Nov. 9, 2007, at A1; Richard Winton and Teresa Watanabe, *LAPD’s Muslim Mapping Plan Killed*, L.A. TIMES, Nov. 15, 2007, at A1; see also Letter to Commander Michael P. Downing, Counter-Terrorism/Criminal Intelligence Bureau, Los Angeles Police Department from Ranjana Natarajan & Peter Bibring, Staff Attorneys, ACLU of Southern California, Farhana Y. Khera, Muslim Advocates, Shakeel Syed, Islamic Shura Council, and Hussam Ayloush, Council on American Islamic Relations (Nov. 8, 2007), available at http://www.aclu-sc.org/attach/m/muslim_mapping_letter.pdf (expressing “grave concerns” about the LAPD’s community-mapping plans).

⁶⁹ 2003 DOJ RACIAL PROFILING GUIDANCE, *supra* note 49.

⁷⁰ MUKASEY GUIDELINES, *supra* note 50, at V.C.2 (“Otherwise illegal activity by a human source must be approved in conformity with the Attorney General’s Guidelines Regarding the Use of FBI Confidential Human Sources.”). See also *id.* at VI.6.C.3.a (“When it appears that a human source has engaged in criminal activity in the course of an investigation under these Guidelines, the FBI shall proceed as provided in the Attorney General’s Guidelines Regarding the Use of FBI Confidential Human Sources.”).

⁷¹ See US DEP’T OF JUSTICE, ATTORNEY GENERAL’S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES (2006) [hereinafter GONZALES GUIDELINES].

⁷² The Gonzales Guidelines explicitly contemplate that informants will be authorized to engage in illegal activity, but place limits on the possible authorization in a section entitled “Authorization of Otherwise Illegal Activity.” Under the General Provisions of that section, the Guidelines provide that “The FBI is never permitted to authorize a Confidential Human Source to: participate in any act of violence except in self-defense” or to “participate in an act designed to obtain information for the FBI that would be unlawful if conducted by a law enforcement agent (e.g., breaking and entering, illegal wiretapping, illegal opening and tampering with the mail, or trespass amounting to an illegal search).” *Id.* at V.A.2.a., V.A.2.b. See also MUKASEY GUIDELINES, *supra* note 50, at V.C.2.

⁷³ The 2006 Gonzales Guidelines replaced Attorney General John Ashcroft’s 2002 Guidelines Regarding the Use of Confidential Informants. GONZALES GUIDELINES, *supra* note 71, at I.A.3. See US Dep’t of Justice, ATTORNEY GENERAL’S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS (2002) [hereinafter 2002 ATTORNEY GENERAL’S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS].

⁷⁴ *Id.* at III.C.1.b (emphasis added).

⁷⁵ See GONZALES GUIDELINES, *supra* note 71, at V.B.3.a.iii.C, D. C.f. 2002 ATTORNEY GENERAL’S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS, *supra* note 73, at III.C.4.a.(iii)(B), (D).

⁷⁶ Specifically, the Gonzales Guidelines provide that the instructions to the prospective informant must state that, “under no circumstances may the Confidential Human Source: A. [engage in violence]; B. [engage in unlawful evidence gathering]; C. If applicable: participate in an act that constitutes obstruction of justice (e.g. perjury, witness tampering, witness intimidation, entrapment, or the fabrication, alteration, or destruction of evidence); D. If applicable: initiate or instigate a plan or strategy to commit a federal, state, or local offense.” GONZALES GUIDELINES, *supra* note 69, at V.B.3.a.iii (emphasis in original).

⁷⁷ 2005 DOJ OIG REPORT, *supra* note 55.

⁷⁸ US DEP’T OF JUSTICE, ATTORNEY GENERAL’S GUIDELINES ON UNDERCOVER OPERATIONS (2002) [hereinafter DOJ GUIDELINES ON UNDERCOVER OPERATIONS]. See also ELECTRONIC FRONTIER FOUNDATION, PATTERNS OF MISCONDUCT: FBI INTELLIGENCE VIOLATIONS FROM 2001-2008 (2011).

⁷⁹ DOJ GUIDELINES ON UNDERCOVER OPERATIONS, *supra* note 78, at V.

⁸⁰ 2005 DOJ OIG Report, *supra* note 55, at 150.

⁸¹ 2010 DOJ OIG REVIEW OF THE FBI’S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS, *supra* note 51, at 186-91. See also US DEP’T OF JUSTICE, OFFICE OF INSPECTOR GENERAL ET AL., UNCLASSIFIED REPORT ON THE PRESIDENT’S SURVEILLANCE PROGRAM (2009).

⁸² CHR&GJ Interview with Mike German, *supra* note 2.

⁸³ See *Handschu v. Special Services Div.*, 605 F. Supp. 1384, 1388 (S.D.N.Y. 1985); N.Y. Civil Liberties Union, *Handschu v. Special Services Division* (challenging NYPD surveillance practices targeting political groups), <http://www.nyclu.org/case/handschu-v-special-services-division-challenging-nypd-surveillance-practices-targeting-political> (noting that the *Handschu* case was aimed at challenging to the NYPD’s practices including “the maintenance of dossiers on political activists and the use of various undercover and surveillance techniques to monitor the activities of political organizations and individuals”) (last visited Apr. 29, 2011); Chip Berlet and Abby Scher, *Political Profiling: Police Spy on Peaceful Activists*, AMNESTY INT’L MAG., available at <http://www.amnestyusa.org/amnestynow/profiling.html> (“Between 1904 and 1985, the NYPD maintained thousands of files and at times deployed undercover agents provocateurs to disrupt organizing. In the Black Panthers case, it was a police spy who nurtured the idea of bombing New York police stations and department stores.”).

⁸⁴ *Handschu*, 605 F. Supp. at 1388.

⁸⁵ *Id.* at 1390.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1391.

⁸⁸ Leonard Levitt, *NYPD Seeks to Overturn Surveillance Rules*, NEWSDAY, Sep. 25, 2002, available at <http://www.newsday.com/news/nypd-seeks-to-overturn-surveillance-rules-1.364071>.

⁸⁹ New York Advisory Committee To The U.S. Commission On Civil Rights, Police Surveillance of Political Activity -- The History and Current State of the Handschu Decree, Testimony Of Arthur N. Eisenberg, <http://www.nyclu.org/content/testimony-police-surveillance-of-political-activity-history-and-current-state-of-handschu-de> (last visited Apr. 29, 2011).

⁹⁰ See *Handschu v. Special Servs. Div.*, 288 F. Supp. 2d 411, 420 (S.D.N.Y. 2003). The revised guidelines are included in the decision as an appendix starting on p. 420.

⁹¹ The revised guidelines specifically state: “These guidelines eliminate many of the restrictions of the former

Handschu Guidelines, and provide the Department with the authority and flexibility necessary to conduct investigations involving political activity, including terrorism investigations.” *Id.* at 420.

⁹² *Id.* (emphasis added).

⁹³ *Id.* at II(1).

⁹⁴ *Id.* at VI(A)(1).

⁹⁵ *Id.*

⁹⁶ Craig Horowitz, *The NYPD’s War on Terror*, N.Y. MAG., available at http://nymag.com/nymetro/news/features/n_8286/ [hereinafter Horowitz, *The NYPD’s War on Terror*]; CHRIS DICKEY, SECURING THE CITY: INSIDE AMERICA’S BEST COUNTERTERROR FORCE—THE NYPD (2009) [hereinafter DICKEY, SECURING THE CITY]; William Finnegan, *The Terrorism Beat*, NEW YORKER, Jul. 25, 2005, available at http://www.newyorker.com/archive/2005/07/25/050725fa_fact2 (noting that whereas prior to 2001 the NYPD had “fewer than two dozen officers working the terrorism beat full time[,] [t]oday, there are about a thousand”).

⁹⁷ Counterterrorism Units, NYC.gov, http://www.nyc.gov/html/nypd/html/administration/counterterrorism_units.shtml (last visited Apr. 29, 2011). The NYPD’s separate Intelligence Division operates the International Liaison Program, which seems to function without federal oversight. See Jeff Stein, *NYPD Intelligence Detectives Go Their Own Way*, WASH. POST, Nov. 10, 2010, http://blog.washingtonpost.com/spy-talk/2010/11/nypds_foreign_cops_play_outsid.html (last visited Apr. 29, 2011) (“With offices in 11 foreign capitals and an unpublished budget, the ILP’s far-flung counterterrorism cops operate outside the authority of top U.S. officials abroad, including the American ambassador and the CIA station chief, who is the nominal head of U.S. intelligence in foreign countries. Neither the Director of National Intelligence nor the Department of Homeland Security have any jurisdiction over the program. Nor have either done a study of how the NYPD’s foreign operations fit into U.S. counterterrorism programs -- or don’t, officials say.”).

⁹⁸ The New York JTTF also includes members of the NY State Police, the NY/NJ Port Authority Police, the U.S. Marshal’s Service, the Bureau of Alcohol, Tobacco and Firearms, and the U.S. Secret Service. “With more than 2,000 FBI agents now assigned to 102 task forces, the JTTFs have effectively become a vast, quasi-secret arm of the federal government, granted sweeping new powers that outstrip those of any other law-enforcement agency. The JTTFs consist not only of local police, FBI special agents and federal investigators from Immigration and the IRS, but covert operatives from the CIA. The task forces have thus effectively destroyed the ‘wall’ that historically existed between law enforcement and intelligence-gathering.” Lawson, *supra* note 7. In 2005, Portland became the only city to withdraw from the JTTF over concerns about lack of oversight, though the city is now reconsidering rejoining via a negotiated agreement with the FBI. See Jim Redden, *Adams says JTTF Proposal Protects City, Civil Liberties*, PORTLAND TRIB., Apr. 20, 2011, available at http://portlandtribune.com/news/story.php?story_id=130331081305173700.

⁹⁹ Horowitz, *The NYPD’s War on Terror*, *supra* note 96 (quoting Commissioner Kelly as having said, “I knew we couldn’t rely on the federal government...I know it from my own experience. We’re doing all the things we’re doing because the federal government isn’t doing them. It’s not enough to say it’s their job if the job isn’t being done.”); Stein, *supra* note 97. (“Cohen and Kelly have not been shy about their antipathy for the U.S. intelligence community in general and the FBI specifically, saying the former has demonstrated it can’t protect New York and accusing the latter of withholding valuable information.”).

¹⁰⁰ SILBER & BHATT, NYPD RADICALIZATION REPORT, *supra* note 19; PATEL, RETHINKING RADICALIZATION, *supra* note 20, at 14.

¹⁰¹ See, e.g., *Matthews v. United States*, 485 U.S. 58, 63 (1988); *Sherman v. United States*, 356 U.S. 369, 376-378, (1958), *United States v. Russell*, 411 U.S. 423, 435-436 (1973).

¹⁰² In the Second Circuit, for example, inducement includes “soliciting, proposing, initiating, broaching or

suggesting the commission of the offense charged.” *United States v. Brand*, 467 F.3d 179, 189 (2d Cir. 2006). In the Seventh Circuit, there also exists the doctrine of extraordinary inducement. *United States v. Haddad*, 462 F.3d 783 (7th Cir. 2006). In all circuits, if the government merely offers opportunities or facilities for the commission of the offense, then the entrapment defense fails. Also, deception alone does not constitute entrapment; the deception must actually “implant the criminal design in the mind of the defendant.” *Sherman*, 356 U.S. at 372. In the Second Circuit, predisposition may be shown by (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. *Brand*, 467 F.3d at 191. In the Seventh Circuit, predisposition also requires that the defendant have been in a position to commit the crime charged prior to government involvement, such that the defendant would have been likely to commit the crime without the government’s help. *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc).

¹⁰³ *Russell*, 411 U.S. at 433. In its latest ruling on the entrapment defense, the Supreme Court underlined predisposition as the focal point of the analysis. See *Jacobson v. United States*, 503 U.S. 540 (1992).

¹⁰⁴ *Said*, *supra* note 7, at 693-94 (citing Brandeis’s articulation of the objective test in his dissent in *Casey v. United States*, 276 U.S. 413, 423-25 (1928)).

¹⁰⁵ According to the Center for Law and Security, since September 11, 2001, in six trials, ten defendants “charged with terrorism-related crimes have formally argued the entrapment defense,” but none have prevailed. In addition to Mohamad Shnewer, James Cromitie, David Williams, Onta Williams, Laguerre Payen, and Shahawar Matin Siraj, Hemant Lakhani, Yassin Aref, Mohammed Hossain, and Narseal Batiste have formally argued entrapment. March 2011 CLS TTRC Update, *supra* note 3. The press release notes that in each of these cases in which entrapment was formally argued, the government agent was an informant as opposed to an undercover officer. *Id.* See also *Said*, *supra* note 7, at 688-91, 715-32; 2010 CLS Terrorist Trial Report Card, *supra* note 4, at 20 (“As of September 2010, the entrapment defense has never been used successfully in a post-9/11 federal terrorism trial.”). See also 2009 CLS Terrorist Trial Report Card, *supra* note 2, at 45-48. *United States v. Al-Moayad*, 545 F.3d 139, 159-79 (2d Cir. 2008) is a rare case where, though the entrapment defense failed, the Second Circuit Court of Appeals reversed the convictions on the grounds that the government deprived the defendants of a fair trial in their use of inflammatory prejudicial evidence, regarding, *inter alia*, a bombing in Israel that defendants were unconnected with, and images of Osama bin Laden).

¹⁰⁶ See *Jacobson*, 503 U.S. at 548-49 (“Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act *prior to first being approached by Government agents.*”) (emphasis added, citation and footnote omitted).

¹⁰⁷ See, e.g., *United States v. Lakhani*, 480 F.3d 171, 174 (3d Cir. 2007) (upholding the jury’s rejection of Lakhani’s entrapment defense); *United States v. Siraj*, 468 F. Supp. 2d 408 (E.D.N.Y. 2007), *aff’d* 2008 WL 2675826 (2d Cir. June 9, 2008) (upholding the jury’s rejection of Siraj’s entrapment defense); *United States v. Cromitie et al.*, 2011 WL 1663618 (S.D.N.Y. May 3, 2011) (upholding the jury’s rejection of the defendants’ entrapment defense). See also *United States v. Cromitie et al.*, 2011 WL 1663626 (S.D.N.Y. May 3, 2011) (denying defendants’ motion for dismissal on the basis of outrageous government conduct). Although *Jacobson* requires that the government prove that the defendant was predisposed prior to coming into contact with government agents, the Second Circuit permits the government to prove that the defendant was predisposed by, among other things, evidence that the defendant was “ready and willing” to accept the inducement and commit the crime. See *United States v. Brand*, 467 F.3d at 194 (“[A] defendant is predisposed to commit a crime if he is ready and willing without persuasion to commit the crime charged and awaiting any propitious opportunity to do so and predisposition can be shown by the accused’s ready response to the inducement.”) (internal citations and quotation marks omitted). Thus, in the case against the Newburgh Four, the prosecution argued that the defendants were predisposed because they were ready and willing to accept the informant’s offer of \$250,000. See Transcript of Oral Argument *United States v. Cromitie et al.*, No. 09-CR-558 (S.D.N.Y. 2010) [hereinafter *Newburgh Four Trial Transcript*] at 3224.

¹⁰⁸ Federal Rules of Evidence Rule 403 provides that “[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .” Little, if any, of the evidence referenced in this section was probative of the individual defendants’ propensity to personally engage in violent acts. Nearly all the evidence, however, was prejudicial because it was highly graphic, controversial, or otherwise unpopular, and it would be difficult, if not impossible, for a jury to disassociate such evidence from the defendant’s individual propensity to commit violence. As current Assistant Secretary for Intergovernmental Affairs in the United States Department of Homeland Security Juliette Kayyem has been quoted as saying, “In this climate [of fear of terrorism], juries are not making the best decisions . . . Juries get swayed—and informants get paid.” ETHAN BROWN, *SNITCH: INFORMANTS, COOPERATORS & THE CORRUPTION OF JUSTICE* (2007) 130, 134 [hereinafter BROWN, *SNITCH*]. See also Waldman, *supra* note 17. (“The United States is now prosecuting suspected terrorists on the basis of their intentions, not just their actions. But in the case of Islamic extremists, how can American jurors fairly weigh words and beliefs when Muslims themselves can’t agree on what they mean?”). But see *Siraj*, 468 F. Supp. at 420 (“Defendant also argues that allowing the undercover officer’s testimony raises ‘considerable First Amendment concerns’ by criminalizing legitimate political discourse. However, even if the undercover officer testified to statements made by defendant that may be described as reflecting defendant’s political views, those statements were properly admitted That defendant’s statements contain political expression does not insulate defendant from their use at trial where the statements also rebut his testimony to prove predisposition.”).

¹⁰⁹ For example, in the Newburgh Four case, the government brought in a stinger missile C4 explosives; and in the Fort Dix Five case, the government brought in jihadi videos—all of this prejudicial and provided to the defendants by the informants or at their encouragement. In another case, *United States v. Aref*, the government displayed a stinger missile, provided by the informant, in a money laundering case. *Entrapment or Foiling Terror*, *supra* note 3.

¹¹⁰ For more on these rights, see *infra* Part III.

¹¹¹ Consider, for example, this reasoning by the Second Circuit Court of Appeals in affirming *Siraj*’s conviction: “Matin challenges the admission of two books purchased from the Islamic bookstore where he worked (one at Matin’s personal recommendation). The district court acted within its sound discretion in admitting the books. To the extent Matin recommended the books, they were relevant to show predisposition; and to the extent the books were for sale in the shop where Matin worked, they tended to rebut Matin’s assertion that the cooperating witness first exposed him to radical Islam and violent jihad.” *United States v. Siraj*, 468 F. Supp. 2d 408 (E.D.N.Y. 2007), *aff’d* 2008 WL 2675826 at *2 (2d Cir. June 9, 2008). See also *Siraj*, 468 F. Supp. at 420 (“Defendant also argues that allowing the undercover officer’s testimony raises ‘considerable First Amendment concerns’ by criminalizing legitimate political discourse. However, even if the undercover officer testified to statements made by defendant that may be described as reflecting defendant’s political views, those statements were properly admitted That defendant’s statements contain political expression does not insulate defendant from their use at trial where the statements also rebut his testimony to prove predisposition.”). See also Said, *supra* note 7, at 697 (“Demonstrating predisposition can therefore become a referendum on a defendant’s political or religious views when the inquiry focuses on how sympathetic the defendant is to terrorist objectives.”), 717 (“In rebuttal to *Siraj*’s entrapment defense, the undercover officer testified about *Siraj*’s praise of Osama Bin Laden and support for further bombings in the United States. Further, the trial saw the admission of evidence of *Siraj*’s support for al-Qaeda, Hamas, Hamas leaders, violence against Jews, and books and videos endorsing and praising so-called violent jihad, which bolstered the government’s predisposition argument.” (footnotes omitted)).

¹¹² See, e.g., the Newburgh Four Trial Transcript, *supra* note 107, at 66 (noting that fake explosives used were provided the informant in that case) and *infra* Part II. There’s also the issue of courts allowing in prejudicial evidence unrelated to the charges against the defendant. See, e.g., *United States v. Al-Moayad*, 545 F.3d 139, 159-79 (2d Cir. 2008) (finding the district court committed prejudicial error, depriving defendants of a fair trial, in admitting evidence regarding, *inter alia*, a bombing in Israel that defendants were unconnected with, and images of Osama bin Laden).

¹¹³ See Said, *supra* note 7, at 689 (“[R]egardless of whether an informant’s conduct legally constitutes entrapment, several of the post-9/11 cases highlight situations in which the existence of any real threat to national security was questionable.”).

¹¹⁴ See *supra* note 109.

¹¹⁵ See *infra* Part III.

¹¹⁶ For example, the Duka brothers became targets of an FBI investigation after agents saw the DVD showing them riding horses and yelling “Allahu Akbar” (“God is Great”). At trial, the government relied in large part on Mohammed Shnewer’s possession of “videos produced by al Qaeda, al Qaeda in Iraq.” Fort Dix Five Trial Transcript, *infra* note 168, at 1523/22-25, 1542/1-25. See also NEW POWERS, NEW RISKS, *supra* note 42, at 29 (“According to the FBI itself, potential indicators of terrorist activity include taking notes, drawing diagrams, espousing unpopular views, or taking photographs, and other law enforcement organizations have expressed the view that increased religiosity is suspicious as well.”).

There are examples in the border enforcement context as well. Tareq Abu Fayad was stopped at San Francisco International Airport where customs officials found what they termed to be “jihadist materials” on his computer, including al-Jazeera news stories and a 9/11 conspiracy theory video downloaded on his laptop. Abu Fayad said the materials were news articles about current events in Gaza that he was planning to read later and that he had never joined or supported Hamas. Nevertheless, the 9th Circuit said immigration officials had reasonably concluded that Abu Fayad was likely to engage in or support terrorism. *UNDER THE RADAR*, *supra* note 10, at 12; Tareq I.J. Abu Fayad v. Eric Holder, 632 F.3d 623, 625 (9th Cir. 2011). See generally UNREASONABLE INTRUSIONS: INVESTIGATING THE POLITICS, FAITH & FINANCES OF AMERICANS RETURNING HOME, *supra* note 22; RETURNING HOME, *supra* note 22.

¹¹⁷ See *supra* note 22.

¹¹⁸ CHR&GJ Interview with Mike German, *supra* note 2.

¹¹⁹ R. v. Mack, [1988] 2 S.C.R. 903 (Can.); R. v. Loosely, [2001] UKHL 53 (U.K.).

¹²⁰ Mack, [1988] 2 S.C.R. 903; Loosely, [2001] UKHL 53 at ¶¶ 24-29.

¹²¹ Loosely, [2001] UKHL 53 at ¶ 25.

¹²² Mack, [1988] 2 S.C.R. 903 at ¶¶ 131, 139-49

¹²³ As Lord Nicholls explained, “Predisposition does not make acceptable what would otherwise be unacceptable conduct on the part of the police or other law enforcement agencies. Predisposition does not negative misuse of state power.” Loosely, [2001] UKHL 53 at ¶ 22.

¹²⁴ See, e.g., Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 591-592 (2010) (“Not only has the Supreme Court not afforded protections against government snooping through undercover agents or confidential informants; it has also explicitly exempted human intelligence, or “humint,” from coverage by the First and Fourth Amendments. While the FBI has historically imposed limits on its own ability to conduct human intelligence gathering by requiring criminal predication before a source could be injected into a group, for example, those internal rules have been substantially relaxed in the years following 9/11. This gap in doctrine is especially striking in view of the mounting importance of human intelligence as part of a broader counterterrorism strategy.”). See also Harris, *supra* note 2, at 141-155 (“[W]e are left with one overarching impression of the law that governs the use of informants. The Fourth Amendment affords law enforcement nearly full discretion to decide when and how to use informants. Defenses like entrapment remain *available at trial*, but these defenses seem more theoretical than real in terms of what they might do to reign in informant activity. While individuals can bring civil suits, relief seems unlikely. Finally, the FBI has largely abandoned internal regulation as a way to regulate discretion over when and why agents can place informants in First Amendment-sensitive places like religious institutions.”).

¹²⁵ The outrageous government conduct defense is grounded in due process. This defense asks whether the government’s conduct during the investigation was so outrageous as to “shock the conscience.” The Supreme Court has emphasized the narrowness of the defense, and, indeed, has yet to hear a case based on the defense.

Thus, it is unlikely to be an avenue through which defendants can effectively challenge the use of informants in counterterrorism investigations. See, e.g. *United States v. Russell*, 411 U.S. 423, 431-432 (1973); *Hampton v. United States*, 425 U.S. 484 (1976) (explaining the narrowness of the outrageous government conduct defense). Most recently, the court in the Newburgh Four case denied defendants' motion for dismissal on the basis of outrageous government conduct. *United States v. Cromitie et al.*, 2011 WL 1663626 (S.D.N.Y. May 3, 2011). See also Amanda J. Schreiber, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship with its Confidential Informants*, 34 COLUM. J. L. & SOC. PROBS. 301 (2001); see also Daniel V. Ward, *Confidential Informants in National Security Investigations*, 47 B.C. L. REV. 627 (2006).

¹²⁶ Harris, *supra* 2, at 158.

¹²⁷ See *supra* note 17.

¹²⁸ Interview with Elizabeth McWilliams, mother of David Williams (Apr. 7, 2011) (on file with CHR&GJ) [hereinafter CHR&GJ Interview with Elizabeth McWilliams].

¹²⁹ *Id.* See Rayman, *Were the Newburgh 4 Really Out to Blow Up Synagogues?*, *supra* note 8.

¹³⁰ CHR&GJ Interview with Elizabeth McWilliams, *supra* note 128.

¹³¹ *Id.*; Email from Lyric Cabral, April 28, 2011 (on file with CHR&GJ).

¹³² Interview with Lord McWilliams, brother of David Williams (Apr. 4, 2011) (on file with CHR&GJ) [hereinafter CHR&GJ Interview with Lord McWilliams].

¹³³ *Id.*

¹³⁴ CHR&GJ Interview with Elizabeth McWilliams, *supra* note 128.

¹³⁵ Interview with Alicia McWilliams, aunt of David Williams (Mar. 8, 2011) (on file with CHR&GJ) [hereinafter CHR&GJ Interview with Alicia McWilliams].

¹³⁶ *Id.*

¹³⁷ Rayman, *Were the Newburgh 4 Really Out to Blow Up Synagogues?*, *supra* note 8.

¹³⁸ Newburgh Four Trial Transcript, *supra* note 107, at 1036 (Hussain admitting he had offered \$250,000 to Cromitie, but insisting it was a "code word" for the costs of the operation), 890 (Hussain admitting he offered to pay for a barbershop for Cromitie), 894 (Hussain admitting he offered a BMW to Cromitie). See also, e.g., *id.* 1613 (Hussain admitting he told Cromitie that Jews are responsible for the evils in the world and that they should be eliminated)."

¹³⁹ *Id.* at 1718 (Hussain admitting he told Cromitie it would be nice to have Muslim "bodies"); Government Exhibit 109-E2-T, November 29, 2008 recording: (after Cromitie falsely tells Hussain that he has a team of fighters, Hussain asks: "But do you think these, these guys that you're talking about are Mus-, will do [it] for the money or for the cause?"); Government Exhibit 133-E2-T, December 17, 2008 recording (Hussain says to Cromitie, "It would be nice, brother. It would be really nice. We can have more bodies with us. Real, good Muslim brothers would be nice, you know? And..." Cromitie: "Yeah, but from where, Hak?"); Government Exhibit 116-E1-T, April 7, 2009 recording: (Hussain says to Cromitie "If we can [get a] lookout. If we can, get a couple of, couple of guys... Lookouts. And uh, they have to believe into it, you know it's not only for the money. It's... they have to believe." Cromitie: "It's not [about] money [for me]." Hussain: "Okay, but I'm talking about the lookout guys . . . The lookout guys has not to be, they have to believe into it, ya know?" And then later, after Cromitie catches the hint and offers: "I think they should be Muslims..." Hussain: "It should be for the cause, you know? It should be for the cause. Less for the money, more for the cause.").

¹⁴⁰ *Id.*

¹⁴¹ Hussain met Cromitie in June 2008. From June through April 2009, Hussain tried to persuade Cromitie to commit jihad. See generally, Ted Conover, *The Pathetic Newburgh Four: Should the FBI really be baiting sad-sack homegrown terrorists?*, SLATE, Nov. 23, 2010, available at <http://www.slate.com/id/2275735/> (last visited April 28, 2011) [hereinafter Conover, *The Pathetic Newburgh Four*]; Government Exhibit 101-E2-T, October 12, 2008 recording: After Cromitie complains about being mistreated by somebody because he was Muslim, Cromitie says “But sometimes I just want to grab him and ahhhh, kill him. But I’m Muslim, *insha’Allah*, Allah will take care of it. Hussain replies: “*Insha’Allah*, if you brother, if you really have to do something, you have to do it in jihad, and try to do something.” Cromitie: “No, because you’re angry.”; Government Exhibit 101-E4-T, October 12, 2008 recording: after Cromitie again complains about being discriminated against for being Muslim, but that he will change his beliefs and will “die a Muslim,” Hussain says, “*Insha’Allah*. As a Muslim, you should die for a, for a cause...”; Government Exhibit 101-E5-T, October 12, 2008 recording: after Cromitie says something about American foreign policy, Hussain says, “But... Allah, Allah always, Allah *subhana wa tala* always said that, (unintelligible) *hadiths*, that... if evil goes too high, then Allah makes ways to drop them. . . . I think that evil is reaching too high at a point, where you, me, all these brothers, have to come up with a solution to take the evil down. That’s how, it’s the *hadith*.”; Government Exhibit 102-E1-T, October 19, 2008 recording: after Cromitie again laments about foreign policy issues, Hussain says, “I think your mind and my mind works as the same thing, you know? . . . As, as the same thoughts, about the world and about Islam . . . And when I, when I see these, these Mushriks, these, these *Yahud*, killing the Palestines, of killing Muslims, of killing people in, in Iraq or in Afghanistan, one of our brothers, I, I always think about going for a cause, you know? For a cause of Islam. Have you ever thought about that, brother?” See also, e.g., Newburgh Four Trial Transcript, *supra* note 107, at 1696 (Hussain admitting he encouraged Cromitie “[m]any times” to come up with a plan, and “[m]any times” to decide on a target).

¹⁴² See Rayman, *Were the Newburgh 4 Really Out to Blow Up Synagogues?*, *supra* note 8 (quoting Imam Salahuddin Mohammad from the mosque: “They said this individual was talking about jihad—there’s something wrong with this guy, he’s not real. People thought he was an FBI agent. The guy was fishing.”); *Entrapment or Foiling Terror*, *supra* note 3 (quoting Imam Salhuddin Mohammad: “I started hearing from different members of the community that he was talking stuff about jihad and something about a group in Pakistan and telling the brothers they should go over and help them in Pakistan because he’s a part of some group.”); Conover, *The Pathetic Newburgh Four*, *supra* note 139.

¹⁴³ The government’s target in that case was Yassin Aref, a Kurdish refugee from Iraq who was the imam of a mosque in Albany, NY. The FBI sent an informant, Shahed Hussein – the same informant in the Newburgh Four case – to become close to a member of Aref’s mosque, Mohammed Hossain, who owned a pizzeria. The informant eventually offered Hossain a loan for his pizzeria. He said the loan had come from the sale of a missile to a terrorist group. Hossain accepted the loan and asked Aref to witness the loan. They were arrested on multiple charges including conspiring to aid a terrorist group and provide support for a weapon of mass destruction, as well as money-laundering and supporting a foreign terrorist organization. They were convicted and sentenced to 15 years in prison each. For more information, see the Muslim Solidarity Committee’s website, <http://www.nepajac.org/Aref&Hossain.htm> and *Entrapment or Foiling Terror*, *supra* note 3.

¹⁴⁴ CHR&GJ Interview with Lord McWilliams, *supra* note 130.

¹⁴⁵ Newburgh Four Trial Transcript, *supra* note 107, at 2056. According to one article, David Williams was scheduled to be sentenced on a grand larceny charge on this date, but the FBI had the date changed. Rayman, *Were the Newburgh 4 Really Out to Blow Up Synagogues?*, *supra* note 8.

¹⁴⁶ FBI Special Agent Robert Fuller testified that the purpose of this step was to get the defendants to cross state lines. Newburgh Four Trial Transcript, *supra* note 107, at 256.

¹⁴⁷ *Id.*, at 427 (Agent Robert Fuller describing contacting the “substitution unit” within the “explosives unit” on April 5, 2009, to see when how fast they could supply IEDs [improvised explosive devices] and stinger missiles).

¹⁴⁸ *Id.*, at 256.

¹⁴⁹ *Id.*, at 387, 1048, 1201, 2104.

¹⁵⁰ *Id.*, at 2126. It is unclear whether the bombs—all fakes—were ever “activated.” *Id.*, at 572-80. The three explosive devices were not received or examined by Agent Fuller until two weeks after the arrest, on June 3, at which time, according to his handwritten notes and testimony, only one of the explosives had both the switch and the associated cell phone turned on. Before the trial was moved from White Plains to Manhattan, the prosecution had sent a letter to the defense saying that would have photographic evidence that might confirm the positions of the switches. They never produced that evidence. David Williams says the explosives were never on. Rayman, *Were the Newburgh 4 Really Out to Blow Up Synagogues?*, *supra* note 8; Email from Lyric Cabral, *supra* note 129.

¹⁵¹ United States v. Cromitie, No. 09 Cr. 558 (S.D.N.Y.).

¹⁵² *Id.*

¹⁵³ A range of concerns have been raised about the treatment of Muslims in the federal prison system. See, e.g., Michelle Goldberg, *The Prisoner-Abuse Scandal At Home*, SALON.COM, May 19, 2004, available at <http://www.salon.com/news/feature/2004/05/19/maddy> (discussing the Brooklyn Metropolitan Detention Center’s guard’s abuses of Muslim prisoners); Sally Eberardt and Jeanne Theoharis, *Guantanamo’s Here at Home*, THE NATION, Jan. 20, 2011, available at <http://www.thenation.com/article/157896/guant%C3%A1namos-here-home> (pointing out the use of solitary confinement and Special Administrative Measures against Muslim defendants); Alia Malek, *Gitmo in the Heartland*, THE NATION, Mar. 10, 2011, available at <http://www.thenation.com/article/159161/gitmo-heartland> (discussing Communication Management Units maintained by the federal Bureau of Prisons, where Muslims and environmental activists are held).

¹⁵⁴ All the defendants were charged with one count of conspiracy to use weapons of mass destruction within the United States, three counts of attempt to use weapons of mass destruction within the United States, one count of conspiracy to acquire and use anti-aircraft missiles, one count of attempt to acquire and use anti-aircraft missiles, one count of conspiracy to kill officers and employees of the United States, and one count of attempt to kill officers and employees of the United States. Indictment, United States v. Cromitie, (S.D.N.Y. June 2, 2009). They were convicted of all charges, except Laguerre Payen and Onta Williams were found not guilty of the last count: attempt to kill officers and employees of the United States. See http://topics.nytimes.com/topics/reference/timestopics/people/p/laguerre_payen/index.html.

¹⁵⁵ United States v. Cromitie, 2011 WL 1663618 (S.D.N.Y. May 3, 2011); United States v. Cromitie, 2011 WL 1663626 (S.D.N.Y. May 3, 2011).

¹⁵⁶ FBI/DOJ Press Release, October 18, 2010, Four Men Found Guilty of Plotting to Bomb New York Synagogue and Jewish Community Center and to Shoot Military Planes with Stinger Missiles, <http://www.fbi.gov/newyork/press-releases/2010/nyfo101810.htm> (last visited April 28, 2011).

¹⁵⁷ CHR&GJ Interview with Elizabeth McWilliams, *supra* note 128.

¹⁵⁸ CHR&GJ Interview with Lord McWilliams, *supra* note 132.

¹⁵⁹ CHR&GJ Interview with Alicia McWilliams, *supra* note 135.

¹⁶⁰ *Id.*

¹⁶¹ See *supra* notes 5-8, 17.

¹⁶² Interview with Ferik Duka, father of Duka brothers (Mar. 25, 2011) (on file with CHR&GJ) [hereinafter CHR&GJ Interview with Ferik Duka].

¹⁶³ Interview with Lejla Duka, daughter and niece of Duka brothers (Mar. 25, 2011) (on file with CHR&GJ)

[hereinafter CHR&GJ Interview with Lejla Duka].

¹⁶⁴ Dritan and Shain Duka were sentenced to life in prison plus 30 years. Eljvir Duka was sentenced to life in prison.

¹⁶⁵ All three brothers were charged with conspiracy to murder members of the U.S. military, attempt to murder members of the U.S. military, possession and attempted possession of firearms in furtherance of a crime of violence, and possession of firearms by an illegal alien. Dritan and Shain were also charged with possession of machineguns and possession of firearms by an illegal alien. The brothers were convicted of all charges except attempted murder and, in Eljvir's case, possession and attempted possession of firearms in furtherance of a crime of violence.

¹⁶⁶ Interview with Burim Duka, brother of Duka brothers (Mar. 26, 2011) (on file with CHR&GJ [hereinafter CHR&GJ Interview with Burim Duka]).

¹⁶⁷ Eljvir Duka is married to Mohammed Shnewer's sister, making them brothers-in-law in addition to long-time friends.

¹⁶⁸ Federal Prosecutor William E. Fitzpatrick noted in his opening statement that the investigation involved "dozens" of police, detectives, investigators, and special agents engaged in many methods of surveillance including physical surveillance, electronic surveillance, and surveillance by informants. Trial transcript of United States v. Shnewer et al, No 07 Cr. 459 (D.N.J.). [hereinafter Fort Dix Five Trial Transcript], at 1536/20-25, 1537/1-3. Burim Duka attended all but three days of his brothers' trial. He stated, "The judge would always talk about the millions of dollars they spent on this case. Like money was the reason to find my brothers guilty... Just because you spent millions of dollars doesn't mean you have to put innocent people in jail." CHR&GJ Interview with Burim Duka, *supra* note 164.

¹⁶⁹ JTTF member John Stermel, a government witness, testified at trial that Bakalli was inserted into the investigation specifically to target the Duka brothers since he was Albanian and would be able to relate to them better. Fort Dix Five Trial Transcript, *supra* note 168, at 2669/1-7.

¹⁷⁰ CHR&GJ Interview with Ferik Duka, *supra* note 162.

¹⁷¹ Federal Prosecutor William E. Fitzpatrick in his opening statement described Omar as "a small time thief" who "began to cooperate when he got in trouble with the law." Fort Dix Five Trial Transcript, *supra* note 168, at 1532/13-14. Defense Attorney Rocco Cipparone claimed that Omar had been paid \$238,000. *Id.*, at 1559/14. Fitzpatrick described Bakalli as "an Albanian national, a tough guy from the streets." "He was about to be deported back to Albania when he agreed to cooperate with the FBI. He was also paid some money...his main goal is status, he wants some sort of legal status at the end of this process...the FBI brought his mother and father from Albania to the United States." *Id.*, at 1532/20-25, 1533/1-6.

¹⁷² *Id.*, at 1625/16 (Michael Riley opening statement).

¹⁷³ Federal Prosecutor William E. Fitzpatrick described as "reconnaissance" Mohammed Shnewer's visits with informant Mahmoud Omar to Fort Dix, McGuire, Lakehurst, Fort Monmouth, Dover Air Force Base, the Coast Guard in Philadelphia, and some federal buildings on August 11th and 13th, 2006. *Id.*, at 1538/17-25, 1539/1-3.

¹⁷⁴ CHR&GJ Interview with Burim Duka, *supra* note 164. According to the opening statement of Federal Prosecutor William E. Fitzpatrick, Dritan and Shain ordered four M16's, fully automatic machine guns, and three AK47, semiautomatic assault weapons. Fitzpatrick refers to them as "weapons of war." Fort Dix Five Trial Transcript, *supra* note 168, at 1517/20-23. According to Defense Attorney Michael Huff, the brothers were purchasing the weapons for recreational purposes for their next trip to the Poconos since in previous trips there weren't enough to go around and they didn't like waiting in line. *Id.*, at 1595/17-25, 1596/1-7. Mahmoud Omar testified at trial that Dritan "Tony" Duka indicated to him that he wanted to buy more guns to avoid having to wait in line for target shooting in the Poconos. *Id.*, at 3673/18-25, 3674/1-5.

¹⁷⁵ CHR&GJ Interview with Ferik Duka, *supra* note 162.

¹⁷⁶ The full list of charges and convictions are as follows: Count 1: All five defendants were charged with conspiracy to murder members of the U.S. military. All five defendants were convicted on Count 1. Count 2: All five defendants were charged with attempt to murder members of the U.S. military. All five defendants were acquitted on Count 2. Count 3: Shain, Dritan, and Eljvir Duka were charged with possession and attempted possession of firearms in furtherance of a crime of violence. Dritan and Shain were convicted on Count 3, but Eljvir was acquitted. Count 4: Mohamed Shnewer was charged with attempted possession of firearms in furtherance of a crime of violence. Shnewer was convicted on Count 4. Count 5: Dritan and Shain Duka were charged with possession of machineguns. Both were convicted on Count 5. Count 6: Dritan and Shain Duka were charged with possession of firearms by an illegal alien. Both were convicted on Count 6. Count 7: Shain, Dritan, and Eljvir Duka were charged with possession of firearms by an illegal alien. All three were convicted on Count 7. Superseding Indictment, United States v. Shnewer, (D.N.J. Jan. 15, 2008); Jury Verdict Form, *Shnewer*, (D.N.J. Dec. 22, 2008).

¹⁷⁷ Eljvir Duka's Defense Attorney Troy Archie argued in his opening statement that Omar was intent on bringing Eljvir into the plot since he needed more people to make out the conspiracy. Archie notes that the recordings reflect that Omar asked Mohammed Shnewer 400 times from August 2-September 22, 2006 and said to Shnewer "I will kiss your feet for someone like Sulayman [Eljvir]." Fort Dix Five Trial Transcript, *supra* note 168, at 1611/7-19.

¹⁷⁸ Geoff Mulvihill, *Did informant's actions aid Fort Dix plotters?: Entrapment defense may be presented in court for alleged plot against U.S.*, MSNBC, May 10, 2007, available at <http://www.msnbc.msn.com/id/18601345/41023075> (last visited May 12, 2011); David Kocieniewski, *The Role of an F.B.I. Informer Draws Praise as Well as Questions About Legitimacy*, N.Y. TIMES, May 10, 2007, available at <http://www.nytimes.com/2007/05/10/nyregion/10informer.html?oref=login>.

¹⁷⁹ Dritan Duka's Defense Attorney Michael Huff argued in his opening statement, "Tony [Dritan] Duka had no knowledge of Mahmoud Omar and Mohamad Shnewer's alleged agreement. He had no idea that they were having these talks that the government is referring to. At the end of this case you will determine that Tony Duka not only didn't know about this alleged agreement, he didn't know what the goals or objectives were of this alleged agreement, and certainly at no point in time did Tony Duka join in this alleged agreement." Fort Dix Five Trial Transcript, *supra* note 168, at 1578/12-19. Eljvir Duka's Defense Attorney Troy Archie argued in his opening statement that Omar was intent on bringing Eljvir into the plot since he needed more people to make out the conspiracy. Archie notes that the recordings reflect that Omar asked Mohammed Shnewer 400 times from August 2-September 22, 2006 and said to Shnewer "I will kiss your feet for someone like Sulayman [Eljvir]." *Id.*, at 1611/7-19.

¹⁸⁰ Mohammed Omar's testimony at trial reflected in numerous places that the Duka brothers were unaware of the alleged plot to attack Fort Dix. Omar testified that Eljvir Duka never indicated to him at any time that he was aware that Omar and Shnewer had traveled to Dover (the same trip where they allegedly surveilled Fort Dix). Omar testified that Shnewer had told him that he had informed Eljvir, but Eljvir never said anything to Omar to confirm this. *Id.*, at 3463/1-10. Omar testified that when he asked Eljvir Duka if Omar had spoken to him about the alleged plot, Eljvir did not know what he was talking about. *Id.*, at 3477/19-25, 3478/1-5. Omar testified that he tried to meet with Eljvir repeatedly but that "trying to meet with Sulayman [another name that Eljvir goes by] is essentially as difficult as it is to meet with George Bush." *Id.*, at 3485/2-5. Omar testified that he had a conversation with Shnewer about the logistics and methodology of attacking Fort Dix but at no time did he hear any kind of planning or specifics of this nature from the Duka brothers or Serdar Tatar. *Id.*, at 3548/4-9. Omar testified that at one point during the investigation, he went to the FBI and told them that Tony [Dritan] and Shain had nothing to do with the alleged plot. *Id.*, at 3727/7-25.

¹⁸¹ Troy Archie, opening statement, *id.*, at 1620/21-25.

¹⁸² National Center for State Courts, The Center for Jury Studies, Anonymous Juries: Frequently Asked Questions, <http://www.ncsconline.org/Juries/InnAnonymousFAQ.htm> (last visited Apr. 29, 2011) (describing anonymous

juries, including their advantages and disadvantages).

¹⁸³ Troy Graham, *Fort Dix Juror: 'They Were Going To Do It'* PHILADELPHIA INQUIRER, Jan. 25, 2009, available at http://articles.philly.com/2009-01-25/news/25280685_1_juror-fort-dix-split-verdict.

¹⁸⁴ *Id.* ("Juror No. 3 has a son who served two tours with the Marines in Iraq, where he was wounded by shrapnel and received the Purple Heart and Bronze Star. One video in particular, called Baghdad Sniper, was difficult for her to watch, she said. In one scene, a sniper shoots an American serviceman in the back, the same place her son was wounded. 'I thought I was seeing my son getting hit,' she said.")

¹⁸⁵ At the end of August 2010, lawyers for the Fort Dix Five filed an appeal of the convictions in the 3rd Circuit. *United States v. Shnewer* No. 09292, 09299-302 (3rd Cir.).

¹⁸⁶ Interview with Zurata Duka, mother of Duka defendants (Mar. 26, 2011) (on file with CHR&GJ) [hereinafter CHR&GJ Interview with Zurata Duka].

¹⁸⁷ According to Ferik Duka, the Duka family filed papers to adjust their immigration status multiple times, indicating that the government was aware that they were in the country without proper documentation long before Ferik's arrest and detention. Ferik asserts that he has paid taxes since 1985 and that he owns two companies and the family's home. Ferik was detained for one month before seeing an immigration judge, who ordered his release. CHR&GJ Interview with Ferik Duka, *supra* note 162.

¹⁸⁸ CHR&GJ Interview with Zurata Duka, *supra* note 186.

¹⁸⁹ CHR&GJ Interview with Burim Duka, *supra* note 166.

¹⁹⁰ For an example of a website that identifies the Dukas' roofing business by name as well as label them as terrorists, see <http://www.realitymod.com/forum/f11-off-topic-discussion/20497-terrorist-mickey-mouse-2.html> (last visited May 7, 2011).

¹⁹¹ CHR&GJ Interview with Ferik Duka, *supra* note 162.

¹⁹² CHR&GJ Interview with Zurata Duka, *supra* note 186.

¹⁹³ *Id.*

¹⁹⁴ CHR&GJ Interview with Burim Duka, *supra* note 166.

¹⁹⁵ *Id.*

¹⁹⁶ CHR&GJ Interview with Lejla Duka, *supra* note 163.

¹⁹⁷ Interview with Shahina Parveen, mother of Shahawar Siraj Matin (Mar. 27, 2011) (on file with CHR&GJ [hereinafter CHR&GJ Interview with Shahina Parveen]).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*; Interview with Saniya Siraj, sister of Shahawar Siraj Matin (Mar. 27, 2011) (on file with CHR&GJ [hereinafter CHR&GJ Interview with Saniya Siraj]).

²⁰⁰ *Id.*

²⁰¹ See, e.g. William K. Rashbaum, *Undercover Officer Testifies in Bomb Trial*, N.Y. TIMES, May 18, 2006, available at <http://www.nytimes.com/2006/05/18/nyregion/18herald.html>.

²⁰² United States v. Shahawar Matin Siraj, 1:05-cr-00104-NG (E.D.N.Y. Sep. 6 2006), Memorandum of Law in Support of Motion for a New Trial Pursuant to Fed. R. Crim. P. 33(a), at 9-10 (citing trial transcripts).

²⁰³ BROWN, SNITCH, *supra* note 108, at 122.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ William K. Rashbaum, *Trial Opens Window on Shadowing of Muslims*, N.Y. TIMES, May 28, 2006, available at http://www.nytimes.com/2006/05/28/nyregion/28tactics.html?_r=1.

²⁰⁷ Horowitz, *Anatomy of a Foiled Plot*, *supra* note 4 (“[T]he informant came to the mosque and introduced himself as a religious man. He told everyone his father was a well-known author of Islamic books in Egypt. ‘When he heard the call for prayer, he would start to cry.’”); Robin Shulman, *The Informer: Behind the Scenes, or Setting the Stage?* WASH. POST, May 29, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/28/AR2007052801401.html> [hereinafter Shulman, *The Informer: Behind the Scenes, or Setting the Stage?*] (“Eldawood was dispatched to several mosques before he was asked to infiltrate the Islamic Society of Bay Ridge, a storefront mosque in the city’s largest Arab community. He became known for praying so fervently he would weep. Once, he objected to the presence of two non-Muslims in the mosque in order to seem fanatical about religion, he told his handler, Detective Stephen Andrews.”).

²⁰⁸ Zein Rimawi, one of the founders of the Islamic Society of Bay Ridge, also asserts that the imam, Sheikh Reda Shata, was Eldawood’s original target. Horowitz, *Anatomy of a Foiled Plot*, *supra* note 4. Sheikh Reda Shata also believes that he was a target, saying that in 2003, Eldawood tried to draw him into an illicit business deal. Andrea Elliott, *Undercover Work Deepens Police-Muslim Tensions*, N.Y. TIMES, May 27, 2006, available at <http://www.nytimes.com/2006/05/27/nyregion/27muslim.html?pagewanted=print>. The NYPD denies this claim. Horowitz, *Anatomy of a Foiled Plot*, *supra* note 4.

²⁰⁹ *Id.* (reporting that the NYPD assigned Eldawood to develop a relationship with Shehawar and to gain his trust, a few months after they had gotten tips about Shehawar’s political rhetoric).

²¹⁰ Shulman, *The Informer: Behind the Scenes, or Setting the Stage?*, *supra* note 207.

²¹¹ William K. Rashbaum, *Lawyer Confronts Informer in Subway-Bomb Plot Case*, N.Y. TIMES, May 5, 2006, available at <http://www.nytimes.com/2006/05/05/nyregion/05herald.html>; Shulman, *The Informer: Behind the Scenes, or Setting the Stage?*, *supra* note 207.

²¹² AMITAVA KUMAR, A FOREIGNER CARRYING IN THE CROOK OF HIS ARM A TINY BOMB 124 (2010).

²¹³ BROWN, SNITCH, *supra* note 108, at 124-25.; William K. Rashbaum, *Staten Island Man Describes Shattered Life, Then a Plot to Bomb a Subway Station*, N.Y. TIMES, May 10, 2006, available at <http://www.nytimes.com/2006/05/10/nyregion/10herald.html>.

²¹⁴ BROWN, SNITCH, *supra* note 108, at 125 (quoting Shahawar).

²¹⁵ CHR&GJ Interview with Shahina Parveen, *supra* at note 197.

²¹⁶ See, e.g., Seymour Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, available at http://www.newyorker.com/archive/2004/05/10/040510fa_fact.

²¹⁷ See BROWN, SNITCH, *supra* note 108, at 126.

²¹⁸ *Id.* William K. Rashbaum, *Defendant Says Police Informer Pushed Him Into Bomb Plot*, N.Y. TIMES, May 16, 2006, available at <http://www.nytimes.com/2006/05/16/nyregion/16herald.html?fta=y>.

²¹⁹ DICKEY, *SECURING THE CITY*, *supra* note 96.

²²⁰ Shulman, *The Informer: Behind the Scenes, or Setting the Stage?*, *supra* note 207; Horowitz, *Anatomy of a Foiled Plot*, *supra* note 4, also reports that the recordings began in June. See also *Shahawar Matin Siraj v. United States*, Case 1:10-cv-00791-NG, (E.D.N.Y. Feb. 22, 2010), Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 [hereinafter Habeas Petition] at 7, noting that recordings began in May, but usable recordings were not made until June.

²²¹ Kumar, *supra* note 212, at 124.

²²² *Id.*, at 125.

²²³ *Id.*

²²⁴ *Id.*; DICKEY, *SECURING THE CITY*, *supra* note 96, at 191; BROWN, *SNITCH*, *supra* note 106, at 127; Habeas Petition, *supra* note 220, at 8.

²²⁵ William K. Rashbaum, *In Tapes of Subway Plot Suspect, A Disjoined Torrent of Hatred*, N.Y. TIMES, Apr. 26, 2006, available at <http://query.nytimes.com/gst/fullpage.html?res=9C04E2DF133FF935A15757C0A9609C8B63>. BROWN, *SNITCH*, *supra* note 108 at 127, Said, *supra* note 7 at 716.

²²⁶ BROWN, *SNITCH*, *supra* note 108, at 127.

²²⁷ KUMAR, *supra* note 212 at 125.

²²⁸ Horowitz, *Anatomy of a Foiled Plot*, *supra* note 4; KUMAR, *supra* note 212, at 125.

²²⁹ *Id.*

²³⁰ Habeas Petition, *Siraj*, No. 05 Cr. 104 (E.D.N.Y.), at 23 (Government Exhibit 19-A, at 3 (transcript of August 23, 2004 video recording) [hereinafter Gov't. Ex. 19-A]). DICKEY, *SECURING THE CITY*, *supra* note 94, at 194; KUMAR, *supra* note 210, at 113.

²³¹ Gov't Ex. 19-A, *supra* note 230, at 3.

²³² *Id.* at 4 (after Eldawoody says that 34th St. has been approved, Shahawar: "What kind of, the thing we will use? Hmm? Tell him that, ah, that we are very careful about the people's life." Eldawoody: "Okay." Shahawar: "Have you told him this?" Eldawoody: "We've spoke of many things." Shahawar: "I don't want to be the one that I put it and people die." Eldawoody: "No, no. He agrees, he agrees about lots of things. Because that's the principle, you know? No suiciding, no killing." Shahawar: "No killing. Only economy problems."); *id.* at 5 (Shahawar changes the subject to a Pakistani parade held the previous day); *id.* at 13 (Shahawar brings up the previous day's parade again, where he says somebody said they wanted to kill President Bush, and was shot); *id.* at 13, 14, 15, 17, 22, 24, 25, 26.

²³³ Gov't Ex. 19-A, *supra* note 230, at 11 (Eldawoody: "So if it's searched and everything are you going to back out?" Shahawar: "No." Eldawoody: "Are you gonna tell him no?" Shahawar: "What? About what?" Eldawoody: "About that, you know, doing jihad?" Shahawar: "No. I'm not talking about jihad. Because before jihad there are some circumstances, right?"); *id.* at 15 (Shahawar: "I will, I will stay for a while being until I have to, you know, ask my mom's permission. Every single thing matters, you know? I will make it this way." Eldawoody: "Well, okay. Here is the point. You willing to do it?" Shahawar: "I will work with those brothers, that's it. As a planner or whatever. But to putting there? I'm not sure."); *id.* at 18 (Shahawar: "I will see what happens. I will agree to work with those brothers but not to putting the ting over there." Eldawoody: "Oh, okay. Whichever you say. The other time you said different. Now you say different. I don't know what's next time. Do you want me to call up Hakim a little bit to tell him your opinion? . . ." Shahawar: "No, you go and talk to him no problem. In shallah. Tell him every single thing

that I told you." Eldawoody: "That you're—are not going to do it." Shahawar: "No, I will not be the one to do it.") *Id.* at 19 (Eldawoody: "Okay. Okay. And Matin, you are out of jihad." Shahawar: "You, whatever you think. Brother." Shahawar: "I am asking you." Shahawar: "I'm not talking about jihad. Planning is also jihad, brother. I'm only talking about the situation that I am going to be helping in this situation and I want to be ready." Eldawoody: "Help, what kind of help?" Shahawar: "Any kind of help, brother, it doesn't matter to me."); *Id.* at 22 (Eldawoody: "Okay. So let's go. So your answer is?" Shahawar: "[Unintelligible]" Eldawoody: "Huh?" Shahawar: "[Unintelligible]." [Pause] Shahawar hands Elshafay the seat belt, and Elshafay says "Thank you."); *Id.* at 23 (after a pause, Eldawoody: "So what do you both guys are willing to do? What do you want me to tell him?" Elshafay offers to drop the bomb, but says he's inexperienced. Elshafay and Eldawoody discourse. Then, after a pause, Eldawoody: "So what's your part, Matin? Your part is out? You don't wanna nothing? You don't wanna help?" Shahawar: "With the 34th thing?" Eldawoody: "Yeah, 34th. They actually refused, ah, the idea of the Verrazano, they told me they refused the idea of the Verrazano." Shahawar: "[Unintelligible] I see you started smoking again. You have to control yourself." They go on to talk about smoking for a while.) *Id.* at 31 (after a pause, Eldawoody: "So you want to do anything except for carrying." Shahawar: "Yeah planning—anything, you can use me." Eldawoody: "Okay, that's what I'm going to tell him.").

²³⁴ Gov't Ex. 19-A, *supra* note 230, at 4-35.

²³⁵ *Id.* at 15.

²³⁶ *Id.* at 17.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Gov't Ex. 19-A, *supra* note 230, at 17.

²⁴⁰ *Id.* at 35.

²⁴¹ *Id.* at 45. Habeas Petition, *supra* note 220, at 8 (citing Elshafay's trial testimony). However, because Shahawar hadn't taken any affirmative steps to withdraw from the conspiracy after August 23, the defense was not available to him at trial.

²⁴² Habeas Petition, *supra* note 226, at 12.

²⁴³ *Id.* at 8 (citing trial transcript).

²⁴⁴ *Id.* at 11-12.

²⁴⁵ U.S. v. Siraj, 468 F. Supp. 2d 408, 414 (E.D.N.Y. 2007).

²⁴⁶ *Id.* at 416; Motion for New Trial, *supra* note 202, at 21-22 (summarizing evidence used in rebuttal).

²⁴⁷ Press Release, U.S. Dep't of Justice, Shahawar Matin Siraj Sentenced to Thirty Years of Imprisonment for Conspiring To Place Explosives at the 34th Street Subway Station in New York (Jan. 8, 2007), available at http://www.justice.gov/siraj_pr.pdf.

²⁴⁸ William K. Rashbaum, 3 Relatives of Plotters Are Held by Officials, N.Y. TIMES, Jan. 10, 2007, available at <http://www.nytimes.com/2007/01/10/nyregion/10plot.html?pagewanted=print>.

²⁴⁹ Jennifer Manley, Pakistani Family Held, Advocates Mobilize, QUEENS CHRON., Jan. 18, 2007, available at http://www.zwire.com/site/news.cfm?newsid=17727444&BRD=2731&PAG=461&dept_id=574903&rfi=6.

²⁵⁰ CHR&GJ Interview with Saniya Siraj, *supra* note 199.

²⁵¹ David Harris describes a similar story involving a family in Beaverton, Oregon where a local attorney who regularly attended a mosque that had been infiltrated by informants was erroneously arrested. The community was aware that informants were in their midst and were reluctant to rally to support the defendant or his family, out of fear that they themselves would become the subjects of government scrutiny and possibly arrest. The attorney was released after several weeks, received an apology from the FBI, and settled a lawsuit against the FBI for two million dollars. Harris, *supra* note 2, at 167-68.

²⁵² See *supra* note 17.

²⁵³ See *supra* notes 5-8, 17.

²⁵⁴ International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. (No. 16), at 52, UN Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S.171, *entered into force* March 23, 1976, *available at* <http://www.ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR]; United Nations Treaty Collection, Status of International Covenant on Civil and Political Rights, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Apr. 28, 2011); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), G.A. Res. 2106 (XX), Annex, U.N. GAOR 20th Sess. Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, *available at* <http://www2.ohchr.org/english/law/icerd.htm>; United Nations Treaty Collection, Status of International Convention on the Elimination of All Forms of Racial Discrimination, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last visited Apr. 28, 2011).

²⁵⁵ See ICCPR, *supra* note 254, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); *id.* art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); and ICERD, *supra* note 254, art. 1 ("the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."); and art. 5 ("In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law...").

²⁵⁶ The ICCPR, *supra* note 254, only allows distinctions between non-citizens and citizens for the right to participate in public affairs, to vote and hold office, and to have access to public service (Art. 25) and the right to freedom of movement (Art. 12(1)). See also UN H.R. Comm., *General Comment 15: The Position of Aliens under the Covenant* (Twenty-Seventh session, 1986), ¶2 *reprinted in* COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.6 at 140 (2003), *available at* <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument> ("Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant."); *id.* ¶3 ("It is in principle a matter for the State to decide who it will admit to its territory."). The CERD Committee has made clear that even though ICERD permits States to differentiate between citizens and non-citizens (Art. 1(2)), they must still "avoid undermining the basic prohibition on discrimination." UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non Citizens*, ¶¶ 1-3, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004) [hereinafter *CERD General Recommendation 30*].

²⁵⁷ This duty is primarily set out in Article 6 of the ICCPR, *supra* note 254, which reads: "1. Every human being

has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life..." Article 6 imposes a legal duty on States to exercise due diligence in protecting the life of every person within their territory and jurisdiction from attacks by criminals. See *Jiménez Vaca v. Colombia*, Communication No. 859/1999, U.N. Doc. CCPR/C/74/D/859/1999, ¶7.3 (UN H.R. Comm. 2002). This duty includes an obligation to take reasonable and appropriate measures to protect the life of persons under a State's jurisdiction and to be cognizant of threats to their personal security. *Delgado Páez v. Colombia*, Communication No. 195/1985, U.N. Doc. CCPR/C/39/D/195/1985, ¶5.5 (UN H.R. Comm. 1990).

²⁵⁸ See, e.g., UN H.R. Comm., Concluding Observation: Estonia ¶8, U.N. Doc. CCPR/CO/77/EST (2003). See also Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism ¶¶7, 8, UN Doc. E/CN.4/2005/103 (2005), available at <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.103.pdf> (stating that human rights and the fight against terror "are not antithetical, but complementary responsibilities of States," and recalling that "when drafting the [ICCPR] and various regional human rights instruments, States were keenly aware of the need to strike a realistic balance between the requirements of national security and the protection of human rights."); OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), DIGEST OF JURISPRUDENCE OF THE U.N. AND REGIONAL ORGANIZATIONS ON THE PROTECTION OF HUMAN RIGHTS WHILE COUNTERING TERRORISM 3, 11-12 (2003), available at <http://www.ohchr.org/Documents/Publications/DigestJurisprudenceen.pdf>; INTERNATIONAL COMMISSION OF JURISTS, BERLIN DECLARATION ON UPHOLDING HUMAN RIGHTS AND THE RULE OF LAW IN COMBATING TERRORISM 1 (2004).

²⁵⁹ A line of cases before the European Court of Human Rights and the UN Human Rights Committee recognize, for example, that rights of family members can be directly violated as a result of the enforced disappearance of a loved one. The cases focus on Article 7 of the ICCPR which articulates the right against torture and other cruel, inhuman, and degrading (CID) treatment, and the equivalent prohibition on torture and inhuman or degrading treatment or punishment under Article 3 of the European Convention on Human Rights. The cases find violations of Article 7 of the ICCPR and Article 3 of the European Convention arising out of ongoing emotional pain and anxiety suffered by close family members of the disappeared and tortured as they campaigned for justice. To the extent that the practices outlined in this Report violate the defendant's right to a fair trial, then, there's an argument that the ongoing emotional suffering and anxiety suffered by the families as a result of these prosecutions could constitute a direct violation of the family members' rights. The extent of anxiety and stress suffered is an important factor, as is the way the state responds to the family member's demands for accountability. See *Kurt v. Turkey*, App. No. 24276/94 (E.Ct.H.R. Chamber Judgment), May 25, 1998, ¶¶ 130-34 (finding an Article 3 violation on the grounds that a mother suffered inhuman or degrading treatment as a result of her son's disappearance); *Cyprus v. Turkey*, App. No. 25781/94 (E.Ct.H.R. Grand Chamber Judgment) May 10, 2001, ¶¶ 154-58 (finding an Article 3 violation on the grounds that families of disappeared Greek Cypriots suffered inhuman or degrading treatment as a result of the disappearances); *T murta v. Turkey*, App. No. 23531/94 (E. Comm'n. H.R. Decision), Oct. 29, 1998, ¶¶ 302-09 (finding an Article 3 violation on the grounds that a father suffered inhuman or degrading treatment as a result of his son's disappearance); *Quinteros v. Uruguay*, U.N. Hum. Rts. Comm., Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 198 (1990 [first publication]), ¶ 14, (1981) (finding an Article 7 violation on the grounds that a mother suffered rights violations, including as to Article 7, as a result of her daughter's torture and disappearance); *Lyashkevich v. Belarus*, U.N. Hum. Rts. Comm., Communication No. 887/1999, U.N. Doc. CCPR/C/77/D/887/1999 ¶¶ 9.2, 10 (2003) (finding an Article 7 violation on the grounds of "continued anguish and mental stress caused . . . [to] the mother of the condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite"). The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, has also found that:

Counter-terrorism measures have had impermissible gendered collateral effects that are often neither acknowledged nor compensated. Indeed, enforced disappearances of male detainees in the name of countering terrorism have had "special resonance" for female family members, who bear the burden of anxiety, harassment, social exclusion and economic hardship occasioned by the loss of the male breadwinner. Similar effects ensue from the prolonged detention without trial of male family members, the practice of extraordinary rendition, and forced deportations of male family members, undermining the enjoyment of economic, social and cultural rights, such

as the right to adequate housing, and the right to family life.

...

As with other counter-terrorism measures that impact third parties (e.g., disappearances), women in these families often bear the weight of these stresses, jeopardizing numerous economic, social and cultural rights protected the International Covenant on Economic, Social and Cultural Rights, including protection and assistance accorded to the family and to children and young persons (art. 10); the right to an adequate standard of living, including adequate food housing (art. 11); the right to health (art. 12); and the right to education (arts. 13 14). Such measures also undermine the enjoyment of women's various civil political rights guaranteed by the International Covenant on Civil and Political Rights, such as the protection against arbitrary or unlawful interference with family and privacy (art. 17) and protection of the family (art. 23).

United Nations, Report of the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, U.N. Doc. A/64/211, ¶¶ 30-41 (Aug 3, 2009) (citing Counter-Terrorism Implementation Task Force working group on protecting human rights while countering terrorism, Expert seminar on 'The Impact of Terrorism and Counter-terrorism Measures on the Enjoyment of Economic, Social and Cultural Rights (ESCR) (5-7 November 2008), U.N. Doc. A/HRC/10/9, ¶ 28 (2009)). The U.S. has not ratified the main instrument for the protection of economic, social and cultural rights, the International Covenant on Economic, Social and Cultural Rights, but it nonetheless has specific obligations under ICERD to guarantee equality in the enjoyment of economic, social and cultural rights. This is provided for both in the definition of "racial discrimination" in Article 1(1) (which refers to restrictions on "human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life") and Article 5(e), which specifically requires State parties to ensure equality in economic, social and cultural rights, including the right to public health, medical care, social security and social services. International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), *entered into force* Jan. 3, 1976, 993 U.N.T.S. 3, *available at* <http://www.ohchr.org/english/law/cescr.htm>; OFFICE OF THE U.S. HIGH COMM'R FOR HUMAN RIGHTS, INT'L COVENANT ON SOCIAL AND CULTURAL RIGHTS NEW YORK, 16 Dec.1966, *available at* <http://www.ohchr.org/english/countries/ratification/3.htm>. See also AMNESTY INT'L, PAKISTAN: HUMAN RIGHTS IGNORED IN THE "WAR ON TERROR" 59-61, AI Index ASA 33/036/2006 (September 2006); AL-AMIN KIMATHI & ALTAN BUTT, EDS., MUSLIM HUMAN RIGHTS FORUM, HORN OF TERROR, 19-21(2008).

²⁶⁰ Article 14 of the ICCPR guarantees, *inter alia*, the rights "to a fair and public hearing by a competent, independent and impartial tribunal established by law;" "to be tried without undue delay;" "to not be compelled to testify against himself;" "to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;" "to be presumed innocent until proven guilty;" and to have a "conviction and sentence [be] reviewed by a higher tribunal." Arts. 14(1), (2), (3), (5) ICCPR, *supra* note 254. Under Article 2 of the ICCPR, States parties must "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR Article 26 reinforces that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICERD *supra* note 254, art. 5(a) ("In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice...").

²⁶¹ Article 6 of the European Convention on Human Rights (ECHR) contains a right to fair trial provision similar to that found in Article 14 of the ICCPR. Specifically, ECHR Article 6 guarantees, *inter alia*, the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law;" to "be presumed innocent until proved guilty according to law;" to "be informed promptly... of the nature and cause

of the accusation against him;" to "have adequate time and the facilities for the preparation of his defence" and to "examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." In determining the content of the ICCPR, the International Court of Justice has looked to analogous regional human rights treaties and decisions. See Case Concerning Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. of the Congo), I.C.J., Nov. 30 2010, ¶68 (interpreting Article 13 of the ICCPR in light of the European Court of Human Rights' interpretation of Article 1 of Protocol No. 7 of the European Convention of Human Rights).

²⁶² Van Mechelen and Others v. the Netherlands, App. nos. 21363/93, 21364/93, 21427/93 and 22056/93 (Chamber Judgment), Apr. 23 1997, ¶50, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695907&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; Teixeira de Castro v. Portugal, App. no. 25829/94 (Chamber Judgment), Jun. 9, 1998, ¶34, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696070&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; Ramanauskas v Lithuania, App. no. 74420/01 (Grand Chamber Judgment), Feb. 5, 2008, ¶55, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=828596&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

²⁶³ Teixeira de Castro, App. no. 25829/94, at ¶ 38; Ramanauskas, App. no. 74420/01, at ¶ 55.

²⁶⁴ Teixeira de Castro, App. no. 25829/94, at ¶ 38-39; Ramanauskas, App. no. 74420/01, at ¶ 73. See also Declan Roche, *Between Rhetoric and Reality: Sociological and Republican Perspectives on Entrapment*, 4 INT'L J. EVIDENCE & PROOF 77, 86 (2000) (noting that Teixeira has implications for Australia because the right to a fair trial in Article 14 of the ICCPR mirrors Article 6 of the ECHR); Simon Bronitt, *Entrapment, Human Rights and Criminal Justice: A Licence to Deviate?* 29 HONG KONG L.J. 216 (1999) (noting that the Teixeira de Castro decision has ramifications for Hong Kong since the right to a fair trial is guaranteed by Article 14 of the ICCPR, to which Hong Kong is a State party).

²⁶⁵ Teixeira de Castro, App. no. 25829/94, at ¶ 38; Ramanauskas, App. no. 74420/01, at ¶ 67.

²⁶⁶ See also Weeks v. United States, 232 U.S. 383 (1914) (deeming evidence gathered in violation of the Fourth Amendment inadmissible at trial).

²⁶⁷ See, e.g., UN Committee on the Elimination of Racial Discrimination, *Statement on Racial Discrimination and Measures to Combat Terrorism*, ¶ 4, U.N. Doc. E/CN.4/Sub.2/2003/23/Add. 1 (Nov. 1, 2002), available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f4b63c02a6cc5e33c1256c690034a465/\\$FILE/N0264357.doc](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f4b63c02a6cc5e33c1256c690034a465/$FILE/N0264357.doc) (recalling that "the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted").

²⁶⁸ Art. 4(1) ICCPR, *supra* note 254 ("Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant").

²⁶⁹ *Id.* arts. 2(1), 26.

²⁷⁰ Art. 2(1) ICERD, *supra* note 254.

²⁷¹ Art. 1(1) ICERD, *supra* note 254.

²⁷² UN COMM. ON H.R., IMPLEMENTATION OF THE PROGRAMME OF ACTION FOR THE THIRD DECADE TO COMBAT RACISM AND RACIAL DISCRIMINATION, UN Doc. E/CN.4/1997/68/Add.1 (Dec. 5, 1996) ("[A]lthough religion was not included in the Convention as one of the grounds on which racial discrimination was prohibited ... [t]he Committee itself sometimes had to take into account religious aspects when they appeared to be part of a consistent trend of discrimination against some people").

²⁷³ See *supra* note 22.

²⁷⁴ See *infra* Part II.

²⁷⁵ IRREVERSIBLE CONSEQUENCES, *supra* note 15, at 20. The Human Rights Committee has stated that distinctions under Article 26 can only be consistent with the Covenant if they are reasonable, objective, and aimed at achieving a purpose which is reasonable under the Covenant. U.N. H.R. Comm. *General Comment No. 18: Non-Discrimination* (Thirty-Seventh session, 1989), ¶13, U.N. Doc. HRI/GEN/1/Rev.1 at 26. [hereinafter *HRC General Comment No. 18*] (“the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”). *Karakurt v. Austria*, Communication No. 965/2000, ¶ 8.3, U.N. Doc. CCPR/C/74/D/965/2000 (UN H.R. Comm. 2002); *Broeks v. The Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 at 196 (UN H.R. Comm. 1984); *Sprenger v. The Netherlands*, Communication No. 395/1990, U.N. Doc. CCPR/C/44/D/395/1990 (UN H.R. Comm. 1992); *Kavanagh v. Ireland*, Communication No. 819/1998 U.N. CCPR/C/76/D/1114/2002/Rev.1 (UN H.R. Comm. 1999).

²⁷⁶ UN Comm. on the Elimination of Racial Discrimination, *General Recommendation No. 14: Definition of Racial Discrimination*, (Forty-Second session, Mar. 22, 1993), ¶ 2, U.N. Doc A/48/18 at 114, [hereinafter *CERD Committee General Recommendation 14*]; *HRC General Comment No. 18*, *supra* note 275, ¶ 7. IRREVERSIBLE CONSEQUENCES, *supra* note 15, at 21.

²⁷⁷ See *supra* note 22. Lininger, *Sects, Lies, and Videotape*, *supra* note 22, at 1244 (“If there is no specific evidence supporting suspicion of a mosque, and the F.B.I. investigates the mosque anyway, the only explanation for the investigation is a universal suspicion of Muslims.”), 1246-1247 (“Some observers have found the Department’s denials of racial and religious profiling to be disingenuous when contrasted with the actual activities of federal law enforcement agents.” (citing Toni Locy et al., *Al-Qaeda Records Solve Many 9/11 Puzzles, But Others Linger*, U.S.A. TODAY, Aug. 29, 2002, (“U.S. officials say the new policy is not designed to target mosques, but the F.B.I. is focusing on mosques as never before.”); Daniel Pipes, *Counterterrorism or Witch Hunt?*, NAT’L POST, Feb. 4, 2003, available at 2003 WL 11542987 (“arguing that high-level officials in Justice Department should not be criticizing racial profiling when F.B.I. agents have no choice but to use this strategy”) (internal quotation marks omitted)). In 2010, the U.N. Human Rights Council reviewed the U.S. human rights record as part of the Universal Periodic Review process and recommended that the U.S.: “Review, with a view to their amendment and elimination, all laws and practices that discriminate against African, Arab and Muslim Americans, as well as migrants, in the administration of justice, including racial and religious profiling” (recommendation 64) and that the U.S. “Devise specific programs aimed at countering growing Islamophobic and xenophobic trends in society” (recommendation 98). The U.S. indicated its support in part for both recommendations. UN Working Group on the Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review: United States of America*, (Sixteenth session, Human Rights Council, Jan. 4, 2011), U.N. Doc A/HRC/16/1, available at <http://www.state.gov/documents/organization/158198.pdf>.

²⁷⁸ See *supra* Part I.B.

²⁷⁹ Behavioral profiling is sometimes offered as a “non-discriminatory” alternative to racial profiling. However, the behavioral patterns that law enforcement officers are told indicate a potential terrorist threat are often just proxies that result in the same profiling of Muslims. IRREVERSIBLE CONSEQUENCES, *supra* note 15, at 7 (“Officers are encouraged to look for persons ‘mumbling (prayer)’; ‘...sudden changes in behavior—for example, a fanatically religious person visiting sex clubs (or the reverse)...’; and the smell of ‘scented water (for ritual purification).’ These religion-based indicators, while neutral on their face, when read in conjunction with other parts of the Training Key that make explicit references to ‘shahid,’ ‘jihad’ and ‘Muslim zealot,’ will lead to the disproportionate targeting of Muslims or those perceived to be Muslim”). See also Hussain, *Defending the Faithful*, *supra* note 22, at 926 (noting that “conduct-based” profiling can disproportionately burden a single minority group by targeting conduct that is significantly correlated with membership but is in no way inherently indicative of wrongdoing”). This conflation of race, religion, and other identifiers has been termed “cultural profiling,” or the substitution of expressions of culture as a proxy for identifying individuals who may be predisposed to commit terrorist acts. *Id.*

²⁸⁰ SILBER & BHATT, NYPD RADICALIZATION REPORT, *supra* note 19, at 33.

²⁸¹ See *infra* Part I.A. and note 22.

²⁸² Art. 1(3) ICERD, *supra* note 254; “Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” CERD Committee General Recommendation 30, *supra* note 256, ¶ 4. See also CERD Committee General Recommendation 14, *supra* note 276, ¶ 2; U. N. Committee on the Elimination of Racial Discrimination, General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms (Art. 5), ¶ 2, U.N. Doc. HRI\GEN\1\Rev.6, at 208 (Mar. 15, 1996); IRREVERSIBLE CONSEQUENCES, *supra* note 15, at 20. The Human Rights Committee has also stated that distinctions under Article 26 can only be consistent with the Covenant if they are reasonable, objective, and aimed at achieving a purpose which is reasonable under the Covenant. HRC General Comment 18, *supra* note 275, at ¶ 13 (“the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”). Karakurt v. Austria, Communication No. 965/2000, ¶ 8.3, U.N. Doc. CCPR/C/74/D/965/2000 (UN H.R. Comm. 2002); Broeks v. The Netherlands, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 at 196 (UN H.R. Comm. 1984); Sprenger v. The Netherlands, Communication No. 395/1990, U.N. Doc. CCPR/C/44/D/395/1990 (UN H.R. Comm. 1992); Kavanagh v. Ireland, Communication No. 819/1998 U.N. CCPR/C/76/D/1114/2002/Rev.1 (UN H.R. Comm. 1999).

²⁸³ IRREVERSIBLE CONSEQUENCES, *supra* note 15, at 31.

²⁸⁴ *Id.*

²⁸⁵ HRC, General Comment 18: Non-discrimination, *supra* note 275, ¶ 13. For examples of how this test is applied, see, e.g., Araujo-Jongen v. The Netherlands, Communication No. 418/1990, U.N. Doc. CCPR/C/49/D/418/1990, ¶ 7.4, (UN H.R. Comm. Oct. 22, 1993) (finding that the requirement that applicants for unemployment benefits be unemployed at time of application is reasonable and objective given that the purpose of unemployment-benefits legislation is to provide assistance to the unemployed); Danning v. The Netherlands, Communication No. 180/1984, U.N. Doc. CCPR/C/OP/2 at 205, ¶ 1.4 (UN H.R. Comm. Apr. 9, 1997) (finding that differentiation between benefits received by married couples and couples merely cohabiting are based on reasonable and objective criteria); Foin v. France, Communication No. 666/1995, U.N. Doc. CCPR/C/67/D/666/1995, ¶ 10.3 (UN H.R. Comm. Nov. 9, 1999) (finding that the decision by France to require conscientious objectors to serve double the period of military service violates Article 26 of the ICCPR as differentiation was based on purported need to ascertain whether beliefs of conscientious objectors was genuine, which is not reasonable and objective); Gueye v. France, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985, ¶ 9.5 (UN H.R. Comm. Apr. 6, 1989) (finding that differentiation by which soldiers of Senegalese origin were paid inferior pensions to soldiers of French origin in the French army serving in Senegal was not reasonable and objective and noted that mere administrative convenience is not a sufficient justification for differentiating in conflict with Article 26 of the ICCPR); Järvinen v. Finland, Communication No. 295/1988, U.N. Doc. CCPR/C/39/D/295/1988, ¶¶ 6.4 - 6.6 (UN H.R. Comm. Aug. 15, 1990) (finding that a 16- month period of civilian, non-combative service for conscientious objectors, compared to only 8 months for combat service, was non-punitive and justifiable); Snijders v. The Netherlands, Communication No. 651/1995, U.N. Doc. CCPR/C/63/D/651/1995, ¶ 8.3 (UN H.R. Comm. Jul. 27, 1998) (finding that the requirement that non-resident beneficiaries of state health insurance pay a contribution when resident beneficiaries are not required to do so was justified on the basis that failure to make this differentiation would deplete the funds available to the insurance scheme). See also CERD Committee General Recommendation 14, *supra* note 276, ¶ 2.

²⁸⁶ IRREVERSIBLE CONSEQUENCES, *supra* note 15, at 31; Broeks v. The Netherlands, *supra* note 282, at ¶ 13. See, e.g., Danning v. the Netherlands, *supra* note 285, ¶ 13 (“The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.”); Gueye v. France, *supra* note 285, ¶ 9.4 (“the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation

based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26”); *Cheban v. Russian Federation*, Communication No. 790/1997, U.N. Doc. CCPR/C/72/D/790/1997, ¶ 7.2 (UN H.R. Comm. Jul. 24, 2001) (“If distinctions are made, they must be based on objective and reasonable grounds”); *Julian v. New Zealand*, Communication No. 601/1994, U.N. Doc. CCPR/C/59/D/601/1994, ¶ 8.5 (UN H.R. Comm. Apr. 3, 1997) (noting the Committee’s prior jurisprudence “according to which a distinction based on objective and reasonable criteria does not constitute discrimination within the meaning of article 26 of the Covenant...”); *Neefs v. The Netherlands*, Communication No. 425/1991, U.N. Doc. CCPR/C/51/D/425/1990, ¶ 7.2 (UN H.R. Comm. Jul. 15, 1994) (“the right to equality before the law and to the equal protection 55 of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.”); *Oulajin v. The Netherlands*, Communication No. 426/1990, U.N. Doc. CCPR/C/46/D/406/1990/426/1990. ¶ 7.3 (UN H.R. Comm. Oct. 23, 1992) (“The principle of non-discrimination and equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria.”); *Pauger v. Austria*, Communication No. 716/1996, U.N. Doc. CCPR/C/44/D/415/1990, ¶ 7.3 (UN H.R. Comm. Mar. 26, 1992) (“The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26”).

²⁸⁷ IRREVERSIBLE CONSEQUENCES, *supra* note 15, at 31; *See, e.g., Kall v. Poland*, Communication No. 552/1993, U.N. Doc. CCPR/C/60/D/552/1993 (UN H.R. Comm. Jul. 14, 1997) (individual opinion by Committee members Elizabeth Evatt and Cecilia Medina Quiroga, cosigned by Christine Chanet, dissenting) (disagreeing with the Committee’s finding that the rights of the applicant had not been violated, and stating that the test of “discrimination” under the Covenant requires the Committee to examine whether the classification in question “was both a necessary and proportionate means for securing a legitimate objective”); *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, ¶¶ 6.2 - 6.4 (UN H.R. Comm. 2004) (with Australia identifying the following test to determine whether a measure constitutes “discrimination”: (a) Whether Tasmanian laws draw a distinction on the basis of sex or sexual orientation; (b) Whether Mr. Toonen is a victim of discrimination; (c) Whether there are reasonable and objective criteria for the distinction; (d) Whether Tasmanian laws are a proportional means to achieve a legitimate aim under the Covenant); *Kristjánsson v. Iceland*, Communication No. 951/2000, U.N. Doc. CCPR/C/78/D/951/2000, ¶ 7.2 (UN H.R. Comm. Jul. 16, 2003) (State party arguing that “the aim of the differentiation is lawful and based on objective and reasonable considerations and that there is reasonable proportionality between the means employed and the aim pursued”).

²⁸⁸ *See supra* notes 265 (the right to non-discrimination is a peremptory norm under international law), 258 (states parties to the ICCPR are obligated to ensure the right to a fair trial); *infra* notes 290 (states parties to the ICCPR are obligated to ensure the right to freedom of thought, conscience, and religion) and 291 (states parties to the ICCPR are obligated to ensure the right to freedom of opinion and expression).

²⁸⁹ *See supra* note 258.

²⁹⁰ *See infra* notes 5-8; Lininger, *Sects, Lies, and Videotape*, *supra* note 22, at 1254-1255 (“Counterterrorism investigations have drained a tremendous amount of the F.B.I.’s resources in recent years. In a 2002 audit of the F.B.I., Comptroller General David M. Walker discussed a ‘massive move of resources to counterterrorism.’ F.B.I. Director Robert Mueller has noted that the number of personnel devoted to counterterrorism has doubled since September 11, 2001. Within the counterterrorism program, the F.B.I. has devoted its resources almost entirely to investigating threats posed by Muslims... Thus, on many levels, the preoccupation with religion has skewed the allocation of resources in the F.B.I.”); NEW POWERS, NEW RISKS, *supra* note 42, at 32 (“There is general consensus that profiling is ineffective; nonetheless, law enforcement has engaged in several tactics targeted predominantly at the Muslim community as a whole, and with unfortunate effects. Indeed these many domestic anti-terror policies do not seem to have made us safer—in fact, the opposite might be true. In some cases, data collected under these programs remains unanalyzed, wasting countless man hours”). Illustrating the costliness of current counterterrorism techniques, Omar Mahmoud, an informant in the Fort Dix Five case, is alleged to have been paid \$238,000 for a little more than a year’s work. Daphne Eviatar, *Terrorism Cases Hinge on Paid Informants*, WASH. IND., Dec. 19, 2008, available at <http://washingtonindependent.com/22674/terrorism-cases->

hinge-on-paid-informants.

²⁹¹ Racial profiling and targeting of a particular community in law enforcement efforts “sends the message to minorities that they are viewed at all times as potential criminals; that they are not valued members of society; and that they cannot rely on the police for protection,” “exaggerates any differences that do exist between that community and the population at large,” and “perpetuate[s] and exacerbate[s] inequality, negative stereotypes about minorities, and discrimination and violence based on these stereotypes.” NEW POWERS, NEW RISKS, *supra* note 42, at 36. See also AMERICANS ON HOLD, *supra* note 15, at 30; Ahmad, *supra* note 22.

²⁹² Art. 18 ICCPR notes:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

²⁹³ Art. 19 ICCPR (providing, *inter alia*, that, “1. Everyone shall have the right to hold opinions without interference;” and “2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”).

²⁹⁴ U.N. H.R. Comm, *General Comment No. 22, Article 18: The Right to Freedom of Thought, Conscience and Religion*, (Forty-Eighth session, 1993), ¶1, U.N. Doc. CCPR/C/21/Rev.1/Add.4. Article 18(3) does qualify that, “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Similarly, Article 19(3) of the ICCPR notes that the right to freedom of expression carries with it special duties and responsibilities: “It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.” However, these limitations are not applicable to the issues that are the subject of this Report. The Human Rights Committee has, for example, stated that “paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.” The Committee also asserted that: “Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.” *Id.* ¶ 7.

²⁹⁵ Art. 19(2) ICCPR, *supra* note 293.

²⁹⁶ Here it is important to note that empirical research has shown that there is no linkage between Islam and terrorism, in fact suggesting that strong religious convictions may actually reduce the likelihood that an individual will commit violent acts in the name of Islam. See PATEL, RETHINKING RADICALIZATION, *supra* note 13, at 10. (“A recent study of 117 homegrown terrorists in the United States and United Kingdom (“FDD Study”) examined the linkage between terrorism and a conservative understanding of Islam....the FDD Study was unable to establish that a significant proportion of actual terrorists exhibited the “religious” behaviors identified as indicative of radicalization. For example, only 17.1 percent of the sample exhibited low tolerance for perceived theological deviance and only 15.4 percent of the sample attempted to impose their religious beliefs on others. The relatively low correlation between religiosity and terrorism—in a study that seemed aimed at finding such a correlation—is a strong indication that conservative religious belief may play a lesser role in radicalization than one might assume. Overall, the available research does not support the view that Islam drives terrorism or that observing the Muslim faith—even a particularly stringent or conservative variety of that faith—is a step on the path to violence. In fact, that research suggests the opposite: Instead of promoting radicalization, a strong religious identity could well serve to inoculate people against turning to violence in the name of Islam.”)

²⁹⁷ U.N. H.R. Comm, Draft General Comment No. 34 (Upon completion of the first reading by the Human Rights Committee), Article 19, (One Hundred and First session, 2011), ¶18, U.N. Doc. CCPR/C/GC/34/CRP.6. The Human Rights Committee is in the process of revising its general comment on Article 19 freedom of opinion, expression, and information. As of this writing, it had published a draft of what will become General Comment No. 34. The Draft General Comment notes, “No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalise the holding of an opinion. The harassment, intimidation or stigmatisation of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.” See also 2010 DOJ OIG REVIEW OF THE FBI’S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS, *supra* note 51, at 186-91 (finding that “in some cases . . . the FBI extended the duration of investigations involving advocacy groups or their members without sufficient basis. This had practical impacts on subjects, whose names were maintained on watchlists as a result and whose travels and interactions with law enforcement were tracked.”).

²⁹⁸ Hussain, *Defending the Faithful*, *supra* note 22, at 934 (“[A]pplication of the state’s coercive investigatory powers to members of [a] community can significantly deter their cultural expression. The greater the dignitary and stigmatic costs to the individuals who are profiled, the more likely that fear of future scrutiny will pervasively chill other community members’ willingness to engage in conduct that defines them”).

²⁹⁹ AMERICANS ON HOLD, *supra* note 15.

³⁰⁰ Harris, *supra* note 2 (describing the chilling effect of widespread infiltration of informants and undercover police officers on the Muslim community including a Muslim high school senior who now thinks “Who is around?” before talking about politics; a teacher who asserted that it’s “like a police state;” and a Palestinian immigrant who intentionally does not “curse out the system.”); RWG RACIAL PROFILING REPORT, *supra* note 22, at 31 (describing an incident in February 2009 in which local residents in CA discovered that their mosques had been infiltrated by the FBI. “Local residents report that the surveillance caused them to avoid the mosques and pray at home, to avoid making charitable contributions—which is a fundamental tenet of the Muslim faith—and to refrain from having conversations about political issues such as U.S. foreign policy”). At trial, Dritan Duka’s defense attorney Michael Huff described the Duka brothers’ internalization of Islamophobia and the assumption that all Muslims are terrorists, “[They felt as if] you can’t trust Muslims in the United States anymore, all of them terrorists, all of them are here to do us harm. So they felt muzzled. They felt like they couldn’t speak their mind. That they couldn’t talk about their religion...But they knew, and Tony [Dritan] says it over and over again, you got to be careful what you say, people listen and people might hear what you say and take it out of context. You got to be careful. All the time he says that. They felt muzzled. They felt like they couldn’t express themselves.” Fort Dix Five Trial Transcript, at 1583/1-13. NEW POWERS, NEW RISKS, *supra* note 42, at 30 (citing evidence that Muslims are avoiding going to mosques and praying at home instead – Muslim leaders have reported a decrease in attendance at religious services; that some mosques have requested that speakers avoid political messages; and that charitable donations to Muslim organizations have decreased). This kind of self-censorship violates the right to free speech and expression protected under both the First Amendment and the ICCPR and the inability to worship freely violates the right to freedom of religion also protected under these same instruments.

³⁰¹ PEW RESEARCH CENTER, MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM (2007), <http://pewresearch.org/pubs/483/muslim-americans> (last visited Apr. 29, 2011).

³⁰² CHR&GJ Interview with Arun Kundnani, *supra* at note 34.

³⁰³ *Id.*

³⁰⁴ United Nations, Report of the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, Mission to the United States of America, A/HRC/6/17/Add.3, ¶ 65 (November 22, 2007).

³⁰⁵ Article 2(3) of the ICCPR states:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Meanwhile in their General Comment No. 31, the UN Human Rights Committee has noted:

"Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy."

U.N. H.R. Comm, *General Comment No. 31: The Nature of The General Legal Obligation Imposed on States Parties to the Covenant* (Eightieth session, 2004), ¶15, U.N. Doc. CCPR/C/21/Rev.1/Add.13.

³⁰⁶ Muslim Americans challenging the government's various practices of targeted surveillance and scrutiny have by and large failed in the courts. See, e.g., Hussain, *supra* note 22. As noted above, the entrapment defense has never been successfully used in a terrorism trial. 2009 CLS TERRORIST TRIAL REPORT CARD, *supra* note 2, at 20.

³⁰⁷ Although states have an obligation under the right to life to protect national security, they must not do so at the expense of their other human rights obligations, for example complying with the rights to freedom of expression, opinion, and religion under Articles 18 and 19 of the ICCPR. See *supra* notes 292 and 293.

³⁰⁸ UN HR Council, Report of the Working Group on the Universal Periodic Review, United States of America, UN Doc. A/HRC/16/11 (Jan. 4, 2011).



Wake up, open your eyes, look around you, see how this world has changed... At least take 5 minutes to look into these cases, and research, and look for real proof.



Since the events of September 11, 2001, the United States government has been targeting Muslims by sending paid, untrained informants into mosques and Muslim communities throughout the country. This practice has led to the prosecution of more than 200 individuals in terrorism-related cases.

Targeted and Entrapped: Manufacturing the “Homegrown Threat” in the United States examines three high-profile terrorism prosecutions in which the government’s informants played a critical role in instigating and constructing the plots that eventually led to prosecution. In all three cases, the government sent paid informants into Muslim communities without any basis for suspicion of current or eventual criminal activity. The government’s informants introduced, cultivated, and then aggressively pushed ideas about violent jihad, encouraging the defendants to believe that it was their duty to take action against the United States. The informants selected or encouraged the proposed locations that the defendants would later be accused of targeting, and also provided the defendants with—or encouraged the defendants to acquire—material evidence, such as weaponry or violent videos, which would later be used to convict them. The defendants in these cases have all been convicted and currently face prison sentences of 25 years to life.

The interviews featured in this Report, with families of the defendants, demonstrate the profound toll these government policies are taking on Muslim communities. These prosecutions—and others that similarly rely on the abusive use of informants—have also been instrumental to perpetuating the government’s claim that the United States faces a “homegrown threat” of terrorism, and have bolstered calls for the continued use of informants in Muslim communities.

Targeted and Entrapped builds on CHR&GJ’s extensive expertise in the area of racial profiling and counterterrorism. Drawing on court documents, interviews, and media accounts, the Report raises questions about the government’s role in each of these cases. The Report considers key trends in counterterrorism law enforcement policies that have facilitated these practices and evaluates the fundamental human rights at stake. It concludes with policy recommendations aimed at ensuring that the U.S. government lives up to its obligations to guarantee, without discrimination, the rights to: a fair trial; freedom of religion, expression, and opinion; and an effective remedy.

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Lejla Duka holds
a picture of her
father Dritan,
which he mailed to
her from prison.